though still detained on the voyage; or where a creditor has attached them while the transit is not over. But it would appear, that the doctrine in questions of this description must be limited to cases in which no actual delivery has been taken by the buyer, but only such equivalent acts have passed, as, at the end of the voyage, might have stood for delivery, had it been impossible to get the goods actually into the buyer's custody. If the doctrine be carried so far as to deny to the buyer the power of taking actual delivery during the transit, it seems to be destitute of any sound principle.[1] The right of stopping in transitu is not stipulated between the parties, so that such anticipation cannot be considered as a breach of contract: The transit is meant merely to convey the goods to the buyer; and if he should meet them on the way, there seems to be no rational impediment to his abridging their voyage, and taking them into his custody. If he has happened to sell them to one residing at a point of the journey nearer to the original seller, shall he be prevented from taking them out of the carrier's possession there, instead of allowing them to make a useless journey, to be immediately sent back?[2] If, indeed, the circumstances should amount to a fraud in thus anticipating the natural time of delivery, such fraud would not be permitted to defeat the seller's equitable remedy.

3. BY WHOM THE RIGHT OF STOPPING MAY BE EXERCISED.

In determining who may stop goods in transitu, the general rule is, that the right of stoppage exists only as between seller and buyer: And so, between principal and factor this right does not exist.[3] Neither does it subsist between one having a lien, and the

[1] Accordingly, in all the cases of this sort which appear in the books, it is only where the goods have been marked as delivered, but not actually taken away, that the seller has still had his privilege preserved. Thus, an attachment by a creditor of the buyer, used at Ostend while the goods were in the course of their voyage, was found unavailable against the seller stopping in transitu. STOKES against LA RIVIERE. 3. Term. Rep. 466.

Again, in HOLST against POWNAL, the assignees under a commission of bankruptcy issued against the buyer, went on board a vessel, which was ordered to quarantine, and opened the packages, &c. and, as far as they could, took delivery. But Lord Kenyon, at Nisi Prius, is reported to have found this insufficient to make an actual delivery; and the Court of King's Bench is also said to have confirmed the opinion on a motion for a new trial. 1. Espinasse, Cases at N. P. 240.

[2] In MILLS against BALL. Goods having been carried part of the way by water, were delivered to a wharfinger, to be forwarded by land to the buyer, and placed to his account. The buyer having failed, refused to receive the goods; and the question was, Whether the transfer was not completed by actual delivery, so as to preclude the buyer from renouncing them? Lord Alvanley took occasion to say,—'If, in 'the course of the conveyance of the goods from the 'vendor to the vendee, the latter be allowed to exer- 'cise any act of ownership over them, he thereby 'reduces the goods into possession, and puts an end 'to the vendor's right to stop them. So, though 'it has been said that the right of stoppage continues 'until the goods have arrived at their journey's end, '*yet if the vendee meet them upon the road, and take* '*them into his own possession, the goods will then have* '*arrived at their journey's end, with reference to the* '*right of stoppage.*' 2. Pull. and Bos. 461.

Here the latter part of the opinion seems quite sound; but it is doubtful whether it be correctly extended to any other act of ownership short of actually taking possession of the goods.

And in conformity with this opinion of Lord Alvanley, Chambre, J., in his judgment in the case of Oppenheim against Russell, 3. Bos. and Pull. 42. says,— 'Perhaps the consignee himself may intercept the 'goods in their passage; and, indeed, I have little 'doubt but that if he do intercept them in their pas- 'sage, before the consignor has exercised his right of 'stopping in transitu, *and do take an actual delivery* '*from the carrier before the goods get to the end of their* '*journey*, that such a delivery to him will be complete.'

[3] In KINLOCH against CRAIG, the general state of the fact was, that Sandeman and Graham acted as factors for Stein: that they were under very large acceptances for them on the credit of consignments to be made; that, while one consignment was on the way, Sandeman and Graham, by want of remittances from Stein, failed; that, when the vessel arrived, they did not take delivery; and that Stein also having failed, the trustee on his estate got the consignment, and sold it. The action was for restitution of the price to Sandeman and Graham's estate. Here the right of property remained in the consignors; the only right to which the consignee could lay claim was a lien by agreement. But lien requires pos-

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owner of the goods:[1] Nor has a surety for the price of goods any right to stop them in transitu.[2]

But it is sufficient that he who stops the goods shall stand substantially in the relation of seller to the insolvent. And so in the sense of this rule, a consignor, who buys goods by order of the consignee, and transmits them, charging a commission on the price,[3] is held to be a

session, and the goods had never reached the consignee's possession. Lord Chief-Baron Eyre, in delivering the opinion of the Judges in the House of Lords, said,—'That the transaction between the parties with respect to the consignments, was as between principal and factor, and not as between vendor and vendee; that, therefore, Sandeman and Graham could have no *property* in the cargo; and the right of stopping in transitu was out of the question, that never occurring but between vendor and vendee; and for this he relied on WRIGHT against CAMPBELL, 4. Burr. 2047.' 3. Term. Rep. 119. and 783.

SWEET against PYM, 1. East. 4.

[1] GARD, a clothier, employed PYM, a fuller. He was indebted to him for work a large general balance, and, by the custom of the trade, Pym had a lien. Pym had cloth in his possession to be fulled, and, on finishing, he shipped them to Gard; and soon after the vessel sailed, hearing of Gard's bankruptcy, Pym overtook the goods, and got possession. Lord Eldon, at the Exeter assizes, held, that the lien expired with the possession, and that Pym could not stop in transitu, so as to revive the lien. The Court of King's Bench refused to grant a rule, on the ground, that a delivery to the shipmaster was equivalent, as between such parties, to actual delivery to Gard.

[2] SKIFFEN, assignee of BROWNE, against WRAY. Here Browne, of London, ordered Dubois and Company, of Dantzic, to ship for him 200 lasts of wheat, in addition to 200 already ordered, and to value for them one-third on him, one-third on Fritzing, his agent at Hamburgh, and one-third on Wilson of London, his corn-factors. The wheat was sent, and bills drawn accordingly. Dubois and Company sent to Fritzing two bills of lading, indorsed in blank; and Fritzing sent them forward to Browne, and they arrived after his bankruptcy. On this, he delivered the bills of lading to Wray, as agent for Fritzing, and he got possession of the wheat, and sold it; the proceeds to abide the decision. The question was, Whether Browne's assignees were entitled to recover? The Court held they were. Lord Ellenborough said,—'Wray had no authority from Fritzing, for Fritzing 'himself had no right to stop the goods in transitu. 'His situation in this transaction was very different 'from that in Fieze and Wray. There he was liable 'in the first instance for the price of the goods, and 'therefore the Court considered him as a vendor 'quoad the bankrupt, to whom he had shipped them.' 6. East. 371.

[3] FIEZE against WRAY. In June 1801, an order was given by Browne to Fritzing, his correspondent abroad, to purchase wax for him: F. bought it accordingly of persons strangers to B., there being no privity between B. and those who sold to F. F. shipped the wax for B., and drew for the price, and sent the invoice and bill of lading. Browne becoming bankrupt, Aitkens, on the part of F., obtained the goods, and the bills finally were not paid. The Court held F. to be essentially the seller. Mr Justice Grose said,—'If 'this were the case of factor and principal merely, I 'should find great difficulty in saying that it did. But 'here Fritzing may in reality be considered as the 'vendor. For the name of the original owner was 'never made known to the bankrupt. There was no 'privity between them; but the goods were purchased, 'and the bills drawn, in Fritzing's own name; and, 'therefore, he stands in the situation of vendor as to 'Browne. The defendant, acting under an authority from Fritzing, applied, upon the bankruptcy of 'Browne, for the purpose of getting security for the 'goods, and received the bill of lading from the bankrupt's brother, as he honestly might, and which the 'other acted honestly in giving up to him.' And afterwards he adds, 'I am not satisfied that there is any 'distinction in law between the case of a vendor and 'a factor consigning goods; but if there be any such 'difference, Fritzing was, in regard to the bankrupt, 'the vendor in this case, particularly as the bills were 'drawn payable to himself.'

Lawrence, J. said,—'I am of the same opinion, that 'the plaintiffs have no right to recover. It has been 'contended, that the right of stopping in transitu does 'not attach between these parties; that Browne must 'be considered as the principal for whom the goods 'were originally purchased, and that Fritzing was no 'more than his factor or agent, purchasing them on 'his account; and that the right of stopping in transitu 'does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly 'put an end to the application of that law in this country; for I believe it happens, for the most part, that 'orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandise to them; the merchants here, upon the 'authority of those orders, obtain the goods from those 'whom they deal with; and they charge a commission 'to their correspondents abroad upon the price of the 'commodity thus obtained. It never was doubted but 'that the merchant here, if he heard of the failure of 'his correspondent abroad, might stop the goods in 'transitu. But at any rate, this is a case between vendor and vendee: for there was no privity between the 'original owner of the wax and the bankrupt; but the 'property may be considered as having been first purchased by Fritzing, and again sold to Browne at the 'first price, with the addition of his commission upon

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seller of those goods. A person sending goods to be sold, on the joint account of himself and the consignee, is also held entitled to stop in transitu.[1]

§ 3. UPON WHAT CONDITIONS THE SELLER IS OBLIGED TO ALLOW THE GOODS TO PROCEED.

The buyer may really be solvent, while, as we have seen, there may be circumstances of suspicion strong enough to authorize the seller to stop in transitu. His friends may come forward to support him: Even his creditors may choose, upon his bankruptcy, to take the goods, and go on with the transaction. How, then, are the goods to be relieved?

1. If the bills for the price have not yet been accepted, (as it is sometimes the practice not to sign the bills till the goods arrive), the seller may insist that good bills shall be given at the terms stipulated. He is not obliged to content himself with the bankrupt's bills, and a bond of caution, or other unmarketable security; but is entitled to have, according to the spirit of his original bargain, bills which he may use in the market, as he could have done the buyer's, if in full credit.

2. If bills have been accepted, and are not yet due, the goods must be relieved, on security being given for payment when the bills fall due. The stoppage in transitu operates with an effect similar, in this respect, to that of the common arrestment in security, which may be loosed on caution, if the debt be future or contingent.

3. If the price be already payable; if the bills, for instance, drawn from abroad, have fallen due before the goods arrive; the buyer, or his creditors, must pay before they can demand the goods: The vendor is not bound to take security in place of payment. Just as in the case of an arrestment in execution, the goods may be kept under the attachment till payment be offered; and it is not permitted to loose the arrestment on caution.

But, 4. Objections may be stated to the price on account of deficiency, &c. in the cargo. If there be such a ground of objection as will justify a judicial suspension of the seller's demand for payment, there seems to be little question, that, although bills have been signed for the price, yet, to the extent of the sum included in the objection, the seller will be obliged to accept of security instead of payment.

§ 4. OF THE MANNER OF STOPPING GOODS IN TRANSITU.

In England, it is now held, though not without expressions of great regret on the part of the Judges, as well as of the bar, that the bankruptcy of the buyer is not equivalent to a stoppage in transitu; that the buyer's warehouse continues open, notwithstanding, for the reception of goods; and that even the assignees under the commission, or provisional assignees named for the purpose, may take goods from a carrier or shipmaster, leaving the seller to rank as a creditor.[2]

' it. He then became the vendor as to Browne, and ' consequently had a right to stop the goods in transitu.' Lord Ellenborough, Ch.-J., then said, ' That having ' been engaged in the cause (though he did not recollect ' on which side), he had not taken part in the discus- ' sion; but that he entirely concurred in the opinions ' delivered by the other Judges. It was substantially ' the case of a vendor, only adding to the original price ' of the goods the amount of his commission. And the ' case of Hodgson against Loy shewed, that a part- ' payment did not destroy the vendor's right of stop- ' ping in transitu; it only reduced his equitable lien ' pro tanto, when he got the goods into his possession.' 3. East. 93.

[1] NEWSOM against THORNTON, 6. East. 17. See also FENTON against PEARSON, 15. East. 419.

[2] HASWELL against HUNT, 1772. ' Lacey came ' to Haswell, and bought a parcel of tobacco, to be ' paid for in ready money. This was in the morning. ' He left orders at his house for receiving the tobacco,

It can scarcely be said, that in Scotland this point has been directly or authoritatively decided; but the opinion of the Court has been uniformly inclined in the opposite direction from that of the English determination on this point. And this opinion seems to be growing stronger.[1]

'and the same day went to France, to absent himself 'from his creditors. After he was gone, Haswell's 'servant brought the tobacco to Lacey's house, but he 'had no orders to make any demand of the money, 'but only to deliver the goods. The question was, 'Whether this was a complete sale, so as to vest the 'property in Lacey? or whether his bankruptcy, be-'tween the sale and delivery, was such fraud as voided 'the sale by non-payment of the money? Lord Chief-'Justice Eyre held, that the sale was made complete 'by the act of the plaintiff, Haswell, who, by delivery 'of the goods, without demand of the money, vested 'the property in Lacey, by his own assent, as a com-'plete sale ab initio, without ready money.' Tried at Guildhall E. Term, 12. Geo. III., J. Burnet's MS.; 5. T. Rep. King's Bench, 231.

In ELLIS against HUNT, (see above, p. 201. Note [3]), where the provisional assignee took delivery, both Lord Kenyon and Mr Justice Buller said,—'That bank-'ruptcy is not, of itself, a countermand; and that no 'case to that effect had ever been decided.' 3. Term. Rep. 467.

In TOOKE against HOLLINGSWORTH, the question came incidentally to be considered. Lord Kenyon said,—'It never yet has been decided, whether or not 'a person, who, acting under a previous agreement, 'sends goods to another, against whom a commission 'of bankrupt has been issued at the time, and who is 'not only an insolvent person, but disabled by the laws 'of his country from dealing at all, can recover these 'goods again, under an idea, that the situation of that 'other, with whom he meant to deal, was so altered, 'that it could not be considered to be a contract with 'him. If the purchaser were dead at the time when 'the goods arrived, must they go to the executor? 'And other cases of the same kind might be put, 'which would considerably distress the argument in 'the affirmative of the proposition, that the assignees 'should take these goods, although the vendee were 'a bankrupt when they were sent. It may be pro-'per to discuss these questions when they arise; but 'I will now forbear entering into a discussion of that 'which appears to be an arduous task; because it is 'not necessary for the determination of the present 'case.' Mr Justice Buller, in the same case, said,—'The next point to be considered, is the effect of 'bankruptcy; and I think, that some points have been 'made by the defendant's counsel, which have not 'been answered. They contended, that, when these 'goods came to the hands of the assignees, the pro-'perty was vested in them; and, if so, that nothing 'has happened since to divest it. This is an impor-'tant part of the case; and therefore it is material 'to consider, whether or not this property was vested 'in the assignees. It has been held, that bankruptcy 'does not put an end to the contract: That was so 'stated by Lord Kenyon and myself, in Ellis against 'Hunt; and that doctrine was not then new; for, in 'Haswell and others against Hunt and others, as-'signees of Lacey, the same point was ruled. (Here 'Mr Justice Buller read the above Note of that case.) 'It seems, then, (continued Mr Justice Buller), that 'bankruptcy does not, in all events, put an end to the 'contracts of the bankrupt. After the bankruptcy, 'several contracts have been binding on the bankrupt, 'though the creditors could not prove their debts 'under the commission.' 5. Term. Rep. 226. and 230.

In SCOTT against PETTIT, Lord Alvanley, who tried the case at Guildhall, suggested, that as the goods were not sent from Manchester till after the bankruptcy of Berkely, that event might be deemed a revocation of the previous order, so as to prevent any right from vesting in Berkely's creditors. But this point was abandoned by Mr Sergeant Best, when the cause came to be argued on a motion for a new trial. He said,—'That, though suggested by the Lord 'Chief-Justice, before whom the cause was tried, yet 'he felt it too late, after so many decided cases, in 'which a similar circumstance had occurred, without 'effecting any alteration in the right of the assignees 'of the bankrupt to claim goods on their arrival, to 'make this objection, however desirable it might be 'to establish a different rule from that which had 'hitherto prevailed.' Lord Alvanley said,—'At the 'trial, I could not help forming a wish, that the ques-'tion, how far the bankruptcy of Barclay had operat-'ed as a countermand of his previous orders to the 'pursuers, Walters, should be considered by the 'Court? but, on looking into the cases, I find that 'question to be completely closed in Westminster 'Hall; and that we, therefore, are bound to hold, 'that, though a bankrupt has altogether ceased to 'be a trader, yet that his warehouse continues open 'for the purpose of receiving goods; and that the 'assignees have a right to take possession of every 'thing that may come into their hands, without pay-'ing a single farthing, even though the consignors of 'the goods are not entitled to come in under the 'commission. In Ellis against Hunt, Lord Kenyon 'says, That it never had been decided that bankruptcy 'was, of itself, a countermand of an order; and in 'Bothlingk against Inglis, 3. East. 381. the goods in 'question were not delivered on board the ship which 'was to bring them from Russia to the consignee in 'London, until after the consignee had committed an 'act of bankruptcy. No doubt, therefore, for the 'purpose of receiving goods, the assignees stand in 'the place of the bankrupt.' 3. Pull. and Bos. p. 471.

[1] In the case of CAVE's Creditors, in 1736, a claim for restitution of goods delivered was made on the ground of fraud. The Court first found, that, in the contract itself, there was no fraud. It was then con-

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Without presuming to determine what ought to be the decision on this question, it may be allowable to suggest, that if a feeling of hardship attend the application of the English rule, it seems, on the other hand, to be doubtful, whether, laying aside the inexpediency of having opposite rules in England and in Scotland, there be any clear principle for supporting a determination opposite to that which has been followed in England. Bankruptcy does not annul a previous contract: If the seller choose, he may insist on the bankrupt, or the creditors, taking the goods, and allowing him to claim under the contract: If the creditors choose, they may pay the price, and take the goods. The contract then being in force, and the order to deliver the goods effectual, unless recalled, the question comes to be, Whether the bankruptcy is a countermand of the order to deliver, so as to annul the delivery, as made without authority? or, Whether there be a fraud entitling the seller to restitution? But, 1. The bankruptcy cannot be a countermand, otherwise than by presumption—that if the seller had known of this event, he would have recalled the goods;—an inference which is far from being unavoidable; for the vendor may have chosen to act differently; and, 2. As to restitution, supposing the delivery once made, there seems to be no ground for it in this, more than in a hundred other cases which occur in bankruptcy. By the civil law, and the jurisprudence of the continent, restitution was given of goods, not only where the *contract* of sale was induced by fraud, but where undue concealment or deceit led the seller, at the time of delivery, into a false credit for the price. In the law of Scotland, restitution is given only where some act of fraud attaching to the original consent to transfer, taints the whole contract; and subsequent occurrences are accounted misfortunes, which equally may attach to all the creditors. The property which, by constructive delivery, has passed at law, may be resumed, if the seller entitle himself in equity to do so; but if not resumed, the transference becomes irrevocable.

In cases where this difficulty has no place, there does not appear to be any specific form or solemnity necessary for stopping goods in transitu.

1. Where goods are sent by sea, the bill of lading is taken in various forms, according to the views of the parties; and the shipmaster is discharged, by delivery to any one holding a bill of lading legitimately transferred. The presentment by the seller's agent of one of the bills of lading, will complete the stoppage. Where the bill of lading is not at hand, the most unquestionable stoppage is by the warrant of a Judge. But that is not

tended, that the date of the delivery is the only period to be considered as to this question; for, supposing the contract fair, yet, if at the time of the delivery by which the property is transferred, the bankrupt is designing cedere foro, and to give up his effects to his creditors, it is fraudulent in him to receive the subject sold, when he has no prospect of doing justice by paying the price. The Lords found the time of delivery must be the rule. 8th December 1736, Sir J. Inglis against the Royal Bank.

In the subsequent case of STEIN's Creditors with ALLAN and STEWART, this doctrine was very much questioned both at the bar and on the Bench. But there was no occasion to decide the question, or to fix any point as to the effect of bankruptcy in putting an end to the contract, or as a countermand of delivery.

In the case of ROBERTSON and AIKEN against MORE, trustees on Sinclair and Williamson's estate, the vendees were bankrupt at the time when part of the goods were taken possession of by them. It was not necessary to decide the case on this ground, as it was held that the goods had been legitimately stopt before delivery. But it was observed on the Bench, —'That Sinclair and Williamson, by taking possession 'of the grain after their avowed insolvency, were 'guilty of a wrong, by which neither they nor their 'creditors ought to profit.' 3d July 1801.

In COLLINS against MARQUIS's Creditors, it was incidentally said on the Bench, that though bankruptcy be no stoppage by the law of England, it is so by the Scottish law, delivery taken after actual bankruptcy being fraudulent and ineffectual. This opinion was not necessary to the decision of the case, and is, therefore, to be taken, not as a judgment on the question, but merely as indicative of the bias of opinion in our courts. In the case, as reported in the Fac. Coll. 23d November 1804, this incidental opinion is not taken notice of.

Lord President Blair took occasion, in the case of STEINS against HUTCHISON, 16th November 1810, to deliver an opinion to the same effect.

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precisely necessary; a private countermand is sufficient, even though verbal.[1] It is right, however, in order to avoid disputes, that the countermand should be in writing. The seller has been held effectually to stop his goods, by entering them at the customhouse in order to pay the duties for them, although the bankrupt, or his assignees, had, at landing the goods, forcibly got possession of them.[2]

2. Where goods are not sent by sea, but by a land carrier, or other person intrusted to transport them, and where, of course, there is no written and transferable document like a bill of lading, but a verbal engagement, or an understood obligation to deliver according to the address; it is still less necessary for the seller, on the one hand, to proceed by warrant of a Judge; or, on the other, to attain the actual possession of the goods. A bare countermand has been held sufficient. The carrier is to be considered as the middleman or trustee between the parties; and, as on the footing of a verbal undertaking, accountable to either of them for the due execution of his engagement, he is, in some degree, subject to the orders of them both,—so far, at least, that he is not entitled to disregard the directions of him who put the goods into his hands, although differing from the original directions, in consequence of circumstances unforeseen at the time of sending away the goods.[3]

3. Where the stoppage is made, not by the seller himself, nor by the holder of a bill of lading, or of other legal authority for interfering, but by the usual agent of the seller interposing as negotiorum gestor, the stoppage should be accomplished by judicial authority. An application from such a person to a Judge will be entertained. It is most salutary, and quite consistent with the principle of negotiorum gestio, that the person who in general acts for a foreign merchant, though he hold no special commission, should be allowed, on the sudden bankruptcy of a buyer, to apply for and obtain the necessary warrant to stop. This is very frequently done; and although it is generally objected to, the Judge never refuses, under proper precautions, to sanction an act which is necessary for the protection of the foreign merchant.

4. If it be not sufficient to entitle the seller to restitution of his goods, that the buyer has become a bankrupt before delivery, neither will it avail him, that he has given notice to *the buyer's creditors*, that he intends to stop the goods, or that he is in the course of obtaining a judicial warrant for so doing. The bankruptcy brings every thing to a fair question of competition, depending upon the legal completion of the real right; and whoever is most vigilant in making his right finally and completely effectual, will, according to the common rules of competition, be preferred. A creditor, who has received from the bankrupt an assignation long before bankruptcy, but who has not taken the due means of completing his right before the completion of that of the trustee under the bankrupt's conveyance, is cut out. And so, in the same way, must the seller be cut out from that security which is still in his power, if he do not take the legal way of getting those goods again into his possession. It will not do to interdict the other creditors, who are in the fair pursuit of the very same legitimate object which the seller is seeking, viz. the securing of themselves from the loss, which the credit given to the bankrupt threatens to bring on them.

5. But what if the seller interdict the bankrupt himself? Suppose, for example, that the seller, meaning to stop in transitu, gives notice to the bankrupt that he has applied for

[1] In the case of SINCLAIR and WILLIAMSON'S Creditors against ROBERTSON and AIKEN, 3d July 1801, the seller had verbally intimated to the shipmaster, that he meant to stop the cargo, desiring him not to deliver to the buyer or the creditors; and told him, that he was about to apply for a warrant to obtain possession of it. In the meanwhile, application for delivery was made on behalf of the buyers' creditors; and they received delivery accordingly. The Court held, that the verbal countermand was sufficient.

[2] Ex parte WALKER and WOODBRIDGE, Trin. T. 1756; Cooke, 419.

[3] In ELLIS and HUNT'S case, (p. 201. Note [3]), it was not questioned, that the letter from the seller would have been a good stoppage of the commodity, had not the provisional assignee already taken delivery.

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a judicial warrant, and, in the meanwhile, the bankrupt takes delivery;—it would appear, that, in this case also, the delivery is unobjectionable.[1]

6. As the privilege of stopping in transitu is an equitable power to resume that possession, which, in strict law, has passed from the seller, the seller must take some active step for resuming the possession.[2] In the preceding section it has been stated, that the attachment of goods, deposited in a public warehouse to be delivered, does not appear to be sufficient as actual delivery.[3] Perhaps this should be stated more as a matter of doubt; because the property, which, *at law*, must be held as transferred, by even a constructive delivery, may well be considered as sufficient to support the diligence of the buyer's creditors; and, accordingly, in the case quoted in the above note, one very eminent Judge held the arrestments as effectual against the right of the seller.

§ 5. EFFECT OF STOPPING IN TRANSITU.

It is a question which has not hitherto been determined, Whether the seller, who stops in transitu, is entitled both to resume possession of his goods, and to claim against the divisible estate for damages? and it is not easy to find a clear principle of decision, where the doctrine itself, of which it forms a part, presents so many anomalous and incongruous propositions.

1. In such questions it is natural to recur to the analogy of retention by the seller, while yet the goods are in his own hands undelivered; in which case it is generally held, that the seller may take the full benefit of his lien, and, at the same time, claim as a personal creditor on his contract for the balance. And, certainly, if the right of the seller to stop in transitu be precisely of the same kind with the right of withholding goods while in his own warehouse undelivered, there should be no difference in the decision. But the distinction seems to lie here, that the property at law has passed in the former case, while, in the other, it remains still in the person of the seller undivested, and under lien. Where the goods are still with the seller undelivered, the decision is to be regulated by the common rule of mutual contract, whereby the party able to perform withholds on account of the other's incapacity; and being bound only by a personal obligation, the

[1] In the case of SINCLAIR and WILLIAMSON's Creditors against ROBERTSON and AIKEN, 3d July 1801, the sellers intimated to the bankrupts that they had applied for a warrant to stop in transitu. But this would not have been deemed sufficient, had it not been accompanied by a notice also to the shipmaster, which, of itself, without any judicial warrant, was a sufficient stoppage. The only Judge who took notice of the intimation to the bankrupts, said,—'This notification 'was nothing; the bankrupts could not interfere. 'They could have no right to refuse the goods, had 'they been brought to them for delivery.'

[2] This was held in the case of FOTHRINGHAM, &c. against SOMERVILLE and Company, in the Second Division of the Court of Session. The case was somewhat complicated; and, in particular, there were circumstances of fraud which were held sufficient to annul the sale, and so to supersede the question of stoppage. But the question was argued, and opinions delivered upon these facts: The goods had been sent from Leith, addressed to Omand at Stromness: on landing, they were placed in a cellar of the shipowner's, and there arrested by certain creditors of the buyer. On this, they were, by the competing creditors, removed to a public warehouse, and an action of multiplepoinding brought into Court, for settling the claims of the several arrestors, and the general creditors. While the goods lay in this situation, the sellers appeared, and claimed as stoppers in transitu. On the Bench it was said by Lord Meadowbank, that here there was no stoppage. Delivery, whether actual or constructive, he held to transmit the property as by tradition; while stoppage in transitu is a resumption of the possession, entitling the seller, after having recovered the goods, to a defence in equity against a demand for the goods till the price shall be paid. To make his right effectual, therefore, and give place for the equity he must rely on, it is necessary for him to follow the property without delay: he must give no faith to the buyer further, by raising diligence, &c.; he must get hold of the goods. But here the seller was not vigilant; he did not get the goods into his possession; he suffered creditors to arrest, and the goods to come into public custody for the benefit of the arresting creditors. 26th May 1809.

[3] See p. 202.

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condition of which is implement by the other party, he may retain his property without any destruction of the contract itself, but, on the contrary, with full reservation of his right to claim damages for non-performance. Where goods have been constructively delivered, the real right of property is gone from the seller; his consent to transfer has been given by the legal token of tradition; and, without the interposition of equity to annul this legal consequence of the contract, the property must remain with the buyer. But in permitting the interference of equity to annul this transfer, and deprive the general creditors of the buyer of property, which, in strict law, has passed to their debtor, it has been considered as equitable, on the other hand, that it should be accompanied by a rescinding of the whole contract, and a renunciation of any further claim; since it would be a great hardship to give a preference to the seller over the other creditors, and subject the divisible funds, which have derived no benefit from the contract, to a further claim of indemnification.

2. Another analogy naturally occurs in considering the question. Not only may the seller stop his goods while not actually delivered, but the buyer, foreseeing his failure, or having failed, may reject the goods; in which case it seems impossible to say that the seller shall be obliged to take them back, without having his claim reserved for the loss, which, by the imprudence of the speculation and fall in the market, may arise on them. But the answer to this is, that the seller is not obliged to take his goods: He may insist on their being kept for the estate, and his claim for the price admitted.

3. Although there are many difficulties either way, it appears, on the whole, most consistent with the great lines of this doctrine of stoppage in transitu, that the extension of the seller's security over the goods sold, though, perhaps, in a large sense, of the nature of a lien,[1] is given by equity originally, on the condition that the seller shall take back the goods as if the contract were ab initio recalled. The expressions made use of by Lord Thurlow in Allan and Stewart's case, when the House of Lords introduced into the Scottish law the doctrine of stoppage in transitu, although perhaps (as delivered to us) not guarded with all the care with which so great a Judge may be supposed to have expressed himself, indicates what appears, on the whole, to be the true principle for the determination of such questions. He said,—'The view taken in the Court of Session excluded all 'attention to this point,—that, as the title to stop in transitu arises from a voidance of the

[1] The right was spoken of as in the nature of a lien in the case of FIEZE against WRAY, (see above, p. 225. Note [3]). The buyer had accepted bills, which, having been indorsed, might, it was said, be proved against his estate, and so draw a dividend; and therefore it was contended, that the seller could not stop in transitu, without relieving the estate of those bills. Sir S. Lawrence said,—'If the vendor have a right to stop 'the goods in transitu, and have stopt them, he *has a 'lien on the goods till the whole price be paid.*' Again, he said,—'Having lawfully possessed himself of the 'goods, the vendor has a lien on them till the whole 'price be paid, which cannot, therefore, be satisfied, 'by shewing a part-payment only.' Le Blanc, J., thought, 'That the vendor had a right to stop the 'goods in transitu, unless the acceptance of his bills 'by the vendee made any difference. But if the full 'price of the goods be not paid to the vendor, it does 'not take away his right to stop in transitu.' Lord Ellenborough assented, and said,—'That a part-pay-'ment does not destroy the vendor's right of stop-'ping in transitu; it only reduces his *equitable lien pro 'tanto* when he gets the goods into his possession.' 3. East. Rep. 93.

The same expression had been used by Lord Mansfield incidentally, in the case of VALE against BEALE. 'A vendor, in a question with the general creditors 'of the vendee, who becomes a bankrupt, has, before 'actual possession by the vendee, a lien upon the 'goods he sends; and if he can get them in transitu, 'to be sure he has the benefit of that lien.' Cowper, 296.

This expression of a lien is not altogether unexceptionable;—1. Because a person cannot have a lien over his own property, its proper application being to property in the hands of another than the proprietor, and which, by the implied condition of his holding it, the custodier is entitled to keep in security of the proprietor's engagement to him; and, 2. Because lien expires with possession, delivery to a carrier putting an end to it. It may, however, be in some measure justified by a sort of fiction, that the goods having been recovered before reaching the buyer, may be held as never having effectually left the seller.

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' contract, and the act of stopping puts things into the same situation between the vendor ' and vendee, or factor and principal, as if there never had been any transaction between ' them relative to the goods so stopt, the stopper certainly can raise no charge against ' the bankrupt's estate, as for freight, insurance, damage, or any thing else, respecting ' such goods, though the contract had, in part, been fulfilled, by carrying them so far, ' or insuring them.' [1]

This doctrine was not imbodied, it is true, in any judgment pronounced on that occasion, the cause having been extrajudicially settled on the footing of Lord Thurlow's opinion. But, in a subsequent case, it was adopted in the Court of Session, first by Lord Justice-Clerk M'Queen, and afterwards by the whole Court.[2] This case was, however, a good deal involved in circumstances; and, from its having been withdrawn from the House of Lords before having been heard, it may be considered as not having settled the question.[3]

§ 6. OF THE BUYER'S REJECTION OF GOODS SOLD, FOR WHICH HE IS UNABLE TO PAY.

The counterpart of the seller's *right* to stop in transitu, is the buyer's *duty* to reject the proffered delivery, if unable to pay the price.

The doctrine laid down in the English cases on this subject is, 1. That it is the part of an honest man, when he finds himself unable, as buyer, to pay the price, but is not yet a bankrupt, to reject goods proffered to him for delivery by a carrier, or other person to whom they have constructively been delivered for him;[4] and that this act of honesty,

[1] This note was taken at the time; and was founded on in the case of Kincaid against Murray and Henderson in 1799, (see next Note), and there held as correct.

[2] KINCAID *v.* MURRAY and HENDERSON, Jan. 17. 1798. Without going into a very minute statement of this case, it may be sufficient to say, that Howden and Co. shipt grain by agreement for Leslie and Kincaid, and drew bills for the price on Murray and Henderson, the bankers of the buyers; and that in the meanwhile the buyers having failed, an agent of the seller stopt the grain on its arrival, Murray and Henderson having approved of what he had done. The bills were paid to the seller by Murray and Henderson, and one of the buyers had made partial remittances to Murray and Henderson, but still a large sum was unprovided for. The sellers afterwards gave a power of attorney to Murray and Henderson, who, having first applied the remittances, claimed indemnification for the balance of the bills, and all the additional expense of insurance, &c. out of the grain as stopt in transitu. At first Lord Justice-Clerk M'Queen held, ' that the stopping of ' goods in transitu, was not an acquittal to the vendee ' of any further claim of damages.' But in his subsequent judgment he found,—' that, agreeably to the ' decision of the House of Lords in the case of Messrs ' Allan and Stewart against Stein's creditors, the con- ' tract was rendered null.' And this judgment was twice adhered to by the Court; 17th January 1798.

An appeal was taken to the House of Lords, but the circumstances of the parties prevented it from being tried.

[3] ARNOT against BOYTER is a case which may at first sight appear to decide this question. Moens and Son of Rotterdam, shipt goods by order of Boyter, but having some suspicions, they sent them consigned to their own agents in Scotland. Boyter was at the arrival of the goods insolvent. The agents tendered the goods, and protested for damages, if it should be necessary to sell them by auction. Boyter refused to give security for payment, and, on application to the Judge-Admiral, a warrant was granted to sell the goods, and decree pronounced, finding Boyter liable for any deficiency that should arise. And the Court of Session affirmed this judgment, 24th November 1803; 11. Fac. Coll. 272.

But it is proper to observe,—1. That the Court held this not to be a case of stopping in transitu, but one in which the goods never had left the seller's hands; and, 2. That care was taken (by Lord Meadowbank particularly) to make it be understood, that ' this decision ' left the question open and undetermined, whether a ' vendor, in a proper case of stoppage in transitu, is ' entitled to claim for damages.'

[4] ATKINS against BARWICK; 4. Burr. 2239.; Cowp. 125. Cripps and Quorum in Cornwall, received goods from Barwick in London, which, on finding their affairs declining, they sent to a third person, with orders to redeliver them to Barwick; and, soon after becoming bankrupt, they wrote to London to inform Barwick of their bankruptcy, and of the fate of his goods. Barwick was found entitled to the goods. Atkins against Barwick; 1. Strange, 165. Lord Mansfield, in subsequent cases, said, that the reasons given for

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when performed, is to be held by courts as effectual, provided the seller assents to the rescinding of the contract.[1] 2. That this power in the buyer, of rejecting the goods, and rescinding the bargain, subsists only while the goods are in transitu;—after actual delivery, they become identified with his stock, and cannot, in contemplation of bankruptcy, be restored to the sellers, in preference to the other creditors.[2] 3. That after an act of

the judgment turned on a subtilty; the true ground was the honesty of the case, and that the trader very honestly refused to accept the goods, and returned them. He added, the Court of Chancery would have interposed, and said the assignees should not have the goods without paying the price.

SALTE against FIELD; 5. Term. Rep. 211. Dewhurst resided as a trader in New York, and had also a house in London under J. Hill, his clerk. Salte sold to Hill, for Dewhurst, 176 pieces of calico, and they were (3d May) delivered at his house to Hill, who sent them to Field, a packer, to be shipt for Dewhurst at New York. In April, Dewhurst had written a letter to Hill, which arrived after the goods were so delivered to Hill, desiring him to buy no more goods, to countermand all orders, and give back such goods as might be furnished. Hill immediately informed Salte of this, who agreed to take back the goods. The goods were in Field's hands as packer, and several attachments were used in his hands by creditors of Dewhurst. A meeting of the creditors was called, and on a demand by Salte against Field for the goods, which were refused, an action was raised. The Court of King's Bench held, that the principal was entitled to disavow and rescind the contract, if that proposition was assented to by the buyer; and that though the goods remained with the packer, it was not for the original purpose, but, after the rescinding of the contract, the property revested in the seller, and the buyer's creditors were not entitled to attach the goods.

[1] It was held in the several cases cited in the last note, that his assent would be *intended*, unless he should actually dissent.

[2] SMITH against FIELD; 5. Term. Rep. 402. This was a case similar to Salte against Field, (see above, p. 232. Note [4]); and the circumstance of the seller having, instead of acceding to the buyer's rejection of the goods, attached the goods as for a debt, (viz. the price), was held to pass the property so absolutely, that there could be no subsequent rescinding of the contract. The case arose out of the very same circumstances, and the same bankruptcy; but Smith, the seller, thinking it impossible that Hill could deliver back the goods, made affidavit of the price, and attached the goods in Field the packer's hand. The Court drew the distinction here, that the renunciation proposed was not assented to. It was held, that when the offer was made to the sellers by Dewhurst, they might have rescinded the contract; but that they declined doing it; for the instant they made affidavit that Dewhurst was indebted to them for their goods, it operated like a positive declaration by them, that they did not rescind the contract. But now the interests of other parties intervene, the general mass of Dewhurst's creditors.

BARNES against FREELAND; 6. Term. Rep. 80. Freeland sold to Lloyd 44 tons of iron, and delivered it. Lloyd accepted a bill at nine months for the price. Four months afterwards, Caldwall and Company, the bankers of Lloyd, failed, and this made Lloyd insolvent. Lloyd called on Freeland, and told him this, and offered him back the iron, which still lay in the warehouse where it was at the time of the sale. Freeland agreed to take it back. The transaction was managed by Lloyd delivering to Freeland a bill of parcels, dated two days before this conversation, for 50 tons, including the above and another parcel in a similar situation, and giving him the key of the warehouse. It was entered in the books as a sale of 16th March. Lloyd, on the day of the above transaction, wrote circular letters; he did no more business; and three days after committed an act of bankruptcy. The Court of King's Bench held the circumstance of the goods having been actually delivered, and the property of the bankrupt until he became insolvent, as decisive against his renunciation of the bargain. The goods here were originally sold and delivered to the buyer, said Lord Kenyon, and they were locked up in his warehouse; therefore, there was a complete transfer of the property from the seller to the bankrupt at the time; and the question is, Whether, when the latter became insolvent, he could redeliver it to the seller in specie? It was held, that the contract being complete, and the property transferred, it could not be rescinded by any subsequent act of the parties, so as to affect the interests of third persons.

In the subsequent case of DIXON against BALDWEN, (see above, p. 201. Note [1]), where the goods were in the possession of the sellers, upon a claim of right to stop them in transitu, it was held, that a fair and bona fide renunciation by the buyers, on consulting with some of their creditors, was effectual. The Battiers, while the right of the sellers to stop was undecided, called a meeting of their creditors, and a case was laid before counsel, who advised the goods to be given up; and they were given up accordingly. Lord Ellenborough, on this point, thought, that the bankrupts were competent to rescind, and had in fact rescinded the contract for the sale of these goods. The circumstance of deliberation, consent of creditors, advice of counsel, and the publicity which attended the whole of the measure, exempted it from being considered as a fraudulent preference in contemplation of bankruptcy. That the Battiers must have considered themselves in a state of insolvency and impending bankruptcy at the time, cannot be doubted: But, until an act of bankruptcy, the jus disponendi over goods remains by law with the trader, unless he exercise it by

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bankruptcy committed, the buyer has no power to return goods to the seller, this being necessarily a preference given to a particular creditor.[1] 4. That, after bankruptcy, the buyer cannot interfere to reject goods, which, being in transitu, are tendered for actual delivery. This has been held with expressions of regret. The distinction between this case and that of an insolvent, first above taken notice of, is extremely nice: though it may certainly in the subtilty of law be contended, that the contract of sale being completed by the consent of parties, they are from that moment creditors of each other, the buyer for delivery of the goods, the seller for the price: that by the delivery of goods to a carrier, &c. the property is passed to the buyer, and to his creditors, subject to resumption by the seller, if he shall be vigilant enough to take them before reaching the buyer's stock: that if the buyer refuses to receive the goods after his bankruptcy, he may be said actively to interfere with the rights of his creditors, and to take from them property which has already by tradition been vested in him for their behoof, conferring thereby on the seller a preference; and that, under the statutes of bankruptcy, he is chargeable with having alienated in favour of one who, at the moment, is merely a creditor, property which would otherwise go as part of his divisible estate.

In Scotland the doctrine is fully established on the sound principles of justice, untrammelled by distinctions so nice as the English Judges have permitted to interfere with the dictates of honesty.

1. In an old case it was held, that where goods have been actually delivered, the buyer, being a bankrupt, cannot return the goods, so as to give a preference to the seller.[2]

2. In another case decided about the same time, a person on the eve of bankruptcy was held entitled to reject the goods when not finally delivered.[3] And in a later case, the English doctrine on this subject was pleaded, and sustained, to the effect of supporting a rejection of goods sold and constructively delivered, the buyer finding himself unable to implement his contract.[4]

way of a voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at least under an idea of the right being probably adverse to the claim of the bankrupts and their creditors; and voluntary favour towards the defendants did not operate as any inducement with the bankrupts to recede from their rights on this occasion. From this opinion Mr Justice Lawrence dissented; holding the communication from the bankrupts not to amount to a consent to rescind the contract, but merely to notice of the meeting, and of an apparent disposition of the creditors who had met, to the giving up of the goods. The other Judges (Grose and Le Blanc) concurred with Lord Ellenborough in thinking this a question fit for the jury, who had affirmed the bankrupts to have acted bona fide, and who had negatived any voluntary preference; 5. East. 175.

[1] This proposition, however, is not settled by any determination: It is the result only of *dicta* in the cases quoted in the preceding Note.

[2] HAMILTON against BARROW and REYNOLDS, 5th December 1767. Smith bought from Hamilton, a cabinet-maker, furniture to fit up his house for receiving lodgers. The furniture was delivered; and, some time afterwards, Smith was imprisoned. From prison he wrote to Hamilton, declaring his inability to fulfil his contract, and desiring him to take back his furniture. Hamilton, accordingly, received back his goods. A creditor afterwards arrested those goods in Hamilton's possession, as the property of Smith. The Sheriff of Edinburgh held the property to have been vested in Smith, and that he had no power to prefer the seller. Lord Pitfour confirmed this judgment; and a petition, drawn up by Crosby, against the interlocutor, was refused.

[3] WALLACE, GARDYN and Company, against MILLER, 13th June 1766. A person on the eve of bankruptcy was allowed to reject a proffered bargain in the very last act necessary for perfecting it. An offer was made by him to buy goods which were in his own possession as a bleacher. It was agreed to, and bills desired to be sent. At that moment the insolvency appeared, and the buyer said he should keep the goods only to manufacture them, not to the effect of completing the sale. Found he could do so, to the effect of excluding poinding by his creditors. 4. Fac. Coll. 256.

[4] M'MILLAN against DRAKE, 8th July 1807. Maccoul, a timber merchant, commissioned two cargoes of timber from Drake. One of them was delivered to Maccoul; the other was on board of a ship to be carried to him, the invoice and bill of lading indorsed being in his hands. Finding his bankruptcy inevitable, he

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3. But it is not actual delivery in this question, if goods have been brought from a distance, and are still on the carts at the cellar-door of the buyer. Nay, the buyer may even take the goods into his warehouse custodiæ causa, and still the goods will be sufficiently rejected by writing to the seller that they have been so taken for his behoof.[1]

4. Goods may be rejected even after they have been taken into the custody of a clerk or warehouseman, acting without express authority from the buyer. And,

5. It has been said in several Scottish cases, that it amounts to a fraud by the bankrupt and the creditors to take delivery of goods which are still subject to stoppage.[2]

SECTION III.

OF RESTITUTION OF GOODS AFTER DELIVERY.[3]

THE seller may be entitled to claim restitution of his goods even after delivery, either in consequence of certain conditions in the contract, or as a remedy against fraud.

took the opinion of counsel, and was advised not to take delivery of this latter cargo. He, accordingly, wrote to his law agent, M'Millan, and indorsed the bill of lading to him, as trustee for all concerned:—'I enclose 'the invoice and bill of lading, concerning which I am 'very much perplexed; because, finding that I am no 'longer able to keep my credit, and that I must be 'under the necessity of immediately applying for a se-'questration, I am at a loss to know whether I should 'take delivery of this cargo, which will bring in Mr 'Drake among my other creditors, or allow it to re-'main, subject to the order of him or his agent.' He then stated the necessity of landing the cargo, to prevent demurrage; and that he thought it right to indorse to him, the agent, as trustee for all concerned, 'for be-'hoof of my creditors in general, or Mr Drake in par-'ticular, whichever of them shall afterwards be found 'to have the best right thereto.' Five days afterwards Maccoul's estate was sequestrated. About a month after sequestration, the agents of the seller took a protest against M'Millan, requiring delivery of the cargo. M'Millan deferred answering this question till the creditors should be consulted. The question in the sequestration was, Whether the seller was entitled to the proceeds of this cargo? The trustee in the sequestration (who happened to be the same person, M'Millan, that had been made indorsee of the bill of lading, though this made no difference on the case) rejected the seller's claim, on the ground that the cargo was not in transitu at the time of the bankruptcy. Lord Robertson found, that the estate of Maccoul was sequestrated on 25th January 1804; that no claim was made by Drake for the cargo till 21st February; that the letter from Maccoul, and the indorsation of the bill of lading, cannot be considered as a renunciation of the contract, as it was in trust, not for behoof of Drake, but of all concerned; that there was no stoppage in transitu by Drake, the property having been vested in the trustee for the creditors in general, by the act of sequestration, before any claim by Drake; and, therefore, he repelled his claim for the proceeds of the cargo. The Court unanimously altered this judgment, and found Drake, the seller, entitled to the proceeds of the cargo.

[1] STEINS against HUTCHISON, 16th November 1810; 16. Fac. Coll. 33. Adams ordered two casks of spirits from Steins; they were sent, and arrived at Adams' cellar door, about nine o'clock in the morning. About an hour afterwards, Adams got letters which decided him in applying for sequestration; and he then took advice what to do with the goods, which could not be left in the street. He was advised to take them into his cellar custodiæ causa; and did so; writing to the seller to that effect. The question was between the sellers and the general creditors of the buyer. The Court held the goods to have been sufficiently *rejected*, to prevent the passing of the property.

[2] In STEINS against HUTCHISON, 16th November 1810, First Division, Lord President Blair intimated his opinion, that a *bankrupt* might reject goods; and even that it was very questionable whether it were not a fraud to take them; and whether, on that ground, restitution would not be given.

See what Lord Mansfield says in ATKINS against BARWICK, above, p. 232. Note [4]. in fin.

[3] In the first edition of this Work, while the doctrine of stopping in transitu was recently introduced, and was only in the course of supplanting the remedy which by our own law was given to vendors on the principle of restitution on account of fraud, actual or presumed, this chapter had an importance which it does not now possess. I think myself entitled, therefore, to abridge the discussion, and dispense with many of the authorities.

§ 1. OF CONDITIONS IN SALE.

Such conditions are reduced to two classes;—suspensive conditions, and dissolving conditions: the former suspending the transfer till the condition be fulfilled, the latter annulling the transfer after it is completed.

By the Roman law, both those conditions were held real. Delivery of the thing sold did not transfer the property, unless the price was paid, or credit given for it: A condition was implied, suspensive of the transference.[1] And even where credit was given, it was lawful to stipulate, that the contract should become void, if the price was not paid against a day certain.[2]

In the application of these rules to mercantile practice, some controversy was maintained on the question, Whether the seller was to be held as giving credit for the price, from the mere fact of delivering the goods without receiving the price?[3] The result seems to have been, that, in order to transfer the property without payment of the price, it was in the Roman law enough, if the seller agreed to the appointment of a future day of payment, and delivered the subject in the mean time, without any condition of eventual dissolution; but that delivery alone did not infer an unconditional transference; passing the property only if the price was paid.[4]

This doctrine is found prevailing as the former law of the Continent; with such particular exceptions as, in various states, appeared expedient or necessary.[5]

But in Great Britain, there is no hypothec or right of restitution for security of the price, after actual delivery. The moment the goods are actually in possession of the buyer, by the vendor's authority, as sold to him, the transference is completed, and the price becomes matter of personal credit merely.

1. In England, this rule is settled as applicable to chattels, and consequently, to mercantile concerns. It is, indeed, laid down in the older books,[6] that payment of the price, day not being given, is a condition precedent implied in the contract of sale, so that the buyer cannot take the goods, nor sue for them, without tender of the price. But day is held to be given by delivery of the subject unconditionally.[7] And although an express condition annexed to the transference of chattels is effectual,[8] it is not held a valid condition, that, on the buyer being unable to pay the price, the seller shall take back the property, as under a lien for the price.[9]

[1] Inst. De Rer. Div. lib. 2. tit. 1. §. 41. Dig. lib. 18. tit. 1. De Contrah. emp. l. 19. See also Ulpian's rule, Dig. lib. 14. tit. 4. l. 5. § 17. and 18. De Tribut. Act.

[2] 'Lex Commissoria est ea, quæ inter venditorem 'et emptorem convenit, ut si intra præfinitum diem 'pretium solutum non sit, res sit inempta.' Pothier, Pandect. lib. 18. tit. 3. § 1.; and it is proper to mark the spirit of this rule, as delivered by Ulpian in the first law of this title,—'Si fundus, commissoria lege, 'venierit, magis est *ut sub conditione resolvi emptio* 'quam *sub conditione contrahi* videtur.'

[3] Casaregi (Disc. 38. § 28.) says,—'Traditio non 'sola sufficit ad probandum venditorem habuisse fidem 'de pretio.' See also § 29. and 30.
Vinnius, Com. in Inst. lib. 2. tit. 1. § 41. p. 181.

[4] Pothier, Tr. du droit de Propriété, No. 239. See above, p. 222.

[5] Van Leewin Censura Forensis, lib. 4. c. 19. § 20. Bynkershock Quæstiones, Jur. Priv. c. 15. Pothier, Cont. de Vente, No. 324. vol. i. p. 389.

[6] Hobart's Reports, p. 41., and the authorities there referred to.

[7] See, as an authority for this, the case of HASWELL against HUNT, quoted above, p. 226. Note [2].
A different rule is held as to land; the seller seems to be considered as having given only a conditional right to the land till payment of the price, the purchaser being considered as trustee for the seller. 1. Vernon, 267.

[8] See below, p. 238.

[9] HOLROYD against GWYNNE, 2. Taunt. 176. Gwynne sold some growing timber to Lee at public auction. A contract was executed, by which Lee had ingress to the lands, to cut down and carry away the timber, and

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2. The Scottish law rejects hypothecs of moveables as destructive to commerce, except in a few special and well ascertained cases, to be afterwards discussed.[1] It gives no sanction to the idea, that a seller continues proprietor of a subject which he has delivered over to the buyer on the title of sale.—'Sale being perfected,' says Lord Stair, 'and the 'thing delivered, the property thereof becomes the buyer's, if it was the seller's; and 'there is no dependence of it till the price be paid or secured, as was in the civil law; 'neither hypothecation of it for the price.'[2] And although it may have been intended that the sale should be a ready money bargain, yet if the subject is delivered by the seller himself, or by his express order, unconditionally, without receiving the price, the property is altered, and the claim for the price is merely personal.[3]

The same effect would not, however, follow, if the goods were delivered by mistake; as if the vendor's servant, misapprehending his orders, deliver goods which it was agreed should be paid for in cash at delivery, without demanding the money, the property will not pass by such delivery.[4]

But although the law rejects, both in England and Scotland, any implied condition of hypothec for the price, it admits express conditions; and an important question arises on the effect of such conditions as against third parties. As already said, they are either suspensive or dissolving conditions; and the effect of these is very different.

Suspensive Conditions.

1. Suspensive Conditions are such as suspend the sale and stay the transfer till something be done. These are admitted to the effect of preventing the delivery from passing the property; although, perhaps, it is to be regretted, that sanction should have been given to any latent real right controlling the apparent ownership which arises from possession.

The effect of such suspensive conditions as real rights has the support of our institutional writers, and has been taken for granted in practice. Lord Stair, while he holds all personal and ineffectual against the real right, where third parties are concerned, lays it down, that a condition *suspensive* prevents the right of the buyer from being completed by delivery.[5] And Mr Erskine delivers the same doctrine in nearly the same terms

to hold it as his own proper chattels, to his own use. But a condition was introduced, that if Lee should fail to pay the purchase-money at the day, or should become bankrupt previously, it should be lawful for Gwynne to secure, distrain, take away, and convert to his own use all the timber and trees, growing or cut, and to sell them, and with the money pay the price, rendering the overplus to Lee. Lee entered, and cut and converted the timber. He failed before paying the price; and Gwynne repossessed himself of what was not sold, and disposed of it by auction. The action was trover for the value, by the assignees under a commission against Lee. The Court held Lee to have had the disposition of the goods; and on the statute of James, that the assignees were entitled to the price.

[1] See below, in Book IV.

[2] 1. Stair, Inst. 14. § 2.
'The Lords found in vendition, that venditor post-'quam convenit de pretio might not claim his goods, 'albeit the price was not paid to him.' 26th June 1621, Park; Hope, Maj. Pract. MS. vol. ii. p. 48.
In the case of Prince against Pallet, (see below, p. 244.), the Court decided,—'That the wares 'being delivered to the skipper, on Udney's order, the 'property was vested in Udney; and that there is no 'hypothec in ware, for the price, by the law of Scot-'land.' 2. Stair, Dec. 824.

[3] On the continent, in some places, delivery was held to complete the transference, even where ready money was stipulated. Consuet. Middleb. tit. 8. § 3.; Bynkersh. Quest. Jur. Priv. lib. 3. tit. 15. vol. vi. p. 496.

[4] In England, this doctrine was laid down in the case of Bishop against Shillito, (p. 238. Note [5]). Mr Justice Bayley said,—'If a tradesman sold goods 'to be paid for on delivery, and his servant, by mis-'take, delivers them without receiving the money, he 'may, after demand and refusal to deliver or pay, bring 'trover for his goods against the purchaser.'

[5] After showing that reservations of a power to redeem are not real rights, but merely personal obligations, his Lordship proceeds thus:—'As to other 'pactions adjected to sale, sometimes they are so 'conceived and meant, that thereby the bargain is 'truly conditional and pendent, and so is not a per-'fect bargain, till the condition be existent; neither 'doth the property of the thing sold pass thereby '(though possession follow) till it be performed; as,

which Lord Stair has used.[1] According to these doctrines, the vendee, previously to the existence of the condition, will be held to possess as a mere depositary, or in whatever character the contract will authorize;[2] there being till then no consent to transfer, and two things being necessary to transmit property,—consent and tradition.

In England, 'where an agreement is conditional, it shall not be completed till the 'condition be performed.'[3] So, if a sale be on trial; that is to say, if the buyer has the power of rejection should the commodity not please on being examined, the delivery does not pass the property.[4] So again, if the buyer is to give bills for the price, or to retire the bills of the seller in the circle, the property is not passed by delivery under such condition till the act stipulated be performed.[5]

In Scotland the doctrine has been applied in similar circumstances. In the case below, there was much doubt whether the condition was suspensive, or whether it was not rather a dissolving condition; but on the idea of its being properly suspensive, the doctrine, as laid down by Stair and Erskine, and practically applied in England, was admitted as effectual against creditors.[6] So if it be stipulated as the condition of a bargain, or if

'if the bargain be conditional only upon payment of 'the price at such a time, till payment the property 'passeth not to the buyer.' Afterwards he says, 'If 'such conditions do stop the transmission of property, 'and be so meant and expressed, then, as is said 'before, the bargain is pendent, and the property 'not transmitted, and the seller remains the proprie-'tor.' 1. Stair, tit. 14. § 4. and 5.
See also Annotations on Stair, p. 80. et seq.

[1] 3. Ersk. 3. § 11.

[2] COWAN against SPENCE, 21st May 1824; 3. Shaw and Dunlop, 42. Cowan, tenant of a paper-mill, sublet it with the machinery, which was his own, and stipulated, 'that as the whole machinery belonged to him 'in property, he has now delivered the same to A. 'Nasmyth, for his free use and benefit during the lease, 'declaring, that at the expiry thereof, and upon all the 'rents, &c. hereby contracted to be paid being fully 'paid up, the whole said moveable machinery shall be 'held to be the absolute and exclusive property of the 'said A. Nasmyth.' On Nasmyth's bankruptcy in possession under this agreement, his creditors claimed the machinery. But the Court held the machinery not to be transferred; the event, both in point of time and of payment, not having taken place on which the transference was to depend.

[3] Com. Dig. Agreement, A. 4.

[4] Ib. same section. ELLIS against MORTIMER, 1. New Rep. 257.; HUMPHRIES against CARVALHO, 16. East. 45. In these cases, the buyer had, by the bargain, power, within a certain time, to disapprove and reject; and while it was so, the property was held to be in the vendor.

[5] BISHOP against SHILLITO, 1819; 2. Barn. and Ald. 329. Note. Here iron was to be delivered, on condition that certain bills were to be taken out of circulation. Part was delivered, but the condition was not fulfilled. The vendor stopt further delivery, and brought an action of trover for what had been delivered. This action can proceed only on the ground of property in the plaintiff. And the Court of King's Bench held this only a conditional delivery, and the condition being broken, the plaintiff might bring trover. Abbot, Chief-Justice, said, he had left it to the jury to say, whether the delivery of the iron and the redelivery of the bills were to be contemporary, and that the jury found that fact in the affirmative; and Bayley, Justice, concurred with the observation already quoted. Supra, p. 237.

[6] M'CARTNEY *v.* M'CREDIE's Creditors. M'Credie purchased cattle from M'Cartney, and granted a bill at three months for the price. The cattle were committed to two servants, one of M'Credie's and one of M'Cartney's, to be driven to M'Credie the vendee's farm. The vendor having heard something to the discredit of the vendee's circumstances, followed the cattle, and stopt them on the road. This stoppage in transitu put the parties on the footing on which they stood before the bargain; and a new bargain was made by the following letter, written by M'Credie, the vendee, to the vendor:—'18th August 1798. Sir, I acknowledge to 'have bought, and received from you, twenty-one 'beasts, at the agreed price of L. 5. 7s. 3d. per beast, 'which I have granted my acceptance for, of L. 116. '15s.; and if the bill is not punctually paid when it 'falls due, you are to be allowed to take back your 'own cattle, and to pay me L. 10 sterling for grass.' The cattle were on the vendee's farm till the beginning of November, when, previous to the term of payment of the bill, he gave notice, that he could not pay the bill; and that the vendor might, therefore, come and take back his cattle, on paying the stipulated L. 10 for grazing. The vendor, accordingly, sent for his cattle; but the vendee's landlord stopped them as the property of his tenant, and subject to his hypothec. The vendor offered the L. 10 to the landlord, but it was refused, and he brought his action for recovery of his cattle. The Sheriff decided,—'That, by the transaction between 'M'Cartney and M'Credie, the property of the cattle 'in question was transferred by the delivery thereof;

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goods be sent accompanied by a draft to be accepted and returned, and the goods are received, but the acceptance not sent, the property is not passed, the goods are still unsold.[1]

Difficulties sometimes arise in the construction of the conditions thus annexed to sales, as to the description of the security to be given by the buyer; but these are points which will be more properly considered in treating of sale as a contract. See below, Book III.

2. Dissolving Conditions in a sale, have an effect very different from that of conditions suspensive. Dissolving Conditions.

It is settled as law in Scotland, that an express paction, made by the seller when delivering the property, that the property shall be reinstated in him if the price be not paid against an appointed day, is quite ineffectual against the buyer's creditors. This is the Pactum Legis Commissoriæ of the Roman law; which had not the effect of making the sale conditional, but of making it conditionally dissoluble. Mr Erskine, in treating of conditions incidental to the contract of sale, lays it down, that the Pactum Legis Commissoriæ, though it has no effect in suspending the transference of the thing sold, yet has this effect, that 'if the buyer fail to pay the price within the 'time limited, the sale resolves, and the property returns from him to the seller.'[2] But this doctrine is too loosely expressed; and is not to be understood as applicable to cases where third parties are concerned. Accordingly we find, that this doctrine is diametrically opposite to that which is delivered by Lord Stair.[3] Lord Stair

'and that the interest of M'Credie's creditors cannot 'be affected by a missive of so collusive a nature as 'that produced and founded on appears to be.' The late Lord Meadowbank, in the Bill-Chamber, remitted to the Sheriff, with instructions 'to find, that, by the 'bargain, (as established by the letter), the sale of the 'cattle to M'Credie was not suspended, but only a 'resolution of the sale stipulated, in the event of the 'price not being paid in terms of M'Credie's accept-'ance; and that as M'Credie became bankrupt before 'the event happened, on which the bargain was to be 'resolved, the agreement to resolve the bargain cannot 'afford the vendor any claim to the ipsa corpora of the 'cattle, in competition with the other creditors of 'M'Credie; so that M'Cartney must be satisfied with 'ranking for the price of the cattle as originally sti-'pulated, or for damages for non-implement, if he con-'ceive these to exceed the said price.' The Court altered this judgment, and 'found M'Cartney entitled 'to restitution from M'Credie, and his creditors, of the 'cattle in question, upon payment of the L.10 of grass-'mail, or payment of the contents of the bill granted 'for the price of the cattle.' There was much difference of opinion on the Bench. It was very strongly urged by some of the Judges, that this was a condition not suspensive of the transference, but merely dissolving a vested right; that in moveables, no such conditional bargain as this can be effectual; and that the false credit to which they give birth, forms a complete bar to their having effect against creditors or purchasers. The prevailing opinion was, that the condition was of a suspensive nature; that the property never was vested; that the condition not being illegal, it must have effect, since there was no fraud on either part, nor design of either bestowing an undue preference, or raising a false credit. 26th November 1799, 12. Fac. Coll. 324. Sess. Papers penes me.

[1] A case of this kind occurred, in which the goods had not reached the buyer; but if they had got into his possession, the result would have been the same; Brodie against Tod and Company, 20th May 1814, 17. Fac. Coll. 609. This was a purchase of clover, said to be paid for by a bill, payable in London, at three months. In transmitting the bill of lading, the vendors sent the stipulated draft payable in London, adding, 'which please return in course.' Not receiving the draft accepted in due course, the vendors relanded the goods. The Court held the sale conditional.

[2] Erskine, b. 3. tit. 3. § 11.

[3] In contrasting the authority of these great lawyers, it may be observed, that they wrote in a very different spirit, and with their minds turned to different objects. Mr Erskine composed his Institute as a course of academical instruction, following out the several divisions and train of his course with admirable perspicuity, but without having his attention turned to the shock of principles which, in actual practice, and especially in the keenly contested competitions that bankruptcy produces, brings out the true principle. And this respectable author often follows in the train of the Roman jurisprudence; and delivers almost a translation of a Roman rescript as the law of Scotland, without distinguishing the difference of manners and change of principle which materially affect the law, or the qualifications it receives in the opposition of contending rights.

Lord Stair composed his Institutions in a very different spirit: he had practised at the bar for nearly twenty years with eminent success; he had sat as a Senator of the College of Justice for nine years; and for eleven years more he had been President of the Court; and thus, with his mind continually turned to

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draws that distinction which is of chief importance in practice, and to which the present discussion requires particular attention. The question he proposes for discussion is this: 'Whether a clause, irritant or resolutive, in a sale, ("that if such a condition were or 'were not, in that case the bargain should be null and void, as if it had never been made 'or granted"), be a personal obligation only, which, though it may annul the property 'or bargain if it remain in the hands of the contractor, (buyer), cannot reach it if it be 'in the hands of a third party?' His general doctrine is, that when the buyer once becomes proprietor, the condition that he shall cease to be proprietor in a certain case is but personal; 'for property or dominion passes not by conditions or provisions, but by 'tradition, and the other ways prescribed by law:' And taking this as the general doctrine, unless where common law or statute have otherwise established, (as in the alienation of feudal rights without consent of the superior, the not-payment of feu-duty, &c.), he next lays down, that such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors using diligence, for they know nothing of the nature of the right; nor against creditors taking voluntary conveyances ex necessitate, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a jus ad rem, not a jus in re. There may, indeed, be fraud in such voluntary acquisition, which may expose the acquirer to a claim of damages; but even that claim is merely personal, and will not pass with the property.'[1]

There appears to be no decision of the Court of Session tending to support the Pactum Legis Commissoriæ, as bestowing on sellers a right to restitution of moveables against creditors, where the transference was completed in the person of the buyer.[2]

§ 2. OF RESTITUTION ON ACCOUNT OF FRAUD IN THE CONTRACT OF SALE.

'Nunquam nuda traditio transfert dominium,' says Paulus, 'sed ita, si venditio aut 'aliqua justa causa præcesserit, propter quam traditio sequeretur.'[3] On the foundation of this great principle, rest several important exceptions to the effect of delivery in passing property.

practice, and the application of legal rules and principles in the business of life, he had, as he himself tells us, 'followed the study and practice of the law con-'stantly and diligently for nearly forty years.' The effects of this course of study are manifest in his book. He seeks with a liberal and learned spirit for the principle of all his doctrines; but he is in general careful to submit them to the test of practice, and to examine rights and obligations with reference to their effects on purchasers and creditors.

[1] 1. Stair, tit. 14. § 5.

[2] In the sale of lands, there are two cases of which it is proper to take notice: In a competition between the Creditors of JAP and DAVID BAIRD, the judgment seems to imply, (and that is all the length to which I carry it), that, if the conveyance had been delivered, the purchaser's right would have been held complete, notwithstanding a private paction. Baird sold a house to Jap, and gave him possession, but retained the conveyance and title-deeds, delivering nothing but an inventory. A letter was written by Baird, binding himself to deliver up the titles on receiving the price: Jap failed, and his creditors claimed the house; but the Court found, 'that Baird, in respect he never 'delivered the disposition, is entitled to the house, or 'to the price.' August 1758, Baird against Jap and Creditors; 2. Fac. Coll. 246.

In the case of YOUNG against DUN, 9th March 1785, a house having been sold for L. 2500, it was conditioned, that the price should be paid at the next term, or that the sale should be void, and the buyer, as tenant, should pay a rent of L. 225. The buyer did not pay, and the seller proceeded, without further notice, to sell the house to another, and then brought an action of removing, in which he was found entitled to succeed. But here, 1. There was no third party concerned: 2. The property was not transferred, for sasine had not been taken, and the possession of the house might be ascribed to the contract of lease included in the bargain.

[3] Dig. lib. 41. tit. 1. l. 31.

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Although, lawful consent and actual delivery once concurring, the real right to the subject sold is vested in the purchaser, and the seller has no privilege of restitution as a resource against the bankruptcy of the buyer; yet where the consent is only apparent, there is no effectual transference; but the seller is entitled to restitution against the creditors of the buyer. Restitution will, therefore, be given, not only against the buyer, but even against purchasers from him, where the seller is incapable of full and legal consent; or where the sale has proceeded from such fear and compulsion as in law annuls and makes it void. Where the sale has been induced by fraud, the seller is to be considered as having given his consent, but, in consequence of the deceit, that consent is held to be revocable to the effect of grounding an action for reduction and restitution; which, though not available against purchasers bona fide,[1] is good against the buyer and his general creditors.[2]

In the farther prosecution of this subject I shall confine myself to the question relative to that species of fraud which consists in the concealment of bankruptcy.

Wherever a transference has been brought about by fraud, such as utterly to subvert the contract, and destroy the original consent to transfer, the objection will be available, not only against the buyer himself, but also against his creditors, entitling the seller to restitution of his property. But here it is necessary to recur to a distinction already taken notice of between the law of this country and the Roman and foreign laws; a neglect of which might lead to misapplication of authorities, and a neglect of the true principles and doctrine of our own jurisprudence.

In the Roman and continental law, however fair, regular, and unobjectionable the contract of sale might be, the property was not transferred by the delivery following upon that contract, so as to divest the seller, unless, at the time of delivery, the seller, by a kind of secondary contract, expressly gave credit for the price, and renounced his hypothec. The consequence of this was, that not only such frauds as undermined the original contract, but such deceptions or concealments as should induce credit at the time of delivery, were sufficient to entitle the seller to restitution, by reinstating him in the full enjoyment of his hypothec for the price. But, in the law of Scotland, there is no such necessity for special credit being given at the time of delivery, in order to constitute a real right in the buyer; since that law acknowledges no hypothec for the price, requiring to be renounced. The contract of sale, once concluded, is, when accompanied or followed by delivery, an irrevocable transference, leaving to the seller no other ground of restitution than such as will be sufficient to overturn that contract, and annihilate the original consent.

Thus, there is a material difference between the Scottish and continental laws, not only in the *direction* of the challenge on the ground of fraud, the one being pointed to the original contract, the other to the credit given at delivery, but in the *force* and *degree* of the fraud necessary to accomplish the restitution; as much slighter circumstances must be held to undermine the consent to give credit, than would be sufficient to overturn ab initio the original bargain.

The civilians define fraud to be,—'Calliditas, falacia, machinatio, ad circumvenien-'dum, fallendum, decipiendum alterum adhibita.'[3] But it is not in every case that

[1] ELLIOT against WILSON, 9th February 1826; 4. Shaw and Dunlop, 429.

[2] In England, it is a doctrine of equity, that the property which passes at law on the footing of the contract, is restored in equity on proof of fraud. And although, strictly, it is in equity only that this remedy is to be obtained, yet as it is available against creditors as well as against the bankrupt himself, the English courts of law have more recently come to regard it as consistent with the sound administration of the law, to avoid wasting the bankrupt's funds, by adjudging to the assignees, as vested in them by law, what it only requires a bill in equity to force them to refund. SCOTT against SURMAN, Willis, 402. GLADSTONE against HADWEN, 1. Maule and Selw. 517.

[3] Dig. lib. 4. tit. 3. l. 1. § 2.

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fraud, machination, or deceit, entitles to restitution in sale. The principle already explained, requires that the fraud shall have formed the inductive cause of that consent which is the essence of the contract. It must be a deceit practised by the buyer, so as essentially to alter, in the mind of the seller, his conception of the bargain into which he is entering, and to induce and give birth to a consent which would not otherwise have been given. Hence, the distinction of fraud into that 'quod causam dedit contractui,' and that 'quod tantum in contractum incidit.' Fraud of the former kind, annuls the contract; fraud of the latter species, gives only an action for restitution or damages.[1]

Fraud may consist either in misrepresentation or in concealment.

1. Fraud, by misrepresentation, is the more distinct and definite species, and generally the more capable of proof; whether it consists in express mistatement, or in that silent kind of misrepresentation, which is accomplished by means of certain arrangements, calculated to deceive.[2]

2. Concealment of circumstances may often as strongly deceive a purchaser as the most express misrepresentation. But it is not every concealment which will taint a contract, and give a preference to the seller over the creditors of the purchaser. Where the circumstances left untold, are such as the purchaser ought to know, or easily may become acquainted with, and for information regarding which he has no occasion to rely upon the other contracting party, concealment will not be held to injure the contract.[3] But wherever the circumstances are of a secret nature, or such as a purchaser does not usually or naturally think of inquiring into, or which he can learn only from the seller's information, the concealment is a fraud: And if that concealment have given birth to the contract, it will annul it.

In England, the question in all such cases seems to resolve into this, Whether the goods have been obtained on false pretences? The doctrine taken in this way, circumscribes the cases in which restitution is to be given on account of fraud within narrow limits, but limits which, after all, are perhaps the most fit for a practical doctrine. It

[1] These two species of fraud are thus distinguished by Voet.—'Causam dare contractui dicitur dolus, cum 'animum contrahendi non habens, ad contrahendum 'inducitur, nullatenus contracturus si dolus defuisset. 'Incidere vero in contractum tunc censetur, cum quis 'sponte quidem contrahit, sed in modo contrahendi, 'veluti in pretio aut aliter, decipitur.' Lib. 4. tit. 3. § 3.

[2] 1. CHRISTIE and Company against FAIRHOLMES, 7th December 1748; Kilk. 216. The seller of goods having required the security of a certain individual along with the purchaser, the purchaser sent him a bill signed by himself, and by another who bore the same name with the man whose security was required. The Court, in a question with the purchaser's creditors, arresting the goods on shipboard, found the sellers entitled to restitution of the goods procured by this fraud. See below, *Of the Effect of Fraud and Personal Exceptions.*

2. DUNLOP against CRUICKSHANKS and Company, 8th January 1752; Kilk. 220. Forbes having, as partner in a joint concern with Cruickshanks, commissioned goods from Dunlop, had afterwards occasion for some for himself, and wrote in the plural number, as if still acting for the joint concern. By this device, he deceived Dunlop into a belief that the purchase was made by the company; and having failed and absconded, the Court seemed to consider the sale as absolutely null, and preferred Dunlop to the creditors of Forbes, arresting the price unpaid, finding,—'that the property of the goods was not transferred from, but 'remained with the said John Dunlop, and preferred 'him for the price of the said goods to all the arrestors,' &c.

3. LOVE against KEMP'S Creditors, 24th June 1786; Fac. Coll. 430. Goods having been sold to Kemp, upon the condition that his father, James Kemp, should become guarantee for the price, Kemp signed, without any authority from his father, a letter of guarantee, with the signature,—'James Kemp and Son, 'military agents, Leith.' The Court found this fraud sufficient to annul the sale in a question with Kemp's creditors, and ordered restitution to the seller.

[3] 'Neque enim id est celare quicquid reticeas; sed 'cum, quod tu scias, id ignorare, emolumenti tui causa, 'velis eos, quorum intersit id scire.' Cic. de Offic. lib. 3. c. 13.

Of this doctrine some good illustrations may be found in the decisions upon warranties, representations, &c. in policies of insurance.

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brings the question to a criterion, on which a jury can fairly give their verdict, instead of leaving the matter ambiguous and arbitrary.[1]

In distinguishing the cases of fraud which will entitle to restitution, and particularly looking to fraudulent concealment of insolvency; it, in the first place, is not necessary that a merchant who commissions goods, should send a state of his affairs to the person with whom he proposes to deal. His proposal is to be accepted or rejected, upon proper inquiries being made into his credit and circumstances, and character as a fair and honourable merchant. If it be accepted, the person who deals with him acts upon his own risk, in expectation of such a profit as may repay him for the interest of his stock, for his labour, and for the risk of the transaction. But if there be any particular circumstances in the situation of him who proposes the transaction, which make it impossible that he can answer for the price, or which plainly indicate a fraudulent design to

[1] The two following cases will sufficiently illustrate the English doctrine.

GLADSTONE against HADWEN, 1813; 1. Maule and Selw. 517. Sill and Watson, on 25th November, applied to Watson for L. 5000 in loan, on ample security. The security was an order for 250 tierces of coffee, (which, however, he had no right to pledge); on which Watson gave Sill bills of exchange for L.1860, and a draft on his banker for L. 2139. Sill sent the bills to his partner, to be applied to pay Richardson, Overard and Company, certain bills due 27th November. On 26th, Sill resolved to stop payment, and sent a messenger to prevent the paying away of Watson's bills. All were stopt except one bill for L. 49, which had been discounted, and from the proceeds of which he delivered back to Watson, along with the bills, two Bank of England notes, for L. 5 each. This restitution was made after, and on the same day with, an act of bankruptcy and a commission being issued. The question in an action by the assignees was, Whether the property had not so passed, that to restore it was a fraudulent preference? and this, again, depended on the validity of the right of Sill and Watson, in the circumstances, to the bills delivered by Watson. Lord Ellenborough, in delivering the opinion of the Court, said, 'The bills were obtained by the bankrupt, Sill, under 'a false pretence of giving the defendant, Watson, an 'ample security, by delegating to him a right to hold 'coffee; whereas the coffee, which was the security 'pretended to be given, was the property of another 'person, over which Sill had no control or lien, or, if 'he had, had already pledged it in favour of another 'creditor. The bills, therefore, appear to have been 'obtained by a criminal fraud. It has been argued, 'indeed, on behalf of the assignees, that the property 'vested in them under the commission; and, in support of the argument, it is supposed, that, by analogy 'to cases in the criminal law, the property may be 'considered as having passed from the defendant to 'Sill and Company; but if it did, it was under such 'circumstances as a court of equity, on a bill filed, 'would have directed the property to be restored. If 'that be so, we think it would be useless for a court 'of law to permit that to be recovered which could 'not be retained one moment.' As to the bank-notes, he added,—'We think, that as they were not mixed 'with the rest of the bankrupt's property, and are 'capable of being distinctly traced, they stand in the 'same position as the bills themselves, and cannot be 'recovered.'

NOBLE against ADAMS, 1816; 2. Marshal, 336. In this case two points were raised, viz. stopping in transitu, and restitution for fraud. Of the former I have already taken notice. The circumstances which led to the latter were, that Noble, dreading insolvency, went to Glasgow to purchase goods in order to enable him to go on and pay his creditors: that he previously wrote to Malcolm, one of his creditors, of his intention, and informed him of the insolvency of Outhwaite and Company, with whom he stood connected. At Glasgow he bought goods from Cross and Company, and paid for them by a bill of Outhwaite and Company, and another of Malcolm, which he presented to Malcolm to sign for his accommodation. The jury found the transaction fraudulent, undertaken knowingly and with intent to deceive Cross and Company of the goods. The Court of Common Pleas granted a new trial, 'because, without defining exactly what may or 'may not amount to such a fraud as would render the 'sale in question absolutely void, we are of opinion, 'that the evidence, as it stands, does not show any 'conduct on the part of Noble sufficient to convince 'us that the transaction was void. It was proved that 'he knew that Outhwaite's bill was worth nothing, 'and that he considered his own credit in England as 'nearly gone: that he went to Glasgow, intending 'to purchase goods there from persons unacquainted 'with his credit, or with the character of his bills. 'But by what means he prevailed on Cross and Company to sell him the goods, is not in proof; and unless his representations amounted to the offence of 'obtaining goods under false pretences, we cannot 'take upon ourselves to say that the contract was 'altogether void. Without, therefore, saying what 'proof the case may be capable of, seeing that there 'is strong presumption of fraud, we grant the new 'trial only on the ground that the proof, as it stands, 'is not sufficient to fix fraud to that extent on the 'plaintiff.'

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get hold of the goods without value, the contract will be voidable, and the property unavailable to the creditors, as obtained on fraudulent and false pretences.

There is some difficulty, however, in fixing what circumstances it is necessary for a person in such a situation to disclose.

At first, perhaps, it was natural to hold, that if a man was really insolvent, and especially, if from his books it could be made to appear that he was so at the time of entering into the contract, it was his bounden duty to disclose this circumstance; and that concealment of it amounted to fraud in the contract. Such, accordingly, was the opinion entertained by our Judges in the end of the seventeenth century.[1] But this doctrine is inconsistent with an advanced state of commerce. The most flourishing and successful merchants are exposed to accidental losses, which may, for a moment, make them insolvent on the face of their books; but they still go on in full credit; and if no other misfortunes overtake them, proceed in the fair road to affluence. If a merchant, whatever might be his prospects or resources, were obliged, the instant that his ledger presented to him the view of insolvency, to relinquish his trade, and call his creditors together, the general trading interest would suffer; but most especially his individual creditors would feel the loss. A merchant's capital is in continual fluctuation; and an interruption to his trade, in consequence of every such threatened danger, would prove a death-blow to all the speculations in which he might have embarked his capital; and his funds would be recalled before the regular profits which were to redeem him from insolvency could return.

It is now settled, accordingly, that the mere appearance of insolvency from the books, is not sufficient to infer fraud in the contract of sale,[2] nor is it enough that a purchaser is struggling even with impending bankruptcy, if there be room for the attempt to retrieve his affairs, and if he be persevering honestly in that attempt.[3]

[1] In the case of PRINCE and PALLET, they found a plea, urged in support of the challenge, viz. that the purchaser was to be presumed insolvent within three months from his public bankruptcy, not relevant, 'unless it were proven by his oath, or by his books, 'that his debts exceeded his estate the time he gave 'the order, which they found would have been relevant 'to annul the contract of vendition.' 22d December 1680; 2. Stair, 823.

[2] This was fixed in the case of Cave's creditors, where the Court rejected the doctrine assumed hypothetically in Prince and Pallet's case. Found it not relevant to reduce any bargain entered 'into between 'Joseph Cave and Sir John Inglis, &c. for the pur-'chase of barley in October 1734, that it appears by 'his books that at the time of the sale he was insol-'vent, since he continued his trade till the 21st Janu-'ary thereafter, and his bankruptcy was not discover-'ed till that time.' 16th June 1736, Sir JOHN INGLIS against the ROYAL BANK; 1. Dict. 336. Elchies, *Bankrupt*, No. 9.

Lord Bankton and Mr Erskine do not seem sufficiently to have respected this decision; for they both lay it down, that a person purchasing, 'where he 'knows himself to be insolvent,' does not acquire the property. And although this be not a doctrine directly in the face of the above decision, it is too loosely expressed after such a decision had been pronounced.

[3] The case of ALLAN and STEWART against STEIN is very instructive upon this point. In October 1787, Mr Stein, by whose singular skill, industry and spirit, the Scottish distilleries were pushed to an amazing extent, entered into an agreement with Allan and Stewart, by which, 1. All his grain was to be purchased through the medium of Allan and Stewart: 2. They were to receive a commission of two and a half per cent: And, 3. Stein was to give bills at seven months. Allan and Stewart, under this agreement, purchased grain in their own name, taking the bills of lading deliverable 'to them or their order,' and these they indorsed to Stein. His bankruptcy took place, while several of the cargoes were in the course of delivery; and Allan and Stewart entered into a competition with his creditors for all the grain that was extant. Of the undelivered part they stopped delivery; and of that part which had been delivered on the eve of bankruptcy, they claimed restitution, on the ground of fraud. A condescendence or specification of the circumstances of the alleged fraud was required. But Allan and Stewart failed in their endeavour to distinguish their own case from that of the other creditors. They showed, indeed, that in October 1787, when their contract was entered into, Stein was struggling with bankruptcy; they exposed many of the schemes by which he contrived to support the extensive range of circulation which alone prolonged his existence as a trader; they showed the history of the four months preceding

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But from the moment the final resolution is taken to abandon every thing, 'cedere foro,' the bankrupt acts fraudulently in entering into contracts. It is very difficult, however, to select circumstances which may be sufficient to establish this resolution.

Concealment of bankruptcy.

1. The most obvious is, Contiguity in time to the public bankruptcy; and it is with regard to this point chiefly, that the peculiarity of the civil and continental laws, already hinted at, had influence.

It was established in the continental jurisprudence as a legal presumption of fraudulent concealment of bankruptcy, that the buyer had failed within a few days after receiving the goods.[1]

It does not appear that this rule was ever admitted, without qualification, into the law of Scotland; but when first pleaded in this country, the Court of Session so far gave their sanction to the doctrine, as to hold contiguity of public bankruptcy a circumstance of very powerful effect, taken in conjunction with insolvency and other indications, to establish a case of fraud. When the question first occurred, the Court ordered restitution of all grain delivered within three days of the public bankruptcy.[2] The cessio fori within three days

his bankruptcy to have been a series of plans for shunning a bankruptcy, which seemed almost unavoidable. But the creditors at large explained satisfactorily all that at first seemed reprehensible in Mr Stein's conduct. They showed, that after a most unlooked-for refusal of permits, by which a very large stock of spirits was lost to Mr Stein, the Scottish distillers met with a formidable opposition from those of London, who, trembling for the consequences of what the Scottish distillers were able to accomplish, at last, as the sole hope of their rivalship, applied to government for an alteration of the duties on importation. It was during this struggle, on which depended the ruin either of the English or of the Scottish distillers, that Mr Stein resorted to the resources for supporting his credit so much found fault with; and it was the passing of the law on the 18th February 1788, which involved the ruin of the Scottish distillers, that forced Mr Stein to stop payment on the 22d. The Court found the facts 'and allegations stated in the condescendence not relevant to infer fraud, so as to entitle Messrs Allan 'and Stewart to restitution of the grain delivered by 'them more than three days prior to the bankruptcy 'of James Stein.' 4th December 1778, STEWART and Company against Creditors of STEIN.

In deciding the case, the Judges proceeded on the following grounds:—That, in a case of this kind, where all are sufferers, and by the same means, something very precise must be made out to distinguish any particular creditor from another, and to entitle him to plead for a preference: that if distinct proof of fraud should be shown applicable to a particular bargain, it will annul it, and entitle the seller to restitution; but that in this case there was no such thing: that in October, when this contract began, though Stein's affairs were in disorder, they were not desperate; he had not at that time any intention of stopping payment; he tried, indeed, every possible resource, which an active and enterprising mind could suggest, for avoiding bankruptcy; but he flattered himself with hopes of success, not altogether without reason, since amidst all his difficulties he still went on till the 23d of February, when the passing of the Act for an additional duty on Scottish spirits gave him the coup de grâce, as he himself called it: that it were of the worst consequence in a commercial country, if all a man's acts were to be annulled from the moment of his insolvency:—he may struggle long; he may retrieve his affairs; or he may fail at last; but to annul all bargains which, from an investigation of books, &c. shall be found to have been made after what may appear even irretrievable insolvency, would put an end to commerce, and is a rule quite unfit for a trading nation.

When the cause came to the House of Lords, the judgment of the Court of Session, finding Allan and Stewart not entitled to restitution on the footing of Stein's having obtained the grain from them by fraud, was fully approved of. Lord Thurlow declared,—'That there were no circumstances condescended on 'which inferred fraud: on the contrary, it seemed to 'be made out, that Stein had no intention of stopping, 'or giving up his trade, till 23d February 1788; and, 'consequently, till then he had a right to make contracts, or to receive goods delivered in performance 'of contracts previously made, just as any merchant 'or dealer would do in the usual course of trade.' The interlocutor of the Court of Session on this point was therefore affirmed.

[1] STRACCHA, *Tract. de Decoctoribus*, p. 3. n. 31. CARPZOVIUS, *Jurisprud. foren. Rom. Saxon.* p. 257. Dec. 18. VAN LEEWIN, *Censura Forens.* lib. 4. c. 19. n. 20. RODRIGUEZ, *De Privil. Cred.* art. 7. No. 67. 76. VOET, lib. 6. tit. 1. § 14.

[2] Sir JOHN INGLIS against THE ROYAL BANK. In October 1734, Joseph Cave agreed with Sir John Inglis and others, to purchase barley, which was, accordingly, delivered to him by parcels, in November, December, and the beginning of January. Cave became bankrupt, and conveyed his effects to trustees for his creditors, 21st January 1735, and a claim was made by the sellers for restitution. Their plea was at first rested upon the insolvency of Cave; but this, (see above, p. 244. Note [2]), was rejected by the Court. Then they pleaded a presumptive fraud, and argued,

was not however taken as irrefragable evidence of fraud. The true spirit of the decision seems rather to be, that, conjoined with prior insolvency, this was to be considered as a circumstance almost decisive of a fraudulent purpose. Neither was the above presumption admitted, as of itself sufficient, in the next case that occurred; for there the contiguity of the bankruptcy was combined with several strong indications of fraud.[1] The question did not again occur till 1788, when it formed a point in the case of Allan and Stewart against the creditors of Stein;[2] and in the course of deciding that case, the whole doctrine of presumptive fraud intra triduum was overturned, as already explained in treating of the doctrine of stopping in transitu.

2. Although the declaration of bankruptcy, within three days, be thus rejected as grounding a presumptio juris et de jure of fraud, yet if any particular dealing shall be immediately followed by bankruptcy, it is a circumstance which, taken with others, will have considerable weight. Wherever the dealings of the bankrupt appear to have for their object, not his fair restoration to solvency, but the preference of some favourite creditors, at the expense of a stranger; or the bankrupt's own emolument; or the advancement of some secret and selfish scheme, which is not for the general behoof;

1. That the date of delivery was alone to be considered in judging whether the transference to Cave was attained by fraud; and, 2. That upon the analogy of the Act 1696, c. 5. the debtor must be presumed to have determined on bankruptcy sixty days before it was declared. These pleas were opposed by the creditors, who, with regard to the presumptive fraud, seem to have been anxious only to prevent so long a period as sixty days from being taken as the presumptive term; and they founded on Van Leewin's authority, contending, that the presumption could be carried no farther back than three days. The Court admitted the presumptive term of three days, and ordered restitution of whatever grain was delivered within that time. 8th December 1736; 1. Dict. 336.

[1] CRAWFORD NEWALL against MITCHELL. In that case, Mitchell having, on the 17th May, bought some cattle, and given his bill for the price, was, on the 18th, proceeding with them towards England, when he was overtaken by two of his creditors, who poinded the cattle; and a question arose between them and Crawford Newall, the seller, who alleged fraud in the purchase. The case is contained in the judgment of the Lord Ordinary, who found,—'That as Mitchell was 'not denied to have been insolvent at the date of the 'sale, and that he fled the country the day after the 'purchase of the cattle; and that it appeared from a 'letter, dated 19th May, (the second day after the 'purchase), that he had intimated a meeting of his 'creditors, and acknowledged his bankruptcy, the 'bargain was to be held fraudulent, and the property 'of the cattle untransferred to Mitchell, so as to be 'attached by his creditors in prejudice of the seller.' To this judgment the Court adhered. 27th February 1765; 4. Fac. Coll. 22.

[2] ALLAN and STEWART against STEIN'S Creditors. See above, p. 244. Note [3]. As to the grain delivered within three days of Stein's bankruptcy, the sellers contended, that they were entitled to restitution; because, by the law of Scotland, the supervening bankruptcy inferred fraud in all dealings within three days prior to the actual declaration of bankruptcy, and because this was a presumptio juris et de jure, which could not be repelled by contrary evidence. To this argument the Court of Session gave their sanction, conceiving themselves to be bound by former decisions. The judgment in the case of Cave's creditors was chiefly relied on by the Judges, and that of Crawford Newall as a strong confirmation of it. It was held, that, by the former of the cases above taken notice of, a rule was laid down absolutely, which had for half a century been considered as inviolable, and which it would be extremely dangerous again to throw loose. The Court, therefore, ordered restitution of the grain delivered within three days from the 23d February 1788, when Stein stopped payment. 4th December 1788; 10. Fac. Coll. 84.

When the cause came into the House of Lords, a very different view was taken. Lord Chancellor Thurlow declared, that, after attentively examining the adjudged cases relied on in support of the judgment of the Court of Session, he could not perceive that the Court had ever proceeded on that positive rule, which the sellers had contended to be now fixed law. It rather was his opinion, from the examination of those cases, that the Court had considered the failure within three days as one circumstance only from which fraud might be presumed, but not as that from which singly fraud was to be absolutely inferred, though other circumstances might show there was none. In the present case, his Lordship observed, there was not a single circumstance condescended upon, which applied more to the three days immediately preceding the bankruptcy, than to an earlier period; and he concluded upon this point with declaring, that the buyer's failing within the three days after the transaction, or after the receipt of the goods, was not per se sufficient to void the contract; and that such a rule would be inexpedient and unjust. The judgment of the Court of Session on this point was therefore reversed. Appeal Cases, 23d December 1790, JEFFREY and others, against ALLAN, STEWART and Company.

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these circumstances, joined with insolvency, and quickly followed by bankruptcy, have been held to indicate fraud sufficient to annul the bargain.[1]

3. If, instead of being merely insolvent, and still finding it possible, with fair hopes of success, to continue the struggle, the buyer, when actually bankrupt, shall, without disclosing his condition, enter into a bargain, he is guilty of a fraud, which will entitle the seller to restitution.[2]

4. If, in addition to insolvency, the buyer shall have been imprisoned and bankrupt, according to the definition of the Act 1696, c. 5. he is guilty of fraud if he enter into a contract without disclosing his situation.[3] But bankruptcy, in this sense, is frequently considered only as insolvency, which does not close a trader's dealings; and although, correctly speaking, the effect of the bankruptcy cannot be extinguished otherwise than by restoration to solvency, or by a discharge from his creditors, either voluntary or under the sequestration statutes, enabling him to commence a new course of trade, and raise a new credit; yet the Court has sustained a sale, though there was no such restoration from a state of insolvency.[4]

[1] Thus, in the case of SANDEMAN and Company against KEMP's Creditors, 24th June 1786, 9. Fac. Coll. 428., there can be no doubt of the intention to defraud; and yet there was no bankruptcy for forty-nine days after the sale. His insolvency was beyond hope in September 1785; and, in this situation, Kemp entered secretly into partnership with two notorious insolvents. He then, from every quarter, commissioned goods fit for a foreign market, and, in particular, a quantity of linens from Sandeman and Company, for which he said he would pay on delivery. To prevent an attachment of those goods, he executed a mock sale, upon their arrival, to his own clerk, who granted bills for the value. After this, he conveyed the goods secretly to different towns on the Frith of Forth, and had a ship prepared to convey them abroad. No trace of all this appeared in his books. A sequestration was applied for, and the goods recovered by the factor under the sequestration. Sandeman and Company petitioned the Court for restitution of their goods, and the Lords unanimously found,—'That the sale of the 'goods in question, by the petitioners to Gavin Kemp, 'was brought about by fraud on the part of Gavin 'Kemp;' and found the same, therefore, void and null; and that the petitioners were entitled to restitution of their goods.

[2] Thus, in the case of FORBES against MAIN and Company, 25th February 1752, Kilker. 224., it was found, that a person who had obtained a cessio bonorum, concealing that circumstance, and commissioning goods from a foreign merchant with all the confidence of a dealer of credit, was guilty of a fraudulent concealment sufficient to annul the bargain, or, at least, to give the foreign merchant a preference for the price.

This was a very strong case; for, 1. The cessio bonorum had been obtained no less than two years before the goods were commissioned; and, 2. The bankrupt had twice, during this interval, commissioned wines, which had faithfully been paid for. The grounds upon which the Court proceeded are reported by Lord Kilkerran:—'They considered the 'bankrupt's concealing his circumstances,' says his Lordship, 'to be fraud, especially when dealing with 'a merchant in a distant country; and it was further 'said not to be a clear point, that even a dealer in 'this country, at a distance, would be presumed to 'know, that the person with whom he contracted had 'obtained a cessio; for that no man alive, in the 'knowledge that a person had got a cessio bonorum, 'would deal with him, without taking care to be paid 'upon delivery.' Kilk. 224.

[3] In the case of ROBERTSON's Creditors against UDNIES and PATULLO, 27th July 1757, 2. Fac. Coll. 33., the buyer was bankrupt by insolvency, diligence, and absconding; and there were, besides, other circumstances grossly fraudulent. Thus, at the time the commission was given, Robertson was at Hull—he dated his letters falsely at London—he went to London to accept the bills, and having got the goods into his hands, sent them off for Scotland, to his son-in-law, in whose hands diligence was used. The Court preferred the seller to the buyer's creditors doing diligence in the hands of the son-in-law.

[4] GORDON against GARDNER, 15th December 1784; 7. Fac. Coll. 288. Dalzel, who had been under ultimate diligence, and was forced to retire to the sanctuary of Holyroodhouse, bought, about a year afterwards, two copper stills, of considerable value, from Gordon, and in three months after he was imprisoned on the old diligence, and was unable to pay the price. Gordon sought to annul the transaction on the ground of fraud, and was opposed by Dalzel's creditors. The Court found,—'That the circumstances 'of the case did not establish a deception or a fraud 'sufficient to set aside the sale.' But it will be observed, that in this case the parties appear to have lived in the same place; so that the case might be supposed to come under the exception indicated in the case of Main and Company, above, Note [2].

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5. If the contract have been fairly entered into, the buyer being then in full credit and solvency, and bankruptcy or insolvency have taken place only before delivery, it does not appear, that, by the law of Scotland, the delivery is ineffectual, or the transference voidable. Yet Lord President Blair took occasion, in one case,[1] to say, that if a bankrupt were to take delivery of goods which he had bought as a solvent man, this would be a fraud which would entitle the seller to redress; and that although the doctrine of presumptive fraud intra triduum is now abandoned, the law remains unaltered in the case of actual fraud. In this question, the distinction formerly hinted at ought not to be lost sight of, wherever an attempt is made to argue from the authority of civilians or foreign writers. The attention of foreign lawyers is confined to the question of credit; and every circumstance which can influence the credit, as at the moment of delivery, is essential, and every concealment or fraud which touches it a ground of restitution. But with us, the consent on which the efficacy of the contract rests is already passed, and the tradition is referred to that preceding consent, uninfluenced by intermediate circumstances. If, in the language of the English law, the goods have not been obtained on false pretences; and if, in the language more familiar to us, there is no dolus dans causam contractui, the contract will stand, and the property be transferred by it. The intermediate circumstances are in the nature of misfortunes, which equally attach to all the creditors; and the seller of goods, whose contract is completed, though the transference is not perfect, is a creditor entitled no doubt to stop in transitu, but not to restitution.[2]

SECTION IV.

OF REPUTED OWNERSHIP OF MOVEABLES, AS RAISING A RESPONSIBILITY FOR THE DEBTS OF THE POSSESSOR.

We have been employed, in the preceding sections, in discussing the various questions which may arise relative to the completion of the transference of moveables; and are now to consider a subject of some importance, where, in consequence of such possession as may raise the credit of ownership, goods and effects are held responsible for the debts of those in whose hands they are found. The numerous class of questions of great nicety which fall under this branch of inquiry, will at once be suggested to any one who considers, on the one hand, that possession is the badge of property in moveables; and, on the other, the many occasions on which the necessities of human affairs require that the fact of possession shall be separated from the right of property.

I propose, *first*, To consider the cases of collusive possession and reputed ownership, which, raising a credit to the possessor, entitle his creditors to attach the goods in their

[1] 16th November 1810, Steins against Hutchison.

[2] In the case of Cave's Creditors in 1736, it was questioned, (upon the assumption that concealment of impending bankruptcy amounted to fraud sufficient to annul a sale), whether it was necessary that the fraudulent concealment should have taken place at the date of the contract, or whether it was not enough that it occurred at the time of delivery. The Court found it sufficient, though it attached merely to the delivery. 8th December 1736, Sir John Inglis against the Royal Bank; (see p. 226. Note [1]).

In the subsequent case of Allan and Stewart against the Creditors of Stein, this doctrine was questioned both at the bar and on the Bench, and an opinion delivered by some of the Judges, that both the taking of delivery, and the contract itself, must be chargeable with fraud. There was no occasion, however, to decide the point either here or in the House of Lords.

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debtor's hands, as if they were his own; and, *secondly*, To point out the cases in which, for lawful purposes, the possession and the right being necessarily separated, no such effect is produced.

SECTION I.

OF REPUTED OWNERSHIP.

WHILE it is often necessary that the possession of moveables should be held by persons who have not the property, personal credit must, in a great degree, depend on the appearance of wealth which a trader is thus enabled to assume. And as, in general, possession of moveables presumes property, and the true owner ought to be aware, that while the power of disposing of his goods remains uncontrolled, or ostensibly so, in another, it may raise a false credit to that other, as if he were proprietor of the effects; so every apparent ownership of moveables, which is either fraudulent, or at least careless or collusive, as not being necessary in the course of honest contracts, should entitle the creditors of the holder to take the subject, as if it actually were his property. This rule is admitted both in England and in Scotland, but upon different footings, and to a different extent. In England, it is the mere creature of statute; in Scotland, it is a rule of the common law, grounded on the principles of equity.

In England, the rule of the common law is, that the proprietor may, wherever he can find his property, recover it. This formerly was accomplished by the action of Detinue, now by the action of Trover and Conversion, which has succeeded in its place:[1] but a statute was made with a view to bankruptcy, for subjecting to the creditors, as a fund of payment, all goods and chattels which, by consent of the true owners, a bankrupt is allowed so to possess as to appear owner of them.[2] This law has been held in the courts of England, to be 'a wise regulation, passed at a time when the commercial interests 'of the country were extremely well understood, and in a reign where as many wise pro-'visions were made for regulating both the external and internal trade of the country, as

[1] DETINUE was an action for the specific recovery of goods and chattels, or damages for the detainer; but as it was an action competent against bailees, borrowers, &c. it was, in the old law, thought not unfit that the plaintiff, who had at first trusted to the good faith of the defendant for the restoring of his property, should, in the action, be held to trust to his oath; and therefore the defendant was allowed the privilege of waging his law, or swearing with compurgators in his own favour.

The inconvenience and injustice of this could not fail, with the increase of commerce, to be felt; and therefore a remedy, of the nature of an action on the case, called an action of TROVER and CONVERSION, was introduced, proceeding on the ground of the defendant having, by finding, &c. come into possession of the plaintiff's goods, and converted them to his own use, and demanding specific delivery or damages. In this action, the defendant has no privilege of waging his law.

[2] This is the statute 21. James I. c. 19. After a preamble, § 10. 'That it often falls out, that many 'persons, before they become bankrupts, do convey 'their goods to other men upon good consideration, 'yet still do keep the same, and are reputed the own-'ers thereof, and dispose the same as their own;' the statute proceeds, in the 11th section, to provide, that 'if any person shall become bankrupt, and at such 'time as they shall so become bankrupt, shall, by the 'consent and permission of the true owner and pro-'prietor, have in their possession, order, and disposi-'tion, any goods or chattels whereof they shall be re-'puted owners, and take upon them the sale, alteration, 'or disposition as owners, that in every such case the 'said commissioners, or the greater part of them, shall 'have power to sell and dispose of the same, to and 'for the benefit of the creditors which shall seek 'relief by the said commission, as fully as any other 'part of the estate of the bankrupt.'

This last section is now re-enacted in the late consolidating Act of Bankruptcy in England.

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'were ever made in any equal number of years.'[1] But, for more than a century after it passed, this statute does not appear to have been in observance. And since it has been revived in English practice, the terms of it were held dark and ambiguous, from the section which was meant as mere recital, (but which by misprint was made a separate section), being more narrow than the enacting part; so that for a long time it was supposed, that the Act applied only to property which *had once been* in the bankrupt, and was *left* in his order and disposition. In the course of a very long train of decisions, the system of its policy, as applicable to trade, was evolved, and settled to be, That while the bankrupt statutes are intended to place all those creditors who have equally trusted to the *personal* credit of the bankrupt, on the same footing; this statute regards collusive possession held by a bankrupt without necessity, to be equivalent to a consent on the part of the real proprietor to be considered as a mere personal creditor on account of that property which, according to the ordinary disposition of the law, he should, on any other footing, have had in his own possession as proprietor; and this construction has proceeded partly as a penalty on the owner of the property, and partly as construing his conduct to be a declaration of his personal trust in the bankrupt.[2] This statute has been re-enacted in the words of the 11th section, (but without the words of recital in the 11th), as the 72d section of the new Bankrupt Act of England.[3]

The effect produced in England by the statute of James I. is in Scotland accomplished by the operation of the common law; and the rule may be stated in this proposition, —That where one is unnecessarily, or by the collusion or gross negligence of the true owner, permitted to give himself an appearance to the world, as if he were proprietor of goods and wares not belonging to himself; and this by exercising acts of ownership, and by holding a possession seemingly uncontrolled; his creditors will be entitled to proceed against the goods, as if they really belonged to him.

1. In order to make property liable for the debts of the possessor, not being the true proprietor, the possession should be accompanied by that uncontrolled power and disposal of it which belongs to an owner. In England, it has this effect by the statute: In Scotland, such possession will have the same effect, independently of the aid of statute on the one hand, or of any supposed vestige of property (as in cases of sale retenta possessione) on the other.[4]

2. But while the law protects creditors from being deceived by such false grounds of credit as may be produced by collusive arrangements, they must so far protect themselves as to avoid giving credit too easily. They must be aware of the many honest occasions of possession independently of property, which the varied business and connexions of life require, and must distinguish such temporary possession as may arise in the fair course of a legal contract, from that which naturally indicates property: they must take care also to make allowance for the possibility of the true proprietor being abused and defrauded in the use to which his property is applied; and they must satisfy themselves, that the circumstances are such as to entitle them to charge him with blamable carelessness or collusion, or simulation in the bankrupt's unfair attempt; or to regard him as holding himself out as a personal creditor, and abandoning his right as proprietor.

[1] Lord Kenyon in GORDON against the EAST INDIA COMPANY, 7. Term. Rep. 234.

[2] This law is largely discussed and laid down by Lord Hardwicke, Lord Chief-Baron Parker, and Mr Justice Burnet, in RYAL against ROLLE, 1. Atk. 165. 185. See Cullen's Principles of the Bankrupt Law, where the general view of the statute is very concisely given, p. 286. et seq. Holt's Nisi Prius Cases, 559. Note.

[3] 6. Geo. IV. c. 16. § 72.; Eden on the Bankrupt Law, 256.

[4] See below.

Thus, the possession must be unequivocal to justify credit; it must imply a full power of disposal; and it must be such as actually to raise a reputation of ownership. If, therefore, in point of fact, the goods are notoriously not the property of the possessor, the rule of reputed ownership derived from possession will not make them available to creditors: The *presumption* is in such case refuted by the *fact*.[1] In cases, for example, where a public sale by auction has taken place under a landlord's sequestration, and the price has been paid or secured by bills of the purchasers with cautioners, the possession being still with the tenant, from the difficulty of removal, as growing crop, &c. will not give to creditors the privilege of attaching the property as their debtor's.

1. The doctrine of reputed ownership from possession, properly applies to moveables only, not to land or other heritable estate.[2] So far as here discussed, it rests on the presumption of property in moveables arising from possession, and continued or conferred without due regard to the right of creditors. In England, it is by the statute limited to 'goods and chattels;' but this, though not extending to any interest in lands or houses, includes more than moveables: it comprehends stock, bills of exchange, choses in action, policies of insurance, and similar rights.[3]

2. By the law of England, if the possession be left with the vendor, it does not prevent the property from passing at law by the mere contract, but it is sufficient under the statute to raise a reputed ownership, of which the vendor's creditors may avail themselves. And the only exception admitted to this, is in the case where, by express agreement, the possession is to continue with the vendor, in circumstances which by usage gives implied notice to persons dealing with the vendor, of the possibility of the goods being the property of another.[4] In Scotland, the law is so far different, that no circumstances appear to be sufficient to pass the property at law, while the possession continues unaltered with the vendor; and in this, the law of sale and the rule of reputed ownership concur.

3. In what is delivered of this doctrine by our institutional writers, they seem to place the doctrine entirely upon fraud and collusion on the part of the true owner;[5] and there

[1] GURR against RUTTON, Holt's Nisi Prius Cases, 327. Gibbs, Ch. J. permitted evidence of *contrary reputation*. He said, 'Reputation of ownership is made 'up of the opinions of a man's neighbours: it is a 'number of voices concurring upon one or two facts. 'Are we to count the voices on one side, and not on 'the other?'

MULLER against Moss, 1813; 1. Maule and Selw. 335. See below, p. 254. Note [1].

[2] A very important class of cases will be discussed hereafter, where a similar principle, applied to heritable rights and rights incorporeal, has sometimes raised questions of great interest to creditors and purchasers. See below, Of the Effect of Fraud and Personal Exceptions, p. 279. et seq.

[3] See Eden on Bankrupt Law, p. 258.

[4] See above, p. 179. See below, p. 253. HORN against BAKER, Note [6].

In THACKTHWAITE against COOK, 1811, supra, p. 179. Note [2]. Mansfield, Ch. J., delivered the opinion of the Court:—'It seems to the Court, and the more 'I consider it the more I am strengthened in that 'opinion, that though the custom of a trade may have 'the effect referred to in Horn against Baker, it must 'be a custom much more clearly proved than this is, 'and such that persons dealing with the traders may 'see and know that the goods may possibly not be the 'property of the possessor. Here is a custom to put 'no mark on the hops: so that no person may perceive 'or know that they are not the property of the seller. 'The reason is, that after hops have lain a year they 'deteriorate; and, therefore, if A B, or any other ear-'mark were visible, it would hurt the sale when that 'mark got old and known; and, therefore, they are 'not to be distinguished from the common stock of the 'seller. There is not, therefore, such a clear, distinct, 'and precise custom proved, as would enable others to 'see that these may not be the hops of the possessor. 'The custom is, to let hops which are sold remain in 'such a manner that it may not be known there has 'been a sale. The objection against disclosing the real 'owner would be easily obviated, by having a separate 'warehouse for hops held there for the benefit of the 'persons who had bought them.' 3. Taunton, 487.

[5] Lord Stair lays down the doctrine,—'Fraud gives 'remedy by reparation to all that are damnified there-'by, against the actor of the fraud, either by annulling 'of the contract, &c. or by making up the damages

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does not appear to be any ground for questioning, that in proper cases, under the doctrine of reputed ownership, this is the true principle, though it may concur, as already observed, with the imperfect right of the vendee where delivery has not taken place.

4. There are two classes of cases in which this question may be raised; one, where property belonging to the debtor has been sold by him, and either not delivered at all, or redelivered to the vendor so as to appear in his possession and disposal; another, where the debtor has moveables placed in his hands, which did not previously belong to him. In the former of these classes, the rule of property, as already said, may concur with that of reputed ownership; or if the property has passed by delivery, and has again found its way into the debtor's hands, the doctrine of reputed ownership alone must be relied on. The other class of cases is strictly under the rule of reputed ownership.

There is a considerable difference in the strength of the presumption for collusion, between the case of a bankrupt being *left* in possession of goods originally belonging to him, and *acquiring* the possession of goods with which he had formerly no connexion. In the former case, all the presumptions, on which the doctrine now under consideration rests, are much stronger; the aptness towards the belief of the bankrupt's right greater; the honesty of his possession less probable; than in the latter case, where a man comes newly into possession of goods or property: For many occasions of such possession arise in the course of affairs, independent altogether of any title whereon credit can fairly rest.[1] In the latter case, the justification of the possession rests upon the proof of an honest occasion, requiring temporary custody: In the former, the justification is often more difficult, and requires a greater detail. And where no such justification can be made out, the new acquirer may not only be held to have no effectual right, but be subjected in damages for any opposition he shall give to the diligence of creditors.[2]

5. It is not a sufficient justification of a continuance in the possession of moveables, that the conveyance was only in security; for, by the law of Scotland, there is no effectual conveyance of moveables in security without possession. Delivery must take place fairly in such a conveyance, as well as in an absolute sale; and, therefore, the Court preferred a creditor doing diligence against shop goods and furniture, to a creditor who had received a disposition omnium bonorum in security.[3]

The same doctrine prevails in England. 'The law,' said Lord Mansfield, 'has declar-'ed, that a trader cannot mortgage his effects, and at the same time keep possession.'[4] And it is no answer, that, as where property is let on hire, the possessor and property are

'sustained by the fraud.' And he proceeds to say, that under fraud are comprehended collusion and simulation, of which he gives conveyances retenta possessione as an example:—'For although the disposition 'be delivered, and that there be instruments of delivery 'of the goods disponed, yet if the natural possession 'be retained, the disposition is presumed simulate, and 'others affecting the things by legal diligence, or by 'natural possession, are preferred.' B. 1. tit. 9. § 12. and 14. See also b. 2. tit. 3. § 27., and b. 3. tit. 3. § 21.

[1] Where a debtor's furniture, under an execution by a creditor, was purchased by the wife from her se-'continued as before the goods were sold; but where 'such change of property is made out, the mere pos-'session is not sufficient to warrant us in saying, the 'goods shall be deemed the property of the husband.' Cross against Glode, 1797; 2. Espinasse Cases, 574, 575. 17th June and 15th July 1714, Carse against Sir J. Halyburton; Dalrymp. 148. 156. See 1. Dict. p. 156, 157.

[2] See this distinction strongly stated by Mr Justice Bayley in Lingard against Messiter; 1. Barn. and Cress. 312. See below, p. 254.

[3] Boys against Watson, 27th July 1708. See also

justifiably separate, so the possession may be continued to the debtor on the footing of location.[1]

6. In England, it seems to be a sufficient justification of possession, that the conveyance is 'conditional only, to take effect on the performance of a condition at some future 'time.'[2] In Scotland, in the case of a conveyance in relief to a cautioner, although a doctrine similar to that of the English law seems to have been started, and listened to at first, the Court finally decided, that a conveyance of a flock of sheep, in relief of a cautionary obligation, being followed only by symbolical delivery, was not effectual against a person purchasing the sheep from the debtor, in whose possession they were allowed to remain.[3]

7. Here, in reverting to a question formerly discussed, it naturally occurs to be determined, what effect the principles of the doctrine now under review should have on a suspending condition in a sale.[4] And although it appeared to be the result of the cases above stated, that creditors must henceforth lay their account with such a condition in giving credit, and not conceive themselves entitled absolutely to rely on the property as irrevocably vested in their debtor; this must always be understood under the qualification, that there is perfect honesty in the arrangement, and no design on the part of the seller to aid the buyer's credit, without risk to himself.

8. In all cases of possession on temporary contracts, it is important to observe, whether the thing in the bankrupt's possession is of a kind that is usually let out and held separately from the ownership, or whether there be any other circumstance to counteract the reputed ownership. If there be not, as the possession tends to raise credit to the possessor, the parties ought to avoid such ambiguous dealing. On this principle, it is difficult to admit a justification of the retained possession of furniture, or stock, or implements of trade; as such possession very strongly implies a continued ownership, and the mere fact of possession a power of disposal and of property.[5] In England, a known usage to rent such implements, or a public sale giving notice of the change of ownership, or acknowledged notoriety of the change, have been admitted to counteract the reputed ownership. This doctrine was laid down by Lord Ellenborough and Mr Justice Lawrence,[6] and was

[1] In the case of BRYSON against WYLIE, such an arrangement was disregarded. See also LINGHAM against BIGGS, 1. Pull. and Bos. 82., below, Note [5].

[2] Cullen's Principles of the Bankrupt Law, 300.

[3] Sir WILLIAM KER against ELLIOT, 22d January 1695, and 6th January 1696; 1. Fount. 661. and 696. It should be observed, that, in this case, the question arose with a purchaser of the sheep, not with the general creditors of the owner.

[4] See p. 237.

[5] In the case already cited, of CARSE against Sir J. HALYBURTON, the circumstances were, indeed, very strong to confirm the inference of ownership; but in a later case, a debtor having conveyed the furniture of his house to his creditor on the 16th of May, and having afterwards continued in possession of it only till the 8th of August, when, another creditor proceeding to do diligence, the first creditor, as purchaser, received actual possession; the Court found the possession of the debtor collusive, and annulled the conveyance. CHALMERS against M'AULEY, 18th January 1739; Kilkerran, 426. In England the same rule has been followed.

So in LINGHAM against BIGGS, 1797. Here the furniture of a coffeehouse was taken in execution, and, without being removed, hired to the debtor after the execution of a bill of sale, for the value found by the Sheriff. It was held a case of reputed ownership; 1. Pull. and Bos. 82.

[6] HORN against BAKER, 1808; 9. East. 215. This was a case of machinery and utensils, at one time used by a company, and belonging to one of the partners; but this partner having withdrawn, left them in possession of a new partnership. Here the Court of King's Bench held, that the utensils were in the order and disposition of the new company, to the effect of raising reputed ownership, and credit sufficient to ground a liability for the possessor's debts. As to the effect of usage, Lord Ellenborough said,—'If, as in some 'manufactories where the engines necessary for car-'rying on the business are known to be let out to the 'several manufacturers employed upon them, there 'had been a known usage in this trade for distillers to

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afterwards followed out in several cases.[1] But the fact of taking in execution is not evidence of any transference to the creditor, but only of the execution.[2] The same principles would be admitted in Scotland.

9. It is a strong point in the seller's justification, in all cases of possession allowed to be retained for a fair purpose, that the seller has taken the best means he could to inform the public of the circumstances, as by public advertisement.[3]

10. But although the creditors of the reputed owner get the benefit of the goods thus in his possession, these goods cannot be held as *forfeited*. The owner must still be entitled to claim as a creditor for the value.

SECTION II.

OF POSSESSION LEGITIMATELY SEPARATED FROM THE OWNERSHIP.

ALTHOUGH possession be the usual badge of property in moveables, and, when collusive, has the effect of raising a liability for the debts of the possessor, there are situations in which it is necessary that the possession and the property should be separated; and contracts, on which the existence of commerce depends, often require a temporary possession in those who have no real right as proprietors. These legitimate occasions for a possession separate from the property, are, in the question of reputed ownership, justifications of the possession, and have the effect of excluding liability on that ground. Those who are thus, in the course of such contracts, obliged to yield a temporary possession, are held, on the bankruptcy of the person intrusted with the possession, entitled to have their property separated from the bankrupt's funds, and restored to them; subject to such claims as the bankrupt would have been entitled to set off against it.

This is the general rule, but it receives several modifications, and may be perplexed

'grant or hire the vats and other articles used by 'them for the purpose of distilling, the possession and 'use of such articles would not, in such a case, have 'carried the reputed ownership. But, in the absence 'of such a usage, there is nothing in the case which 'qualifies the reputed ownership, arising out of the 'possession and use of the things in their trade.' Mr Justice Lawrence said,—'It may happen, from the 'course of certain trades, that masses of machinery 'are let out by the owners to the mechanics engaged 'in them; and the notoriety of such a usage in the 'trade may rebut the presumption of ownership, which 'would otherwise arise from the possession; but, in 'general, the possession of utensils of trade must be 'taken to be by the owners of them.' 9. East. 239. 243.

[1] MULLER against Moss, 1813; 1. Maule and Sel. 335. Here the transfer was notorious. GURR against RUTTON, supra, p. 251. Note [1]. WATKINS against BIRCH, 1813, 4. Taunt. 823. where, after goods were taken in execution, there was a public sale, at which the creditor becoming purchaser, afterwards allowed the debtor to retain the possession for a rent.

[2] LINGARD against MESSITER, 1823; 1. Barn. and Cress. 308. The subject was machinery taken in execution, and sold to the creditor, but not by public sale, and afterwards delivered to the debtor for rent. The verdict was for the bankrupt's creditors, and the Court discharged the rule for a new trial. Bayley, J. said, 'It has been held, that where there 'has been a public sale of property under an execu-'tion, the new owner may permit the former owner to 'continue in possession; and that in the event of the 'bankruptcy of the latter, the property will not pass to '*his* assignees. In that case, the change of property 'becomes notorious by the public sale. If the vendor, 'however, permits the former owner to continue in 'possession without making the change of property 'notorious to the world, the consequence will be, 'that in the event of his bankruptcy it will pass to his 'assignees, as being in his order and disposition, with-'in the statutes of James.' In this Holroyd and Best, Justices, concurred. Holroyd said, 'The fact of the 'goods having been seized under an execution, &c. was 'at most only evidence of the notoriety of their having 'been taken in execution.'

[3] In BAMFORD against BARON, 2. Term. Rep. 594. the transaction was with the trustees of the owner's creditors, and the permission to possess was publicly advertised.

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with difficulties, amidst the varying circumstances in which a bankrupt's affairs, and the property in his possession, may be found. To explain these, it may be proper, 1. To lay down and illustrate the general rule, as applicable to the several contracts which require a temporary possession in another than the owner without any change on the subject; and, 2. To inquire into the modifications which the right of the proprietor suffers in consequence of the loss of identity, by changes in the shape, appearance, or nature of the subject while in the bankrupt's possession.

§ 1. OF GOODS AND EFFECTS IN POSSESSION OF ANOTHER THAN THE OWNER IN THE COURSE OF LEGAL CONTRACTS.

Several of the known and definite contracts, and many of the arrangements convenient in trade, require or produce a temporary separation of the property and possession.

1. CONTRACT OF LOAN.—This contract is either commodate or mutuum; loan for Use, or loan for Consumption. Where a thing is lent in COMMODATE, or for use only,[1] the borrower binding himself to return it specifically, there is, of course, no transference of the property or real right. Where the thing is lent in MUTUUM, or for consumption, as in the case of all fungibles,[2] the obligation of the borrower being to return it in equal value or quantity; the absolute property is transferred to the borrower,[3] and the lender becomes a mere creditor for the value. If the borrower fail while the things lent are still unconsumed, his creditors have a right to them as part of the divisible fund.

2. CONTRACT OF HIRING.—LOCATION is, in general, defined—A contract, by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire. It may be distinguished into three classes:—

First, IN THE HIRING OF A SUBJECT, LOCATIO CONDUCTIO REI, by which the hirer acquires, for a price, the right of possessing a thing for a particular period or purpose, the property remains unaltered, and the owner has a right to recover it from the hirer and his creditors, subject to the stipulated right of possession and use.[4] But where property has been sold privately, and immediately afterwards let out to hire by the purchaser to the former owner; the separation of possession as owner and as tenant is so thin, and the collusion so difficult to be detected, that this seems a case proper to be disposed of on the principle of reputed ownership. See above, p. 251. This is a transaction which frequently takes place where the machinery used in trade is attached by the diligence of a creditor: the goods or implements being purchased or given over to the creditor, he grants the use of the machinery to the debtor for a rent, and the business goes on as before. In such cases, the creditor of the person holding possession has been held entitled to take the property as his, unless the change of property has been made notorious.[5]

[1] Nemo commodando rem facit ejus cui commodat. Dig. lib. 13. tit. 6.; De Comm. l. 6.

[2] Fungible is not an English word. In the civil law, it was taken to mean res quæ pondere numero et mensura constant; and this is its meaning in Scottish law: whatever consists in quantity, and is regulated by number, weight, or measure, is a fungible—as corn, money, wine: It is a word adopted in the same sense by the French lawyers. 2. Denizart, 449.

[3] Paulus says, 'Appellata mutui datio ab eo quod 'de meo tuum fiat.' Dig. lib. 12. tit. 2.; De Reb. Cred. l. 2. § 2.

[4] 'Non solet locatio dominium mutare,' says Ulpian, Dig. lib. 19. tit. 2. Loc. Cond. l. 39.; '*Non solet*' being (as Cujacius, lib. 8. Obs. c. 39. and Bynkersh. Obs. Jur. Rom. lib. 8. c. 4. learnedly show) used to express, that it has the force of a negative rule.

[5] See above, p. 253.

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Secondly, In the Hiring of Work, Locatio operis faciendi; as where a carpenter receives wood to be made into a waggon; or a tailor, cloth to be made into a coat; or a bleacher or dyer, cloth to be bleached or dyed; the employer, if he furnish the materials, has, on the workman's failure, a claim for the specific subject delivered, as being his undivested property; subject, of course, to the claim of the workman for his labour bestowed.[1] But it has already been observed, that difficulties often arise from the complication of this contract of Locatio operis faciendi with that of sale.[2] It is strictly requisite to the contract of the Hire of Work, when simple, that the locator, or person who hires the labour, should furnish the materials, the conductor only the labour; and, in this case, the property of the materials remains with the locator, unaffected by the conductor's temporary possession of them while he is finishing his work. Where the conductor furnishes the materials, or even the principal materials, as well as the labour, it is more strictly sale than location, in which the tradition seems to be completed only by the delivery of the perfect work. It is only from the confusion of the two contracts that, on bankruptcy, any question can arise concerning the locator's right of vindication and preference. Where I send a jewel to be set, the jewel continues mine, and cannot be claimed by the creditors of the jeweller. Where the materials of the work to be performed are fungibles, if they be delivered indefinitely to the workman, with an order 'to make the thing want-'ed,' the property of them has, in the subtilty of the Roman law, been held as transferred to the workman; but if with a particular order to 'make it from those very materials,' the property is not changed. Such is the rule laid down by Alfenus, and by Pomponius in the Roman law. Alfenus, in the celebrated law, 31.[3] lays it down, that there is a difference in the right of the person employing the workman, when he gives him a subject to be specifically restored (as clothes to a fuller), and when he delivers materials, to be restored in kind; as silver to a goldsmith, with orders for a vase; or gold, with an order for a ring. Pomponius[4] more pointedly says, that where the order is to manufacture *that* gold, (ex *eo* auro), the property of the gold is undivested; but where the order is not to manufacture that gold, but merely general, (non tamen ex eo auro, sed ex alio), the property is passed to the workman, and the employer becomes a creditor. Perhaps where the materials so intrusted to the workman are not found distinguishable in his hands, this rule would be followed: But if, by the commencement of the work, or any other unquestionable indication, the materials were marked as identically those intrusted to the workman, they would not go to his general creditors; and this is not inconsistent with the general rule respecting all fungibles, that the person receiving them is held to restore only their equivalents. The rules laid down by Alfenus and Pomponius, were applied to corn delivered for transportation from place to place, where no care was taken to keep it separate and distinct.[5]

Thirdly, Hire of Labour in Carriage, Locatio operis mercium vehundarum.—In this contract for carriage of goods, the property does not pass to the carrier; he is a mere possessor for a special purpose; and there is no distinction worth observing between the

[1] This is a rule so well established, that authorities are unnecessary. It is taken, in the English cases, for example, as a resting point of argument, but never as in itself questionable. See Collins against Forbes, for example, 3. Term. Rep. 328. See also Eyre, Ch. Justice, in case Lingham against Biggs, 1. Pull. and Bos. 89.

[2] See above, p. 187.

[3] Dig. lib. 19. tit. 2. Locat. Cond. l. 31.

[4] Dig. lib. 34. tit. 2. de Aur. et Argent. Leg. l. 34.

[5] The rule of the Roman law is followed in England. Blackstone, speaking of the action of Detinue, says,—'In this action it is necessary to ascertain the thing 'detained, in such a manner as that it may be suf-'ficiently known and recovered. Therefore, it cannot 'be brought for money, corn, or the like; for that can-'not be known from other money or corn, unless it be 'in a bag or sack; for then it may be distinguishably 'marked.' 3. Blackst. 152.

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case of fungibles and other commodities, according to the common practice of trade.[1] Money is almost the only fungible which is now sent otherwise than specifically. In sending money by a carrier, it is common to take his receipt for the sum, with an obligation to pay it according to order. It would rather appear, that the sender of the money is in such a case a mere creditor; so that if the carrier fail, he comes in only for a dividend. But if the money be rendered specific by being enclosed in a box, or in a sealed bag, there is no question that the property is still with the employer. It is, for example, the custom of banks to send to their branches and country correspondents, or it is often necessary for the branches to send to the bank, specie or notes. The banks in the metropolis have branches in the country; or a country bank maintains its credit perhaps by the notes of the Bank of England, or of the Scottish chartered banks, which the public receives as cash. In sending supplies to the country for the use of such establishments, it is necessary to send bank-notes or coin. But if the carrier were to become merely a debtor for the amount, he might pay the debt in the notes of the very company to which he is carrying it, and thus the object of the transaction would be disappointed. He must, therefore, deliver the specific parcel which he receives. But unless the notes be sealed up, or, at least, put in a separate parcel or box, the sudden death or bankruptcy of the carrier would leave to the senders of the remittance only a general claim against his estate, and not a specific right of vindication. Perhaps it would be held sufficient specification if the carrier's receipt were taken for particular bank-notes, with an obligation to deliver them according to their numbers and other marks. But a proof of extraneous and collateral circumstances of identification would not probably be admitted; for it is impossible to say where that would stop.

3. CONTRACT OF DEPOSITE.—Deposite is that contract by which one delivers property to another to be kept for the owner's behoof without reward. The depositor has right to have the deposited property restored; the depositary has neither the use nor disposal of it; and the possession and property are effectually separated.[2] The depositary may, indeed, fraudulently sell the deposite; in which case it may be doubtful whether the purchaser in market will be safe against the proprietor's claim for restitution: But it is certain, that while the subject continues in the possession of the depositary himself, his creditors have no right to it, and never can avail themselves of it, as of property belonging to their debtor. But this is true only of what is called PROPER DEPOSITE; in which a special subject is placed with the depositary, to be restored without alteration. There is another species of the contract, which lawyers have called IMPROPER DEPOSITE, with

[1] In the case discussed by Alfenus in the law alluded to above, namely, that of a cargo of corn to be delivered to several persons by measurement, a distinction should perhaps be made.—1. As against the creditors in general, the persons interested in the cargo seem entitled to the character of creditores dominii or proprietors of the cargo, and to rei vindicatio; leaving their respective rights to be settled according to their several proportions. 2. As with each other, the several consignees seem to be only personal creditors of the shipmaster or carrier. It is not, however, a likely case to occur, according to the present practice of trade.

In that case, a cargo of corn was loaded on board the ship Saufeius, consisting of grain belonging to several traders, in one undistinguished heap. One of the traders had received his share, after which the ship perished with the remainder. The question was, What remedy the others had? It is for the decision of this case, that Alfenus lays down the doctrine already detailed; and he applies it in this way,—that if the corn had been kept separate, and each man's quantity specific and distinct, it might have been known whether the person receiving delivery had received his own or not; if he had got the portion of another, the person whose quantity had been given, would have had rei vindicatio, with an actio locati conducti against the master; but, as they were confounded, each was merely a creditor for a quantity of grain, and the master was justifiable in delivering the quantity required.

[2] 'Rei depositæ,' says Alfenus, 'proprietas apud 'deponentem manet sed et possessio.'

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regard to which a distinction is admitted similar to that already marked between commodate and mutuum:[1] In improper deposite, money, or other fungibles, are placed in the depositary's hands, to be returned in kind. In the former, the possession, as well as the real right of the subject, remain with the depositor; in the latter, the real right is transferred, and the depositor becomes merely a creditor of the depositary for the quantity of fungibles or money which he binds himself to return.

There may be a proper depositation, even of fungibles and of money; but then they must be delivered as a specific subject, and be kept distinct; and they must be so put up and marked as to be fairly distinguishable from the debtor's stock, and from all other fungibles of the same kind: They must, as the English Judges term it, have an ear-mark.[2] On this subject, in the Roman law, Alfenus held, that money must have been delivered in bags, or sealed and marked so as to be distinguished; otherwise, the depositary's obligation resolved into that of a common money debt. And, on the same principle, corn must be put up in sacks or barrels, or in separate and distinct repositories, so that it may be known and distinguished.[3] This doctrine is taken for granted, in all those laws of the title in the Pandects, 'Depositi vel contra,' in which the irregular deposite is spoken of;[4] and Paulus says,—'If I have deposited a money-bag, or money 'marked and distinguished, and the depositary without my consent has spent it, I have 'an action of deposite and theft against him.'[5]

There may be a proper deposite of bills and other documents of debt; but if of a negociable nature, they must be so deposited that the power of negociation is not with the depositary, otherwise he may, as in the case of money, pay them away, and defeat the depositor's right. We shall see afterwards, in treating of factory and of pledge, several distinctions that must be observed in questions of this sort.[6]

It appears, then, 1. That where deposited goods are extant and distinguishable, the depositor, in all cases of proper deposite, is entitled to have them set apart from the common fund, and delivered up to him. 2. That where the subject deposited is not to be itself returned, but only in kind, the depositor is only a personal creditor.

4. Contract of Pledge.—The creditor who receives a pledge, holds the possession for the debtor; but the property in the goods continues unchanged. The creditor is said,

[1] See above, p. 255.

[2] 'If an executor,' says Lord Mansfield, 'becomes 'bankrupt, the commissioners cannot seize the spe-'cific effects of his testator; not even money, which 'can be specifically distinguished and ascertained to 'belong to such testator, and not to the bankrupt him-'self.' This is the general rule applicable to all cases of temporary possession and trusteeship; but the difficulty is to lay down rules for distinguishing the identity.

[3] Dig. lib. 19. tit. 2. Loc. Cond. l. 31.

[4] Lib. 16. tit. 3. Depos. vel Contra, l. 24. l. 25. § 1.; l. 26. § 1. The continental lawyers seem to admit a much looser proof, by indications from the shortness of time between the delivery of the money and the question; the situation of the money-holder; the probability of his having cash elsewhere, &c. Cardinal de Lucca, de Cred. Disc. 1. § 12. and Disc. 26. § 3.

[5] 'Si sacculum vel argentum signatum deposuero, 'et is penes quem depositum fuit me invito contrecta-'verit, et depositi et furti actio mihi in eum competit.' Lib. 16. tit. 3. Dep. vel Contra, l. 29.

There are deposites (or what are commonly called deposites) in daily use in trade, which are in law properly referable to the contracts of pledge or of mandate. I allude to deposite accounts and transactions with bankers. The class to which the claims of the customers of a banker for money, bills, &c. in his possession on his bankruptcy are referable, is that of mandate or factory. See p. 259, 260. But frequently, especially in England, jewels, &c. are deposited with bankers merely for safe custody; in which case there is no question that the property remains unaltered. See in Strange, 1187, a case of jewels, sealed in a bag, and deposited with a banker, who, abusing his confidence, broke the seal, and sold them. The Court gave trover against the purchaser. Harlop against Hoare.

[6] See below, p. 259. et seq.

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indeed, in English law, to have a *special property* in the thing pledged: But the meaning of this is only, that he is entitled to keep possession till the claim, in security of which he received it, is satisfied; and that in order to protect himself in the enjoyment of his right, he has all the remedies by which a proprietor is protected.

The pledgor, or person who receives the advance and gives the pledge, is the true proprietor of the subject impledged, under the burden of the debt in security of which the pledge is constituted. Thus, if one receive an advance from another, and in security deposite in his warehouse a bale of goods; the borrower is, on the bankruptcy of the lender, bound to repay the money before he can be entitled to redelivery of the bale; but, on the other hand, if the money is tendered, or if, on a statement of accounts, the balance is even, the lender is entitled, as proprietor, to the bale in the bankrupt's warehouse.

Where, instead of money actually advanced upon a pledge, the person to whom the pledge is delivered engages his credit, or accepts a bill, or allows the pledgor to draw on him; and, becoming unable to answer his engagement, the pledgor himself is obliged to provide for the bill; the pledgor is entitled to recover his pledge against the creditors of the pledgee.

5. CONTRACT OF MANDATE OR FACTORY.—In the Roman law, the contract of MANDATE was merely gratuitous; but with us, FACTORY, an improper species of mandate, is a more important and useful contract. Perhaps, indeed, the modern contract of factory is more accurately referable to locatio operarum than to mandate; or, rather, it is a mixed contract, composed of those two. This contract is, in the English books, discussed under the title PRINCIPAL and AGENT. We shall have occasion hereafter to consider the contract itself, in relation to the personal claims which arise out of the respective obligations of the parties. At present, we have to consider only the disposition of the property which, in the course of the factory, may be thrown into the possession of others than the owner.

The cases of temporary possession, which naturally arise either in the course of an occasional and single mandate to act as factor, or in the execution of the duties belonging to a settled course of employment, are very numerous; including mercantile consignments of cargoes, or commodities to be sold for the consignor's behoof; deposites of bills with bankers, to be duly and regularly negociated for the holder; orders for the purchase of goods in the name of the mandant; and, in short, every sort of temporary possession which can occur in the course of a person acting by the order of another, in conducting transactions for him, and managing his trade.

The general doctrine is, that where the goods, sent by the principal, or acquired for him by his order, are found in the hands of the factor, distinguishable from the general mass of his property; they are not part of the factor's estate, but must be given up to the principal; subject, of course, to lien.

1. In England, the general rule was distinctly laid down, in the following terms, by Lord Chancellor King,[1] as applicable to goods consigned to a factor, to be sold for the principal, and found in his possession on his bankruptcy.—'When a merchant beyond 'seas consigns goods to a merchant in London, on account of the latter, and draws bills 'on him for such goods, though the money is not paid, yet the property of the goods 'rests in the merchant in London, who is credited for them, and, consequently, they are 'liable to his debts; but where a merchant beyond seas consigns goods to a *factor* in 'London, who receives them, the factor, in this case, being only a servant or agent for

[1] GODFREY against FURZO, 3. P. Williams, 185.

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' the merchant beyond seas, can have no property in such goods, neither will they be ' affected by his bankruptcy: and the Lord Chancellor said he had discoursed with the ' merchants about the matter, who held this to be the practice among them.' This has always been held as sound law; and particularly by three eminent Judges, Lords Hardwicke, Mansfield, and Kenyon.[1] This is law in Scotland as well as in England.

2. Where a factor, being ordered to purchase goods for his principal, (and being properly reimbursed), has made his purchases in compliance with the orders, and failed with the goods in his warehouse; the goods are not to be taken as part of his divisible estate, but as the property of the principal. This seems never to have been thought doubtful in Scotland, when the purchase was made in the principal's name, and the goods were found in the factor's possession.[2] And, in England, the same rule is observed.

The only doubts that seem ever to have occurred respecting cases of this kind, have been where the factor has purchased *in his own name*. But, even in that case, the doctrine of the English law seems to be clear, (and it is the doctrine most consistent with principle), that where the goods are clearly identified as those ordered by the principal, the factor's creditors cannot take them as his. And so a purchase of stock in the factor's name, but entered in his books for the principal, is held not distributable under the factor's commission.[3]

3. Where the principal remits bills or money to the factor, and the factor becomes a

[1] Lord Hardwicke, in the case of DUMAS, thus expressed himself:—' Suppose the petitioners had con- ' signed over goods to Julian, as their factor, and he ' had sold them, and turned them into money, the prin- ' cipal then could only have come in as a general cre- ' ditor under the commission; but if the goods had ' continued in specie, and had been found in Julian's ' hands at the time of his bankruptcy, it would have ' been otherwise, and has been so determined in several ' cases: and even contrary to the express words of the ' statute, 21. Jac. I. factors have been excepted out of ' it for the sake of trade and merchandise.' Ex parte Dumas, 1. Atk. 234.

Lord Mansfield, in MACE and CADELL, said, that the statute of James ' does not extend to the case of fac- ' tors or goldsmiths who have possession of other men's ' goods, merely as trustees, or under a bare authority ' to sell for the use of their principal.' Cowper, 232.

Lord Kenyon in TOOKE against HOLLINGSWORTH, said,—' The case of a factor has been so frequently ' decided, and so much taken for granted, for a series ' of years past, that it must now be considered to be at ' rest. If goods be sent to a factor to be disposed of, ' who afterwards becomes a bankrupt, and the goods ' remain distinguishable from the general mass of his ' property, the principal may recover the goods in ' specie, and is not driven to the necessity of proving ' his debt under the commission of bankrupt. Nay, ' if the goods be sold, and reduced to money, provided ' that money be in separate bags, and distinguishable ' from the factor's other property, the law is the same. ' Then taking that as an incontrovertible point,' &c. 5. Term. Rep. 226.

[2] SPENCE's case, February 1687, Harcarse, 245. A supercargo was employed to export some goods, and to sell them in Holland, and with the price to buy other species of goods. The supercargo fulfilled his commission, and having returned with the goods, wrote to the principal that he had cellared them for his behoof. In this situation, a creditor of the supercargo poinded the goods as his; and against an action by the principal for the goods, the creditor defended himself on the ground that possession presumes property in moveables; that there was no bill of lading showing the goods to belong to the principal; that he would not have been bound, had they been lost, to have owned them, or stood to the loss; and that, in every view, till delivery, they were to be reputed the goods of the factor. The Court found, that the property of the goods was in the pursuer, (the principal), and ordered the defender to make restitution.

HOTCHKIS against DUNDEE BANK, 18th January 1797. The Dundee Bank employed Bertram, Gardner and Company, to take up their notes from the Edinburgh banks, for which they were put in cash by remittances. Bertram, Gardner and Company, regularly took up the Dundee bank-notes in the hands of the Edinburgh bankers every Monday and Friday, put them up in parcels, sealed them, entered the amount in their book, notified it by post to the Dundee Bank, and sent the parcels by the first opportunity. On Bertram, Gardner and Company's failure, the manager of the Dundee Bank went to Edinburgh, and received a parcel of 1340 notes, which had been taken up, parcelled, entered in the books, and notified to the Bank; and the trustee on Bertram, Gardner and Company's estate claimed these notes, as improperly given up by the bankrupt. The Court found that the creditors were not entitled to have the notes back.

[3] Ex parte CHION, Tr. Term. 1721; 3. Peere Williams, 187. *Note.* A trader in London having money of J. S., who resided in Holland, in his hands, bought South Sea stock, as factor for J. S., and took the stock in his own name. In his account-book, however, it was en-

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bankrupt with the remittances in his hand, the great distinctions seem to be these:[1] 1. That to give to the principal, on the factor's bankruptcy, any claim of property in the remittance, the remittance must be made as to a factor, and not on the footing of a sale. 2. That it must be a remittance for a special purpose, and not merely for the liquidation of a general balance. And, 3. That the remittance must be specific, 'money having no 'ear-mark.'[2]

1. The remittance must be made as to a factor. If one order goods from a merchant abroad, not his factor, and, on receiving the invoice, remit bills for the amount, it is a simple contract of sale: And therefore, if the goods are not sent, and the foreign merchant fail with the bills in his possession, the buyer is nothing more than a general creditor, and cannot demand his bill back, in preference to other creditors. But if one employ a *factor* to purchase goods, and remit bills to him for the purpose of paying the price, those bills, if found in the factor's repositories, are the principal's; as having been sent to a mere factor, to relieve the principal from the claim for the price: So that if the factor fail to pay the price, and the principal satisfy this claim himself, the factor holds the bills for the principal's behoof alone, just as if they were goods.[3]

tered as bought for J. S. The trader, after this transaction, became bankrupt, and the question between the principal and the creditors of the factor was, Whether the stock was liable to the bankruptcy? Lord Parker determined that it was not liable to the creditors.

Lord Parker is here reported to have said, that it would lessen the credit of the nation if the stock were to be held as the factor's. This does not appear to have been the ground of the decision, but merely an additional consideration. It may, perhaps, be imagined, that some weight in this question should be given to the circumstance of the money with which the goods are purchased having been the principal's, and the goods, in truth, a mere substitution for it: but this were to mingle two questions. The effect of such change we shall have an opportunity of considering hereafter.

See ex parte SAYERS, 5. Ves. Jun. 169.

[1] Bills, perhaps, ought to be considered not here, but in a subsequent part of the Work; but it is better to show the principle in cases so closely analogous to moveables.

[2] Lord Mansfield has said of this expression, that 'it has been quaintly said, that the reason why money 'cannot be followed is, because it has no ear-mark: 'But that is not true. The true reason is on account 'of the currency of it;' 1. Burrow, Rep. 457. But it has been well observed by Mr Paley, that his Lordship was there 'considering the case not of *reclaiming* 'money from the person with whom it had been de-'posited, but of *following* it into the hands of a third, 'to whom it had passed in currency; and that it is 'only in that view that he expresses a disapprobation 'of the reason alluded to.' Law of Principal and Agent, p. 73.

[3] In the case of TOOKE and HOLLINGSWORTH, already taken notice of, there was an agreement of a double nature:—1*st*, That the bankrupt should purchase of Tooke, at a certain rate, all the light gold he should send, and that Tooke should draw bills for the price at two months. 2*dly*, That Tooke should be allowed to draw bills on the bankrupt for his accommodation; and that he should, in that case, remit value to answer them. The bankrupt had accepted much in advance, when Tooke sent him three bills and 213 light guineas, and 19 light half-guineas, to answer his acceptances. Both in the King's Bench, where the case was first tried, and in the Exchequer Chamber, it was thought, that if the transaction had stood on the footing of the first part of the agreement, there would have been difficulty in the case; but that, on the footing of the second, Tooke was entitled to recover the property from the creditors.

'If it really were a sale of goods under the first 'part of the agreement (said Mr Justice Grose), I 'should have considerable doubts about the case. If 'the gold is to be considered as goods sold to the de-'fendant, then bills were to be drawn by the plaintiff 'on the bankrupt at two months; but in the verdict 'not a word is said about the bills being drawn for the 'light gold mentioned in the verdict. The state of 'the transaction, at the time of the bankruptcy, was 'this:—There were acceptances by the bankrupt to 'the amount of L. 873, over and above the gold and 'bills in question. Now, the bankrupt being under 'such acceptances, What was the probability of the 'transaction? Not that the plaintiff would sell the 'gold, but that he would remit goods to discharge the 'acceptances. However, we are not left to determine 'on conjecture or probabilities on a special verdict; 'for it is expressly found as a fact, that the plaintiff, 'in order to enable the bankrupt to pay the accep-'tances when they should become due, sent the goods 'in question; and it is also found by the verdict, that 'those bills were afterwards paid by the plaintiff. 'Then, the purpose for which the property in question

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2. The remittance must be for a special purpose, and not for the liquidation of the general balance. This is distinctly explained in a case which occurred before Lord Hardwicke, where the following principles were laid down:—That if bills are sent by a correspondent to a merchant here, to be received, and the money applied, to a particular use, and the merchant become bankrupt before the money is received on the bills; the correspondent has a special property, in respect of those bills, and the money shall not be divided among the merchant's creditors at large:[1] But that where bills are sent on a general account, between the correspondent and merchant, and as an item in the account, it is otherwise.[2]

Where there is only one transaction between the parties, the thing intrusted to the mandatory must, of course, be considered as particularly appropriated; as in his hands for a special purpose, not as transferred.[3]

Where there is a running account between the parties, it is frequently a nice question, Whether a remittance be an item in the general account, or specially appropriated? The chief or sole illustrations of the doctrine are to be found in the English cases. It would appear, 1. That it is held a specific appropriation of bills, when bill is pledged against bill, or one transaction against another.[4] 2. That the allotment of a particular account, under a specific title or mark, for a certain class of remittances, will sufficiently distinguish

'was sent, was answered by the plaintiff himself; and 'that lets in the doctrine of Lord Hardwicke, in the 'case ex parte Dumas, which I consider immediately 'and directly in point. The instant the acceptances 'were taken up by the plaintiff, and the end for which 'the goods were sent was answered, I consider the 'property as re-vested in the plaintiff. But it has 'been asked, When, and how, was this property re-'vested in the plaintiff? I consider it to have been a 'qualified and conditional property in the defendants. 'It was not vested in them as an absolute and uncon-'ditional property by the transmission for a particular 'purpose. It was vested in them only for a special 'purpose; and the instant that purpose was answered 'in another way, the property was re-vested in the 'plaintiff. Then it was asked, What would have been 'the case, had the acceptance been discharged by the 'bankrupt? I answer, that, in such a case, the pur-'pose for which they were sent would have been 'answered by the bankrupt, and then the plaintiff 'would have had no property in the goods; then that 'property, which was before conditional, would have 'become absolute in the bankrupt. This case comes 'directly within that of Dumas; for here the goods 'were sent for a particular purpose; and as soon as 'that purpose could not be answered by the bankrupt, 'or was otherwise answered by the plaintiff, the pro-'perty re-vested in the plaintiff; and therefore I think 'he may maintain this action of trover, to recover back 'this property, or the value of it.' 5. Term. Rep. 234. In the Exchequer Chamber, a similar view was taken of the agreement by Lord Chief-Justice Eyre, who delivered the opinion of the Court. 2. Henry Blackstone, 501. See also BENT against PULLER, 5. Term. Rep. 494.

[1] Ex parte DUMAS, Julian's bankruptcy, 9th August 1754. See below, p. 263. Note [2].

[2] Ex parte OURSELL, in the same bankruptcy, 10th August 1754; Ambler, 297. Below, p. 263. Note [2].

[3] M'KENZIE against WATSON and STEWART; 2. Stair, Dec. 607. M'Kenzie held a blank bond, (a kind of security very common in Scotland in the seventeenth century), and being unwilling to do diligence in his own name, he filled up the name of another in the blank, and that other gave an acknowledgment that he held the bond merely in trust. The creditors of this trustee, or factor, attached the money as his; and a question arose in the Court of Session between them and M'Kenzie, Whether he was not, as principal, entitled to this bond as his property? The Court found that he was entitled to it; 5th February 1678.

There is a similar case reported, BLACK against SUTHERLAND, 19th July 1705; 2. Fount. 285.; Forb. 28.: and another, MONTEITH against DOUGLAS, 8th November 1710; 2. Fount. 595.

In England, the case of PARKE against ELLEASON, 1. East. 544., affords an illustration of the same position. See below, p. 272. Note [3].

[4] BENT against PULLER, 5. Term. Rep. K. B. 494. Bent had kept a banking account with Caldwell and Company, bankers at Liverpool. This account consisted, on the one side, of bills drawn by Caldwell and Company in Bent's favour, on Forbes and Gregory, bankers in London. It was filled up by Bent with bills and negociable securities lodged with Caldwell and Company. An interest account was kept, wherein the bankers, when in advance, debited Bent with interest; and when they were in cash for Bent, gave him credit for interest. The account was balanced every three months, and a commission charged by the bankers of 5 per cent on the amount of the bills drawn by them. The accounts were balanced in February 1793, with a balance against Bent of L. 3882. In March, he received other bills for

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bills which are meant to be specifically appropriated.[1] 3. That where bills are sent in a letter, to answer 'what remains for the sender to pay,' the appropriation has been held sufficient.[2] 4. That where a banker has engaged to accept bills for his correspondent's convenience, on an agreement to remit for answering them, and the correspondent sends bills accordingly for the purpose of answering acceptances, such remitted bills are in the

L. 445. On the 13th March, he sent them seven excise debentures, to the amount of L. 674. On the 16th, he sent them further fifteen bills for L. 3953, which, if placed to his credit, would have turned the balance L. 799 in his favour, on the supposition of Caldwell and Company's drafts being good. On the same day, the 16th March, the London banker stopped, and, with the arrival of the post on the 18th, Caldwell and Company stopped also, and their drafts were returned on Bent; and the question, in an action of trover by Bent against the assignees of Caldwell and Company, was, Whether the bills sent on the 16th were paid to the bankers, on a general account, or with a particular appropriation for the answering of the current drafts? The jury, under the direction of Lord Kenyon at Guildhall, and after inspecting Bent's books, held the bills to have been paid to Caldwell and Company on the general account; and they, therefore, nonsuited Bent, the plaintiff. On the argument on a rule for a new trial, the Court was unanimously of opinion, that Bent could not recover in the circumstances of the case. Mr Justice Buller said, —'In order to make a specific appropriation of bills, 'there must be a lodging of a bill for a bill, or, at least, 'several deposited at once, as one entire transaction, 'to answer some particular purpose; whereas here the 'bills were paid in on a general running account, and 'the amount of the bills claimed as a deposite, not even 'corresponding with the amount of those for which 'they were supposed to be deposited: and the case 'must be considered in the same manner as if the 'question had arisen before the bankruptcy of Cald-'well and Company; in which case the plaintiffs could 'not have compelled the bankers to deliver up the bills 'in question, on paying the others.' Lord Kenyon said,—'I agree with my brother Buller, that there 'must be either a bill pledged against a bill, or a trans-'action against a transaction; but here the bills were 'coming in day after day, not for the purpose of op-'posing a bill on one side of the account to another 'on the other, but all were paid in one general account. 'The plaintiff therefore is not entitled to recover these 'bills, on the ground, that the particular purpose for 'which they were deposited has not been answered; 'because it does not appear that they were deposited 'to answer that particular purpose. On the trial, the 'jury, on inspecting the books, thought that this was 'a general banker's account, and that there was no 'specific appropriation of the bills in question: it ap-'pears to me in the same light.'

[1] Ex parte DUMAS, 9th August 1754, 1. Atk. 232. Dumas and Company of Paris, drew bills on Julian and Son of London, for L. 1115, and undertook to provide for them by remittances. They informed Julians, that the transaction was for the benefit of their house at Cadiz, and desired it to be kept in a particular account, distinguished by the letter G. They, in terms of the agreement, sent bills of L. 1146, and the Julians acknowledged receipt of the bills to the credit of the new account G. The father died, and the son stopped. After taking the resolution to stop, he discounted two of the bills, the rest remained in his drawer. Dumas and Company gave up all pretensions to the discounted bills in the hands of the bona fide holders, but claimed the others as appropriated to a special purpose. Lord Hardwicke said,—'The present is a very plain case, 'to give the petitioners a title to those bills which re-'main in specie unnegociated. The letter G appears 'to be the initial letter of the first partner's name at 'the house at Cadiz. These bills I consider as appro-'priated to a particular purpose, and intended to answer 'and reimburse the Julians what they should pay on 'this special account; for, by being indorsed, they 'could negociate and discount them: L. 580 appears 'to be the amount of the bills left in specie. Upon 'all these circumstances, it would be the hardest 'thing in the world to say, these bills should go to the 'creditors at large; and therefore, on the whole, I am 'clearly of opinion, that the specific bills, amounting 'to L. 580, must be delivered up by the assignees of 'Julian to the petitioners, Dumas and Company, or to 'such persons as they shall empower to receive them, 'and order accordingly.'

[2] In the bankruptcy of the Julians, a case occurred, in which the question was, Whether there was sufficient evidence of an appropriation of the bills of exchange remitted by Oursell? Lord Hardwicke said,—'When 'this matter came on before, it was, in a more general 'way, insisted, that where bills of exchange are re-'mitted on a general account, if they can be got at 'before the money due upon them is received by the 'merchant here, who becomes bankrupt, it shall not 'be divided among his creditors at large, but the cor-'respondent shall have them returned. But, in my 'opinion, that is going too far. The fact now is, 'Oursell at Paris, and Julians at London, corresponded 'and dealt with each other, in drawing and redrawing 'bills of exchange. They kept separate accounts; and 'in the account kept by Oursell, the Julians were in-'debted to him, on balance, L. 2200. In the account 'kept by the Julians, Oursell was indebted to them 'L. 316. Oursell drew several bills of exchange on the 'Julians, to the amount of L. 2200, which were pro-'tested for non-payment, and returned, and Oursell dis-'charged them, with the cost of the protest. After 'those bills were drawn, Oursell remitted to Julians 'two bills, one for L. 540, the other for L. 460, payable 'to Julians. These two last bills were not paid till 'after Julians' bankruptcy, and were then received by 'the assignees. It appears these two last bills were

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banker's hand, unapplied, in the nature of goods unsold; the property is in the remitter, subject to the banker's lien.[1]

3. The money or bills must remain in a state capable of being identified and distinguished from the factor's other property. On this subject, some remarks have already been made in treating of deposite.[2] Where a public bank employs agents in the country to manage the business of their branches, the money intrusted to those agents is the *commodity* in which the bank deals; and under the agent's management in the office of the bank, and lying in the strong-box, drawers, and desks, used in carrying on the bank's trade as dealers in this commodity, it has been held the specific property of the bank, not divisible on the bankruptcy of the agent among his creditors.

The changes which, in the course of the bank transactions, are made in that commodity, may suggest a doubt, Whether the bank can, on the agent's bankruptcy, claim all the cash in the repositories as their own, although not one note or guinea of the supply originally given to the agent may remain in his possession? In one case which occurred of this sort, the Court of Session held the money in the strong-box to be the specific property of the bank. And so far the decision appears to rest on sound principles. But in the case to which the rule was applied, the agent had been engaged, with the knowledge of the bank, in very extensive business on his own account, and, in the course of that business, large sums were passing through his hands, as factor for other persons.[3] And it may well be doubted, whether,

' sent to enable Julians to pay the bills drawn on them. ' When Oursell sent them he wrote a letter to Julian, ' and in it takes notice that he would send to answer ' what *was remaining for him to pay* on his account, ' not what was due on his account. Argued, that these ' bills must be on account of the remittances, and were ' intended, in the first place, to pay the L.316 balance ' due from Oursell: but that cannot be; for Julians had ' satisfaction for that balance in their own hands; for ' they were indebted to him in a greater sum, and the ' letter imports otherwise. It must be taken as the ' letter imports. It is a matter of fact, not of law. I ' am satisfied on the evidence. It amounts to an ap- ' propriation, and is within the rule and reasoning I ' went upon, and laid down in the case ex parte Dumas.' Ex parte OURSELL, Ambler, 297.

[1] ZINK against WALKER. Jenner was employed, as an agent or banker, by Zink, who drew bills on him, under an agreement to make remittances to answer the same when due. Jenner sent (November 1776) an account-current, including all the accepted bills running on him, up to 30th November, amounting to L.1022, and making the balance due to himself L.1137. Zink sent first a bill for L.150, then one for L.300, and, on the same day on which they were sent, Jenner became bankrupt, without having paid any of the drafts, and Zink himself was obliged to retire them. The bills for L.450 were, when they came to hand, deposited by Jenner's clerk with Staples and Company, who wrote them short in Jenner's book. Zink claimed his L.450, under deduction of L.195, for which he stood indebted to Jenner for commission, &c.; and the Court held him entitled to it. The bills were held to be merely deposited with Staples and Company, and to be in Jenner's hands, as factor, till paid, in the nature of goods unsold. 2. Blackst. 1154.

[2] See above, p. 257. et seq.

TOOKE against HOLLINGSWORTH, 1793; 5. Term. Rep. 215. 2. H. Blackst. 501. The question was concerning the specific appropriation of three bills and a quantity of light guineas. It arose out of an agreement between one Daniel, a goldsmith in London, and Tooke, a merchant in Manchester, under which Tooke, to answer the special purpose of the agreement, sent to Daniel, the bankrupt, in a box by the mail-coach, 213 guineas, and 19 half-guineas, with three bills, and a letter, informing Daniel of their being intended for answering his drafts. The box, with its contents, were delivered to the officer under the commission of bankruptcy on Daniel's estate: and the Court of King's Bench held, that the bills and money ' remaining in ' specie, and not blended with the other subjects of ' Daniel,' Tooke had a right to recover them from the other creditors of Daniel.

[3] GILCHRIST against THOMSON, as trustee for Christie's Creditors, 4th July 1809. Christie was manager of the British Linen Company's branch at Montrose. He received at first a large sum of cash, and this was deposited in a strong-box in the office where the bank business was done; the bank having one key and he another. Christie carried on extensive concerns, as a trader, in partnership with others, and he was treasurer for some public institutions, and factor for gentlemen of large estates, whose rents he levied. He failed, when there was found in the strong-box L.3000. The bank claimed this as their own money; the other creditors contended, that the placing of money in the strong-box being voluntary on the part of Christie, he could not appropriate the cash in his hands to one of his employers more than to another; and that the money there deposited could not possibly be the identical money trusted to his management at the first. There was

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in such a case, an exception ought not to be admitted to the general rule. Indeed, on this ground, and from want of confidence in the decision, the case was afterwards compromised.

From connexion with the subject now before us, some cases may here be considered which strictly belong to the next section, viz. cases of Factory, in which the goods in the factor's hands have been changed in the course of his transactions.

1. Where the factor has sold the goods of his principal, and failed before the price of the goods has been paid, the principal is the creditor, and preferable to the creditors of the factor.[1]

2. Where bills have been taken for the price, and are still in the factor's hands, undiscounted at his failure; or where goods have been taken in return for those sold; the principal is entitled to them, as forming no part of the divisible fund.[2]

3. Where the price has been paid in money, coin, bank-notes, &c. it remains the property of the principal, if kept distinct as his.—'If goods be sent to a factor to be

some difference of opinion on the Bench, but the majority held, that the money belonged to the bank; that the agent was the mere institor and servant of the bank; that the money, taken out and put into the chest, in the course of bank operations, was the bank's money, sufficiently identified, and kept specific; that the agent may have, by fraud, augmented this store, for which the bank might be liable, as for their servant; but that the justice to be done on this ground should not be allowed to injure the general principles which made the distinguishable money the property of the bank.

This case was settled out of Court.

[1] Ex parte MURRAY, December 1783; Cook's B. L. 4th Edit. p. 400. Murray consigned linens to Bate and Hankell, with a del credere commission; which implies a guarantee by the factor; so that, if the purchaser fail, the principal does not suffer. They sold the linens, and, before receiving the price, became bankrupts. Their assignees afterwards received the price from the purchasers, and refused to deliver it to Murray, the principal; desiring him to come in as a creditor. Murray petitioned the Lord Chancellor for delivery of the price of his linens, deducting commission, &c. His Lordship was clearly of opinion, after hearing the point of law argued, that the purchaser not having paid for the linens previous to the bankruptcy, Murray, the consignor, was entitled to receive the price of the linens; and, accordingly, the assignees were ordered to pay him the money.

In Scotland, the case of HAY against HAY, below, p. 269. Note [2]. affords an example of the same doctrine. See below, p. 266. Note [5].

[2] In England, in the case of DUMAS, Lord Hardwicke mentioned a case in these words:—'The Court 'of Common Pleas, in a case, the name of which I do 'not remember, determined, that notwithstanding the 'goods so consigned were sold, yet as the factor took 'notes instead of money for them, the principal was 'entitled to the notes, and not the creditors at large.' This was the case of SCOTT against SURMAN, Willis' Rep. 400.

In Scotland, the following cases may suffice on this point.

STREET against HOME and BRUNTFIELD, 9th June 1669; 1. Stair, 616. Street, a merchant in London, having sent down a parcel of skins to Lyel, his factor at Edinburgh, Lyel, the factor, sold them, and took a bond for the price in his own name, advising Street of the receipt of the skins, and giving him the names of the purchasers. Lyel died bankrupt, and Street claimed this bond as his property, and obtained a decree of declarator to that effect. Having raised an action for the contents of the bond, the debtors objected, that they were not in safety to pay, lest they should expose themselves, by payment, to a claim for second payment at the instance of Lyel's creditors. The Lords repelled the defence, and found the bond not to be in bonis of Lyel, nor to be confirmable as his goods, but to belong to the pursuer, Street.

Sir JOHN BAIRD against MURRAY's Creditors, 4th January 1744; Kames' Rem. Dec. 78. Murray was executor to Sir James Rochead, and having taken the assistance of Gordon in recovering the estate, a balance was struck upon Gordon's intromissions, a bill granted by him to Murray for L. 286, payable to order, and Gordon completely discharged. Murray died with this bill in his possession, and some of his creditors having attached it, the question arose, Whether they or the next of kin of Sir James Rochead had the preferable right to the bill? The Court found,—'That there was sufficient evidence that the sum con-'tained in Gordon's bill was part of the proceeds of 'Sir James Rochead's executry; and, therefore, that 'Sir James Rochead's next of kin are preferable for 'the sum in the said bill, before the other creditors of 'Murray.'

A question remains here, Whether the purchaser can have compensation upon debts due to him by the factor? The most respectable of the Continental lawyers are decidedly against such compensation. Casaregis, Dis. 75. § 23, 24. But of this hereafter, in considering the doctrine of Retention and Compensation.

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'disposed of, (says Lord Kenyon), who afterwards becomes a bankrupt, and the goods 'remain distinguishable from the general mass of his property, the principal may 'recover the goods in specie, &c. Nay, if the goods be sold and reduced to money, 'provided that money be in separate bags, and distinguishable from the factor's other 'property, the law is the same; and this,' he adds, 'may be taken as an incontrovertible 'point.'[1] Where not kept distinct, the rule that seems to be adopted on the Continent is, that circumstantial and presumptive proof of identity may be received; such as the evidence of the bankrupt's having no other money; or that arising from the shortness of the interval between his acquisition and the question,[2] &c. But such evidence does not seem to be admissible with us.

4. Where a bill received for the goods, or placed with the factor, has been discounted, or where money coming into his hands has been paid away, the indorsee of the bill, or the person receiving the money, will be free from all claim at the instance of the principal, however cruelly the purpose for which they were deposited should be disappointed;[3] but it has been doubted, Whether the principal will have a preference for the value on the funds of the factor? This is indeed as much an unlawful conversion of the money and bills to the factor's use, as if he had actually stolen them; or as if, having goods deposited with him, he had made free with them. But the presumption is, that the bankrupt has accomplished the fraud, not so much for the benefit of his general creditors, as for the purpose of embezzlement, and there seems to be no ground for a preference.

5. Where the factor sinks the name of the principal entirely, (which may be done without fraud[4]), it is necessary to distinguish. Wherever a factor, employed to sell goods, receives a del credere commission, for which he engages to guarantee the payment to the principal, it is not the practice to communicate the name of the purchasers to the principal, except where the factor fails. In this situation, there are several points well fixed in England:—1. Where the factor fails, the principal is the creditor of the buyer, and has a direct action against him for the price.[5] If, therefore, the principal give notice to the buyer, on the factor's failure, not to pay the factor, and the buyer notwithstanding does pay the factor, he will be liable to pay the price over again to the principal. But, 2. The persons contracting with the factor in his own name, and bona fide, are entitled to set off the factor's

[1] In the case of TOOKE against HOLLINGSWORTH, 5. T. Rep. 227. See also SCOTT against SURMAN, 1743, Willis, 400. HOWARD against JEMMET, 1763, 2. Burr. 1369. Ex parte SAYERS, 1800, 5. Ves. Jun. 169. Montagu, Bank. Laws, vol. ii. Notes, p. 233.

[2] De Lucca De Cred. Disc. 1. No. 12. and Disc. 26. No. 3.

[3] COLLINS against MARTIN and Others, 13th February 1797; 1. Puller and Bosanquet, 648. BOLDEN against FULLER, 1. Pull. and Bos. 539.

[4] Casaregis delivers it as the practice of merchants,—'Introdotto per motiva di prudenza il contrattare 'senza spiegare la persona per cui fanno il negozio.' Disc. 56. § 12.

[5] See above, p. 265. Note [1]. This doctrine was first laid down by Lord Chief-Justice Lee ineffectually; for the jury would not decide according to his direction. SCRIMSHIRE against ALDERSTONE, 2. Stra. 1182.

Afterwards, it was fully established, and the assignees were ordered, when they had received the price from the buyer after the bankruptcy, to pay to the principal.

This was first decided where there was no del credere commission. GARRAT against CALLUM, Buller's N. P. 42.

The effect of an obligation under a del credere commission, may appear to make an essential difference, and to be decisive against this doctrine, (since the principal is not obliged to take the bills of the buyer in payment, but entitled to look only to the factor); but the factor's obligation here is as guarantee; or rather, properly speaking, as insurer; and though he gets a premium to insure the solvency of those to whom he sells, yet where he fails, the buyer is the debtor to the principal, the factor debtor only for the loss that may arise from insolvency. Accordingly, this was decided in a case where there was such a commission. Ex parte MURRAY, December 1783; Cook's B. L. p. 400.

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debt to them. Lord Mansfield thus laid down the law :—'Where a factor, dealing for a 'principal, but concealing that principal, delivers goods in his own name, the person 'contracting with him has a right to consider him, to all intents and purposes, as the 'principal; and though the real principal may appear, and bring an action upon that 'contract against the purchaser of the goods, yet that purchaser may set off any claim 'he may have against the factor in answer to the demand of the principal; this being 'long settled.'[1] 3. Where the factor is intrusted with property or money of his principal to buy stock, exchequer bills, &c. and misapplies it, the produce will be the principal's, if still clearly distinguishable. And although it has been attempted to be maintained, that such misapplication not being in execution of the trust, the property acquired could not be held as acquired for the principal, but as added to the general stock of the factor, leaving the principal a creditor; this has been rejected as mischievous in principle, and supported by no authority in law.[2]

[1] RABONE against WILLIAMS, 7. Term. Rep. 360. Note *(a.)* Rabone, senior, and Company, of Exeter, were factors for Rabone junior, and sold goods to Williams. The factors failed before receiving the price from Williams, and he, when called on by the principal, set off a debt due to him by the factors, alleging that the plaintiff, Rabone junior, had not appeared at all in the transaction; and that credit had been given by Rabone and Company, the factors, and not by the plaintiff. The set-off was allowed.

In the former edition of Cook's Bankrupt Law, a doctrine very opposite was laid down on the authority of ESCOT against MILWARD, tried two years before the above case. But Mr Cook had mistaken the decision, which proceeded entirely upon the ground of fraud between the factor and purchaser, as appears from an accurate note of the case obtained from Mr Justice Buller, who tried the case. 7. Term. Rep. 361. It was upon the strength of the erroneous report of Escot's case, that the new trial was applied for in the above case of Rabone and Company.

A case was, conformably to this doctrine, decided by Lord Kenyon at Guildhall.

GEORGE against CLAGGET. George, a clothier at Frome, employed Rich and Heapy of London, as factors under a del credere commission. Besides acting as factors, they dealt in woollen cloth on their own account, and all their business was done at one warehouse. Clagget bought woollen cloth from Rich and Heapy for exportation, at the price of L.1237. The cloth was taken out of a general mass in the warehouse, and Rich and Heapy made out a bill of parcels in their own name, never disclosing to Clagget that George was owner of the goods. Rich and Heapy became bankrupts, and George gave notice to Clagget not to pay the price of a part of the goods, amounting to L.142, as to that extent the goods were his. But Clagget stood as indorsee of a bill of Rich and Heapy for L.1198; and a question arose, Whether he was entitled to set off this bill against the price of the woollen cloth? Lord Kenyon was of opinion that he was. A new trial was applied for, and the Court was clearly of opinion, that the direction given by the learned Judge on the trial was right; and that the case was not distinguishable from that of Rabone against Williams. 7. Term. Rep. 359.

[2] TAYLOR against Sir THOMAS PLUMER, 1815. Sir T. Plumer employed Walsh, a stockbroker. Intending to buy an estate, he consulted Walsh about the proper time of selling out stock, and afterwards gave Walsh an order to sell out. He, accordingly, sold to the amount of L.21,774. 5s. The stock was transferred by Sir Thomas, and Walsh received the money, and paid it into Sir Thomas's bankers. It was then proposed to invest it, till wanted, in Exchequer bills, and Sir Thomas gave Walsh a check for L.22,200, to be laid out in Exchequer bills, to be delivered on the same day to Sir Thomas or his banker. Walsh bought Exchequer bills with L.6500, which he lodged at the bankers. With eleven of the Bank of England notes of L.1000, received from the banker, he bought from an American merchant, American bank shares and stock of the United States. He with others of the notes bought bullion. He then went off for America, taking the way of Lisbon, and was overtaken at Falmouth, when he surrendered the certificates and bullion, and gave an assignment in trust for payment to Sir Thomas of L.15,500, the difference between the Exchequer bills lodged in the bankers and the L.22,000; and he also gave a double bond for the sum. A commission having been issued, an action of trover was brought by his assignees against Sir Thomas Plumer. A verdict was given for the plaintiffs for the bank stock and American stock, and for the bullion separately, subject to the opinion of the Court on a case. Lord Ellenborough delivered the opinion of the Court. He said,—'The plaintiff in 'this case is not entitled to recover, if the defendant 'has succeeded in maintaining these propositions in 'point of law, viz. That the property of a principal in-'trusted by him to his factor for any special purpose 'belongs to the principal, notwithstanding any change 'which that property may have undergone in point of 'form, so long as such property is capable of being 'identified, and distinguished from all other property. 'And, secondly, That all property thus circumstanced 'is equally recoverable from the assignees of the 'factor, in the event of his becoming a bankrupt, as it 'was from the factor himself before his bankruptcy. 'And, indeed, upon a view of the authorities, and 'consideration of the arguments, it should seem that 'if the property in its original state and form was

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6. Where the factor purchases goods for behoof of his principal, but on his own general current account, without mention of the principal, the goods vest in the factor, and the principal has only an obligation against the factor's estate.[1] But where the factor, after purchasing the goods, writes to his principal, that he has bought such a quantity of goods in consequence of his order, and that they are lying in his warehouse, or elsewhere, the property would seem to be vested in the principal.

Thus, the general rule may be laid down, that in all cases of factory, where the property remitted by the principal, or acquired for him by his order, is found distinguishable in

' covered with a trust in favour of the principal, no ' change of that state and form can divest it of such ' trust, or give the factor, or those who represent him ' in right, any other more valid claim in respect to it, ' than they respectively had before such change. ' An abuse of trust can confer no rights on the party ' abusing it, nor on those who claim in privity with ' him. The argument which has been advanced in ' favour of the plaintiffs, that the property of the prin- ' cipal continues only so long as the authority of the ' principal is pursued in respect to the order and dis- ' position of it, and that it ceases when the property is ' tortiously converted into another form for the use of ' the factor himself, is mischievous in principle, and ' supported by no authorities of law. And the posi- ' tion which was held out in argument, on the part of ' the plaintiffs, as being the untenable result of the ' arguments on the part of the defendant, is no doubt ' a result deducible from those arguments; but unless ' it be a result at variance with the law, the plaintiffs ' are not on that account entitled to recover. The ' contention on the part of the defendant was repre- ' sented by the plaintiff's counsel as pushed to what ' he conceived to be an extravagant length, in the ' defendant's counsel being obliged to contend, that ' "If A is trusted by B with money to purchase a horse ' for him, and he purchases a carriage with that money, ' that B is entitled to the carriage." And, indeed, if ' he be not so entitled, the case on the part of the ' defendant appears to be hardly sustainable in argu- ' ment. It makes no difference in reason or law into ' what other form, different from the original, the ' change may have been made, whether it be into that ' of promissory-notes for the security of the money ' which was produced by the sale of the goods of the ' principal, as in Scott against Surman, Willis, 400.; ' or into other merchandise, as in Whitecomb against ' Jacob, Salk. 160.; for the product of or substitute ' for the original thing still follows the nature of the ' thing itself, as long as it can be ascertained to be ' such, and the right only ceases when the means of ' ascertainment fail, which is the case when the sub- ' ject is turned into money, and mixed and confound- ' ed in a general mass of the same description. The ' difficulty which arises in such a case is a difficulty of ' fact, and not of law, and the dictum that money has ' no ear-mark must be understood in the same way; ' i. e. as predicated only of an undivided and undis- ' tinguishable mass of current money. But money in ' a bag, or otherwise kept apart from other money, ' guineas, or other coin marked (if the fact were so) ' for the purpose of being distinguished, are so far ' ear-marked as to fall within the rule on this subject, ' which applies to every other description of personal ' property whilst it remains (as the property in ques- ' tion did) in the hands of the factor, or his general ' legal representatives.' His Lordship then went into a discussion of the previous cases; and concluded with saying, that the difficulty, in respect of proof, which occasioned doubt in any of those cases, does not stand between the original proprietor and his rights, in respect to the ascertained produce of his own funds on this occasion.—' He has repossessed himself of that, ' of which, according to the principles established in ' the cases I have cited, he never ceased to be the ' lawful proprietor; and, having so done, we are of ' opinion, that the assignees cannot in this action re- ' cover that which, if an action were brought against ' them, the assignees, by the defendant, they could ' not have effectually retained against him, inasmuch ' as it was trust-property of the defendant, which, as ' such, did not pass to them under the commission.' 3. Maule and Selwyn, 562.

[1] Boylston against Robertson and Fleming, 24th January 1672; 2. Stair, 54. Boylston in London employed Mackelwood in Halifax to buy linen cloth for him, and sent money for the purpose. The factor sent Palmer, her servant, and purchased the cloth; and having left it in the hands of Robertson, a third party, it was there arrested by a creditor of the factor, Mackelwood. Boylston claimed the goods. Evidence was taken, and two witnesses swore that Palmer subscribed in the transaction as servant to Mackelwood; and that the cloth was bought and received by him in her name, and for her use. Mackelwood deposed, that she was employed by Boylston to buy the cloth, and sent the money furnished by him with Palmer, who again swore he bought the cloth for the use of Boylston. The Court found, that the cloth being bought in name and for the use of Mackelwood, the property was thereby stated in her person, and not in the person of Boylston, although she had a mandate or trust from him, which is but a personal obligation; but property or dominion is transmitted or constituted only by possession; and Boylston had got no possession of the linen cloth, either by himself, or by any in his name to his use. Lord Stair, (B. 1. tit. 12. § 16.), and Erskine, (B. 3. tit. 3. § 34.), lay it down, that the mandatory receiving money from his principal, but buying goods in his own name, becomes proprietor; the real right is in him, and there is an obligation on him to transmit them to his constituent.

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the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt; the creditors of the factor, who has become a bankrupt, have no right to the specific property. The case quoted below shows the discriminations necessary in the application of the doctrine.[1]

6. NEGOTIORUM GESTIO.—I may here briefly dispose of the analogous contract of NEGOTIORUM GESTIO, which is a species of spontaneous factory; one interfering, from friendship or benevolence, in the affairs of another, without authority. In this situation, still less than in factory, is there any alteration of the property which comes into the possession of the gestor. Thus, Mr Seton, brother to the Earl of Winton, assumed, during the Earl's absence, the management of his estate, and entered into a contract with Hay, Mitchell, and Gordon, for the sale of 400 bolls of the wheat of the estate. He engaged to deliver the wheat at a certain place, and they to pay the price to him, or his order. The wheat was accordingly delivered; but before the price was paid, Mr Seton died; and his creditors having attached the price, a contest ensued with a creditor of the Earl of Winton, who attached it as the property of the Earl. The Court found, that the grain was not Mr Seton's; and, therefore, that the price could not be claimed by his creditors.[2]

There are some other cases of frequent occurrence, which may here be explained, as presenting difficulties respecting the property of goods, or bills, or money.

1. GOODS SENT ON SALE AND RETURN.

It has been often questioned, Whether goods sent on sale and return, are in the same condition, in respect of the law of reputed ownership, as goods in the hands of a factor?

1. Sometimes goods are sent by a manufacturer or wholesale dealer to a retail trader, in the hope that he may be induced to purchase them, on the understanding that what he may choose to take, he shall receive on the footing of the contract of sale; what he does not take, are to be in his hands for the consignor. Here the goods not purchased are not held to fall under reputed ownership; but they are, on the footing of deposite or factory, in the consignee's hands for benefit of the creditors of the consignor.

[1] Ex parte SAYERS. 5. Ves. Jun. 169. Sayers, paymaster of the forces in the island of Dominica, wrote to Cheap and Company of London, to purchase for him certain kinds of foreign coin, and enclosed for them bills upon the paymaster-general for L.16,000. For this amount he desired them to give him credit; and he drew upon them for L.2000. Cheap and Company discounted the bills; and, not being able to procure the coin in England, they remitted L.5000 to Peter and Company at Lisbon, with directions to purchase the coin wanted, or, if not to be procured, to return the money in good bills. They afterwards sent a similar sum with the same directions. Not being able to procure the coin, Peter and Company sent back the money in good bills not indorsed by them; and Cheap and Company having become bankrupts, those bills came into the hands of the assignees, and Sayers petitioned to have them delivered up as specifically his property. Lord Chancellor Loughborough, in deciding this case, proceeded upon the following grounds:—*1st*, That the money was sent for a particular purpose to Cheap and Company. *2dly*, That the correspondence showed the remittance by them to Lisbon to have been made for the specific purpose of executing the trust by making the purchase. *3dly*, That if coin had been returned, it would have been specifically the property of Sayers, and not a general debt, as being purchased by his order with money remitted for the purpose. *4thly*, That if Sayers had gone to Lisbon, he might have stopt the transaction, and taken bills instead of the coin ordered. *5thly*, That the bills, when sent to London, might equally well have been taken by Sayers, had he been there; and, on the whole, that the right of Sayers to the bills should be allowed. His Lordship, at the same time, acknowledged the case to be difficult, and offered to take it for further consideration. The general ground of his decision was this,—'That the money acquired an identity, 'and a distinction from all the rest of the fund, by 'the application of it in sending it to Portugal.'

[2] HAY against HAY, &c., 15th March 1707; Forbes, 150.

2. Where goods are sent subject to approbation, the simple fact of possession, without some act of acceptance to change the property, will still leave the property undisturbed by reputed ownership.

3. Where goods are sent on the proper footing of sale and return, the transaction is commonly of this nature:—The wholesale dealer sends goods periodically, which the retail dealer is to sell. The settlement is monthly, or quarterly, or annually, at a certain rate, (as, perhaps, at invoice price, or with a certain deduction from invoice price), and the stock is to be kept up to a certain proportion. If the retail dealer find the commodity does not take the market at any particular time, he may stop sales, and return upon the consignor what is unsold. This is frequent in the woollen manufactory, in bookselling, and in several other lines of trade. The question is, Whether, in case of a bankruptcy of the retail dealer, the goods which are in his hand unsold are the property of the wholesale trader; or can, on the footing of reputed ownership, be made responsible to the creditors of the retailer? It has been held, in England, that the goods so in the hands of the retailer are in his order and disposition, and, by the law of reputed ownership, liable to his creditors:[1] And the same decision would probably be given in Scotland; such a transaction, with the uncontrolled power in the consignee, being a fair ground of extended credit.

2. TRANSACTIONS WITH BANKERS.

The general rule is, that where a banker fails possessed of his customer's property, distinguishable from his own, it does not pass to his creditors, but may be vindicated by the true owner; subject to such liens as the banker may have over it.[2]

In transactions relative to bills between bankers and their customers, it is not always easy to distinguish precisely, on the failure of the banker, what the nature of the contract is to which the transaction is referable, and where the property is.

[1] LIVESAY against HOOD, 1809; 2. Camp. 84. By agreement between Livesay, a wholesale hosier, and Almond, a retailer, the former was to supply the latter with hosiery goods upon sale or return, and to keep up the stock to L.100; the settlement to be monthly; Almond to pay the invoice price, deducting five per cent. The bill of parcels were, 'J. Almond from 'Livesay and Company.' At the end of the first month, the account was settled, the articles sold paid for, and the stock agreement made up to L. 100 worth. About the end of the second month Almond failed with goods in his shop, furnished as above, to the value of L. 61. The question was, Whether the assignees under Almond's commission were entitled to the goods? The plea for Livesay was, that Almond was a factor. But Mr Justice Lawrence directed a nonsuit, as the goods appeared to the world as Almond's property, and this reputed ownership was calculated to gain him a delusive credit.

GIBSON against BRAY, 1817; 1. Holt, 556. Here goods were sent to Markham on sale and return, and so expressed in the invoice. Markham not being at home, the goods were taken in, and the carriage paid by his servant. He afterwards became bankrupt, while the parcel containing the goods remained unopened. This was a strong case for the original owner of the goods; and the statute of reputed ownership was held not to apply. Gibbs, Chief-Justice, said,—'We all 'know what is meant by the ordinary terms of sending 'goods on sale and return. They become the pro- 'perty of the trader so far that he may sell them either 'for money or credit, and receive the proceeds; but 'if he is unable to sell them, the seller cannot, as a 'matter of course, call upon him for the value of the 'goods, but he has a right to return them in specie. 'He is not a factor, nor any thing like it.' He adds, 'Goods sent upon sale and return, in the ordinary 'meaning of that contract, are within the order and 'disposition of the bankrupt; he deals with them as 'his own stock; they procure him credit; but it is not 'reasonable that those who so trust him should take 'their chance with his other creditors. It is, however, 'a strong feature in this case, which sustains the 'claim of the plaintiff, (the consignor), that the parcel 'so sent was never opened, nor taken to, by any ex- 'press act of acceptance on the part of the bankrupt.' A verdict was directed for the plaintiff, subject to the opinion of the Court. The Court of Common Pleas was of opinion, that this was not a case of reputed ownership under the Act.

[2] WALKER against BURNELL; Douglas, 303. BRYSON against WYLIE; 1. Bos. and Pull. 83. BOLTON against PULLER, 1. Bos. and Pull. 539.

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1. Bills discounted in a single transaction are *bought* by the banker, and are the property of his creditors on his bankruptcy.[1]

2. But when a bill is sent to a banker, not for discount, but for a special purpose, as for the purpose of negociation, or to get payment, the banker is a mere agent, and the bill, being distinguishable, is the property of the principal.[2]

The ordinary and more correct way of entering this transaction in the books, is by what is called a *short entry;* that is to say, stating the amount in an inner column, and carrying it out into the account between the parties only when the bill is paid. Thus, the amount of the bill, while unpaid, does not go into account at all between the parties, and the banker is a mere agent holding the property of the customer, which, on the banker's failure, makes no part of his estate, unless upon inquiry it shall appear that between the parties they were held as cash, the onus of which is on the banker.[3]

Even where the bills are sent to the banker indefinitely, and entered not short, but generally in account, it would appear that they are not to be held as discounted, or as the property of the banker, unless where the customer has been allowed credit to their amount, and has drawn upon it;[4] or at least the customer is allowed to draw checks to

[1] CARSTAIRS against BATES, 1813. Kensington and Company, bankers, discounted three bills for Allport, the drawer, and credited him with the amount, debiting him with the discount, so that, deducting the discount, they were placed to his account as cash which he might have drawn out. A balance was at this time due to Allport, when the bankers failed. Lord Ellenborough held the bankers here to be purchasers of the bill, of which the whole property and interest vested in them, they standing all risks from the moment of discount; so that if burnt or stolen it would have been lost to them. Verdict for Carstairs, assignee of the banker; 3. Campbell, 301.

See ex parte SARGEANT, below, Note [3].

See also GILES against PERKINS, below, Note [4]. and PARKE against ELLEASON, p. 272. Note [3].

[2] BRUCE against HURLEY, 1815. Bruce and Company, London bankers, held a certain note with other securities from Young and Company, bankers at Taunton, and on the day before the note became due, Bruce and Company sent it down to Young and Company to get payment. It was not paid; and Young and Company failing, it was found by their assignees among their papers. In an action of assumpsit by Bruce and Company, as indorsers, against Hurley, the maker of the note, Bruce and Company produced the letter enclosing the note to Young and Company, and proved that this note had been placed with them as a security, and the custom of sending such notes back to the correspondents to get payment. Young and Company had overdrawn the amount of their securities in Bruce's hands. Lord Ellenborough was of opinion, that there was evidence to show that the note had been sent down by the plaintiffs to Young and Company for the purpose of procuring payment, and the plaintiffs had a verdict. 1. Starkie, 24.

See ex parte AIKIN, 2. Madox, 192.; where bills were by a customer placed with his banker, to be applied in providing for the customer's acceptances, and they were found not to be distributable among the banker's creditors.

[3] In the case of SARGEANT, p. 272. Note, Lord Chancellor Eldon said,—'It is quite clear that *short bills*, 'in the possession of bankers, are to be considered as 'still remaining in the possession of the parties by 'their agents, to be specifically returned; and if *these* 'bills were written short, the petitioner could have 'compelled Kensington and Company so to settle with 'Burrough as not to break in on his claim.' 1. Rose, 153.

[4] GILES against PERKINS. Dickenson and Company, bankers at Birmingham, had an account with Giles. On 12th November 1805 Giles paid in three bills, amounting to L. 1100. They were indorsed by him, but not due till December and January. Dickenson and Company failed on 18th November. Independently of these bills, there was a large balance due by them to Giles. The assignees considered the bills as having been entered in the books in common with cash, so that Giles might have drawn for the amount, and refused to deliver them up to Giles. Lord Ellenborough was of opinion, that Giles was entitled to the bills. On a motion for a new trial, his Lordship said, 'Every man who pays bills not then due into the hands 'of his banker, places them there, as in the hands of 'his agent, to obtain payment of them when due. If 'the banker discount the bill, or advance money upon 'the credit of it, that alters the case: he then acquires 'the entire property in it, or has a lien on it pro tanto 'for his advance. The only difference between the 'practice stated of London and country bankers in 'this respect is, that the former, if overdrawn, has a 'lien on the bill deposited with him, though not in-'dorsed; whereas the country banker, who always 'takes the bill indorsed, has not only a lien upon it, 'if his account be overdrawn, but has also his legal 'remedy upon the bill by the indorsement; but neither

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the amount, the banker has uncontrolled power over the bills, and the customer is credited and debited with interest.[1]

3. The bills are still more clearly to be held as the customer's, where the agreement with the banker is, that the customer shall be permitted to draw only a certain proportion of the amount. This is a very common arrangement with bankers. The bills are blank indorsed, and the banker receives payment when due. If he fail before they are due, the bills belong to the depositor, under a lien for the advances.[2]

4. Where the banker has received bills at long dates, and has on the security of them given bills, or accepted drafts, at shorter dates, for the purpose of discounting; the long dated bills seem to be with the banker only in pledge; so that the customer may demand them on the banker's failure, provided he relieve the estate of the short-dated drafts.[3]

'of them can have any lien on such bills until their 'account be overdrawn: and here the balance of the 'cash-account, at the time of the bankruptcy, was in 'favour of the plaintiff.' Per curiam. Rule refused. 9. East. 12.

Ex parte SARGEANT, in the matter of BURROUGH, 1810. Sargeant employed Burrough, a banker at Salisbury, as his banker, and had been in the habit of paying bills and cash indiscriminately into his account, and they were entered without distinction. He paid in two bills, not due till after Burrough's bankruptcy, and Burrough remitted them to Kensington and Company, his London agents, in whose hands they remained at Burrough's bankruptcy; the balance on Kensington and Company's account being in Burrough's favour. Sargeant petitioned, on Burrough's bankruptcy, to have those two bills delivered up, or their amount from the estate. Lord Chancellor Eldon, after laying down, as above, in Note [3]. p. 271. the doctrine as to short bills, says,—'That these bills were not written 'short amounts to nothing, unless there be a concur- 'rence manifested at the time, or to be inferred from 'the habits of dealing between the parties, that they 'were to be considered as cash; if they were there 'with the petitioner's knowledge as cash, and he 'drawing or entitled to draw upon them as having 'that credit in cash, he would thereby be precluded 'from recurring to them specifically; but it is upon 'them to prove that to be the case, and the petitioner 'is therefore entitled, unless they have been carried 'to his credit as cash, with his knowledge or con- 'sent.

'Take an inquiry before the commissioners, and 'declare the petitioner entitled to the proceeds of the 'bills, unless by his consent, or from the habit of deal- 'ing between the parties, they can be considered as 'cash.' 1. Rose, 153.

[1] THOMSON against GILES; 2. Barn. and Cress. 422.

[2] See below, p. 275.

[3] PARKE against ELLEASON. Parke sent to Persent and Bodecker, bills blank indorsed for L.4833, to be allowed to draw, without renewals, at two or three months. The bankers answered, that they had discounted the bills, and that short drafts would meet due honour. Parke, accordingly, drew to the amount at three months, and the drafts were accepted. But soon after the bankers failed, with Parke's bills in their hands. The assignees under the commission received the contents, but none of Parke's drafts having been paid, an action was raised against the assignees. Lord Kenyon said,—'If the bills had been taken upon a 'simple proposal to discount them, the transaction 'would have been merely that of a purchase, and no 'question could have arisen. But this is nothing like 'a case of discount, but the bills were placed in their 'hands to answer a particular purpose.' Referring to the cases of Tooke against Hollingsworth, (see above, p. 261. Note [3]), and Bent against Puller, (see above, p. 262. Note [4]), as settling the distinction between bills paid into a banker's hand on a running account, and the case of a single transaction, where a deposite is made for a special purpose, Lord Kenyon added, that he would make no exceptions or nice distinctions; and that the bills here were deposited to enable Parke to draw; and that those very bills, having an ear-mark on them, remained distinguished from the bankrupts' property at their bankruptcy. The rest of the Judges agreed that this was a deposite of bills for a specific purpose, though the word discount was used; and the condition not having been complied with, the depositor was entitled to have them back; 1. East. Rep. 544.

BOLTON against PULLER. Forbes and Gregory carried on business in London, under the firm of Barton, Forbes, and Gregory. They also were partners of the house of Charles Caldwell and Company, bankers at Liverpool. The Liverpool house had connections with the London company, and there was an open current account between them. Bolton, a merchant in Liverpool, employed the Liverpool house as his bankers, and they procured his bills drawn payable in London, to be paid by the London company. The payments so made were by the London house carried to account with the Liverpool house, who stated them in their account with Bolton. In the Liverpool house account, Bolton was debtor for the bills payable in London, and for cash drawn by him; and he was creditor for all bills and cash paid in. Bolton accepted bills payable in London for L.19,000; and, to enable the Liverpool house to provide for them, he delivered

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5. Where a bank allows credit on bills deposited, the property is not changed while the credit is not operated on; but it is sometimes agreed that the banker shall have it in his

certain bills. The London house failed, and then the Liverpool; and Bolton had L.2000 due to him by the latter. None of the acceptances were provided for by the bank, and Bolton retired them. Two of Bolton's bills came into the hands of the assignees of the London house; and the action was trover to recover them. Lord Chief-Justice Eyre, after stating the case, said,—'The question is, Whether the plaintiff can maintain 'his action upon this case? For him it is urged, that 'the house in London is a house of trade, carried on 'by two of the partners in the banking-house at Liver-'pool; though it is admitted, that the trade carried on 'in London is the separate estate of those two part-'ners. It is insisted, that the bills in their hands re-'mained in the same state, subject to the same rules 'of law and equity, as would have applied to them in 'the possession of the house at Liverpool; and that, 'having been appropriated, (as it is called), or deli-'vered to the house at Liverpool for a special purpose, 'and not having been ultimately applied to that pur-'pose, and remaining in specie in their possession, 'Bolton would have been entitled to demand to have 'them delivered up to him by the banking-house at 'Liverpool, or by the assignees of that house, suppos-'ing them to have come to the hands of those assig-'nees. I take it to be now settled, that bills in the 'hands of a banker, like goods in the hands of a factor, 'in the event of a bankruptcy, are to be delivered up, 'subject only to the lien which the banker may have 'upon them for the balance of his account. On the 'other hand, it is clear, that if indorsed bills are de-'posited with a banker, and they are by him negociat-'ed to a third person, though the purpose for which 'they were deposited should be ever so cruelly dis-'appointed by his becoming bankrupt, the original 'owner can have no claim to recover them in trover 'against such third person. The present seems to be 'a middle case, and, I believe, is a new one. We 'must endeavour to ascertain to which class it belongs. 'The true nature of that transaction has been warmly 'disputed in the course of the argument; but it comes 'out to be simply this: Bolton paid into his bankers' 'hands these bills on his general account for a parti-'cular purpose. This has been called an appropria-'tion, and legal consequences are deduced from thence, 'as if appropriation was a technical term, or at least 'was used in some definite or precise sense; whereas 'no term in popular use can be more general, or more 'uncertain in its import. In truth, when I say, these 'bills were paid in on a general account for a parti-'cular purpose, I mean only to say, that the object 'which the parties had in their view was, that the 'bankers might be enabled to provide for the payment 'of Mr Bolton's acceptances in London. So far from 'being appropriated to any particular purpose, in the 'strict sense of the word, the bills in specie were not 'intended to be applied to any other purpose than to 'be converted into cash, in order to increase Mr Bol-'ton's credit with his bankers; and, in the nature of 'things, they could not be applied in specie to the 'particular purpose of paying Mr Bolton's acceptances 'in London. These bills, at least the bills in question, 'were remitted to the house in London, on the gene-'ral account of the banking-houses. We cannot think 'that this was a misapplication, or that the confidence 'of Mr Bolton was abused. It may be asked, assum-'ing that Mr Bolton considered both houses to be in 'full credit, Was it not the very thing he meant? 'Was not this the probable mode by which the bank-'ing-house would be enabled to provide for the pay-'ment of Mr Bolton's acceptances at the house of 'Forbes and Gregory? They were to be dealt with as 'the banking-house thought fit to deal with them: to 'be negociated if they thought fit; to be discounted at 'Liverpool if they pleased, or remitted to whom they 'pleased; and were necessarily to be converted into 'money, in order to be means effectual to the purpose 'even of the parties who deposited them.

'If, then, Forbes and Gregory were parties capable 'of acquiring a property in these bills, as capable as 'any third party, and did acquire it without reproach, 'and, in truth, in pursuance of that agreement upon 'which they were delivered to the banking-house, 'Why are not Forbes and Gregory to be considered 'as third persons, with whom these bills have been 'negociated? If they were to be so considered, this 'determines the class to which I said, in a former part 'of the argument, we were to endeavour to reduce 'this middle case, between the case of original parties 'to the transaction, and the case of a third person 'holding such bills as these in the ordinary course of 'the negociation of bills of exchange.' Judgment for the defendants. 1. Bos. and Puller, 539.; 1796.

Cases on BOLDERO's bankruptcy. In consequence of the failure of the great house of Boldero and Company, several questions of this kind arose, particularly on their dealings with the Hull, Wakefield, and Leeds banks; and it was held that the property was with the depositor, he relieving the estate of the other engagements. See those cases in 1. Rose, 232. 243. 254.

Ex parte BUCHANAN. The Chancellor ordered the provisional assignee to deliver up short bills which were in the hands of Kensington and Company, bankrupts, at the time of their bankruptcy, to the petitioners, bankers at Glasgow, upon their giving security to pay all the bills which Kensington had accepted for them. 1. Rose, 280.; 1812.

Ex parte CLAYTON. Kensingtons, bankers, at the time of their bankruptcy, had L.5000 of the cash of Clayton and Company of Preston; the bankers had accepted bills to the amount of L.219,000, of which L.9000 worth, so accepted, had been paid by Clayton and Company (or their payees or the indorsees) to the Crown, for duties upon the excise; the officers of the Crown entered Kensingtons' premises by an extent, and had these bills paid in full by Kensingtons' assignees from the general fund.

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power to discount all or any of the bills, when the credit is drawn out. And, when the bills are so discounted, the property is passed. It is not, however, enough to pass the property as by discount, that the bankers charge interest on the sums overdrawn.[1]

6. The banker holding bills with blank indorsations, has it in his power to discount them, although deposited with him only as agent, or for a special purpose;[2] and in that

Kensingtons' house held, at the time of failure, about L.20,000 worth of short bills remitted by Clayton.

The petition of Clayton was, that these short bills might be given back upon his paying all the acceptances, because by paying them and taking them up, Clayton would not be in any degree indebted to Kensingtons' house, and would therefore be entitled to take all their property remaining in specie.

The order was to the following effect:—

The first thing Clayton had to do was to pay the L.6000 which Kensingtons' house had paid to the excise, for that is just the same as if the bills had been paid by Clayton at Preston.

Then all the other acceptances by Kensingtons, which Clayton had received cash for, by discounting, must be paid by Clayton, so that they may never appear under Kensingtons' commission.

Clayton must prove and take a dividend upon the L.5000 which Kensingtons had in their hands at the time of their bankruptcy.

Then Clayton will be entitled to all the short bills, or bills not due, transmitted by Clayton to Kensingtons, and not discounted by them before the bankruptcy, or to the proceeds of them, if any have been received by Kensingtons' assignees since the bankruptcy. August 12. 1813.

[1] Ex parte MADISON. C. and T. Shaw established a bank at Southampton, and a correspondence with Staples and Company in London. There was a special agreement that short bills remitted to Staples and Company should not be discounted, unless Staples and Company were overdrawn; *then* they might discount. Staples and Company, however, did not discount when overdrawn; but charged interest instead, for the sums overdrawn. The petition prayed the delivery of the short bills to the petitioners.

The Court ordered the assignees of Staples and Company to pay to the petitioners, as assignees of Shaw and Company, the bills, to the amount of L.2000, and also the sum of L.200, admitted by their counsel to have been received. 12th November 1796, cited by Lord Eldon in ex parte PEASE; 1. Rose, 241.

[2] See above, BOLTON against PULLER, in Note [3]. p. 272.

COLLINS against MARTIN. Collins had sent bills to Nightingales his bankers, indorsed in blank, in order to be received by them when due, and carried to his account. They were entered short by the Nightingales, and the balance was in favour of Collins. The Nightingales being in want of money, deposited some of the bills with Martin and other bankers, and got money on the pledge. Collins brought an action of trover against Martin, &c. for the bills pledged in their hands. He was nonsuited by Lord Chief-Justice Eyre, at Guildhall; and a rule having been obtained to set aside this nonsuit, the cause came on before the Court of Common Pleas, when the opinion of the Court was delivered by his Lordship thus:—'We are all of opinion that the plaintiff was properly nonsuited. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The counsel for the plaintiff admitted, that the bankers might have sold these bills, but it was argued that they could not pledge them; and the case of a factor pledging the property of his principal was urged as an authority; for it was said, that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors, or in the nature of factors; upon the same principle as, in other cases, between holders of bills of exchange and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the prima facie consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground, to impeach the apparent value received, was ever admitted in a case between such an acceptor and drawer, and a third person holding the bill for value: and the rule is so strict, that it will be presumed that he does hold for value until the contrary appears. The onus probandi lies on the defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected with every thing which would affect that first holder. This all proceeds upon an argumentum ad hominem; it is saying, You have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all resemble factors; nor will the rule, that factors cannot pledge, apply to the case of a banker pledging indorsed bills. That rule is grounded on the strict rule of property; the goods are not the factor's, and therefore he cannot pledge them. He may sell them; because, though they are not his, he is intrusted to sell them for his principal. He manages the sale, but it is his principal who, through him, sells them. For the purpose of rendering bills of exchange negociable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negociable; and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing

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case the owner of the bills is a mere personal creditor of the banker. Even a restrictive indorsation does not seem to afford any safeguard.[1]

7. If the bill has only been pledged by the banker for less than its amount, the owner of the bill will be entitled to redeem it on paying the sum advanced.

8. The banker has a lien for the general balance of his banking account, over all bills placed with him;[2] unless they have been *discounted*, in which case they are taken out of the account between the parties.

3. CONSIGNMENTS OF GOODS FOR ADVANCES AND SALE.

As a banker, in respect of bills sent to be negociated, sometimes gives permission to the owner of the bills to draw for a certain proportion of the amount, so merchants, factors, and commission-agents, sometimes agree to a similar mode of dealing. They receive goods to be sold, and allow the owners of the goods to draw for a certain proportion, greater or less, according to the promise of the market. In such a case it is clear,—1. That if the factor should fail, and the principal should be obliged to pay the bills which he had drawn on the factor, he may demand back, as his unalienated property, the goods consigned. 2. That if the principal should fail, and the goods remain unsold, the factor has a lien over the goods to the amount of all engagements on the faith of them. But, 3. If both houses fail while the goods are unsold, and the bills are in the circle, the bill-holder, in the *first* place, has his claim against each for the amount of the bill, to the effect of receiving on the whole full payment: *Secondly*, The factor's estate has a lien over the goods, to the effect of entire relief and indemnification: And, *thirdly*, The estate of the principal is entitled to demand the goods after such indemnification has been given from the proceeds; or on full security given to relieve the factor and his estate of the bills.

An incidental advantage may arise to the *bill-holder*, in such a case deserving of notice. Although the bill-holder has to trust to the personal credit only of those whose names are on the bill, he may, in certain circumstances, have the benefit of the factor's lien. The factor is liable to his demand, not only in his *estate*, but in his *person;* and therefore, if the factor be a bankrupt undischarged, he is undoubtedly entitled to resist the demand of the principal to have back the goods, till not only his *estate* is indemnified for the dividend paid from it, but till the last farthing of the debt be paid for which he can be made personally liable. And so the bill-holder, to the amount of what the factor is liable to pay, will have the benefit of the factor's lien.

' with the possession, it is admitted, that a banker who ' receives indorsed bills from his customers, to be got ' in when due, and carried to his account, may discount ' or sell them. Why may he not pledge them? Either ' is a breach of the confidence reposed in him. He ' may sell, because the property has been intrusted to ' him; and he may pledge for the same reason; for he ' who has the property has a disposing power, and the ' law has not limited it to be used in any particular ' manner. Perhaps the confidence reposed in bankers ' may be abused, and it might be wished that they ' could be restrained from abusing their trust. But an ' arbitrary restriction cannot be imposed; any restric- ' tion would possibly check the facility of negociation. ' As in cases of other property we say, ' Caveat emp- ' tor;' so, in this particular case, we may say to the ' customer who prefers to intrust his bankers with his ' bills, and with his cash, rather than be at the trouble ' of doing his own business, Caveat!' 1. Pull. and Bos. Rep. 648.; COLLINS against MARTIN, 1797.

[1] The legislature, under the momentary impression produced by the great failure among London bankers, enlarged the criminal code by an Act, ' for more effect- ' ually preventing the embezzlement of securities, &c. ' left or deposited for safe custody, or other special ' purpose, in the hands of bankers, merchants, brokers, ' attornies, or other agents.' 52. Geo. III. c. 63. The punishment is transportation not exceeding 14 years, or an arbitrary punishment, as for a misdemeanor. The Act extends to Scotland. It contains an exception of the right of bankers, &c. to sell, negociate, transfer, &c. securities, &c. over which they have a lien, &c. which by law may entitle them to dispose of them.

[2] See below, Of Liens.

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§ 2. OF THE EFFECT OF CHANGES ON THE PROPERTY INTRUSTED TO THE BANKRUPT.

Where the goods are extant, and remain unchanged, and capable of complete identification, in the bankrupt's possession, the ipsa corpora must, of course, be delivered up. But there is a difficulty where the goods have suffered change. In the preceding section some very important cases of this sort have been incidentally considered: But some still remain to be discussed.

It is impossible to enter upon this inquiry, without recollecting the famous controversy of the Proculeiani and Sabiniani concerning specification; which, after a course of perplexed and subtile reasoning, turning on imaginary and vain distinctions, was, by Tribonian, and the other lawyers appointed by Justinian to digest the Roman jurisprudence, decided according to a rule, as distant perhaps from plain sense, or any useful purpose, as the opinions which it professed to reconcile. On the Continent, wherever it remained as law, that property might be revindicated by the former proprietors, long after having been purchased and delivered, a claim of restitution must often have attached to subjects in situations very different from those in which they first came into the bankrupt's possession: and this controversy continued, or may still continue, to find a place in jurisprudence.[1]

[1] Neither the system of the Proculeiani, nor that of the Sabiniani, nor the middle opinion of Justinian's lawyers, have been universally approved of abroad. The Proculeiani maintained (according to the doctrines of the Stoics) the superiority of form and of the manufacture; and that the new species formed by the workman should belong to him that made it. The Sabiniani, on the other hand, contended, that the essential part being the materials, the property of them was not to be changed by the mere alteration of their form and appearance. Like most other disputes of the kind, where the palm that belongs to ingenious and subtile reasoning, rather than the plain use and application of a doctrine to the business of life, is the object of the disputants, no progress was made in resolving the difficulty, or settling the controversy on satisfactory grounds. The dispute proceeded, with great names arranged on either side, when Justinian, or rather the lawyers whom he employed, pretended to settle it, by taking what they called the 'media sententia.' But this conciliating doctrine was founded too much in subtilty; for, 1. Wherever the new species could be restored to its pristine form, the owner of the materials was held the proprietor. 2. Wherever this restoration to the original form was impracticable, the manufacturer was held to be the proprietor; more especially where the new subject was composed partly of the manufacturer's own materials. Instit. lib. 2. tit. 1. De rer. divis. § 25.

It was not to be expected, that a rule, founded on this kind of subtilty, should be tamely acquiesced in by modern nations, to whom the Roman jurisprudence was rather a fountain than a code of law. And, accordingly, we find the commentators of various countries contesting this point. One commentator, who is quoted by Vinnius, speaks very judiciously on the subject. He considers it as absurd to enter into these distinctions, and holds, that, in common sense, the point on which the attention should be fixed, is the comparative value of the rude material and of the manufacture; Connanus, lib. 3. Comm. 6. Grotius takes another view: he holds, that there should be a common property established; De jure belli ac pacis, l. 2. c. 8. n. 19. But Vinnius (Instit. Imper. Com. p. 148.) differs from both, and holds, that the rule established by Justinian is the true one; for, without regard to value, the point is, Where, in truth, does the property lie? and to determine this point, the essential question is, Whether the original subject be extinguished or not? This, on the authority of Grotius, (Manud. ad Juris. Holl. lib. 2. c. 8.) he represents as the modern rule of the Dutch states. Pothier seems to approve of Justinian's middle course, with this qualification, that a certain degree of arbitrary judgment should be reserved to determine according to circumstances; Traité du Droit de Propriété, No. 188.

In the practical jurisprudence of the Continent, it was essential to revindication, in many provinces and states, that the thing should remain unaltered. In Marseilles, it was necessary that the goods should be 'trouvées en nature, et existantes entre les mains du 'premier acheteur ou de ses commissaires, ou du second 'acheteur, qui n'en a pas payé le prix au premier.' So it was established by a regulation of the Chamber of Commerce and Consuls, 11th August 1730, confirmed by an arret of the Parliament of Aix, 26th August 1730. In Lyons, a similar rule was enacted, 14th December 1722, and 19th January 1731. Nay, in Paris, the matter was carried much farther; for by an 'Acte de 'Notoriété du Chatelet,' 13th May 1711, the right of vindication was extinguished, if the goods were taken out of their original strings and packages; Denizart, vol. iv. p. 376, 377. But these rules were in other places thought too harsh and unjust, and plainly the principle of them could not be applied to our questions of revindication: they seem to have proceeded on the

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But in this country little room is left for these perplexing subtilties. The occasions on which a proprietor is entitled, on the bankruptcy of one who holds his property, to claim against the creditors of the possessor the surrogatum that has come in place of his goods, are of two kinds:—1. Where the bankrupt has acquired the property by some fraudulent or illegal title; and, 2. Where he has held it on the footing of a legal contract, requiring temporary possession.

I. PROPERTY ACQUIRED BY FRAUD.—In this case, the bankrupt cannot acquire for his creditors an effectual right by any change which he may make upon the subject; so that all the doctrines of the controversy are out of place in such circumstances.[1] The chief decided cases illustrative of this doctrine, are those in which the goods fraudulently acquired have been disposed of by the bankrupt, and where the claim of the proprietor has been for the price.

1. It has been decided, that as a sale of the goods does not divest the original proprietor of his right, the proprietor has a preference for the price, where it is still unpaid.[2]

2. Where the price has been paid in money to the bankrupt, perhaps there may be room for a distinction. While property obtained by fraud is extant in the hands of the bankrupt, the creditors who take that property, or who resist the claim for restitution, are striving to gain by the proprietor's loss; they participate in the fraud of their debtor. In the same way, where the price of the goods sold is still due, they also participate in the fraud in claiming that price. But if the price have been paid to the bankrupt, there is no evidence of the general fund having been increased by it; the presumption, indeed, is rather, that the bankrupt has applied it to his own secret purposes. To give a preference,

idea, that, by the change, the presumed power of annulling the conditional trust was at an end. In Rochelle, it was sufficient if the property could be traced, though altered. Valin lays down the rule to be, that wherever there is clear evidence of the identity of the thing, or of what remains of it, it must be restored: nay, that even where the form is changed, brown sugar into white, skins into leather, corn into flour, the proprietor of the original material is entitled to it, on reimbursing the creditors for the addition made to its value; Com. sur les Coutumes de Rochelle, tome 3. p. 150. Basnage delivers the same doctrine, with several cases to illustrate it; Basnage, Traité des Hyp. Œuvres, vol. ii. p. 68, 69.

[1] In the case of Cave, (p. 245. Note [2]), he had *malted* the grain obtained by what was held to be a fraud. But 'it was found, that the specification by 'malting did not bar the reduction.' Lord Elchies, *Bankrupt*, No. 9.

See above, the case of Sir THOMAS PLUMER, p. 267. Note [2].

[2] CHRISTIE and Company against FAIRHOLMES, (already taken notice of on the general question of fraud, p. 242. Note [2]). Here the claim of the sellers was made while the price of the goods remained in the hands of the bankrupt's consignee, and the sellers were preferred to the creditors of the bankrupt arresting. 7th December 1748, Kilk.

DUNLOP against CRUICKSHANKS, p. 242. Note [2]. the Court found the goods not transferred, and preferred the sellers to the price in the hands of the purchasers from the bankrupt.

In another branch of the same cause, a distinction was taken; the Court thinking the fraud to be of such a kind as to entitle the seller to restitution, but at the same time holding the bargain to be legal, and one in which fides habita erat de pretio. They agreed in this, that were the goods extant in Forbes's (the bankrupt's) hands, Dunlop (the seller) would have direct access to them without the aid of diligence; but as, in fact, the goods were not extant, but had been sold to a third party, the question remained, Whether Dunlop should have the same access to the price yet in the purchaser's hands without the aid of diligence, and on that ground be preferable to the arresters? And on this point the Lords were of different opinions. 'Some thought that 'the price came into the place of the goods as surro-'gatum; but the more general opinion seemed to be, 'that Dunlop could have no preference upon the price, 'as the same never was his; and that were once that 'doctrine laid down, there was no saying how far it 'might go, after the goods may have gone through 'many different hands.' But the cause was not decided upon this view: it was merely an opinion, not a judgment; and however much entitled to respect, there seems to be good reason for questioning the grounds on which it rests.

ROBERTSON'S Creditors against UDNIES and PATULLO, 27th July 1757. The sellers of goods obtained by fraud, and sold, were found preferable on the price in the hands of the purchaser from the bankrupt against the arresting creditors of the bankrupt. See above, p. 247. Note [3].

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therefore, upon the general fund, would be to risk a gross injustice to the other creditors, and to lay upon them that loss which had been occasioned by the imprudence or misfortune of the owner of the goods.

Although a proof of identification may, in many cases, be made out; as where the money may be traced by unquestionable marks into a bank account; or to the purchase of goods which remain extant in the warehouse; or into the hands of a creditor; and although in such cases the other creditors are benefited by the fraud of the debtor, at least to the extent of what they are thus enabled to draw beyond the dividend, which, without such payment, would have been demandable from the common fund; yet it is an undecided point, whether the proprietor suffering by the fraud is entitled to indemnification.

3. Where the bankrupt has acquired, not goods, but money, by deceit; as where, by forged documents, or on false pretences, he has induced a person to pay him cash; there, equally as if he had delivered goods, the person defrauded is entitled to indemnification in a question with him who has deceived him; but, as in the case just discussed, it is a difficult, and seems to be an undecided question, whether the person defrauded is entitled to a preference on the common fund? and whether collateral evidence of identity is admissible to show, that the common fund has been enlarged by the money received?[1]

II. Change on Property possessed on Legal Contract.—Where the possession by the bankrupt is temporary, on the footing of a legal contract, any change produced must either be accidental, or fraudulent, or in the natural course of the contract.

1. No fraudulent change can benefit the creditors, or prevent the owner from getting back his property from them, if in any way distinguishable.[2]

2. No accidental change, not intended by the owner, is sufficient to destroy the right of the proprietor, unless it should amount to a total destruction of the subject, and necessarily reduce the owner of the goods to claim as a creditor for damages. It would appear, that a person whose property (corn, wine, or spirits) had been so mingled with the general mass belonging to the bankrupt, or with that belonging to other persons in his custody, as to be inseparable; or whose rude materials have been manufactured into a different species not reducible to their original state, should be entitled to have them back as converted; or such a share of the common mass as should correspond with the quantity commingled.

3. Where the change takes place in the necessary course of the contract, which places the property with the bankrupt, the only situation in which the property can be supposed

[1] M'Knight against Bertram, Gardner and Company's Creditors, was a case attended with very peculiar hardship, and which seemed to involve the point now alluded to; but when analyzed, it was found to depend upon different principles. M'Knight had a cash-account with Bertram, Gardner and Company, who were bankers, on which a balance of L.1200 having arisen against him, they desired it to be paid up, or a bill or other security to be given for it. A bill for this sum was accordingly drawn, and attempted to be discounted at the national banks; but, in the alarmed state of the country at the time, (March 1795), this could not be done; and the bill was placed in the banker's hands as a security. In April, Mr M'Knight sent L.1200 to the bankers, and desired them to return the bill, if not discounted, with a receipt for the payment. He called afterwards for the bill, and was told it was not at hand, but should be sent. The truth was, it had been discounted by Bertram, Gardner and Company, for their own use, and lay in the Royal Bank. Mr M'Knight having entire reliance on the bankers, believed that the bill would be sent, and in this confidence went to London. Some months after he received notice of the bill being due at the Royal Bank; and his bankers stopt payment. He brought his action against the bankers for damages, in expectation of either being found entitled to a direct preference by restitution, or a judgment for a sum of damages which should cover his loss. The Court, however, decided, that he was only a personal creditor for the amount of the bill, and the expense of the loan necessary for taking it up. January 1797.

[2] See above, Sir Thomas Plumer's case, p. 267. Note [2].

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to be altered in consequence of the change, is where the evidence of identity totally disappears, and the bankrupt's obligation resolves into a personal one merely as debtor. The occasion on which this change is most commonly produced, is where a factor is intrusted to buy and sell. But this case has already been fully considered, and may stand as an illustration of the whole doctrine.[1]

CONCLUSION OF BOOK II.

EFFECT OF RADICAL OBJECTIONS, AND OF CONDITIONS AND PERSONAL EXCEPTIONS ON THE DOCTRINES OF THE PRECEDING CHAPTERS.

In the three Parts into which this Second Book has been divided, Estates in Land, Incorporeal Rights, and Moveable Property, have been considered as forming the aggregate fund for the payment of debt. And in those several classes of subjects, the particular act of tradition, or completion of the right, which the law has regarded as the badge of transference, has been seen to serve as the criterion of real right. It thus ascertains, not only what shall be held as the divisible property of the debtor, but also regulates what preference shall be given to one creditor over another, in the division of the common fund; or, in other words, what creditor shall be preferred as holding real securities; or who shall be ranked as general creditors, to take only a rateable share of the common fund.

As it is on this criterion that the distinction between real right or Jus in re, and Jus ad rem or personal right, depends; that distinction again regulates the two classes of real and personal creditors. Jus in re is that direct right which we have in a thing, by which we call it ours, either entirely and unconditionally, or to a certain effect; and which entitles us to defend it or to recover it from any other person into whose possession it may have come: Jus ad rem is that indirect right which we have to a thing, in consequence of an engagement, express or implied, by the person holding the real right, to transfer or deliver it; and which entitles us only to an action directed personally against him, for enforcing his obligation, and compelling him to deliver the thing if in his possession, or to indemnify us for the loss if it is gone. He who holds a right of the former description is a proprietor; or, at least, a real and preferable creditor on the particular subject: He whose right is of the latter species, is a personal creditor; entitled only to demand payment of his debt, or satisfaction for it, as far as possible, out of the general mass of the debtor's funds.[2]

[1] See above, § 1. of this Section.

[2] The essential distinction of real and personal rights, was represented in the form of action under the Roman law. The actio in rem was thus conceived,—'Aio hanc rem ex jure Quiritium meum esse.' The actio in personam was,—'Aio te mihi dare aut facere 'oportere.' The former was not directed against any person, but against the property itself, in whose hands soever it might be, the possessors being called only for their interest:—the latter was directed against a particular person, whether the property was with him or not. Lord Stair denies that any actions in our practice, except the action of poinding the ground, are strictly of the nature of real actions. Spottiswood considers all reductions of infeftments, and actions of redemption, as properly actiones in rem. But although our actions are, in common practice, more in the nature of the 'actio personalis ad restituendam rem aut pre-'tium;' wherever the accurate discrimination of principle becomes necessary, we must recur to the distinction between the actio in rem, and the actio in personam.

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It has appeared, however, in the course of this inquiry, how greatly the simplicity of the doctrine has been disturbed, by that necessity which, for the purposes of trade, so often requires that the possession of moveables should be separated from the property: It is further disturbed by the effect of objections to the right of the debtor, as not having been derived from the true proprietor; or as having been brought about by fraud; or as in its original constitution not absolute, but limited to the use of the person conveying it. Again, there are doubts, whether, among personal obligations, there are not some which truly are conditional of the right of property, and to which creditors must submit as burdens. In these circumstances, the difficulty of arriving at any uniform or satisfactory conclusion, has been greatly increased by the frequent changes of opinion among our Judges formerly, concerning the comparative pretensions of creditors and of purchasers. Sometimes it has been said, that the transaction of a purchaser with the seller being voluntary, the person who buys must take his risk of the seller's title; according to the maxim, 'Qui cum alio contrahit vel est vel 'debet esse non ignarus conditionis ejus:' While creditors are purchasers or acquirers, ex necessitate legis, and must be protected in the right which they have attached.[1] At other times it has been maintained, that purchasers trust only to the property which stands, or appears to stand, in the seller, and not at all to personal credit; while creditors are, as it were, the representatives of the bankrupt, and take the property and funds of their debtor, 'tantum et tale,' as they stand in him. Out of this phrase of 'tantum et tale' a new host of difficulties arose; for, taking the sound instead of the sense of the phrase, it has sometimes been held, that creditors come precisely into their debtor's place, so as to be responsible for all his engagements relative to the subject in question, on a footing somewhat similar to that of an heir; and to be entitled to claim no benefit from it, without performing all the counter-obligations of the transaction by which the property came into the hands of the debtor, or was allowed to continue with him.

The only general doctrine which appears to be safe, is, that in all competitions the right of the general body of creditors, or of an individual claiming a preference, is to be regulated strictly according to the criterion by which *real* right is contradistinguished from *personal;* unless it can be stated, either,

1. That there is a radical defect in the title by which the bankrupt holds, and on which the right of the general creditors must rest; or,
2. That his right is radically qualified or conditional, not absolute; or,
3. That the acquisition of the property, on the part of the bankrupt, was accomplished by fraud, of which creditors cannot, without participating, take advantage.[2]

On the general rule, a very ample commentary has been delivered in the preceding chapters; in this concluding chapter, the exceptions are to be considered.

§ 1. RADICAL DEFECT OF TITLE IN THE DEBTOR.

Where, in support of a claim as a Creditor dominii, against the general body of creditors, for property alleged not to have been effectually transferred to the debtor, any radical defect can be shown in the title by which the property came to the debtor, the claimant will prevail. Thus, it is a radical defect, that the person from whom the pro-

[1] See Dirleton and Stewart, whose opinions stand curiously opposed, *voce* Comprizer.

[2] It is properly to the two first exceptions now enumerated, that the maxim applies, 'Nemo plus juris 'alteri transfert quam ipse habet.'

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perty was acquired was incapable of consent; as being a pupil, a lunatic, or an idiot. It is also a radical defect in the title, that the thing has been stolen,[1] or obtained by violence; or that the transference has been procured by force and fear.[2] In such cases, there is no transference from the true owner. He retains his right as proprietor, and may vindicate that right against creditors.[3]

Such radical defect of title is, in general, available, not only against creditors, but against purchasers also:—1. In heritable subjects, the records prove no safeguard against such radical defects; 2. Incorporeal rights, in such circumstances, cannot be effectually transferred to the disappointment of the true owner; and, 3. Moveables can neither be effectually sold, nor impledged, (much less taken by creditors on bankruptcy), where they are held by such defective or tainted title.[4] Moveables sold by a thief, for example, may be claimed or *vindicated* by the owner, wherever he may find them. Even a sale in public market will not save the purchaser, whatever his bona fides may be, against such claim of restitution.[5] He will be liable, even after he has parted with the goods, si dolo desiit possidere; or, at all events, in quantum lucratus.[6] In England, great privileges are given to public market, the buyer in market overt being safe against the unknown owner, unless in the single case of theft, where the thief shall be prosecuted by the owners to conviction.[7] But in Scotland no such privilege is given to public market. The exception in favour of the owner in cases of theft and violence, is admitted in all cases.

Bills of exchange, however, and bills of lading, acquired for full value, and bona fide,

[1] 4. Stair, 40. 21. p. 700. See also cases below. HAY against LEONARD, 21st November 1677; 2. Stair's Dec. 561. The *opinion* of the Court extended this to cattle in custody for grazing, in ALEXANDER against BLACK, 17th January 1816. See below, p. 287. Note [3].

[2] CASSIE against FLEMING, 27th June 1632; Durie, 634. WOODHEAD against NAIRN, 24th June 1662; 1. Stair's Dec. 113. See also Dirleton's Report of STEWART against WHITEFOORD, 10th January 1677. 'By the Prætorean Edict, and the custom of 'this and other nations,' says Lord Stair, 'such deeds 'and obligations as are by force and fear are made 'utterly void;' 1. Stair, 9. § 8.

[3] Deathbed has also been held as a labes realis in a conveyance, so as to affect singular successors purchasing bona fide. LIVISTON against BURNS, 18th December 1697; 1. Fount. 803.

[4] The decision BEVERIDGE, May 1583, carries this doctrine too far: the goods having been sold by judicial warrant. WRIGHT against BUTCHART, June 1662. RAMSAY against WILSON, January 1666, as to jewels impledged. SEMPLE against GIVAN, 24th February 1672. PRINGLES against GRIBTON, 3d January 1710.

[5] BISHOP of CAITHNESS, 2d July 1629. FERGUSON, 19th March 1639. Both cases of restitution of horses stolen and sold in market.

FORSYTH against KILPATRICK, 18th November 1680, where a horse was sold by one to whom he had been hired; but it is not said that the sale was at market.

HENDERSON against GIBSON, 17th June 1806, where cattle stolen and sold in public market were found subject to restitution.

[6] SCOTT against LOW, 15th June 1704. WALKER against SPENCE and CARFRAE, 13th November 1765.

[7] Lord Coke says,—'The common law did hold it 'for a point of great policy, and behoveful for the 'commonwealth, that fairs and markets overt should 'be replenished, and well furnished with all manner 'of commodities vendible in fairs or markets, for the 'necessary substantation and use of the people. And 'to that end, the common law did ordain, (to encourage 'men thereunto), that all sales and contracts of any 'thing vendible in faires and markets overt should not 'be good only between the parties, but should bind 'those that right had thereunto.' 1. Inst. 713.; 2. Black. 449.

A sale in market overt will not, however, avail the purchaser, if the goods have been stolen, and the true owner prosecutes the thief to conviction. Blacks. ub. cit.

In London, the shops in which goods are publicly exposed to sale, are market overt, for such things only as the shopkeeper professes to deal in. But Wilkinson sent a quantity of lead to the wharf of one Ellit, in the borough of Southwark, there to remain till it should be sold. Ellit used to sell lead from this wharf; yet not having authority to sell this lead, Lord Ellenborough ruled, that a bona fide purchaser of the lead did not acquire the property; and observed, that an opposite doctrine 'would give to wharfingers the do-'minion over all the goods intrusted to them; but that 'a wharf could not be considered, even in London, as 'a market overt for the articles brought there.' Ellit had no colour of authority to sell the lead, and no one could derive a good title to it, under such a tortious conversion. WILKINSON against KING, 2. Camp. 335.

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by a third party, are not subject to challenge on account of any original defect in the right of the seller;[1] an exception introduced for the encouragement of trade.

Fraud is not reckoned among the radical defects which annul the title of the acquirer. It is to be classed among those unjustifiable means of inducing consent, which, however effectual they may be in exposing creditors to the consequences of the fraud, as having adopted it, do not annul the right, or affect purchasers; and it has been contended, that cases of force and fear stand on the same footing.[2]

§ 2. RIGHTS HELD BY THE DEBTOR UNDER QUALIFICATIONS AND CONDITIONS.

A right, as it stands in the bankrupt's person, may be limited or qualified by certain conditions and stipulations; and, in general, the qualification, if inherent in the constitution of the right, and apparent on the face of it, is effectual against third parties. A great class of the cases under this head, will be found to partake of the obvious difficulty of distinguishing between conditions which truly limit the right of the holder, and those which resolve into mere personal obligations, extraneous to the right. But wherever the right itself is qualified or limited, the condition is effectual; with the exception, 1. Of real rights to lands where the limitation does not appear in the infeftment; 2. Of jura incorporalia ex facie absolute; and, 3. Of rights to moveables, which must be allowed to pass current in trade.

I. LAND RIGHTS.—These are either real rights, completed feudally, or they remain still personal.

1. REAL RIGHTS.—The statutes relative to the records have the effect of protecting both creditors and purchasers against such burdens and qualifications of the real right of a proprietor infeft, as are not of the nature of a radical defect in his title. When the proprietor of land sells, or conveys it to another, under the burden of the payment of a certain sum to a third person; or under the implied condition, that the receiver is to apply the price to particular purposes; or that, after a particular period, or upon the accomplishment of a certain act, the estate is to be restored: Or where land or houses are vested in one individual, intending that he shall hold as trustee for a company; or in all the partners of the company, by name individually, intending the property to be with the company;—the condition of the right in all those cases, although undoubtedly effectual against the disponee himself and his heirs, is unavailing as a real burden on the property, if it do not appear in the record. And so the right vested in an individual in some of these cases, will be available to those who purchase or adjudge from him: Or where vested in several, each individual, and his singular successor, will take it as common property pro indiviso, the personal condition or qualification not being of force against third parties.

This doctrine, as with purchasers, has long been settled—as already observed in considering the case of conditions in feudal grants;[3] and a great number of illustrations are to be found in the Dictionary, under the title Personal and Real.[4]

But a distinction has sometimes been admitted in the case of creditors, as being entitled to take their debtor's property only as it stood in the person of the debtor; 'tantum et tale'

[1] GRAHAM against GILLESPIE, 27th January 1795. See also the case of LICKBARROW, for illustration, above, p. 215.; and COLLINS against MARQUIS's Creditors, p. 173. Note [1].

[2] Brown on Sale, p. 395. et seq.

[3] See p. 26.

[4] WORKMAN against CRAWFORD, 20th November 1672; 2. St. 121. A back-bond by a creditor, binding himself, on receiving payment, to denude of an heritable subject, held not to affect purchaser.

ANDERSON against Sir JOHN DEMPSTER, 14th November 1702; 2. Fount. 159. A declaration of trust, that the subject was conveyed merely to give an election qualification, held ineffectual against a purchaser. Same held in THOMSON's case in 1786. See p. 283. Note [1]. See also 2. Stair, 10. § 5. p. 342.

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as he held it.[1] The question, however, must always return to this, What was truly the extent of real right in the debtor? and although he may be under a relative personal obligation, the real right legally constituted is that only which his sasine bears, and of which it gives assurance to the public; and, accordingly, it has at last been held, that such personal exceptions have no effect against creditors.[2]

There are other questions which may arise, not from conditions in the right of the debtors, but from personal engagements and exceptions, which will demand attention hereafter.[3]

2. The rule respecting PERSONAL RIGHTS to land, is, that the conditions and qualities inherent in the constitution of the right are effectual against third parties, both purchasers and creditors, while the right is not made real by infeftment. If, therefore, a person hold a conveyance to land, qualified by a limitation, as of trust; or a condition, as of pre-emption; and on which no infeftment has taken place; his creditors must take the right as he has it. So a person on receiving an assignation to a comprising, on which no infeftment had been taken, having granted a back-bond to denude on payment of debt, afterwards assigned the comprising, still uncompleted by infeftment; and a competition arose between the assignee to the comprising, and one in the right of the back-bond. The Court held, that the personal right of the assignee was qualified by the back-bond; so that this not being a personal debt, the first intimation of an assignation to which would have carried the right; nor a real right, the first sasine on which would have been preferable; but a mere personal right to heritage, the person having first right in the competition, or, in other words, the title first in date, is preferable.[4] But the real right is freed from the condition, which becomes a personal obligation merely, when sasine is taken: Nay, even where sasine is taken by a singular successor acquiring the right while it was yet personal.[5]

[1] THOMSON against DOUGLAS, HERON and Company, 15th November 1786; 7. Fac. Coll. 453. 2. Hailes, p. 1002. Thomson, in consequence of a contract with his man of business, disponed his lands to him, 'heritably and irredeemably, that he might sell the same, 'and apply the proceeds for the disponer's behoof.' The disponee contrived to omit the declaration qualifying his right; and he used the estate as a fund of credit for himself, borrowing money on heritable security; while other creditors, who had trusted to his personal credit, finding his affairs going into disorder, adjudged. Thomson sought back his estate, in competition with both those sets of creditors; and he was found entitled to this as against the adjudgers, not as against the holders of the heritable securities.

It was said on the Bench,—'In the present case, the 'disposition imported absolute and unlimited property, 'although, as the counterpart of this grant, there arose 'a personal obligation on the disponee to render account; and whether this has been justly fulfilled, or 'fraudulently violated, the right of property remains 'equally unaffected. A bona fide purchaser, therefore, might have effectually acquired such property 'from the disponee; and an heritable creditor by infeftment is held to be in the same situation. The 'adjudging creditors, however, stand in a different 'predicament; for as it has been found by decisions, 'which, for the stability of the law, ought not to be 'departed from, they must take the right of their 'debtor, tantum et tale, as it was in his person.'

Lord Braxfield, who concurred in this judgment, grounded his opinion in favour of a distinction between purchasers and adjudgers, on the case of GIBB against LIVINGSTON. See below, Note [5].

[2] WYLIE against DUNCAN, 8th December 1803. See the statutes 1469, c. 27. and 1617, c. 16. Pactum de retro-vendendo contained in a back-bond, was held merely personal, and not effectual against creditors.

RUSSELL against ROSS of Kerse's Creditors, 31st January 1792. See above, p. 49. Note [1]. Here the decision in Thomson's case was disapproved of and departed from.

[3] GIBB against LIVINGSTON, 25th July 1766; 1. Hailes, 100. Here the reduction was on fraud, under the Act 1621, c. 18.; and on a hearing in presence, the Court held a creditor-adjudger liable to the challenge; and this was relied on by Lord Braxfield in Thomson's case, as fixing a point not to be altered.

[4] SIR L. GORDON against SKENE and CRAWFORD, 6th July 1676. The case is reported by Stair, Dirleton, and Gosford. Gosford's report will be found in Morison's Dictionary, p. 7167; but to make it intelligible, the fifth and sixth lines from the foot of p. 7168. must be delete. 2. Stair, 440.; Dirleton, 183.

[5] M'CUBBINS against FERGUSON, 20th July 1715; Dalrymple, 207.

A distinction is made as to apprisings, grounded on the peculiarity of that diligence. See several cases of apprisings, conveyed before sasine, and held as limited *in the purchaser's person.*

Nay, the doctrine is held to apply *to apprisings even* after infeftment, by a back-bond granted previously. BROWN against GAIRN, 21st November 1673. GORDON against CHEIN, 6th July 1676; 2. Stair, 440.

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II. JURA INCORPORALIA UNCONNECTED WITH LAND.—Rights of this description, debts, shares in a company, and the like, fall under the general rule, Assignatus utitur jure auctoris.[1] But, in the construction of this rule, it is necessary to distinguish between such conditions as are incorporated with the right (in corpore juris), and such as are extraneous to it.

1. Conditions of the former kind, inherent in the nature of the right, or (in the case of debts), existing as exceptions or counter-claims by the original debtor against his creditor, are effectual both against creditors and purchasers coming in place of the original holder of the right.

2. Conditions of the latter species, collateral obligations, or latent trusts extraneous to the deed (extra corpus juris), and of which the new holder of the right has no notice, have given occasion to great diversity of opinion among our lawyers.[2] It seems, however, now

In a case taken notice of above, (THOMSON against DOUGLAS, HERON and Company), had no infeftment been taken, the objection of trust would have been correctly found good against creditors, and also should have been made effectual against purchasers. Earl of SOUTHESK against Marquis of HUNTLY, 31st July 1666. KENNEDY against CUNNINGHAM, 12th July 1670. See especially Gosford's report of it, Mor. 10206; SINCLAIR against SINCLAIR, January 1685.

See Sir R. PRESTON against Lord DUNDONALD'S Creditors, 6th March 1805. See above, p. 28.

[1] An heritable bond is liable to the same exceptions between the debtor and the creditor. The distinction between the exceptions competent to the debtor against the original creditor, and those arising from fraud or collateral obligation, are well explained in M'DOWALL against CARMICHAEL, 10th November 1772.

[2] Lord Stair is of opinion, that all the possible injuries to commerce from the admission of those latent exceptions, must yield to the common rule of law. That the assignee utitur jure auctoris in personalibus; that this applies not only to mutual contracts, where the conditions appear in the deed, but also to back-bonds and obligations in separate deeds; and that these, provided they make part of the same transaction, and are causes or considerations of each other, will be held mutually to qualify the rights even of assignees. 1. Stair, 10. § 16. This passage, however, is one of those which seem not to have received the author's last corrections: for it is expressed with great obscurity; and, in particular, it is not very obvious whether he did not mean to speak only of the defences that might be made against a demand by the original debtor, not by a third person. Mr Brodie, in his edition of Stair, has observed, that this passage is not to be found in either of the editions published during Lord Stair's life, p. 120.

Stair's doctrine in this passage is followed by Erskine, b. 3. tit. 5. § 10.

The Court also have, on several occasions, given effect to such separate and latent conditions and qualifications of jura incorporalia. M'KENZIE against WATSON and STEWART, 5th February 1678; effect given to a back-bond of trust. The same in BLACK against SUTHERLAND, 19th July 1705; Forbes, 28.

The like effect was given against assignees and purchasers, SCOTT against MONTGOMERY, Jan. 14. 1663.

See also MONTEITH against DOUGLAS, 8th November 1710; Forbes, 438.

But this doctrine has been accompanied with expressions of sincere regret, that no means had been taken to establish a record of back-bonds.

On the other hand opposed stands, in the first place, the opinion of the minority of the Court in Crawford's case, as reported by Lord Dirleton, p. 183.; where it is laid down, that singular successors, taking, not by representation, but by purchase of the individual right, are entitled to it unqualifiedly if no condition appear; that the analogy of reversions is applicable, the law with regard to which rests not on the statute merely, but on the common law; that obligations only bind the granter to retrocess, and cannot operate more strongly than if a formal retrocession were made; and that the admission of such latent exceptions would be an irreparable prejudice to the public. Dirleton states the effect of co-respective obligations of one date, but not of one body, as doubtful; while Stewart seems to hold them as personal; Dirleton and Stewart, voce Obligants Co-respective. And among the older authorities there is one to which great weight seems to be due, namely, the anonymous author of Annotations on Lord Stair, (supposed to be Lord Elchies), who argues this point very fully; distinguishes justly between counter-engagements and those exceptions which are competent to the debtor in the obligation, extinguishing the debt; and protests against the decision in the cases of Crawford, 'as 'sanctioning the greatest defect I have observed in 'our law, in personal rights; entirely against the ana-'logy of law; a great handle for fraud, and the great-'est obstruction to trade and commerce that I know:' Annot. on Stair, p. 71. et seq. Recollecting the principles upon which assignations were originally admitted, as procuratories in rem suam, it will not appear wonderful that persons acquiring, by assignation, the right to debts, and other jura incorporalia, should be considered as coming precisely into the place of the cedent, and as liable, of course, to all the personal exceptions pleadable against him. In that way arose the maxim, 'Assignatus utitur jure auctoris,' which has so often been misunderstood, and held to imply a responsibility like that of an heir. But this doctrine, in so far as it has been considered applicable to any other exceptions than those competent to the debtor in de-

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to be settled, 1. That such extraneous, collateral, and latent conditions and obligations, have no effect against third parties purchasing or advancing money on the right. This was determined by the House of Lords, in a case relative to the effect of a latent trust, under which a person held a share in a company; and this trust was found to be ineffectual against an assignee who lent money in bona fide, relying on the right as absolute and unconditional. The reasoning on which this case was decided in the Court of Session, and on which the reversal proceeded, is stated in the Note.[1] The Court of Session have since assented to this, as conclusively settling the question with purchasers,

fence against the claim, should not be held good in the present day, when the whole aspect of the law, relative to assignations, is altered; and when, instead of being a mere procurator of the original creditor, the assignee is considered as a proper purchaser, holding by the cessio in jure, as against the defender, the full jus obligationis, transferred by intimation, as property is by delivery.

[1] SOMMERVAILS against REDFEARN, 22d November 1805; 13. Fac. Coll. 508. Stewart held a share in the Edinburgh Glass-house Company, apparently in his own right, but really in trust for a company of which he was a partner, but which, by the regulations of the Glass-house Company, could not hold it in the social name. Stewart having borrowed money for his own use, assigned, in security to the creditor, this share in the Glass-house Company; and the assignment was intimated. The question lay between a partner of Mr Stewart's and the lender. The Court found 'the allegation, that the stock in question stood in 'Stewart's person, in trust for the company, relevant 'to exclude the assignment.'

Upon this question there was much difference of opinion among the Judges in the Court of Session. While all of them acknowledged the inexpediency of admitting latent claims to affect purchasers, and expressed their regret in particular that there is no record for trusts; it appeared to some that this consideration ought to control the rule of law, and entitle a purchaser to take the benefit of the right, without any responsibility for the counterpart: By others, this was held a very secondary consideration, the rule being, that in personal rights personal faith is followed; and that, with intrinsic qualities in the constitution of the right, the public, whether creditors or assignees, are bound to lay their account. The main point of the argument turned upon these different views:—On the one hand, it was held, that tradition is the criterion of real right; and that this applies to heritage, moveables, and jura incorporalia; that nothing qualifies the right so constituted, which does not affect the reality; that no obligation can qualify a real right; and that the mistake, in supposing that it can, has arisen from a mistake in the history of the law, in which it has been held, that 'jura incorporalia inhæ-'rent ossibus,' so as to make an assignee not so much a claimant in his own right, as a procurator in rem suam for the cedent; that to follow this notion would be to bestow preferences on personal creditors, and to disturb the whole doctrine of real rights; that the sole principle on which any condition can be allowed to affect the right of an assignee, is, that it forms a radical qualification in the constitution of the cedent's right; and that trust does not appear to be a qualification of this kind. On the other hand, it was held, that even if there were no clear principle, the series of authorities and precedents should settle the question; but that the principle is clear, 'assignatus uti-'tur jure auctoris;' that a trustee is not truly proprietor, but holds a limited right, which must pass with its limitations to his assignees and creditors; that trust forms an intrinsic quality in his right; and that, in the purchase of all personal rights, there is so much of personal credit, that the mere appearance of an unqualified right is not to be relied on, to rear up a right where none exists.

In the House of Lords, this judgment was considered by Lord Redesdale as not settled by previous authorities, but as establishing distinctly, and for the first time, a principle which their Lordships would not be desirous to recognize, viz. That a latent equity, however unjust in its application, should defeat the right of a bona fide assignee. He held all the authorities of text writers, and even all the cases, to be inapplicable, as truly relating to such exceptions or counter-claims as the original debtor may have against his creditor, and not to another title set up by a third party against the assignee; and that the principle of the law was in favour of the assignee, since the right set up in competition against him, was only that of a person entitled to compel an assignation, which could be no better than if the assignation had been made, but not intimated, till after Redfearn's. Lord Chancellor Eldon marked clearly the same line of distinction. The question here, he said, was not between a debtor of Stewart's and his assignee, but between the assignee and one possessing a secret equity. He would ask, then, How the authorities cited for the respondent could possibly apply? A assigns a bond to B, and B to C: C knew that he was taking that of which no part, or of which some part, or the whole, might have been discharged. Utitur jure auctoris. He took what interest B had in the bond, and no more: and this was no hardship; for it was his fault if he did not apply to the known debtor to ascertain how that matter really stood. His Lordship added, that he had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, and he had found none. See 1. Dow's Rep. 50—73.

See 2. Shaw and Dunlop, 678. for observations from the Bench on this decision.

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contrary to the general rule which they regard as having till then regulated both sets of questions; the exception being established on grounds of equity and expediency, which are not now to be shaken. And the result is, that Jura incorporalia, though liable even in the hands of a purchaser to those exceptions which the debtor may have to state against the claim, are not qualified by any collateral obligation or latent trust. 2. It has now also been determined, (though not in the last resort), that a different rule applies to creditors. It was by some conceived, that the rule adopted in the case of heritable subjects was, in principle, applicable to jura incorporalia; that where a bankrupt holds a pure and unqualified conveyance to the real right, or jus in re, of a debt transferable only by written titles, accompanied by intimation; and which, in a question with purchasers, is not held to be qualified by any collateral obligation, merely personal; such right ought to belong to creditors, as part of the fund of division, leaving the personal obligation to ground a claim to a dividend. But this opinion has been discountenanced, and the maxim, Assignatus utitur jure auctoris, declared to have been always applicable to such cases; the exception introduced by the House of Lords extending no farther than to the case of purchasers and lenders of money in bona fide.[1]

III. Moveables.—There is here a distinction which, although not obvious perhaps at first sight, it is of great importance to attend to. Possession is the badge of property in moveables; the sasine by which their transfer is completed; and so is said in law to presume property. But this is not to be taken without qualification. For the possession of moveables is frequently unaccompanied by the ownership; since they are necessarily, in the course of dealings, intrusted to the custody and possession of persons who have no further concern with them than to keep them safely; or to perform upon them some operation of art; or to dispose of them in the character of factor for the true owner. Passing from hand to hand in transference, without the necessity of any written title to explain under what conditions they may be held, there being, in consequence, a presumption of ownership in the possessor, and yet being so frequently in the hands of others than the owners of them, distinctions have arisen between the rights of purchasers and those of creditors.

1. As possession presumes property in moveables, the general rule is, that the purchaser of moveables at market, or otherwise, in bona fide, acquires the right to them, although they may have been sold by one who is not the owner.[2]

This rule, however, must be taken with the exception already alluded to,[3] namely, in the case of theft or violence. Under this branch of the inquiry it may be doubted, whether the breach of trust, and the obligation faithfully to restore property placed in the possession of another, will bring the case under the analogy of the exception. In one case very nearly approaching to theft, the Judges seemed to think the exception would be so extended. But there is danger in admitting any arbitrary rule, and no very clear line of distinction appears to regulate the cases in which the exception should be admitted. Breach of trust has much the character of theft; but at the same

[1] Gordon against Cheyne, 5th February 1824; 2. Shaw and Dunlop, 675. Here Saunders held a share of the stock of the Aberdeen Shipping Company in his own name, but truly as trustee for the Rev. Mr Gordon. This was proved by a letter acknowledging the trust, granted at the origin of it. Fourteen years afterwards Saunders became bankrupt, and Gordon's infant child claimed the share under the latent trust. The Court sustained this claim against the trustee for the creditors of Saunders, 'in respect he is trustee for 'general creditors who are neither purchasers nor 'special assignees.'

See also Dingwall against M'Combie, 6th June 1822; 1. Shaw and Ballantine, 501. and observations on that case in the above case of Gordon.

[2] 'The reason,' says Lord Stair, 'is because moveables must have a current course of traffic, and the 'buyer is not to consider how the seller purchased, 'unless it were by theft or violence, which the law 'accounts as labes realis, following the subject to all 'successors, otherwise there would be the greatest encouragement to theft and robbery.' B. 4. tit. 40. § 21. Ersk. b. 3. tit. 5. § 10. See also Voet, L. 6. tit. 1. De rei vind. No. 8. and 12.

[3] See above, p. 281.

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time it stands distinguishable by this strong circumstance, that the owner has exposed himself to the usurpation by which an innocent third party has suffered. When a person with whom goods have been pledged, or a depositary of jewels carries them to a jeweller, and sells them, or raises money on them as a possessor; if the bona fide purchaser or lender in such cases be entitled to retain the goods against the true owner, there may be a hardship upon the owner; but an equal hardship would arise on the other side, and one against which there is no protection, if the fair purchaser were obliged to part with them to the owner, who has himself to blame for choosing an unfaithful depositary. In cases of this kind, a sale at market in England would save the purchaser. And although in Scotland there is no such regard paid to public market, it is impossible to deny that a sale in open market should naturally induce a stronger bona fides than can accompany a private sale; the presumption of property, grounded on possession, being strengthened by the consideration, that without a full disposing power the holder would not thus publicly expose the goods. It has, accordingly, been maintained, that wherever the possession under which the sale is made is legitimate possession, it will validate the sale at market. This seems to be admitted in the case of tenants selling their hypothecated corn: Where one buys corn from a tenant at his farm, he must be aware of the possibility of interfering with the hypothec, and so he is held liable for the corn, or its price, to the landlord; but to carry this so far as to give restitution of goods sold in public market, though adjudged once,[1] has been since disapproved of.[2] In a late case it was pleaded, that the custody which the tenant of a grazing farm has of cattle, ought to validate a sale in market. But the Court did not approve of the doctrine.[3]

A factor having goods consigned to him, has power to sell, so as to give an unchallengeable right to a purchaser. But in England, at common law, such a person cannot pledge the goods of his principal for his own debt; and it has been necessary to provide by statute for such power as the necessities of trade require.[4]

2. But although purchasers of moveables, relying on the title implied in possession, are, in Scotland, freed from challenge by the owner, where the goods have not been stolen, it is unquestionable, that the creditors of a person possessing moveables in trust, or upon the footing of any of the known contracts requiring temporary possession, are liable to a preferable claim of restitution by the owner. This subject has already been fully discussed; and it is only necessary to observe further, that the question in such cases is, Whether the right vested in the bankrupt be truly an unqualified and absolute, or a limited and conditional right? In the former case, whatever may be the bankrupt's personal duties or obligations, the subject will make a part of the divisible fund: In the latter, the true proprietor's rights will prevail over those of the creditors, and he will be entitled to a preference.

IV. The conditions which operate as limitations of the original right, are not to be confounded with those personal engagements which the bankrupt may have undertaken, either at entering into the contract whereby the property was acquired by him, or subsequently to such acquisition. Where a person, for example, has bought goods and received delivery, he is bound to pay the price, as a counterpart of the right acquired: or where one has paid for goods of which he has not received delivery, the obligation to transfer the property is incumbent on the seller. But, in all such cases, the right to

[1] 29th March 1639, HAY; Durie, p. 886.

[2] 2. Ersk. 6. § 60.

[3] ALEXANDER against BLACK. The Court expressed an opinion, that if a person who has the possession of cattle for the purpose of grazing, carry them to market, and sell them to a bona fide purchaser, the owner can claim restitution. But the case was decided on special circumstances, 17th January 1816, (Second Division).

[4] See 4. Geo. IV. c. 88. and 6. Geo. IV. c. 94.

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the goods, or to the money, is real and absolute; the obligation to pay or to deliver is separate and personal. The creditors of the person bound by such engagements are not otherwise responsible for them, than for performance of any of the other obligations which their debtor has incurred; for the restitution of money borrowed, or the payment of a bill of exchange. All obligations, or personal engagements, whether express or implied, are of the same nature in law; whether the object be the payment of money, the delivery of property, or the performance of any particular act. They give only a personal action to enforce performance, or to recover satisfaction in damages for the breach of engagement.[1] If one have lent money on the promise of the borrower, that an heritable security shall be granted, or that goods shall be delivered to him in pledge; and the borrower fail before the pledge be given, or sasine taken on the heritable bond; still the lender is but a personal creditor, entitled to no preference; though the bankrupt, had he continued solvent, must have implemented the engagements he had undertaken, and action would have lain ad factum præstandum. If, again, the money have been given, not in loan, but as the price of goods, which the proprietor sells, and promises to deliver, and if bankruptcy take place before the contract can be fulfilled; there may be great dishonesty in the neglect; but the buyer is only a personal creditor, entitled to no preference over the rest. In one and all of those cases, there is a reliance, greater or less, for a longer or shorter time, upon the personal credit and good faith of the bankrupt, without any qualification constituted over the real right of the bankrupt: the claimant has allowed himself to fall into the class of personal creditors, instead of securing to himself a place as a preferable and real creditor.[2]

Where a person sells property, and, before the purchaser's right is completed, sells it a second time, he is guilty of a crime known in Scotland by the name of Stellionate: he fraudulently fails to fulfil his original engagement to complete the transfer; but although the seller be liable to punishment, the right of the second purchaser, if first completed, is effectual. The property was complete in the seller; and it is only a dishonest use of that property with which he is chargeable. If a single creditor adjudging, or the general creditors of the seller, be substituted in the room of such second purchaser, and they be supposed to have completed their diligence before the real right of the first purchaser is completed, they will be precisely in the same situation with the second purchaser, and preferable of course to the original purchaser. The cases in the notes settle this doctrine.[3]

[1] An obligation, as defined in the Roman law, is,—'Juris vinculum quo necessitate astringimur alicujus 'rei solvendæ secundum nostræ civitatis jura.' Instit. Lib. 3. tit. 14. De oblig. pr. And it is said by the best of all the commentators,—'Solvere verbum generale 'quod dare et facere complectitur.' Pothier's Ed. of Pand. vol. iii. p. 272.

[2] This consideration ought not to be lost sight of in such questions, under the Bankrupt Law, as that of BANK of SCOTLAND against STEWART and ROSS, 7th February 1811. See below, Book VI.

[3] MITCHELL against FERGUSSON, 13th February 1781; 8. Fac. Coll. 60.; where the disponee of a house not having been infeft, the creditors of the disponer adjudged, and were infeft, and were found preferable to a purchaser from the disponee. See the principle of the decision fully explained and illustrated by Lord Braxfield; 2. Hailes, 880.

This was a solemn decision, but it was thrown into some doubt by a decision pronounced in SMITH against TAYLOR, Dec. 18. 1795; where a person, though his right was merely personal, borrowed money on heritable bond. Infeftment was instantly taken on this bond; but, of course, no real right could be constituted in the lender till the borrower himself was infeft; and the latter having become bankrupt, the trustee on his sequestrated estate made up titles without infefting the debtor, by dropping him out of the feudal progress. Thus the trustee came to hold a real right, while that of the person holding the heritable bond continued only personal. The only chance which the latter had for a preference was upon the general plea, that the creditors could take no better right than stood in their debtor. The Lord Ordinary repelled this plea, and sustained the right of the creditors; but the Court (erroneously) altered the judgment.

The erroneous opinion, however, which this judgment tended to sanction, did not long prevail. Gordon assigned a bond of 3000 merks to Farquharson. The assignation was not intimated till the 4th of

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§ 3. OF THE EXCEPTION OF FRAUD AS IT AFFECTS CREDITORS.

The effect of fraud, in cases where the interest of creditors is concerned, may occur to be tried in two situations: Either as invalidating the right of the debtor, and so hostile to the interests of the creditors; or as chargeable against persons who, on bankruptcy, insist on real rights, which have been concealed from creditors, so as to mislead them, and give to the debtor a false credit.

1. In the class of cases in which the right of the bankrupt has been acquired by fraud, or other unjustifiable means, there is a distinction to be observed between the objection of fraud, and that of force or nonage. In the latter cases there is an absolute defect of consent; the possession is not given but assumed, and may be retaken by virtue of the undivested real right which remains with the proprietor. In fraud it is different: consent has passed, though ill-founded and revocable; and the real right has been transferred, though action may lie on the personal objection of deceit, for restitution or indemnification. The forms of our actions are so loose, that all the minor distinctions are confounded; but, in principle, the action applicable to the former case is a rei vindicatio; that which is proper to the latter is an actio personalis ad restituendam.

This distinction leads to a similar difference in the effect of fraud against third parties, with that which I had occasion to mark in the case of moveables. The objection of fraud has no effect against *purchasers*, who, seeing the buyer in possession of the property, give their money for the thing itself, trusting nothing to personal credit, but only to that property which the true proprietor has placed in the hands of another, together with the power of deceiving the public. Against *creditors*, fraud has been thought entitled to full effect, where it is of that kind which lawyers have distinguished as originating the contract; dans causam contractui.[1] In all such cases, creditors, in taking the benefit

August; which ceremony is the legal completion of the real right of the assignee. In the interim, viz. on the 19th July, Gordon's estate was sequestrated; but the conveyance to the trustee was not granted till after this intimation. The question between the trustee for the creditors and the assignee, was, Whether the real right of the assignee was first completed? and, if not, Whether the creditors, as representing the bankrupt, could take advantage of the defect of the assignee's right, or were not rather bound to complete it, and, of consequence, excluded, personali exceptione, as the bankrupt himself would have been? It was observed from the Bench, upon the above case of Smith and Taylor being quoted as a precedent, that the Court ought entirely to disapprove of the decision, and of the principles on which it proceeded; and in this opinion the whole Court concurred. The notion, it was observed, of the estate of a bankrupt going 'tantum et tale,' as it existed in his person, into the hands of the trustee, is erroneous, when it is pleaded to exclude a competition between the trustee and creditors, who have obtained a disposition only from the bankrupt, without having as yet completed it by sasine. While the deliverance upon the petition of sequestration is no bar, on the one hand, to such a creditor from going on to complete his right, yet if, on the other, he neglect so to do till after the trustee has vested the property in himself by a complete feudal title, the subject must unquestionably be carried to the creditors at large, and the imperfect right of the earlier claimant superseded. BUCHAN against FARQUHARSON, 24th May 1797; 12. Fac. Coll. 66.

Upon this decision being pronounced, containing so marked a disapprobation of the judgment in the case of Smith and Taylor, the creditors of Smith attempted, on the pretence of new facts having come to their knowledge, to open up the final judgment. This attempt was not successful. The Court thought the grounds for opening the decree insufficient; but all the Judges were clearly of opinion, in point of law, that, upon the original question, the creditors were entitled to have succeeded. SMITH'S Trustees against TAYLOR, 5th December 1797.

[1] See above, p. 242. Lord Stair has said, that fraud is good against singular successors; because assignees are but procurators in rem suam, and therefore in the same case with their cedents. And he limits his doctrine, as not extending to moveables, only on account of commerce, (see above, p. 286. Note [2].) 4. Stair, 40. 21. But this doctrine may now be considered as obsolete, though Mr Erskine has followed the authority of Lord Stair; 3. Ersk. 5. 10. Mr Erskine has also laid it down, that a sale, ubi dolus dedit causam contractui, has no effect to transfer; 3. Ersk. 3. 8. But this is not law; and Lord Kilkerran, both in the case of Dunlop, to which Erskine refers, and in the case of Forbes,

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of the property, are considered as adopting the fraud of the bankrupt, by which he acquired the property.

Examples of the application of this rule are extremely frequent. Thus, in the case of Prince against Pallet, a hypothetical opinion was delivered by the Court, illustrative of the doctrine. The fraud alleged was not thought to be sufficiently established, and therefore the seller lost his cause; but the Court held, that, if certain circumstances had been proved, they would have been sufficient 'to annul the contract of vendition, and, consequently, the decree of furthcoming:' that is to say, the diligence of the creditors would have been of no avail, 'though if, by way of commerce, the goods had been *bought* from 'the bankrupt, the parties would have been secure, if noways partakers of the fraud.'[1]

The doctrine delivered hypothetically in this case, was confirmed in the determination of the subsequent case of Main against Maxwell.[2] In a still later case, the same distinction was acknowledged.[3] In the two subsequent cases of Dunlop, the Court sanctioned the distinction. 'Most of us thought, (says Lord Elchies), that there was fraud even in 'concilio on Forbes's part, in the purchase of the spirits; and that had they been extant, 'though the property was transferred, yet the sale might be reduced, and the property 'brought back to Dunlop, (the original owner), *notwithstanding any arrestment of Forbes's 'creditors:* But as the property was transferred to Forbes, so they were bought bona fide 'by Napier, *who could not be affected by Forbes's fraud.*'[4] In Kemp's case, the Court unanimously found,—'That the sale of the goods in question was brought about by fraud 'on the part of Kemp; and therefore, that the same was void and null; and that the 'sellers were entitled to restitution of their goods.[5]

In the case of Thomson, against Douglas, Heron and Company, where a person fraudulently disappointed a trust, perhaps the judgment might have been justified on the rule, that fraud passes against creditors; although, as a qualification of the right, the trust taken by itself was not (in a case of feudal property completed by sasine) sufficient to support the decision.[6]

2. But as fraud may, in one situation, be pleaded against creditors, so they may, in another, be entitled to found upon it as limiting or restricting what otherwise might, as a

lays it down clearly, that, notwithstanding the fraud, the property would be transferred; Kilk. 222. and 224.

[1] PRINCE against PALLET, 22d December 1680; 2. Stair, 823. See above, p. 244. Note [1].

[2] MAIN against MAXWELL, 18th January and 4th February 1715; Bruce, 35. and 71.; Dalrymple, 181.

[3] CHRISTIE and Company against FAIRHOLMES, 7th December 1748; Kilk. 216—218. Lord Elchies, after stating the case, says, Most of the Lords were of opinion, 'that the property was not transferred; and 'that the fraud was a vitium reale;—the President, 'that there was a difference betwixt arrestors and 'purchasers, in the way of commerce; that arrestors 'are liable to the same exceptions with their debtor; 'and that their changing the bills of lading did not 'transfer the property. It carried to prefer Christie 'and Company. Remarked by Kilkerran and me, who 'approved that it was a fraud in Anderson, but that 'the property was transferred by sale and delivery; 'and though that sale might be reduced against Anderson, and even against his creditors, yet they having 'acquired the property by the new bill of lading, and 'sold it again, so that nobody knows now who has the 'property, or if the tobacco is not consumed; that 'Anderson's fraud could not affect them who were not 'partakers of it. And Kilkerran observed, that their 'right, by having the tobacco transferred to them by 'the new bill of lading, would not be the worse for 'their having had an anterior arrestment. 7th December; and, on 17th December 1748, refused a bill, 'without answers, and adhered.' Elchies' Notes.—In his report, *voce* Fraud of Creditors, he reports the case, and says,—'The Court thought Anderson's fraud 'a vitium reale; and that the property was not transferred: and the President distinguished between the 'case of arrestors and purchasers, in way of commerce.' Mor. Edition, Fraud, No. 520.

[4] Kilk. p. 221. and Elchies, MS. 8vo. 237. Mor. Edition, Notes, p. 166. See also 18th January 1752, DUNLOP against CRUICKSHANK; Kilk. 220. Elchies, MS. Rep. p. 236.

[5] 24th June 1786, SANDIEMAN and Company against KEMP'S Creditors; 9. Fac. Coll. 42. The question was with creditors.

[6] See above, p. 283. Note [1].

jus in re, be the ground of preference. We have formerly considered the effect of that collusive possession of moveables which gives a false credit to a bankrupt, and on that account has been recognized as a ground on which moveables are made answerable for the debts of the ostensible owner. The principles on which the doctrine rests apply equally to conveyances of lands as to those of moveables; the doctrine holds in either case, so far as the other principles of the law admit or require its application. It is not, like the rule of the English statute, restricted to goods and chattels. There was of old more room for the application of this rule to heritable rights than at present; for the record now is the sole criterion and test of property in land.[1] At the same time, there still is room for questions of this kind:—1. Where there is a competition with a single creditor, the completion of the feudal right is unquestionably, in the general case, the test of the competition; but if it can be proved, that, after the conveyance was granted, it was kept latent, in order to accomplish the fraud meditated by the disponer, the person who receives the disposition shall, notwithstanding his having completed his real right, take no advantage from it against the person defrauded by his collusion and by the reputed ownership left in the disponer. And so, 2. Where the general creditors have been deceived into false credit by such concealment, even although the completion of the right has been so contrived as to be beyond the sixty days preceding the bankruptcy, the creditors will, on the principles of the doctrine now explained, be entitled to reduce the conveyance as 'simulate.' This doctrine may be rested on the authority of a case, prior indeed to the Act 1693, c. 13., by which registration was introduced as the criterion of preference; but the decision of which is, in principle, plainly applicable to the present state of the law, as well as to the rules then prevalent.[2]

[1] Under the old law, base infeftments, without actual possession, were deemed fraudulent, till the Act 1693, c. 13. made the record the rule. And several cases are to be found, while the records were yet imperfect, and before the statute 1696, c. 5., relative to preferences within sixty days of bankruptcy, in which circumstances of 'simulation' for disguising the right, were held to have the effect of depriving the real owner of land, and giving to the disponer the right, as if still undivested.

See, for example, the case of DUFF and BROWN against FORBES, 14th and 15th December 1671; 2. Stair's Dec. 23—25.

See the doctrine well explained by Lord Stair, 2. Stair, 3. § 27., p. 215, 216.

[2] A trader conveyed his house and shop to his brother and sister-in-law, and continued to possess for two years, carrying on his business as formerly. He then failed, and his creditors challenged the conveyance, which had been completed about six months before. The Court,—'In respect that the sasine upon 'the tenement was not taken for eighteen months after 'the date of the disposition; and that the common 'debtor continued in possession of the house, shop, and 'goods, as formerly, and kept an open shop, and the 'same being all the estate he had till he broke, re-'duced the disposition as simulate ad hunc effectum, 'to bring in all the creditors pari passu according to 'their diligence.' The Court had refused to reduce on the Act 1621, as the creditors had done no diligence, and as the disponee offered to establish the onerous cause of the conveyance. Creditors of HAMILTON against HAMILTON, 11th January 1682; Pres. Falc. 9.

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