

not departed from by express contract, is held and read as a part of every mercantile bargain.

Per Holt in *Blunt v. Cumyns*, 2 Vesey senior, 38. *Newman v. Cazlitz*, per Buller; Park, 630. *Robertson v. French*, per Lord Ellenborough; 4 East. 135. See below, § 101.

84. Mutual contracts in writing do not require delivery (§ 23), but are completed by the subscription of all the parties.

Crawford, June 29. 1625; M. 12304. Lockhart, Dec. 23. 1709; M. 8430.

II. PARTICULAR CONTRACTS.

The main objects of contracts are, 1. the transferring and disposing of property,—by sale, or location, or loan, or deposit, or pledge: 2. the employment of manufacturers, and workmen whose labours are used in the common intercourse of life; or the engaging of professional aid in law, medicine, &c.: 3. the carrying trade of the country by land and sea: 4. the administering of affairs during absence, by means of factors or mandataries: 5. the insuring of property against perils by sea, fire, &c.: 6. the combination in partnership of the capital, skill, and industry of several in one common concern; or, finally, the circulating of money and credit by means of notes and bills negotiable. In considering these several contracts and forms of engagement, they may be reduced to these four classes: *First*, The Contract of Sale, by which goods and commodities are transferred. *Secondly*, Those Contracts in the course and existence of which the property of one is necessarily entrusted to the care or custody of another. *Thirdly*, Those in which personal credit is more immediately the object of convention; and, *Fourthly*, Those by which maritime concerns are carried on or made safe.

I. CONTRACT OF SALE.

3 Ersk. Pr. 3. § 2-4. 1 Stair, 14. 3 Ersk. by Ivory, 3. § 2-13. Brown on Sale. 2 Kent, Com. 468. 1 Bell, Com. 434. Pothier, Tr. du Cont. de Vente. 1 Domat, tit. 79. Code Civ. § 1582-3. 4 Van Leeuwin, c. 17.

85. The contract of sale is a mutual consensual contract, for the transference of property, in consideration of a price; the seller binding himself to deliver and transfer the thing; the buyer to pay the price.

86. Sale, as a *contract*, is contradistinguished from sale as a *transference*. The contract of sale, when completed, is, in the law of Scotland, nothing more than the *titulus transfe-*

rendi dominii, with obligations on either part to pay the price and to deliver the thing sold. No property passes till delivery; nothing but the *jus ad rem specificam* (§ 3). See below, § 1299, et seq. (a).

NOTE.—A distinction is to be observed between the language of the English law and that of the Scottish in this respect; for much confusion has arisen from this source, in running the analogy between the laws of the two countries (b). The English lawyers say, that, the contract of sale being completed, the property is passed (c): They do not, however, mean by this that the absolute property, the proprietary right or dominium, is thenceforward with the buyer; but only that a special property, *jus ad rem specificam*, has passed. There is still with the seller a right to retain the thing sold for the price. The English law in this respect is law in America (d); and by the Code Civil of France (e), the rule which formerly prevailed there, according to the principle of the civil law, has been abandoned, and the property held to pass with the completion of the contract. In Holland the property is not passed till delivery on credit, or payment of the price (f).

(a) 1 Stair, 14 § 2. 3 Ersk. 3. § 2.

(b) Brown on Sale; Introductory Discourse.

(c) 2 Blackst. 448.

(d) 2 Kent, Com. 498.

(e) Code Civ. No. 938; 1583. 6 Toullier, 213.

(f) 4 Van Leeuwin, c. 17. § 3. 4 Dig. lib. 18. t. 1. c. 19. Voet, lib. 6. t. 1. De rei vind. § 20.

87. The RISK of the thing sold is on the buyer, according to the maxim, *Periculum rei venditæ nondum traditæ est emptoris* (a); and this is strengthened if the goods be deposited, or placed (as on shipboard) at the buyer's desire (b). This in the law of Scotland, does not, as in England, proceed on the ground that the property is transferred; but, the engagement of the seller being to deliver the thing sold, and the right of the buyer being *ad rem specificam*, the obligation is discharged and the right extinguished by the thing perishing without fault. On the other hand, the engagement of the buyer is to pay the price, against which it is no answer that the thing has not been delivered, if it have perished (c) without fault of the seller. In order to transfer the risk to the buyer, the thing must be specifically appropriated as under the contract (d). See § 116, 117.

(a) 1 Stair, 14. § 1 and 7. 3 Ersk. 3. § 7. Brown on Sale, 2 et seq. 31. 355. 2 Black, 448. Voet, lib. 18. t. 6. § 1. Noodt ad Pand. 1. 18. t. 6.

Code Civile, art. 1138; 1 Pardessus, 282. Pothier, Oblig. No. 115; Vente, No. 56, 69. M'Donald, July 6. 1744; M. 10070; Elch. *Sale*, No. 5. Campbell, July 15. 1768; M. 10071. See Milne and Co. Feb. 1. 1809; F. C.

(b) M'Laren, June 25. 1777; 5 Brown's Sup. 506. Hall, June 3. 1823; 2 S. D. 358.

(c) M'Donald, Jan. 3. 1744; Elch. *Sale*, 5. Hinde v. Whitehouse, 7 East. 558. Phillimore v. Barry, 1 Camp. 513. Tarling v. Baxter, 6 Barn. and Cress. 360. Anderson v. Scott, 1 Camp. 235 note.

(d) Hinde, *supra* (c). Green v. Haythorn, 1 Starkie, 447. Hodgson v. Le Bret, 1 Camp. 233. Anderson v. Scott, 1 Camp. 235.

88. But the risk is continued on the seller, 1. where there is undue delay in making delivery without fault on the buyer's part (a); 2. where there is an express or implied undertaking of the risk by the seller; as, to deliver at a certain place (b); or, 3. where any thing remains to be done in completing, ascertaining, or identifying the thing to be delivered (c).

(a) 1 Stair, 14. § 7. 3 Ersk. 3. § 7. 4 Domat. 2. § 7. 1 Illus. 88.

(b) Pothier, Tr. des Oblig. No. 663; du Vente, No. 58. 1 Pardessus, *ut supra*. Spence, Jan. 25. 1687; M. 3153. Melville, Jan. 31. 1749; M. 10072. Milne and Co. Feb. 1. 1809; F. C. Rugg v. Minnett, 11 East. 210.

(c) 3 Ersk. 3. § 7. Hanson v. Meyer, 6 East. 614. Simmons v. Swift, 5 Barn. and Cress. 857. Pothier, Tr. du Vente, No. 309; Voet, lib. 18. t. 5. § 4.

89. I. CONSTITUTION OF THE CONTRACT. The contract of sale is complete, when the parties are agreed the one to pay a certain price, and the other to sell for that price a certain subject. There is then consensus in idem placitum et conventio. Written evidence of the consent is required in Scotland to complete the contract of sale of land, of copyright, of ships, and of goods bonded for duties in the warehouse of the importer. (See below, § 1330, 1360, 1378.) But the sale of goods and merchandize in general is effectually proved by evidence prout de jure; parole, written, or confession (a). When the bargain is made by the principals without writing, the evidence of two witnesses, or one corroborated by circumstances, is necessary; or the letters of the parties holograph, or signed by them, are good proof (§ 2289). Where a factor or broker makes the bargain, his authority must be proved. See § 219, 229. Where, as in England, and in great mercantile cities, brokers are employed, a *bought and sold note*, signed by him, completes the bargain.* Or, where he acts for both, the entry

* The bought and sold note is in this form:—'Sold for A B, to C D, 250 firkins butter, at 100s. Shipped in the month of July, and payable by bill at two months.'

of the sale in his book, accompanied by the notes sent to the parties, completes the contract in England (*b*) ; though there is not in Scotland any necessity, as by the practice of England, for a signed note to be entered in the broker's book (*c*). If in a sale by intervention of a broker, the buyer's name be not previously communicated by the broker, there is a power of rejection within a reasonable time, on disclosure of the name (*d*).

NOTE.—The proof of this contract in ENGLAND is regulated by the statute of frauds (29 Ch. II. c. 3. § 17), and a supplementary act (9 Geo. IV. c. 14) : The former requiring in sales for L.10 or upwards, either a note in writing, signed by the parties ; or something given in earnest to bind the bargain ; or part payment of the price ; or delivery and acceptance of part of the goods sold : The latter supplying a defect in the older statute by providing that the same rule shall apply to executory sales ; where the goods are to be delivered at some future period, or are not yet made, or provided, or ready for delivery. The very numerous cases which have arisen on these statutes, prevent any useful reference to them here. The most modern exposition of the doctrines sanctioned by the Courts may be found in Smith's Compendium of Mercantile Law, 292 et seq. ; and 1 Starkie on Evidence, 353, 868.

The United States of AMERICA have adopted the English statute of frauds, 2 Kent, Com. 493, et seq.

In FRANCE, the law of this contract is not very different from that of Scotland. Parole evidence is admitted, but with strong injunctions to jealousy and caution. Code de Com. No. 109 ; 9 Toullier, 367.

The law of HOLLAND seems most nearly to resemble that of Scotland, 4 Van Leeuwin, 17. § 7. and 5, 20. § 12, 14, 22.

(*a*) 4 Ersk. 2. § 20. 1 Illus. 88. Hamilton, Jan. 13. 1698. Gibb, July 526. 171. See also Carruthers, Nov. 13. 1812. 1 Illus. 176.

(*b*) Heyman v. Neale, 2 Camp. 337. Cumming v. Roebuck, Holt's Cases, 172.

(*c*) Grant v. Fletcher, 5 Barn. and Cress. 436.

(*d*) Hodgson v. Davies, 2 Camp. 530.

90. II. ESSENTIALS OF SALE. It is essential in sale that there shall be a determinate subject and a price. But it is not necessary that the subject should be identified, or the price a certain definite sum. In relation to the subject, sale may be of three several kinds,—1. of a certain specific thing clearly distinguished in description, or set apart for the buyer ; or, 2. of a determinate quantity, or number, or weight of a com-

modity, described generically—as cattle, or corn, or wine ; or, 3. of a commodity or thing to be prepared or provided for delivery at some future time,—as a ship to be built ; or provisions to be furnished for a voyage, or an hospital, or an army. This last is in England called an executory sale, though, properly speaking, there is combined with the contract of sale other contracts,—as *locatio operis*, mandate, &c.

91. *Subject or Thing sold.* 1. In proper sale a certain specific commodity capable of identification is sold ; and as soon as it is so, it lies for delivery to the buyer, at his risk. The property is passed in England ; in Scotland the *jus ad rem specificam*. (See above, § 87.) In the sale of a certain number, or quantity, or weight, of a commodity, described generically, until the stipulated quantity is separated from the mass, or weighed or measured off, neither the property in England, nor the specific right in Scotland, is passed, nor the risk laid on the buyer ; and yet the contract is obligatory, and will ground an action for fulfilment (*a*). In the executory sale, also, the same distinction and effect take place. If the thing to be furnished is specific, and capable of identification, as the very thing to be furnished, it will be at the buyer's risk ; if indefinite, the risk will remain with the seller.

2. If the sale be indefinite, as of a quantity of goods, no part of that species of goods in the dealer's warehouse being specifically the buyer's, a duty on such goods unsold will fall on the buyer (*b*). A mere *spes* may be sold, as the cast of a net, *jactus retis* ; a hope of succession ; the good-will of a trade or shop (*c*).

3. A commodity sold by measurement or weight, may be very different according to the standard used in different countries ; and either the standard or the place should be fixed (*d*).

4. All British contracts are ruled by the imperial standard ; the Winchester bushel, Scottish ell, and all other local and customary measures being abolished (*e*).

5. If the quantity be vaguely expressed (as *about* 300 quarters of corn), a disproportioned excess is not to be held as sold (*f*).

6. If an order be given for several articles, the buyer is entitled to consider it as one order, and to refuse to accept any one article unless the whole be sent (*g*).

(a) 3 Ersk. 3. § 3. Brown on Sale, 44. 1 Bell, Com. 447. Pothier, Vente, § 6, 7. 1 Illus. 89. Rugg v. Minett, 11 East, 210. Buck v. Davis, 2 M. & S. 397. Zagury v. Furnell, 2 Camp. 240. Wallace v. Bruds, 13 East, 322. White v. Willis, 1 Marsh. 2. Hanson v. Meyer. 6 East, 614. Simmons v. Swift, 5 Barn. & Cress. 857.

(b) Haig, May 25. 1805; House of Lords, May 17. 1813; 1 Dow, 255.

(c) 3 Ersk. 3. § 3. Pothier, Vente, No. 6. Aikenhead, July 6. 1630; M. 9491. Ragg, July 15. 1708; M. 9492.

(d) 1 Ill. 93. See Schmermans, June 25. 1833; 11 S. & D. 779.

(e) 5 Geo. IV. c. 74. § 15. 6 Geo. IV. c. 12; 5 and 6 Will. IV. c. 63. Watt, 10 Barn. and Cress. 446.

(f) Cross v. Eglin, 1831; 2 Barn. & Ald. 106.

(g) Champion v. Short, 1 Camp. 53. See also Baldy v. Parker, 2 Barn. & Cress. 37.

92. 2. *Price*. The rule is, No price, no sale. There may be donation, transference, engagement; but no sale, without a price stipulated (a); and,

1. The price must be certain; or referred to such standard or criterion as to fix it beyond question (b); as to the Sheriff-fiars fixing the price of grain (c); or the award of a third party (d); or even of one of the parties subject to the control of equity (e); or the market or current price at a particular time or place; and if no place or time be fixed, the price at the time and place of receiving the order or settling the bargain will be presumed (f). The price may by the bargain be made to vary according to events (g).

2. The price must not be illusory, for that is donation (h).

3. The price must be in money, or what passes as such, otherwise it is barter, not sale (i). Between these two contracts, however, there is no essential distinction (k).

If there be a material error as to the price it is no sale (l).

(a) 1 Stair, 10. § 13. and 9. § 14. 3 Ersk. 3. § 4. Pothier, Cont. de Vente, No. 18, 20.

(b) 2 Vinnius, lib. 3. c. 24. p. 613. Voet, lib. 18. tit. 1. § 23. 2 Noodt, p. 388. Pothier, Vente, No. 18. 1 Stair, 10. § 13; 9. § 13; 9. § 14; 14. § 1. 3. Ersk. 3. § 4. Earl of Selkirk, Jan. 17. 1778; M. 627. Hunter, June 9. 1831; 9 S. D. 703. See Treasurer of Aberdeen, Aug. 5. 1760; M. 4415. Earl of Montrose, March 13. 1639; M. 14155.

(c) Act of Sederunt, Dec. 21. 1723. Treasurer of Aberdeen, Feb. 29. 1728, supra.

(d) 1 Ersk. 14. § 1. Earl of Montrose, ut supra. Earl of Selkirk, Jan. 17. 1776; M. 627. 3 Inst. 24. § 1; 4 Cod. de Contr. Empt. 38. l. 15. Pothier, § 24. Comyn's Dig. tit. *Agreement*, a. 4.

(e) 1 Stair, 14. § 1. 3 Ersk. 3. § 4. Earl of Montrose, ut sup.

(f) Leslie, Jan. 27. 1714. 2 Black. 30. Hoadley v. McLean, 10. Bing. 487. Champion, Jan. 14. 1811; F. C.

(g) Smith, Dec. 12. 1735. Elch. v. Sale, No. 1.

(h) 1 Stair, 10. § 14. 3 Ersk. 3. § 4.

(i) 1 Stair, 14. § 1. Ersk. ut sup.

(k) 3 Ersk. 3. § 4. Brown on Sale, 151, objects to this, but he proceeds on a distinction peculiar to excambion of land. See below, § 893.

(l) Sword, July 8. 1771. See above, § 11.

93. III. CONDITIONS IN SALE. Conditions in sale are, 1. implied, from the nature of the contract, as part of the agreement, if not otherwise stipulated; 2. or express, introducing by stipulation some point of agreement not naturally arising from the sale.

94. 1. *Implied Condition.* The implied conditions may relate either to the quality and state of the goods; or to the mode and terms of payment of the price.

95. *Implied conditions as to quality of goods.* It is a condition implied, that the goods shall be fit for the purpose for which they are bought (*a*), and such as they are represented or taken to be, according to the fair understanding of the parties (*b*).

In applying this principle, two cases are to be distinguished;—one where the thing bought is produced to the buyer, and under his examination; the other where it is not seen or examined by the buyer.

(*a*) 1 Stair, 9. § 10, 11. 3 Ersk. 3. § 10. 1 Pardessus, 291.

(*b*) Ralston, July 9. 1808; *M. Sale*, App. 6. Baird, Dec. 14. 1765; M. 14240. Adamson, May 14. 1799; M. 14244. Dickson, Dec. 15. 1808; F. C. Fisher v. Samuda, 1 Camp. 193. Kerr and Sons, June 26. 1828; 6 S. D. 1029. Jones v. Bright, 5 Bing. 533. Okill v. Small, 1 Starkie, 108; Gray v. Cox, 4 Barn. and Cress. 108.

See Poulton v. Latimer, 9 Barn. and Cress. 259.

96. 1. Where the buyer has himself seen and examined the goods, the *general* rule (and it is so in England as well as in Scotland) is, Caveat emptor—the buyer's eye is his merchant; once approved, the subject is held unexceptionable, unless fraud shall be proved against the seller (*a*). But to this rule there are exceptions:

(1.) The rule does not apply if the commodity have not been seen; or an opportunity given to the buyer of satisfying himself; or if the seller knew of any material defect not obvious and concealed it; or if any misrepresentation have been made, or statement framed to mislead (*b*).

(*a*) 1 Stair, 9. § 11; and 10. § 14. Parkinson v. Lee. La Neuville v. Nourse. Blewett v. Osborne, § 97. Power v. Barham, 4 Adol. and Ellis, 473. Hill v. Gray, 1 Starkie, 435. Pilmore v. Hood, 5 Bing. N. C. 97.

(*b*) Stair, ut sup. Gardner v. Gray, 4 Camp. 144. Laing v. Fidgeon, 6 Taunt. 108. Duthie, Jan. 12. 1815; F. C.

97. 2. If the fault be latent, although the buyer should see the commodity, there is, by the law of Scotland, an implied warranty (*a*); the goods may, on discovery of the fault, be rejected; and if the article perish by such latent fault, the

buyer will be relieved from payment, or entitled to have back the price (*b*). See note below.

(*a*) 1 Stair, 10. § 14. Brown, June 16. 1741. Reid, July 2. 1824; 3 S. D. 201.

(*b*) Gilmer, Jan. 29. 1830; 8 S. D. 420.

NOTE.—The ENGLISH rule formerly was, that a sound price implies the warranty of sound goods; but this is now departed from, as too elusory; and in all defects, even latent, the buyer is held to be aware of the possibility of their existence, and to take the risk; unless either, 1. an express warranty is taken; or, 2. there is fraud on the part of the seller (*a*).

In AMERICA the same rules prevail, except in the States of South Carolina and Louisiana (*b*).

(*a*) Parkinson v. Lee, 1802; 2 East, 314. Neuville v. Nourse, 3 Camp. 351. Blewitt v. Osborne, 1 Starke, 384. Bagglehole, v. Walters, 3 Camp. 2. Gray v. Cox, 4 Barn. and Cress. 108. Poulton v. Latimer, 9 Barn. and Cress. 259.

(*b*) 2 Kent, Com. 478. Siexas v. Wood, 2 Caine's Rep. 48; and Swett v. Colgate, 20 Johnson's Rep. 196.

98. 2. When the goods are afterwards to be furnished or sent to the buyer, they may be rejected on implied warrantice. Either, 1. where they are not merchantable according to the denomination of the commodity (*a*); or, 2. where sold by sample, they do not, when sent in bulk, correspond with the sample (*b*).

In order to raise this implied warranty by sample, it is not sufficient that a part of the goods shall have been drawn and exhibited; unless it is expressly referred to in the bargain as such, and due precaution taken for identifying the sample (*c*). But although the sale be not properly by sample, a specimen produced to the buyer, as indicating the quality, may be referred to as evidence of deceit or error (*d*). See below, of Special Warranties, § 111.

(*a*) Gardner v. Gray, 4 Camp. 144. Laing v. Fidgeon, 6 Taunt. 108. Pye v. Finmore, 3 Camp. 462. Bridge v. Wain, 1 Starkie, 504. Watt, Feb. 6. 1829; 7 S. D. 372. Parker v. Palmer, 4 Barn. and Ald. 387.

(*b*) Hibbert v. Shoe, 1 Camp. 113. 1 Pardessus, 293.

(*c*) Meyer v. Everth, 1814; 4 Camp. 22.

(*d*) Meyer, *supra* (*c*).

99. In order to avail himself of warranty, the buyer must make his challenge instantly, or without unreasonable delay, otherwise he is liable for the full price (*a*). In judging of the time to be allowed, 1. Where the fault is known or manifest, if the challenge be not immediate, the legal inference is, that the buyer is satisfied (*a*). 2. Where the fault is not mani-

fest at first sight; but easily discoverable by such examination as a merchant skilled in the commodity naturally bestows in buying, he must immediately investigate and determine (*b*); and if he break bulk, or make use of the article, he is barred from objecting to it (*c*). 3. Sometimes there is a certain time allowed by custom for examination (*d*). 4. Immediate inspection is more especially required, when the commodity may alter by keeping (*e*). 5. When in an executory contract goods have been returned as disconform to order, proof of conformity is necessary to sustain action by the seller (*f*).

(*a*) 1 Stair, 10. § 15. 3 Ersk. 3. § 10. Paton, July 7. 1675; M. 14232. Brisbane, Nov. 28. 1684; M. 12328. Mitchell, Feb. 22, 1694; M. 14236. Murdoch, July 23. 1776; 5 Brown's Sup. 583. Gordon, Nov. 26. 1773. Ib. 585. Stevenson, June 28. 1808; M. Sale, App. 5. Bennock, Jan. 27. 1820; F. C. Cossar, June 8. 1826; 4 S. D. 685.

Fisher v. Samuda, 1 Camp. 193. Hopkins v. Appleby; Ib. 477. Groning v. Menham, 1 Starkie, 257. Parker v. Palmer, 4 Barn. and Ald. 387. See Rowe v. Osborn, 1 Starkie, 140.

(*b*) Yeats v. Pym, 1815; Holt's Cases, 95. See Street v. Blay, 1831; 2 Bar. and Ald. 456.

(*c*) Murdoch, July 23. 1776; 5 Brown's Sup. 583. Gordon, Nov. 26. 1773. Ib. 585. Jaffray, Dec. 7. 1824; 3 S. D. 375.

(*d*) Yeats, ut supra.

(*e*) Yeats v. Pym (*b*), and Stevenson (*a*).

(*f*) Haydon v. Hayward, 1 Camp. 180.

100. *Implied Conditions as to Payment of the price.* Where the sale is on credit, solvency is an implied condition; and if the buyer fail, or be vergens ad inopiam, the seller may refuse to proceed. See above, § 71 and 46.

101. The usage of trade is an implied condition in sale, as in every mercantile contract (*a*); and as such held to be incorporated in the agreement. So a sale, in simple terms, implies the usual credit given in that line of trade. But it is an exception to this rule, 1. that if the usage be local, and unknown to one of the parties, it has no effect; 2. that no custom will be admitted in contradiction of the express words of the contract (*b*).

(*a*) See Newman v. Cazalet; Park, 630. Robertson v. French; 4 East. 135. Sheriff, March 14. 1828; 7 S. D. 47. Stewart, Feb. 17. 1831; 9 S. D. 466. Dickson v. Sitwell, 4 Camp. 279. Hodgson v. Davies, 2 Camp. 530. Smith v. Wilson, 3 Barn. and Ald. 728. Woodhouse v. Swift, 7 Car. and P. 310.

(*b*) Yeatts v. Pym; Holt's Cases at N. P. 95.

102. 2. *Express or Special Conditions.* These are employed to introduce some point of agreement not naturally implied in the contract; or to alter what is so implied. They may either regulate the payment of the price; or arrange the delivery;

or suspend or dissolve the sale in particular events ; or give special warranties.

103. *Express Conditions as to Payment.*

1. The accustomed credit held to be incorporated in the contract by force of usage (§ 101), may by special agreement be rejected ; if so rejected tempestivé (*a*). An agreement to pay at six months, by a bill at two or three months, has been held credit at nine months (*b*). A special condition of “ ready money ” suspends the passing of the property even in a question with creditors (*c*).

(*a*) Arnot, May 12. 1825 ; 4 S. D. 4. Hodgson v. Davies, 1810 ; 2 Camp. 532.

(*b*) Helps v. Winterbottom, 1831 ; 2 Bar. and Ad. 431.

(*c*) See below, § 109.

104. 2. If it be stipulated that “ a bill shall be given for the price,” it is generally sufficient to send the bill without undue delay, reasonable time being taken to examine the goods ; but if stipulated “ to be sent in course,” that is an absolute condition.

Brodie, May 20. 1814 ; F. C.

105. 3. The stipulation of “ a bill,” imports the buyer’s own bill (*a*). But the seller may object to the credit, 1. if the sale be made by a broker for the seller ; provided the seller intimate his dissent as soon as he has an opportunity of inquiring into the buyer’s credit (*b*) ; or, 2. if there have been undue concealment ; or, 3. if there be a change on the condition of the buyer, between the time of the bargain and the time of tendering the bill. See § 100.

(*a*) Somerville, May 14. 1794 ; Bell’s Cases, 2.

(*b*) Hodgson v. Davies, 2 Camp. 532.

106. 4. The stipulation of “ a discountable bill,” imports a bill, in time and in credit, such as will produce money at the banks.

107. 5. The stipulation of “ an approved bill,” seems to import only a bill to which no reasonable objection can be made, and which *ought* to be approved ; otherwise every thing would be left to the caprice of the party.

Lord Ellenborough in Hodgson’s case, *supra*.

108. *Express Conditions as to Delivery.*

1. Where the goods are sold “ on arrival of (or “ by”) a

certain ship," it is a conditional sale, binding only if there shall be such arrival: And the object in construing all such stipulations is, to find the true and honest meaning of the contract, which is the business of the jury (*a*).

2. Where the delivery is to be "on arrival, not beyond a certain day," it is a condition, that the goods shall arrive in time for delivery on that day (*b*).

3. Where there is an entire contract for a quantity to be delivered within a certain time, and part is delivered, the buyer may return that part if the rest be not delivered; and as this privilege endures till expiration of the term, the seller cannot sooner demand payment. But if the term pass without return of the part delivered, the seller has action for the price of what is delivered (*c*).

(*a*) *Hawes v. Humble*, 2 Camp. 327, note. *Boyd v. Siffkin*, 2 Camp. 326. *Hayward v. Scougal*, 2 Camp. 56. *Thornton v. Simpson*, 2 Marsh. 267; 6 Taunt. 556.

(*b*) *Alwyn v. Prior*, 1 Ryan and Mudie, 406. *Cox v. Tod*, 7 D. R. 131.

(*c*) *Oxendale v. Wetherell*, 1829; 9 Barn. and Cress. 386.

109. *Suspensive Conditions*, if expressly stipulated, may delay the sale, and (even against creditors) bar the passing of the property, though delivered (*a*).

1. Sale and return. This is either on approval generally or within a certain time; in which case the sale is suspended (though the vendor may be bound) till the vendee have declared his option (*b*): Or an arrangement with retail dealers (as between publishers and booksellers), in which goods are sent to them on an agreement that those only are to be transferred which they can dispose of. In such contracts this is a legitimate condition suspensive (*c*). But such a case must always be viewed as subject to the law of reputed ownership. See below, § 1315.

2. Goods, or furniture, or other things, may be taken on hire, with an option to keep them as sold at a price (*d*).

(*a*) 1 Stair, 14, § 4, 5. Annot. on Stair, 80. 2 More, p. lxxxviii. 3 Ersk. 3. § 11; 1 Bell, Com. 237; Comyn's Dig. *Agreement*, A. 4. Pothier, Oblig. No. 198. Cowan, May 21. 1824; 3 S. D. 42. Macartney, Nov. 26. 1799; F. C. M. *Sale*, App. 1. Wight, Dec. 10. 1828; 7 S. D. 175. See Brodie, May 20. 1814; F. C. *Ellis v. Mortimer*, 1 N. R. 257.

(*b*) *Gibson v. Bray*, Holt, N. P. Cases, 556. *Graham*, Jan. 16. 1760; M. 14198. Marshal, Elchies, *Sale*, No. 6.

(*c*) More's Stair, vol. 1. p. lxxxviii; 1 Bell, Com. 269.

(*d*) Cowan, May 21. 1824; 7 S. D. 42.

110. *Dissolving conditions* have effect only against the party and his heirs, not against creditors.

Pothier, Oblig. No. 224. Contrast the sounder doctrine of Stair, 1 Stair, 14. § 5. with the more questionable doctrine of Erskine, 3 Ersk. 3. § 11. 1 Bell, Com. 239.

111. *Special Warranties*. These are given where the party, instead of trusting to the implied obligation, requires the condition to be expressly described and warranted. They become absolute qualifications of the contract; whether they relate to the mode of payment; or to the quality of the commodity; or to the time of delivery.

1. Every affirmation of quality made to the buyer as a ground of reliance is a warranty (*a*).

2. The eulogies which dealers are accustomed to make of their goods are not to be received as warranties. They are understood in the ordinary intercourse of trade as boastful recommendations which the buyer is to take or reject according to his prudence.

3. If the article be expressly purchased to answer a particular purpose, that is a warranty (*b*).

4. If the article be taken expressly "with all faults," that will not save the vendor from a warranty express or necessarily implied (*c*).

NOTE.—There is an important distinction between warranties in the contract of Insurance, and warranties in Sale. In the former, no question is admitted as to the *materiality* of any deviation from the warranty (see below, § 474–5.): in the latter, materiality seems to be essential to the plea of breach of warranty.

(*a*) Per Buller in *Pasley v. Freeman*, 3 Term. Rep. 59. *Button v. Corder*, 1817; 7 Taunt. 405. *Shepherd v. Kain*, 5 B. and Ald. 240.

(*b*) See the Cases above, and those under § 94.

(*c*) *Shepherd*, ut sup. See 3 Illus. 105.

112. 4. RECIPROCAL OBLIGATIONS OF THE PARTIES. The obligations of the one party form the *rights* of the other: rights and obligations being in all contracts counterparts.

113. 1. *Primary Obligation of the Seller*. The primary duty of the seller is to deliver the thing sold.

114. 1. The seller is bound to deliver the thing so as to complete the transfer; that being the great object of the contract to the buyer. And so there is an implied warranty, that the seller has a good title enabling him to sell. But possession of moveables presumes property; and, in the rapid inter-

course of trade, the buyer of goods is not allowed to stop the bargain on pretence of want of title, or on mere doubts as to the possibility of a challenge (*a*). But a claim of warrandice arises on eviction.

NOTE.—The rule is different in sales of land, where sound title alone gives right (*b*).

(*a*) 1 Stair, 14. § 1. Brown on Sale, 232. Dig. lib. 19. tit. 1. De Act. Empt. 1. 30. § 1. Domat, liv. 1. t. 2. § 2. Pothier, Cont. de Vente, No. 1.

(*b*) See below, § 889.

115. The delivery must be made at the time, and in the manner, stipulated in the contract; and if there be no stipulation as to time, the delivery must be immediately on the vendor's performing all the conditions stipulated; reasonable time being allowed to prepare for the delivery.

Cooper, May 20, 1791; M. 10100. See Morton v. Lamb, 7 Term. Rep. 125. Rawson v. Johnson, 1 East. 203.

116. Sometimes the goods are stipulated to remain with the seller till convenient for the buyer to remove them; in which case the seller is truly custodier for the buyer. The perishing of them without fault of the seller will discharge his obligation to deliver (see § 87), and the goods to certain effects are held delivered: But if they are allowed to remain till the term of payment has arrived, and the buyer fail, or his bill for the price be dishonoured, the seller may retain the goods.

New v. Swain, 1 Danson and Lloyd, 193. See Hurry v. Mangles, 1 Camp. 462. Harman v. Anderson, 2 Camp. 243. See Bayley in Bloxham v. Sanders, 4 Barn. and Cress. 948.

117. If a place be fixed at which delivery is to be made, the goods must be delivered at that place; and they are held as still the seller's till brought thither for delivery; the intermediate risk being with the seller. If no place be fixed, the delivery is to be where the goods are at the time of purchase (*a*). If the buyer be at a distance, the seller's duty and risk ends with delivery to the proper carrier (*b*). See § 119. It is sometimes a matter of doubt, what is the point or port of delivery; and on this it may depend by what rule the measurement or weight is to be adjusted. Thus a cargo of timber sold at so much per English cubic foot, is a very different bargain (in consequence of the difference of measurement) if to be measured at Rotterdam or at Aberdeen (*c*). The question will

depend on the terms of the order as understood by merchants, and it is for the jury to fix it on proof of mercantile usage and understanding.

(a) Pothier, *Cont. de Vente*, No. 52.

(b) Miln and Co. Feb. 1. 1809; F. C. Spence, Jan. 25. 1687; M. 3153.

(c) Schuurmans, June 25. 1833; 11 S. D.

118. If the goods are to be sent to a distance, and no directions given, the rule is, that they are to be delivered in the usual way (a): if any directions be given by the buyer as to the carriage, they must be followed as far as possible (b); and in that case the buyer must stand to the loss (c). At all events, the goods must be despatched with due care (d), so as, 1. to fix a demand on the carrier (e); 2. to secure safe carriage (f); 3. to enable the buyer to insure (g).

(a) Copeland and Lewis; 2 Starkie, 33.

(b) Hart, Jan. 24. 1749; M. 10095; Elch. *Presump.* 31.

(c) Vale v. Bayle; Cowp. 294.

(d) Sword, Feb. 17. 1813; F. C.

(e) Buckman v. Levi, 2 Camp. 414.

(f) Clark v. Hutchens, 14 East. 475. Cottray v. Tute, 3 Camp. 129.

(g) Hoog, July 24. 1754; M. 10097. Johnston, June 2. 1815; F. C. Hesseltines, Jan. 15. 1802; M. 10111. Hammond and Co. Dec. 13. 1808; F. C. Andrew, Dec. 6. 1810; F. C. Arnot, Nov. 25. 1813; F. C. Cooper, May 20. 1791; M. 10100. Cook v. Ludlow, 2 Term. Rep. 119.

119. If the goods are to be delivered free on board a foreign ship, it is sufficient if the seller put them on board such ship: he is not bound, when he has an adverse interest, to deliver them into the buyer's hand, nor to transfer them in the books of the warehouse where they lie.

Wackerbarth v. Mason; 3 Camp. 270. Wetherell v. Coope, Ib. 272.

120. On the seller failing to deliver, the buyer may, at his choice, annul the bargain, or insist for performance with damages.

121. 2. *Secondary Obligation of the Seller* is to warrant against eviction. This obligation on the seller is implied in Sale, and consequent on eviction. Eviction is the loss of a thing, in whole or in part, to the buyer, by the judicial establishment of a right in another, preferable to the seller's; or by such right being admitted by the seller; or by the emerging of an unquestionable burden on the subject purchased, which the buyer is compelled to discharge.

3 Ersk. 3. § 9. 1 Domat, t. 2. § 10. Pothier *Vente*, Nos. 83, 85.

122. The obligation of warrandice is implied or express.

1. Implied Warrandice is (1.) Absolute ; where a full price is paid, or what the parties consider as such. It is an engagement that the buyer shall be protected against eviction on any ground existing antecedently to the sale (a). To entitle the buyer to redress, the eviction must be *ex defectu juris*, not *ex natura rei*, nor proceeding from accident or violence (b). It must be a loss, strictly speaking, not subsequent to the sale, as by a supervenient law (c). Partial loss must be indemnified, and burdens removed (d).

(a) 2 Ersk. 3. § 25.

(b) *Ib.* § 29.

(c) Plenderleith, Jan. 31. 1800 ; M. 16639. Alexander, June 9. 1812 ; F. C. Earl of Hopetoun, Dec. 8. 1819 ; F. C. Hamilton, June 13. 1823 ; F. C. ; 2 S. D. 403.

(d) Pothier Vente, No. 99.

123. (2.) Warrandice from fact and deed is a more limited obligation ; viz. protection against eviction by reason of the seller's own act or omission, past or future.

124. (3.) Simple warrandice protects the buyer only against the future act and deed of the seller.

125. 2. *Express Warrandice*. This is a special bargain altering the implied engagement. And, (1.) The buyer is entitled to redress on eviction, provided he shall have given notice of the challenge : And he is not bound to defend himself (a). (2.) But the buyer is *entitled* to defend himself ; and if he choose to do so, he will be held to undertake the risk of all omissions in his defence, with the expense of the contest ; for it is only eviction that grounds an action of warrandice (b).

(a) 2 Stair, 3. § 46. 2 Ersk. 3. § 29, 32. Downie, Jan. 31. 1815.

(b) Inglis, Feb. 26. 1771 ; M. 16633.

126. The buyer, on eviction, may claim the whole loss and damage as at the time of eviction, deducting the intermediate profits drawn. But he is entitled only to such law expense as he may have bona fide laid out in defending himself, either with the assent of the seller, or without any offer on the seller's part to give instant indemnification, or to defend against eviction.

Hill, Dec. 18. 1769 ; M. 16631. 1 Hailes, 328.

NOTE.—These propositions are chiefly applicable to sales of land ; as to the warrandice of which, see below, § 893. See also as to warrandice in the sale of debts, § 1468.

127. 1. *Primary Obligation of the Buyer.* The chief obligation of the buyer is to *pay the price*, according to the terms express or implied; *i. e.* on delivery, or at the day appointed, or at the time when, by usage or the expiration of the accustomed credit, the price is due (*a*).

1. The payment must be by a legal tender if insisted on (*b*); or it may be in such notes as may have been received without objection, or which have been stipulated (*c*).

2. When instead of cash the buyer's note or a bank-cheque is taken in payment, and dishonoured, this does not discharge the buyer (*d*).

3. When bank-notes, or a bill or note of a third party, are offered and taken as cash, and without the indorsation or recourse on the buyer, the seller has no remedy, if they should prove bad by insolvency of the bank or third party; unless the buyer had known of the insolvency; or had omitted some observance necessary for procuring payment (*e*).

4. If the seller, on presenting the buyer's bank-cheque to the banker, agree to receive in payment a bill on a third person, the buyer is discharged although that bill should be dishonoured (*f*).

5. If the goods are to be paid for in ready money on delivery, delivery of them may be refused unless payment is so made; but if delivered without requiring payment, the buyer will be entitled to set off against a demand for the price a sum due to him by the seller (*g*). It is not, however, a waiver of the condition of ready money, if the buyer has been allowed to take away part of the goods without having paid for them (*h*).

6. If the seller negotiate by discounting the bill of the buyer, it is held to certain effects as payment; so that the seller cannot after that retain the goods: But this circumstance will not deprive him of his right to come against the buyer on the bill being dishonoured (*i*).

(*a*) See above, § 100, 106.

(*b*) See § 1334 et seq.

(*c*) See *Warwick v. Noakes*; *Peake's Cases*, 67.

(*d*) *Everet v. Collins*, 1810; 2 Camp. 515.

(*e*) *Camidge v. Allenby*, 6 Barn. and Cress. 373. *Read v. Hutchinson* 3 Camp. 352.

(*f*) *Smith v. Ferrand*, 7 Barn. and Cress. 19.

(*g*) *Cornforth v. Rivett*; 2 Maule and Sel. 510.

(h) *Payne v. Shadbolt*, 1 Camp. 427.

(i) *Horncastle v. Farran*, 3 Barn. and Ald. 497. *Bunney v. Pointz* 4 Barn. and Ald. 568.

128. *The secondary obligation of the buyer is to take delivery of the thing*, if in the condition stipulated or implied, at the time when the seller is bound to deliver it. And he will be liable in warehouse rent, or damages, if he shall refuse to do so.

NOTE.—Action has been refused in England on a contract of sale, where the seller had not the goods, or any hope of having them by consignment; but meant to go into the market to supply them. This may be doubted as a general proposition. If on such a bargain the commodity were procured and tendered, could it be refused?

See *Bryan v. Lewis*, 1 Ryan and Mudie, 386.

See below, as to the effect of sale when completed by delivery, § 1299 et seq. See also as to sales in market, § 665.

129. PECULIARITIES IN THE SALE OF HORSES. The common rules apply to the sale of horses: the peculiarities relate to the implied or special warranty.

1. The general rule that all latent faults are under the implied condition of soundness (§ 94.), while obvious faults only are excepted from it, applies in the sale of horses (a).

2. Where there is any express condition, it rules the question: while general and vague assurances are not to be held as express agreements altering the implied engagements. Warranty generally of soundness (whether implied as in Scotland, or express as in England) is an engagement of difficult construction.

3. Warranty of soundness seems to comprehend, *first*, all constitutional diseases affecting the life of the horse; *secondly*, all accidental injuries which affect the life; *thirdly*, all diseases and accidents attended with lameness, or rendering, or tending certainly to render, the horse prematurely unfit for work; *fourthly*, all defects or bad habits, indicative, or symptomatic, of disease,—it being the disease, however, which in such case amounts to unsoundness; *fifthly*, opinions differ extremely as to slighter faults, whether they amount to unsoundness; as temporary lameness (b). Bad corns, if concealed, have been held unsoundness (c); so running thrush (d); roaring, proceeding from organic defect; and crib-biting, when inveterate, have also been held unsoundness (e).

4. Those faults relative to temper, steadiness, timidity, use, &c. which, however important, are not unsoundness, must be guarded against by express warranty; and it is a question of evidence, whether such engagement has been undertaken, and how far it has been complied with (*f*).

5. A horse in which a defect has been discovered, comprehended under the seller's engagement, must be returned immediately, or as soon as the fault is discovered: Or if there be a time limited within which the horse, if objected to, is to be returned, that makes the rule between the parties (*g*).

(*a*) Ralston, June 16. 1761; M. 14238. Lindsay, 1771; 5 Brown's Sup. 585. Brown, June 16. and July 9. 1791; M. 14244.

(*b*) Ellon v. Jordan, 1 Starkie, 127. Garment v. Barrs, 2 Esp. Ca. 673.

(*c*) Hamilton, Feb. 24. 1830; 8 S. D. 596.

(*d*) Ralston, July 9. 1808; M. Sale, App. 6.

(*e*) Basset v. Collis, 2 Camp. 523. Deuchars, May 17. 1833; 11 S. 612.

(*f*) Geddes v. Pennington, in House of Lords, June 1817; 5 Dow, 159. Begbie, June 24. 1828; 6 S. D. 1014.

(*g*) Brown, Jan. 9. 1624; M. 14229. Ayton, Jan. 29. 1668; M. 14230. Kinnaird, July 5. 1694; 4 Brown's Sup. 184. Russel, June 12. 1792; Bell's Cases, 479. Bennock, Jan. 27. 1820; F. C.

130. 6. OF SALES BY AUCTION. These are either, 1. *Judicial*, as in the sale of lands (see § 2425); or in sales of goods pawned; or sequestrated, or poinded goods before the Sheriff (see § 209, 1245, 2372): or, 2. *voluntary*. The contract of sale by auction is formed by the offer to sell, and acceptance; the offer being by the bidding, the acceptance by the fall of the hammer (*a*), or by the running of a sand-glass; or by the judicial close of the biddings, by the judge or auctioneer declaring the last offer to be accepted.

It is the implied duty of the judge of the roup, or auctioneer, to give to offerers a fair opportunity of bidding (*b*).

(*a*) Payne v. Cave, 3 Term Rep. 148.

(*b*) Burns, Nov. 27. 1807; F. C.

131. The *exposure* may be at the pleasure of the bidders, or at an upset price; and must in either case be so conducted, that the subject may fall to the highest real bidder. Much doubt has arisen as to the lawfulness of biddings for the exposor. And,

1. The exposor may set a price below which the thing is not to be sold. This is best and most openly done by fixing an upset price, as is done by the judge in judicial sales; or in voluntary, on the owner's estimate of the worth of the thing.

2. After much doubt, it was at one time held as settled in England, that without fixing an upset price, the exposor might accomplish the same object by the defensive precaution of appointing one to bid for him in order to prevent the thing from being sold below a certain price; but that he could use no unfair means of enhancing the price; as by appointing more than one to bid for him, so as to give the appearance and excitement of a competition; or by allowing his bidder to go on for the purpose generally of taking advantage of the eagerness of competition (*a*). But that doctrine has again been thrown into doubt, and all private interference considered as a fraud (*b*). In Scotland, the cases condemn absolutely such interference, and do not adopt the rule of merely limiting the owner's interference to a fair defensive precaution for preventing a sale at an undervalue (*c*). The American rule is similar.

3. It has been said, that if there be no upset price, and no agreement to sell at the pleasure of the company, the owner may bid (*d*); but that is not law, or is at least too broadly laid down.

4. A power may be reserved to the exposor to offer, and by the Road Act such a power is given to the trustees (*e*). But if the sale is declared to be *without reserve*, or at the *pleasure of the company*, the plain meaning and effect of this even in England is held to be, to bar all biddings in behalf of the vendor (*f*).

5. It is implied in fair exposure, that the description shall not be deceitful (*g*).

6. The *biddings* among the real bidders must be fair, and the competition not defeated or restrained by combination or collusion among them (*h*).

(*a*) *Conolly v. Parsons*; 3 Ves. J. 625. *Bexwell v. Christie*, Cowp. 395. *Bramley v. Alt*, 3 Ves. J. 620. *Howard v. Castle*, 6 Term Rep. 642. *Smith v. Clarke*, 12 Ves. J. 477. *Hill v. Gray*, 1 Starkie, 434. *Sugden* on vendors and purchasers, 20. et seq.

(*b*) *Crowden v. Austin*, 2 Bing. 368. See also *Lord Tenterden*, in *Wheeler v. Collins*, 1 Mood. and Malk. 126.

(*c*) *Gray*, Aug. 7. 1753; M. 9560. *Creel*, Dec. 1810; *Anderson*, Dec. 16. 1814. The American law is similar, 2 Kent. Com. 539.

(*d*) *More*, Notes on Stair, xci.

(*e*) 4 Geo. IV. c. 95. § 53.

(*f*) *Meadows v. Tanner*, 5 Maddox, 34.

(*g*) *Hill v. Grey*, 1 Starkie, 434.

(*h*) *Murray*, March 1. 1783; M. 9567. *Aitchison*, Feb. 29. 1783; M. ib. *Smith's Case*, and *Bramley's*, *supra*.

132. Particular conditions are frequently introduced in articles of sale; and these are not to be controlled by any verbal declaration of the auctioneer (*a*); as, 1. That the exposor shall be allowed one or more biddings (*b*). 2. That each bidding shall exceed the preceding, in a certain sum. 3. That the time to be allowed for biddings shall be fixed by the expiration of a specified time; as the running of a sand-glass, &c. (*c*). 4. That other offerers besides the highest shall continue subject to the contract for a certain time, in case of the highest offerer failing. This precaution is taken in sales of land; the offers are subscribed; and the rule is, that the stipulation being for the exposor's benefit, the offerers have no jus quæsitum, or right to insist on the bargain, if the highest offerer should fail; but if called upon by the exposor, they have the full benefit as well as burden of the contract (*d*).

The pasting up of the conditions of sale on the auctioneer's box, or on the door or walls of the auction room, or the publication of them in printed catalogues to be had in the room, is sufficient notice of the conditions (*e*).

(*a*) *Horsfall v. Fauntleroy*, 10 B. C. 755.

(*b*) See cases *supra*, § 131 (*a*).

(*c*) *Burns*, Nov. 27. 1807; *M. Sale*, App. 4.

(*d*) *Walker*, Feb. 10. 1787; *M. 14173*. *Hannay*, July 15. 1788; *M. 14194*; 2 *Hailes*, 1046. *Creditors of Currie*, Dec. 13. 1791; *M. 3162*; *Bell's Cases*, 148.

(*e*) *Mesnard v. Aldridge*, 3 Esp. 271; *Lord Kenyon*.

II. CONTRACTS ACCOMPANIED BY CONFIDENTIAL POSSESSION.

These are contracts in which there is necessarily entrusted to one the custody, or use, or manufacture, of the property of another; called Bailment in the law of England and of America, but not distinguished in Scotland by any technical name.

I. *Contract of Hiring.*

3 *Ersk. Pr.* 3. § 6. 1 *Stair*, 15. 3 *Ersk.* 3. § 14. *Pothier*, Pand. xix. t. 2. § 1. *Ib.* *Cont. de Louage*. 1 *Domat*, tit. 4. *Jones on Bailments*. *Story*, *Com. on Bailments*, 247. 2 *Kent*, *Com.* 582.

133. By this contract, one party, in consideration of a certain hire, which the other engages to pay, agrees to give, during a certain time, or to a certain effect, the temporary use of a certain subject: or personal service and labour; or both combined.

NOTE.—It is a contract in some degree analogous to sale. It is a sale of the use or service ; necessarily distinguished from sale, 1. as being *temporary* instead of *permanent* : and, 2. as the *risk* does not shift, but remains with the Locator or Letter of the subject or of the labour.

134. The essentials of this contract are, 1. a subject let and hired ; 2. the hire or consideration to be given for it ; and, 3. the time or occasion during which the use, or occupation, or benefit, is to be given, or which is to be allowed for the performance of the work.

135. The reciprocal obligations are, 1. To deliver the thing for use ; or to perform the service ; 2. To pay the hire ; 3. To restore or deliver the thing hired, or about which the work is to be performed, after the time is expired or the occasion past.

136. This is a mutual consensual contract ; completed by consent, and proved, as in sale, by parole or written evidence (*a*) : In land by writing ; in moveables by parole ; but if reduced to writing the terms not alterable by parole evidence (*b*).

(*a*) Pothier, Louage, No. 2.

(*b*) Pollock, Dec. 12. 1828 ; 7 S. D. 189.

137. I. HIRING OF THINGS. The hiring of things is a reciprocal engagement to give and secure the use of the thing during a certain time or occasion, in consideration of a hire, which the other engages to pay.

NOTE.—It implies a thing to be used and returned. So things which are consumed by use are not the proper subjects of hiring. These are in the law of Scotland and of France called “ Fungibles,” *quarum natura est ut aliæ aliarum ejusdem generis rerum vice fungantur* : *Res quæ pondere, numero, et mensura, constant*. The consumption may be either natural and absolute, as of corn, wine, &c. or civil, in which the substance is not altered, but the uses of it destroyed, as of paper for writing. Fungibles *quæ pondere, numero, et mensura constant*, are to be restored not identically, but in kind, by measure, weight, or number.

3 Ersk. i. § 18. Pothier, Tr. du Pret. de Consumption, No. 22, et seq.

138. The SUBJECT may be certain and definite, as the hire of a particular horse or ship ; or it may to a certain extent be indeterminate, as in engaging freight with a shipping company, or in jobbing a carriage, or horses.

139. The USE may be, 1. according to stipulation ; or, 2. according to the implied use of the subject.

140. The HIRE must be either certain, or ascertainable by reference to a standard.

141. 1. *Obligations of the Lessor.* The obligations of the parties are analogous to those of sale.

1. The lessor is bound to furnish the subject fit and free for use. If a *definite* subject, he is discharged by the accidental perishing of it; this being also a discharge of the hire. A partial destruction by accident will entitle the lessee to an abatement of the hire, or to abandon the contract. 2. When the subject is *indefinite*, the obligation of the lessor is absolute to furnish the article, the destruction of any one not discharging the obligation. Insolvency is no defence to the lessor against an action for implement; but the demand resolves into damages, there being no *jus in re* to the lessee to be a ground of preference.

142. 2. The lessor is bound to warrant the use, and in so doing to protect the lessee in possession; to maintain the thing free from all faults or defects impeding the use, and in a state fit for the purpose stipulated; to indemnify the lessee for any loss occasioned by the want of a subject thus fit, or arising from any supervening incapacity not from inevitable accident; and to suffer abatement or loss of hire, if the subject by accident become wholly or partially useless. See afterwards relative to agricultural leases, § 1206, 1253.

3 Ersk. 3. § 15. Wilson, March 10. 1810; F. C.

143. 2. *Obligations of the Lessee.* The lessee is bound to pay the hire stipulated or customary; with deduction of an abatement for temporary or partial deprivation of the use by defect or fault of the letter.

3 Ersk. 3. 16. Pothier, Louage, No. 134. Story, 274.

144. He is bound to take only the stipulated use, or that which is implied, according to the bona fide agreement of the parties; and to indemnify the lessor for all excessive use assumed.

3 Ersk. 3. § 16. Pothier, Louage, No. 159. Story, Com. p. 272. Straiton, July 10. 1610; M. 3148. Moffat, June 29. 1624; M. 10073.

145. He is bound to bestow due care on the subject (*a*). (See below, of Responsibility for Neglect, § 231.) The hirer of animals is bound to provide them with food, or to pay for

the shoeing of horses let on time (*b*); and to restore them in proper condition (with the exception of fortuitous loss), when the time shall have expired, or the occasion shall be over. Where there is loss total or partial, the onus probandi is in Scotland (and in France) laid on the hirer in whose custody the thing was at the time (*c*). By the English and American law the onus probandi of negligence is laid on the owner (*d*)

(*a*) 3 Ersk. 3. § 15. Johnston, June 1687; M. 10080. Trotter, Feb. 28. 1688; M. 10080. Binny, July 16. 1679; M. 10079. Robertson, June 23. 1809; F. C. Marquis, June 11. 1823; 2 S. D. 386. Bray v. Mayne, 1 Gow, 1. Dean v. Keat, 3 Camp. 4. Garside v. Trent and Mersey Navig. Co. 4 Term Rep. 462, 581. Longman v. Gallini; Lord Kenyon, 1790. Cooper v. Barton, 3 Camp. 5.

(*b*) Handford v. Palmer, 2 Brod. and Bing. 359.

(*c*) Robertson, June 23. 1809. Marquis, June 11. 1823; 2 S. D. 386. Pothier, Louage, No. 199. See Code Civ. Art. 1732. et seq.

(*d*) Cooper v. Barton, 3 Camp. 5. note. Story on Bailments, 271.

146. II. HIRING OF LABOUR AND SERVICE. The contract of hiring of labour is an engagement, on the one part, to perform certain work, or to labour during a certain term, in consideration of a certain hire; on the other part, to pay that hire. It applies to common labour; to skilled labour; to care and custody; to carriage.

147. 1. HIRING OF COMMON LABOUR. This strictly is an engagement to do certain work on materials furnished to the workman; the material being *bailed*, or delivered, to the temporary possession of the workman to have the labour bestowed on it. Where the thing to be prepared of the materials to be furnished by the workman (as in the general case of manufactures), the contract partakes of sale. It is the executory sale of the English law.

Pothier, Louage, No. 394. Story on Bailments, 277.

148. 1. *The Lessor's Obligation* is, to do the work or labour stipulated or implied, and within the time appointed; with an implied warranty that these duties shall be well performed, otherwise the hire shall not be due, nor damages demandable.

149. Such contracts are frequently made on a specification and estimate; from which, in the course of the work, there may arise a deviation. In such cases two sets of questions may be raised. And,

1. If more be done than is bargained for, the employer is not bound to take it, unless the excess be slight or unavoida-

ble; or, if it must necessarily be taken, as incorporated with his own materials, he will not be liable for a greater hire of labour than he at first engaged to pay.

2. If he have acquiesced in the deviation, the quantum meruit, ascertained by measure or value, will be the rule; as in contracts for the building or repairing of houses (*a*).

3. If the work have been imperfectly or unskilfully done, 1. The employer is not bound to take it; and is entitled to damages, unless he shall have acquiesced; or, 2. If united with his materials, it seems not yet to be settled whether the employer shall have right to the subject without paying, or the workman shall be bound to indemnify (*b*).

NOTE.—In England, the employer seems to be held at law entitled to take what has been done amiss, without paying for it. This probably arises from the rules of English pleading.

(*a*) Peacock, Jan. 15. 1825; 3 S. D. 436. Duchess of Buccleugh, July 1. 1712; M. 4051. Scott, Dec. 11. 1827; 6 S. D. 233. Brown, June 19. 1832; 10 S. D. 667.

(*b*) Ellis v. Hamlen, 3 Taunt. 52. 1 Bell, Com. 455. 2 Kent, Com. 590. Story on Bailments, 287.

150. The degree of care requisite on the part of the workman is that implied in ordinary diligence. See below, § 231, of responsibility for neglect.

151. 2. *The Lessee's Obligation* is, to pay the hire, at the time, and in the way, stipulated or implied.

152. 3. *Risk*. In proper locatio operis, where the subject on which the work is to be bestowed belongs to the employer, the risk is with the employer—*Res perit domino*. And, 1. If the employment be general to labour, or on time, the hire is due as the work is done and added to the employer's materials; and it is not forfeited, or repayment demandable, if the thing should, without fault of the workman, perish with the work on it (*a*). Such is the case of repairs to a ship, which is burnt before being finished (*b*). As to printer's work burnt in the printing office usage has been held to alter the general rule (*c*). But, 2. If the workman be hired to accomplish some particular operation which he undertakes to do, and the whole perishes before he has completed his undertaking, the loss of his work would seem to fall on him (*d*); yet in those cases of executory contracts, where the price is paid periodically, and the subject appropriated to the employer, at the several payments, the whole would perish to the employer. See below,

§ 1303. 3. If the workman is to make an article of manufacture of materials to be found by himself, the risk is with the workman, and the unfinished work perishes to him. It is an incomplete executory sale (see above, § 88), and he cannot claim the price of his labour. 4. If the work be unskilfully performed, and such as the employer would not have been bound to receive if completed, the hire will not be due (e).

(a) Pothier, *Louage*, act 434.

(b) *Menetone v. Athawes*, 3 Burr. 1592.

(c) *Gillet v. Mawman*, 1 Taunt. 137.

(d) See *Gillet's case*, *Adlard v. Booth*, 7 Car. and P. 108.

(e) 1 Bank. 20. § 21. 1 Bell, Com. 456. Pothier, *Tr de Louage*, No. 433.

153. 2. HIRING OF SKILLED LABOUR. The engagement here is, to bestow attention, art, and skill, on the act to be performed: skill being presumed in all professional persons, according to the rule—*Spondet peritiam artis, et imperitia culpæ enumeratur*. The *selection* for superior skill is with the employer; but he is entitled to rely on ordinary *skill*.

The rate of hire is settled by the contract; or by the ordinary wages of such labour; or by the usage of the parties; or by quantum meruit (a).

The time is regulated in the same way by agreement, or by usage, as in the hiring of clerks and managers (b).

(a) *Stewart*, Feb. 2. 1831; 9 S. D. 382. *Sinclair*, Feb. 22. 1831; 9 S. D. 487.

(b) *Beeston*, 2 Car & Pay. 607; 4 Bing. 309. *Huttman*, ib. 510; 4 Car. & Pay, 208.

154. The rules of responsibility derived from the above principle are,—

1. That one not a professor of the art is liable only for the best exertion of his skill, such as it may be (a).

2. That, by a professional man, a specific act is to be done according to rule, if a rule be fixed (b). When the rule is obscure, professional usage may excuse error (c).

3. Where express directions are given to such a person, slight deviations, within the fair limits of professional discretion, are justifiable (d).

4. That if the object be safely attainable by a known method, the professional man takes the risk of deviation from that method (e). In general the criterion is reasonable care and skill (e).

5. That if the act be difficult, or complicated, want of success is not an absolute test of responsibility (e).

6. That the responsibility is only for actual damage; as in killing a lame horse; blundering an objectionable adjudication (*f*).

7. It is no defence to a messenger-at-arms, that he has not injured or betrayed the interest of his employers; or to an agent bungling an act in which adverse parties are concerned (as a loan), that he was employed by one of them (as by the granter of the bond):—He acts for both parties; and the person injured, or who is to receive the security, is he for whose behoof the law will interfere, and by whom the order is held to be given (*g*). See below, § 219.

8. When the hiring is on time with a salary, incapacity or negligence of the person employed will free the employer; but not if acquiesced in without complaint (*h*).

(*a*) Jones on Bailments. 1 Bell, Com. 456.

(*b*) 1 Illus. 125, and v. iii. p. 106, et seq. Aitkinson, Dec. 3. 1756; M. 13965. Chatto, Jan. 17. 1811; F. C. Kennedy, Dec. 13. 1821; F. C. Goldie, Jan. 4. 1757; M. 3527. Currie, June 17. 1823; 2 S. D. 407. Dougan, July 3. 1817; F. C. Lillie, Dec. 13. 1816; F. C. Struthers, Feb. 2. 1826; F. C.; and 4 S. D. 418; and in House of Lords, 2 W. S. App. Cases, 563. Mason, Feb. 4. 1787; M. 3535. Rowand, July 14. 1830; 5 S. D. 903; 6 Ib. 272. Affirmed, 4 W. S. 177. Frazer, Jan. 28. 1831; 9 S. D. 345. Sim, Dec. 2. 1831; 10 S. D. 85. Affirmed, Sh. Sup. Cases, 89. McLeod, Jan. 22. 1835; 13 S. D. 287. Haldane, March 3. 1836. Pentland, June 28. 1833. Frame and Co. June 9. 1836.

(*c*) Graham, Dec. 3. 1830; 9 S. D. 130. See also, McLean, Nov. 15. 1805.

(*d*) Burnet, Dec. 1771; M. 8491. Laing, Nov. 15. 1753. Elch. *Mandate*, 4.

(*e*) Lennox, Nov. 26. 1784; M. 14381. Grant, Jan. 1. 1791; Bell, Cas. 319. Shilcock v. Passman, 7 Car. and P. 289. Duncan v. Blundel, 3 Starkie, 6.

(*f*) McLean, Nov. 10. 1805. Murray, May 1828; F. C.

(*g*) Grant, July 8. 1758; M. 2081; affirmed in House of Lords. Struthers, ut supra. Wilson, June 28. 1826; 4 S. D. 732. Haldane, ut sup. (*h*).

(*h*) Frazer, Feb. 10. 1831; 9 S. D. 418.

155. 3. HIRING OF CARE AND CUSTODY. This is the contract which regulates the duties of depositaries for hire, wharfingers, warehousemen, livery stablers, and persons who keep depasturing fields for cattle. The engagement is for safe keeping: And this implies, 1. a secure place of custody; a warehouse water-tight, secure from attacks without, and fire within, and free from vermin or whatever is injurious to that kind of commodity;—a grazing field guarded against the escape of cattle, and free from pitfalls and dangers. 2. It implies the personal care of the lessor and his servants to prevent injuries incident to property in that situation (*a*). By express contract, or even by notice, these liabilities are alterable in extent of responsibility (*b*).

(a) Sir W. Jones, *Bailment*, 91-2. 1 Bell, Com. 458. Davidson, June 2. 1749; M. 10081. Hagart, March 16. 1832; 10 S. D. 506.

Leck v. Maestaer, 1 Camp. 138. Cailif, v. Danvers, Peake, 114. Clarke v. Earnshaw, 1 Gow, 30. Broadwater v. Blot, Holt's Cases, 547.

(b) Whitehead, Nov. 14. and 16. 1667; M. 10075. Birnie, Dec. 21. 1680; M. 10079. Maxwell, Feb. 20. 1684; M. 10079.

156. The commencement of a warehouseman's and of a wharfinger's responsibility is different. The warehouseman or the wharfinger when employed as such, is a mere custodier, and his responsibility begins with the arrival of the goods at the warehouse, and the act of custody; as by applying the crane of the warehouse (a). But a wharfinger has the duty of attending to the landing and receiving of the goods; and his responsibility will commence as soon as the goods are landed on the wharf, or put out of the hands of the carrier or porter for embarkation (b).

(a) Thomas v. Day, 4 Espin. No. 262.

(b) Cobban v. Dower, 5 Espin. 41. Leigh v. Smith, Ryan and Mood. 224.

157. 4. HIRING OF CARRIAGE. The carrying trade, now so important a branch of commercial intercourse, is either inland, by land or water; or sea-carriage. The former, together with the general principles of the contract, may here be considered: The peculiarities of sea-carriage will be discussed under Maritime Contracts. See below, § 407, et seq.

158. The contract of carriage may be viewed, 1. as relative to goods; 2. as relative to persons.

159. 1. *Inland Carriage of Goods*. *Locatio operis mercium vehundarum*. This contract is for safe carriage of commodities, and delivery of them in good condition, in consideration of a hire stipulated or implied.

The contract of carriage may be, 1. Express, depending on the terms of the agreement; or, 2. Implied, from the status of a common carrier, with goods fixed on him by receipt or parole proof, and which, by his office, he is as much bound to carry as if there were a special contract. He is bound to take the goods offered, and can justifiably refuse them only if dangerous from their nature, or from popular tumult; or if he does not profess to carry such goods; or has no convenient means of doing so; or if not brought in due time for packing.

Edwards v. Skerrat, 1 Maule and Sel. 604. Batson v. Donovan, 4 Barn. and Ald. 32.

160. The essential peculiarity in the contract with a *common carrier* is, that, holding himself out in a public character, he is under certain fixed responsibilities. A common carrier is one who, for hire, undertakes the carriage of goods for any of the public indiscriminately, from and to a certain place.

See *Riley v. Horne*, 5 Bing. 224.

161. To raise the liability, he must be legitimately charged with the goods.

162. A common carrier by land is so charged, by delivery of the goods to him, or to some one empowered to act for him (*a*). But, 1. it is not sufficient to lay them down in a common yard of an inn, where other carriers' goods are (*b*); nor, 2. to deliver them to the carrier's servants on the road, between the two points of his journey (*c*), unless the servants be sent round or commissioned to receive goods (*d*); nor, 3. to deliver a letter to the postman on the street (*e*); nor, 4. to deliver them in a state insecure and unfit for carriage; yet if the defect of security be manifest, and the carrier undertake the carriage notwithstanding, it is enough (*f*).

See below, as to Water-Carriage, § 412.

(*a*) 1 Bell, Com. 464. 3 Chitty, Com. Law, 380. *Williams v. Cranston*, 2 Starkie, 82. Bain, Dec. 4. 1824; 3 S. D. 362. Bain, Feb. 15. 1825; 3 S. D. 533. *Syme v. Chaplin*, 5 Ad. and Ellis, 634.

(*b*) *Selway v. Holloway*, 1 Lord Raymond, 46. *Buckman v. Levi*, 1813; 3 Camp. 414. *Clarke v. Hutchins*, 14. East. 475.

(*c*) *Howie and Co.*, Jan. 23. 1826; F. C.; 4 S. D. 752. *Buckman v. Levi*, supra (*b*). *Clayton v. Hunt*, 3 Camp. 27.

(*d*) *Clayton v. Hunt*, ut sup.

(*e*) *Hawkins v. Rutt*, Peake's Rep. 186; 1 Bell, Com. 464, foot note.

(*f*) *Stuart v. Crawley*, 2 Starkie, 323.

163. The obligations incumbent on a Carrier are either, 1. under his contract; or, 2. under certain rules of public policy.

164. 1. *Obligations of the Carrier by his Contract*. These are, that the vehicle shall be sufficient for safely carrying the goods; that they shall be properly packed and placed in the vehicle; that ordinary care, and the regular course of the journey, shall be observed in the transit; and that the goods shall be delivered according to the undertaking. In all these points the presumption is against the carrier where any damage is sustained; and the onus probandi is laid on him.

1 Illus. 135. 1 Bell, Com. 463. 3 Chitty, Com. Law, 37. *Langley v. Brown*, 1 Moore and Pay, 583. Lyon, June 22. 1838; 16 S. D. 1188.

165. The Vehicle in land-carriage, whether Cart, Waggon,

Wain, Van, or other Carriage or Coach used in transporting goods, must not only in itself, but in all accessories, as tackle, horses, drivers, &c., be sufficient (*a*); as in water-carriage, the Ship, Boat, Barge, &c. must be sea-worthy; not merely in itself, hull and rigging, tight, staunch, and strong for the voyage, but also properly manned and navigated; with the necessary stores, and documents for safety (*b*).

(*a*) *Robinson v. Dunmore*, 2 Bos. and Pull. 416. *Upshore v. Adie*, Comyn's Rep. 25. *Low v. Booth*, 13 Price, 329. *Houghan v. Rae*, Nov. 26. 1776; 5 Br. Sup. 2 Hailes, 725. See *Curtis v. Drinkwater*, 2 Barn. and Ad. 169.

(*b*) See cases of Ships below, § 408.

166. The goods must be skilfully packed, so as to undergo in safety the concussion of the journey (*a*); a question peculiarly fit for a jury (*b*). They must be so placed as to be safe from injury and depredation (*c*); and not in an overloaded vehicle (*d*).

(*a*) 1 Illus. 137. *Lawrie*, Nov. 7. 1677; M. 10107. *Countess of Glasgow*, Dec. 12. 1758; M. 10099. *Sprott*, June 15. 1803. *Jones and Co.* Feb. 12. 1830. *Crofts v. Waterhouse*, 3 Bing. 319.

(*b*) See *Lowe*, Sup. § 165 (*a*).

(*c*) *Curtis v. Drinkwater*, 2 Barn. and Ad. 169.

(*d*) *Israel v. Clark*, 4 Espin. 259.

167. The carriage must be performed with the care and skill necessary for safety; At land, by having careful and skilful drivers, and by due observance of the rules of carriage; at sea, by sailing according to the rules of good seamanship. See below, § 176, and § 235.

1. The presumption is against the carrier, where no extraordinary accident has caused the damage (*a*).

2. Care must be taken in the transit to prevent injury from concussion or explosion (*b*).

3. Care must be taken to cover and protect the goods from the weather (*c*).

4. Due vigilance must be exercised to prevent depredation (*d*).

(*a*) *Lamont's case*, supra. *Sprott*, Feb. 15, 1803; M. 10114. *Stein*, Feb. 2. 1811; F. C. *Jones and Co.* Feb. 12. 1830; S. D. 495. *Riley v. Horne*, 5 Bing. 224.

(*b*) *Sjordet v. Hall*, 4 Bing. 607. *Buller v. Fisher*, 3 Espin. 67.

(*c*) *Robinson v. Dunmore*, 2 Bos. and Pull. 416.

(*d*) *Batson v. Donovan*, 4 Barn. and Ald. 21.

168. The thing carried must be delivered according to the undertaking (*a*); either, 1. to the person indicated by the con-

tract, or according to the address, the carrier being liable for porters (*b*); or, 2. to one properly authorized to receive them (*c*); or, 3. to another carrier, in order to complete the transit, if, on that line of road, the latter part of the journey is performed by another (*d*); or, 4. to the consigner stopping in transitu (*d*).

A carrier may retain the goods for the price of their carriage, but not for a general balance or the hire of former carriages (*e*).

The carrier will be discharged of his obligation to deliver under the contract, if the goods have perished by inevitable accident; by internal defect, or some peculiar peril of the article carried (*f*); or even by the carrier's own act, if compelled by manifest necessity, as jettison in crossing a ferry to save life (*g*).

NOTE.—It is important, in all questions of responsibility of carriers, to recollect and distinguish between the responsibility under the contract and that which is imposed by the rules of subscriptions. See § 235.

(*a*) 1 Bell, Com. 464. 557. Story on Bailments, 345. et seq. Bishop, Feb. 19. 1830; 8 S. D. 558. Rae, Feb. 7. 1832; 10 S. D. 303. Catley v. Winttingham, Peake's Cases, 150. Golden v. Manning, 2 Blackst. Rep. 916. Gerald v. Donison, Holt's Cases, 346. Syeds v. Hay, 4 Term Rep. 260. Joliffe, ib. 248. Gibson v. Inglis, 4 Camp. 72. Sleatt v. Fagg, 5 Bar. and Ald. 342. Griffiths, 1 Car. and Pay. 638.

(*b*) Armstrong, Jan. 22. 1825; 3 S. D. 464. Hyde v. Trent and Mersey Navigation Co. 5 Term Rep. 389. See Edinburgh, Leith, and Hull Shipping Co. May 31. 1819; 2 Murr. 136. Golden v. Manning, 2 Blackst. 916.

(*c*) Denniston, Jan. 15. 1791; Bell's Cases, 260. Bain, May 16. 1821; F. C. and 1 S. D. 14. Edinburgh Shipping Co. sup. (*b*).

(*d*) See below, § 1307. et seq.

(*e*) Stevenson, Nov. 18. 1824; 3 S. D. 204.

(*f*) Arg. from Lawrence v. Aberdeen, 5 Barn. and Ald. 107. Gabay v. Lloyd, 3 Bar. and Cress. 793. Gosling v. Higgins, 1 Camp. 451.

(*g*) 2 Kent, 604. Story on Bailments, 367.

169. *Responsibilities under the rules of Public Policy.* These are different in principle and effect from those under the contract. As shipmasters, innkeepers, and stablers, have facilities for associating themselves, or their servants, with robbers, thieves, and pilferers of all descriptions, it has been deemed expedient to admit against them a legal presumption of negligence or collusion, and to allow of no excuse or justification for loss or injury to the goods entrusted to their care, without proof of inevitable accident. But as this is a part of the great doctrine of care or diligence prestatable, it is better to take the whole in one view. See below, § 235.

170. 2. *Carriage of Persons.* This contract differs from the contract for the carriage of goods, in so far as the protection of human life has required a stricter rule, both of sufficiency and of vigilance.

1. Carriers of this description are not at liberty to refuse a passenger, if room be left unengaged (*a*); and if a place be engaged, it must be made good to the passenger.

2. The coach must be strong and fit for the journey, road-worthy, as far as human foresight can provide (*b*), with steady horses and suitable harness (*c*).

3. There must be provided drivers of competent skill and steadiness; and for any failure in that respect the coach-master is liable (*d*).

4. The degree of care that is requisite exceeds in vigilance that of the ordinary contract of carriage. The safeguard to which, by the policy of the law, the lives and limbs of passengers are entrusted, is extreme vigilance and caution; enforced by penal statutes (*e*), and by a very strict civil responsibility: So, if the coachman is guilty of furious driving; if he allow an extra number of passengers; if he carry the reins so loose as not to keep the command of his team on any sudden interruption or alarm; if he do not give due notice to outside passengers in passing any obstacle, or under a gateway; if he permit collision with another carriage, by not observing the rules of the road; the coach proprietors are liable for the damage thence arising (*f*).

5. The rules of the Road which are thus to be observed are, 1. in *meeting* a carriage or horse, &c. to keep to the left hand;* 2. in *passing*, to keep to the right, the foremost bearing to the left; 3. in *crossing*, to bear to the left, and pass behind the other carriage (*g*). But these rules will not hold invariably in crowded streets or where the street or road is broad, and there is no fault chargeable on the coachman (*h*).

6. The coachman is bound to receive and take charge of the usual luggage allowed to a passenger (*i*).

(*a*) 3 Chitty, Com. Law, 370.

(*b*) *Christie v. Griggs*, 2 Camp. 79. *Anderson*, March 18. 1820; 2 Mur.

* The reverse is the rule in America. Story on Bailments, 377.

216. Lyon, June 22. 1835; 16 S. D. 1158. Sharp v. Gray, 9 Bing. 457. See § 408.

(c) Crofts v. Waterhouse, 3 Bing. 819.

(d) 1 Illus. 144 et seq.

(e) 50 Geo. III. c. 48. 3 Geo. IV. c. 85. 7 Geo. IV. c. 33. § 2. 9 Geo. IV. c. 49. 2 and 3 Will. IV. c. 120. 3 and 4 Will. IV. c. 47.

(f) Allan, July 10. 1819; 2 Murr. 158. Gun, Feb. 28. 1820; Ib. 194. Anderson, March 18. 1820; Ib. 261. Edinburgh and Glasgow Union Canal Co. March 15. 1832; 10 S. D. 505. Mayhew v. Boyce, 1 Starkie, 423. Jackson v. Tollett, 2 Starkie, 37. Dudley v. Smith, 1 Camp. 167. Israel v. Clark and Chuck, 4 Esp. 259. Curtis, 2 Barn. and Ald. 168. Jones v. Boyce, 1 Starkie, 493. Aston v. Heaven, 2 Esp. 533. Curtis v. Drinkwater, 2 Barn. and Ad. 169. *

(g) Wayde v. Carr, 2 Dow and Ry. 255.

(h) Wordsworth v. Willan, 4 Esp. 273.

(i) Per Chambre, J. 2 Bos. and Pull, 419. See Clark v. Gray, 4 Esp. 177.

171. 5. **HIRING OF SERVICES.** The hiring of services includes, 1. The hiring of domestic servants; and, 2. The hiring of workmen in a manufactory.

3 Ersk. Pr. 3. § 5. 3 Ersk. 3. § 14, 18. 1 Bell, Com. 362, 384.

See above as to Hiring of Clerks, § 153.

172. *Hiring of Domestic Servants.* This is a contract for the hire of services to be performed in the domestic economy of a house, garden, or farm, or in personal attendance.

173. 1. The contract may be either verbal or in writing (a).

(1.) If the engagement be for a year, or during the term which, by general or local usage, is fixed as the ordinary duration of the particular service, the contract may be proved by parole evidence, or oath of party; and, if unconditional, will effectually bind the parties (b). Commonly earnest is given as the test of engagement; but is not indispensable, unless where established by custom, when there is locus pœnitentiæ till it has been given. When given, the return of the earnest will not dissolve the engagement (c).

(2.) For a longer term a probative writing is required; till which there is locus pœnitentiæ as to the excess beyond the usual term, in absence of rei interventus; and oath of party will not supply the want of it (d). But,

(3.) From term to term the engagement is held to be renewed, in all its parts, by tacit relocation, without writing, where due interruption or warning is not given by either of the parties that the engagement is to terminate. See below, § 187 (d).

(a) 3 Ersk. 3. § 14. Tait's Justice of Peace, voce *Servant*.

(b) Forbes, Nov. 17. 1827; 6 S. D. 75.

(c) Caddel, June 3. 1749; M. 12416; Kilk. Elch. *Writ*, 2. § 4. Dale, Feb. 5. 1829; 7 S. D. 609. Paterson, June 17. 1830; 8 Ib. 431. See Countess of Dunmore, Dec. 15. 1830; 9 S. D. 190.

(d) Baird, Jan. 16. 1779; 5 Brown's Sup. 514; 2 Hailes, 889. Earl of Mansfield, June 21. 1831; 9 S. D. 780.

174. 2. The Term of Duration is different in different employments and places; and it is held, 1. That rural servants are engaged for a year (during the revolution of the seasons), work or no work (*a*). 2. That, generally speaking, domestic servants, in town or country, are engaged for six months (*b*); and that it is no alteration of this, although the engagement bear to be at the *rate* of so much a-year. 3. It has been said that in one case a governess was held to be engaged for a year (*c*); but this is not now held to be law. 4. That the engagement may be prolonged to any term (*d*). 5. That sometimes the engagement is indefinite; to be closed on the one part by a month's warning, on the other by payment or forfeiture of a month's wages (*e*). 6. That the engagement usually terminates only by warning. See below, § 187.

(a) Ersk. and Tait, *ut supra*. Finlayson, June 6. 1829 7 S. D. 717.

(b) Baird, *ut supra*.

(c) Wood, Nov. 14. 1804.

(d) Moffat, Feb. 8. 1839.

(e) Silvie, July 3. 1830; 8 S. D. 1010.

175. 3. The Essentials of the contract are, service on the one hand; hire or wages on the other.

176. The service is regulated, either, 1. By special contract or engagement; as the service of a butler, of a valet, of a groom, of a gardener, &c.; or, 2. By custom, general or local.

The rule as to service is, that the master is entitled to require the servant to perform all that fairly belongs to the line of service for which he is engaged: That slight deviations from such line of engagement, will not be held to justify a servant's disobedience of his master's orders: But that if such deviations, though slight, be often repeated, or if what is required be a manifest departure from the line of the servant's engagement, he will not be bound to obey: as when a servant is turned from rural to domestic service, or vice versa.

Fairie, July 1775; 2 Hutchison, J. of P. 166, note 3. Douglas, June 11. 1807.

177. The price of the labour to be performed by a domestic servant, is given in the hire or wages, accompanied in the ordinary case by board and lodging. Strictly speaking, a sum

allowed for board and lodging is not *wages*, though generally called *board-wages*. See below, § 186.

178. *Servant's Obligation.* The servant's express obligation is, to serve in the capacity, at the place, and for the time for which he engages (§ 176-7.), or to pay damages. A collateral and implied obligation is, to be faithful, honest, and observant of all the decencies of domestic life; to avoid insolence in his intercourse with his master and his family; to keep his master's hours; and not absent himself without leave.

Ersk. and Tait, *ut supra*. Lady Crawford, March 13. 1822; 1 Shaw's App. Cases, 124. Hamilton, Dec. 9. 1824; 3 S. D. 379. Silvie, July 3. 1830; 8 S. D. 1010. Matheson, June 4. 1832; 10 S. D. 825. See Callo, 4 Car. & Pay. 518. Stirling, Gordon, and Co. Dec. 6. 1832; 11 S. D. 180.

179. The stipulated time of service may be abridged, 1. by the death of the servant; in which case his representatives will be entitled to rateable wages for the time during which the service continued (*a*). 2. By inability from hurts received *in his master's service* (*b*), which will excuse the servant's non-performance, without forfeiting his wages. Sickness, or inevitable accident, though not incurred in the master's service, will excuse non-performance for a short time: But if the inability should continue long, and a substitute should be required, the master will be discharged from his counter obligation to pay wages.

(*a*) McLean, Feb. 4. 1813; F.C.

(*b*) White, Nov. 29. 1794; M. 10147.

180. Although there should be no stipulation as to change of place, a domestic or personal servant may be removed from town to country, or from country to town; and required to accompany the master's family or person; but, 1. not to leave Scotland: nor, 2. to go to a distant part of the country without an engagement for his return, and indemnification for time and expense (*a*). A servant engaged for *local* employment cannot be compelled to go to a distant part of the country (*b*).

(*a*) See Baird, Jan. 16. 1779; 5 Brown's Sup. 514; 2 Hailes, 839.

(*b*) Tait, J. of P. 348.

181. Enlisting in the King's service is, by the Mutiny Act, admitted not only to exempt the servant from damages for breach of contract, but to entitle him to wages during the

time of his actual service. But this exception is merely statutory, and against the rule of the common law.

No other voluntary engagement will excuse the servant: So, 1. marriage during the currency of the engagement, is no legitimate excuse for not fulfilling the obligation; and although a husband will be entitled to have the society of his wife, and to require her to leave her service, he will be liable in damages for her breach of contract; and, 2. imprisonment for debt will not excuse a servant's absence; the wages will be forfeited, and damages due.

182. Master's Obligations. The master must receive a domestic servant, and give bed and board during the time agreed on. And so, 1. he is not entitled prematurely to dismiss the servant, paying wages; but will be liable besides for board-wages and for damages: 2. the servant cannot lawfully be dismissed for a slight fault, but only for a serious breach of engagement, or for insolence.

Erskine and Tait, *ut supra*. Silvie, *supra*, § 179. Graham, Feb. 12. 1822; 1 S. D. 3. Batchelor, March 4. 1831; 9 S. D. 549.

183. The master has been held entitled to dismiss a servant on paying wages and board-wages (*a*), see above, § 182): But he is not entitled capriciously and without cause shewn, to compel the servant to reside out of the family while the service continues; the engagement (especially of a female) being on the faith of the protection of the master's house (*b*).

(*a*) Cooper, March 5. 1825; 3 S. D. 435.

(*b*) Graham, Feb. 12. 1832; F. C.; 1 S. D. 287. *Sed quære?*

184. The master must pay the wages stipulated or usual. This payment is (according to the usage) either half-yearly or yearly; the servant's claim prescribing in three years. See § 629.

Erskine, *ut supra*. Cooper, March 5. 1825; 3 S. D. 619.

185. If the master should become unable to perform his engagement, the servant has still right to his wages, as a creditor; under deduction of what he earns elsewhere during the time engaged for.

Puncheon, Nov. 17. 1790; M. 13990.

186. On the master's death wages to the next term are due, provided the servant is ready to perform his part; and not

only proper wages are due, but board-wages also, if the establishment of the deceased be broken up. Upon the master's executry the servant has a preference by privilege, for the term's wages; but not for board, which is not wages.

On the master's bankruptcy or insolvency, the servant has preferable claim over the other creditors, to the same extent as against the executry on death. See below, of Privileged Debts, § 1407.

187. Termination of Service. There must be warning on either part to put an end to the engagement (see above, § 273). This must be forty days before the term, unless by agreement or local usage a shorter time is sufficient (*a*). The proof of warning may raise questions: and, 1. it is not necessary that the warning shall be judicial as in the warning of tenants: 2. it is not warning that the master has been enquiring after another servant, or the servant after another place (*b*).

(*a*) Anderson, July 13. 1818; 1 Murr. 429.

(*b*) M'Lean, Feb. 4. 1813.

188. It has been sometimes held, that the master must, at the termination of the contract, give to the servant a character; but this is only a *moral*, not a *legal* obligation, and cannot be enforced. Although not bound to comply with the servant's demand for a character, he *may* give one, even unfavourable to the servant, and in so doing is privileged to speak: But if a bad character be given, and not truly, the master will be liable to the servant in damages.

Fell, Dec. 12. 1809; F. C. Raeburn, Feb. 1793. Carrol v. Bird, 3 Esp. 201. See Christian, July 6. 1818; 1 Murr. 427. Anderson, July 13. 1818; 1 Murr. 429, 439.

189. The engagement of a manager, cashier, or other servant in a bank must depend entirely on the contract—but the importance of having the absolute command over such persons and in such establishments, where many objections may occur which cannot be brought to any known or recognised breach of duty, is held to give a bias in the construction of such contracts favourable to the uncontrolled power of dismissal without reason assigned.

Pollock, June 12. 1829, House of Lords; 3 W. S. 430. Mitchell, June 26. 1836; 14 S. D. 358.

190. *Hiring of Workmen or Artisans.* The hiring of work-

men or artisans is a contract on time, or by piece-work, for labour to be performed in a manufactory along with other workmen. The contract on time is, like that of domestic service, verbal for a year or a shorter term ; but requires writing for a longer period.

Paterson, June 17. 1830 ; 8 S. D. 931. See Dale, Feb. 5. 1829 ; 7 S. D. 369.

191. 1. The obligation of the workman is, to perform his stipulated work with due subordination and regularity, and observance of the rules of the establishment, during the term agreed on. The Legislature has interposed to compel fulfilment of workmen's engagements, by empowering one or more justices of the peace, in certain descriptions of manufacture, on complaint upon oath, to apprehend, inquire, and, if necessary, imprison the workman not beyond three months to hard labour ; Or to abate his wages, 1. if he shall refuse to enter to his work ; or, 2. if he shall desert his service before expiration of the term ; or, 3. if he shall be guilty of any misconduct or misdemeanour respecting the service.

20 Geo. II. c. 19. 6 Geo. III. c. 25. 4 Geo. IV. c. 34.

192. 2. The obligation of the master is to pay the wages stipulated or implied (*a*), and in this he is placed under certain restraints as to the mode of payment—not by truck, but by money (*b*). He is bound also to give to the workman a full supply of work (if his wages depend on the price), during the term agreed on. And (as the counterpart of the restraints on the workmen), the Legislature has given them certain facilities for recovering payment of wages (*c*).

(*a*) Grieve, May 30. 1821 ; 1 S. D. 39.

(*b*) 12 Geo. I. c. 34. 1 Geo. IV. c. 93. Monteith and Co. Feb. 2. 1827 ; 5 S. D. 280.

(*c*) 4 Geo. IV. c. 34.

193. 3. Combination Laws. Masters and workmen have reciprocally great power over each other, by means of combination. Formerly, the combinations of the masters were the more powerful and oppressive, from their unity of counsels, their comparative wealth, and ability to wait for the effect of their plans, and from better information and greater prudence. More recently, workmen have learnt to organize their proceedings, to collect a common fund, and to proceed

by union of purpose, and too frequently by force. The great objects of the late statutes on this subject are, 1. to give perfect freedom to voluntary agreement; and, 2. to prevent all threats, intimidation, and violence.*

53 Geo. III. c. 40. Report of the House of Commons on Artisans, May 19, 1824, followed by 5 Geo. IV. c. 95. Report, June 1825, followed by 6 Geo. IV. c. 129.

III. CONTRACT OF LOAN.

1 Stair, 11. 3 Ersk. 1. § 18-25. 1 Bell, Com. 255. Pothier, Tr. de Prêt à l'Usage et de Consommation. Story on Bailments, 156. 2 Kent, Com. 573. Van Leeuwen, 397, 349.

194. Loan is a real contract, by which the owner of a thing gives, for the temporary accommodation of another, the use or services derivable from it. There are two kinds of loan;—one proper, where a thing is lent for use, under an obligation to restore the same thing to the owner; the other improper, in which the thing lent is transferred, on an obligation by the borrower to restore as much of the same kind, and of equal goodness. The former is *COMMULATE*, or *LOAN FOR USE*; the latter, *MUTUUM*, or *LOAN FOR CONSUMPTION*.

NOTE.—The distinction is of importance in bankruptcy, where, under the one contract, the lender, as *creditor dominii*, is entitled to have his property restored; under the other, he is a *personal creditor*, entitled only to a dividend. See above, § 3.

195. 1. *COMMULATE*. This (*quasi commodo datum*) is a real contract of loan, for a certain use, without hire, and on an engagement, express or implied, that the identical thing lent shall be restored to the owner.

The loan is either, 1. on time; or, 2. for a special occasion; or, 3. at will,—which is also called *PRECARIUM*.

3 Ersk. 1. § 20. Van Leeuwen, 349.

196. The Loan is not complete till the thing has been delivered. But the terms on which the delivery is to be made may be proved by parole evidence.

197. The borrower is bound, 1. to limit his use of the thing

* The Law of Apprenticeship is more properly connected with a view of the privileges which it is the object of Apprenticeship to confer. See below, § 2209.

lent to that which is expressed or implied in the loan (*a*), and any excess will make the borrower responsible for any loss or damage (*b*). 2. He must himself only, take the use, not communicate it to others (*c*). 3. He is bound to the most vigilant care (*d*), but is not liable for inevitable accidents occurring in the proper course of the use contemplated (*e*). 4. He is bound to restore the thing without faulty deterioration; and, according to the several kinds of the contract, either on the occasion being answered; or on the term having expired; or when the restoration is demanded: And if he fail, he will be liable for the damages consequent on his misconduct; or the lender may, in particular circumstances, be entitled to reject the thing, and insist for its value.

(*a*) Pothier, Prêt. à Us. No. 2021.

(*b*) *Cogs v. Bernard*, 2 S. D.; Raymond, 909.

(*c*) *Bringlor v. Morrice*, 2 Falk. 271.

(*d*) Pothier, ut sup. No. 48. See below, § 234.

(*e*) Jones on Bailment, 67. Story, 165. 2 Kent, 575.

198. The borrower is entitled to *retain* for the reimbursement of extraordinary expense laid out on the thing; but there is no lien for any extraneous cause.

199. The property remains with the owner. The risk also is with him, unless the borrower shall be in fault; and as the loan is gratuitous, the slightest fault will make him responsible. See above, § 197, below, § 232.

Authorities ut supra. Colville, Dec. 12. 1693; 1 Fount. 544. Buchanan, Feb. 19. 1696; 1 Fount. 712.

200. 2. MUTUUM (*quasi de meo tuum*) is a real contract, by which one gives and transfers a fungible to another without hire, for use by consumption, on an engagement to restore as much of the same thing at the stipulated term. The loan of money does not fully accord either with mutuum, if interest stipulated or implied be held as profit and not as mere restitution; or with Locatio Rei, which is not proper to fungibles (above § 137). But, setting aside the subtlety of the Roman law, the loan of money seems practically referable to mutuum.

NOTE—Steelbow is a species of mutuum. See below, § 1264.

1 Stair, 11. § 5. 3 Ersk. 1. § 18; Van Leeuwen, 337.

201. The obligation of the borrower confers only a personal right on the lender to demand the equivalent; *ex. gr.* if a com-

modity, to require an equal quantity of the same kind and quality, without regard to the difference of market value at the time. And so action will lie for the thing or its value, as at the time and place stipulated for restoration, or otherwise at the time when a legitimate demand for restitution of the thing lent may be made. If money be lent, the current coin or nominal value of the sum lent is to be restored, not the intrinsic value.

1 Stair, 11. § 5. 3 Ersk. 1. § 18.

202. There is no counter obligation on the lender. The property being transferred (§ 200), he is liable neither for risk nor expense.

Authorities ut supra.

IV. CONTRACT OF PLEDGE.

203. Pledge is a real contract, by which one places in the hands of his creditor a moveable subject, to remain with him in security of a debt or engagement, to be re-delivered on payment or satisfaction; and with an implied mandate, on failure to fulfil the engagement, to have the pledge sold by judicial authority.

NOTE.—See afterwards the doctrine of pledge as a real security, and the distinction between Pledge, Retention, and Hypothec. § 1364, 1385, and 1411.

3 Ersk. Pr. 1. § 13. 1 Stair, 13. § 11. 3 Ersk. 1. § 33. 1 Bell, Com. 258. 2 Bell, Com. 25. 3 Domat, 3. tit. 7. § 1. Pothier, Tr. du Cont. de Nantissement. Story on Bailment, 106. 2 Kent, 577. Van Leeuwen, 353.

204. Pledge is constituted by the delivery of the subject, on terms or conditions, proved either by writing or by witnesses. The right of the creditor is continued by possession.

205. The subject of pledge must be capable of delivery; such as corporeal moveables, goods, wares, and merchandize. Debts also may be pledged, when identified with the document as in bills and notes. And so may title-deeds, as corporeal moveables, but not as carrying any interest in the land.

Hog, May 18. 1820; 2 Bell, Com. 28. Innes, June 22. 1821; 1 S. B. 85.

206. The creditor's obligation is, to restore the subject of the pledge on payment of the debt; bestowing ordinary care in the custody of the subject while in his possession. And,

1. The right of property remains with the pledger, subject to the burden : 2. The risk is with him : 3. The creditor has no right of use during his possession : 4. The security expires with loss of possession.

207. By the Roman law, the contract included a mandate to sell. But with us (and also in France), the subject of the pledge cannot be sold without the order of a Judge, which is obtained on a summary application to the Shériff (*a*).

In England and America no judicial authority is necessary (*b*).

(*a*) 1 Stair, 13. § 11. 3 Ersk. 1. § 33. Code Civile, No. 2078.

(*b*) Pothonier v. Dawson, Holt's Cases, 383. 2 Kent, 582.

208. On the principles of Pledge are grounded, 1. the Montes Pietatis of the Continent ; 2. the system of the warehousing of goods for the duties, see below, § 1368 ; and, 3. the occasional relief granted to traders by Government in the way of loan on goods deposited.

209. PAWNBROKING is one species of pledge, affording a resource to poverty, and a ready means to traders and manufacturers of raising occasional supplies. In order to prevent fraud and oppression, it has been subjected to special regulations by the Legislature. The great lines of this restraining policy are, 1. That each pawnbroker shall take out an annual licence, and have his name, as pawnbroker, over his door. 2. That he shall not take pawns before or after certain hours of the day, nor from persons intoxicated, or under twelve years of age. 3. That he shall record a description of each article pawned, with a special note of the name and abode of the pawner, and deliver a duplicate of such note to the pawner, by which the article may be reclaimed. 4. That a certain rate of interest may be claimed, but the advance not to exceed L.10 on one article. 5. That the pawnbroker shall keep the article unsold for a year. 6. That in order to prevent depredations by workmen and apprentices, the pawnbroker shall be liable to certain penalties for taking in pawn unfinished goods. 7. That the pawns are forfeited at the end of the year, to the effect of entitling the pawnbroker to have them sold, unless notice be given for a further indulgence of three months. 8. That the sale must be public, after advertisement, if the sum advanced be above 10s., while certain goods must be sold by themselves.

9. That an account of the sale shall be entered in a book, if 10s. have been advanced on the pawn, and the surplus proceeds of the sale paid over to the pawner, if claimed within three years (*a*).

On this act it has been held a fraud, 1. to advance more than L.10 on one article, by dividing the sum into several tickets of L.10 each (*b*). 2. That the expiration of the year does not transfer the pawn; so that after the year the pawn, if unsold, may be redeemed (*c*). 3. That no provision is made for securing a public sale, or accounting for articles pledged for less than 10s. (*d*).

(*a*) 30 Geo. II. c. 24. 25 Geo. III. c. 48. 39 and 40 Geo. III. c. 99.

(*b*) *Ross v. Equitable Loan Company of Scotland*, Dec. 23. 1826; F. C.; 5 S. D. 192.

(*c*) *Walter v. Smith*, 5 Barn. and Ald. 439.

(*d*) *Henderson*, Jan. 18. 1834; 12 S. D. 313.

V. CONTRACT OF DEPOSITE.

210. Deposit is a real contract, in which a corporeal moveable is delivered by the owner (or depositor) for custody on his account; the depositary engaging without hire to keep it safely, and restore it on demand. If hire be stipulated, the contract is *Locatio Operis*. See above, § 156.

1 Stair, 13. § 1. 3 Ersk. 1. § 26. 1 Bell, Com. 257. Pothier, *Traité de Depot*.

211. Deposit is proper or improper: 1. proper, where a specific subject (or a fungible made specific) is placed in deposit, to be specifically returned; 2. improper, where fungibles not kept distinguishable are deposited for the return of an equal quantity; as money with a banker. In the former the property remains unchanged, the rule being, ‘*Rei depositæ proprietas apud deponentem manet sed et possessio.*’ In the latter the property is not preserved, but the depositor is a mere creditor.

Pothier, *Tr. de Depot*, No. 18. et seq., and No. 82.

212. *The obligation of the depositary* is to keep the thing with reasonable care, and not to use it unless with permission express or implied, nor to penetrate into or disclose any secret which may be included in the trust, as by breaking open a packet or box (*a*).

He is not liable for the contents of a packet, casket, &c. if restored precisely as he received it, and uninjured (*b*).

The thing deposited is subject to attachment by creditors of the depositor, and to retention for what the depositary may have expended on the subject, but not for any debt otherwise due.

There is a distinction to be observed between the simple deposit for *custody*, and for *safe keeping*. The latter implies a greater degree of care and vigilance, and may either be expressly enjoined, or implied from the very nature of the deposit, as in the case of jewels or plate sent to a banker's, while a family is in the country (*c*).

The risk is with the owner when the thing perishes without fault (*d*). But if the thing be not restored in due time, the depositary will be liable for damages or the value, with the benefit to the depositor of his oath in litem (*e*).

Joint depositaries are liable in solidum.

See below, § 232.

(*a*) Story on Bailments, 41. Rooth *v.* Wilson, 1 Barn. and Ald. 59. See Norvel, June 22. 1763; M. 12290. Logan, Feb. 27. 1823; 2 S. D. 253.

(*b*) Earl of Cassilis, March 18. 1626; M. 3452. 3 Ersk. 1. § 26.

(*c*) Coggs *v.* Bernard, 2 Lord Raymond, 909. Story on Bailments, 51.

(*d*) Douglas, July 1665; M. 8541.

(*e*) 1 Stair, 13. § 10. White, Dec. 4. 1661; M. 9233.

213. *The obligation of the depositor* is to reimburse the depositary of his necessary charges, and to receive back the deposit.

214. Sequestration is classed as a species of deposit; and is either voluntary or judicial: the subject being placed in the hands of a neutral party, to abide the issue of some controversy or reference on which the right depends.

3 Ersk. 1. § 30.

215. Consignation of money is deposit. The occasions are, 1. redemption of a wadset or pledge; 2. refusal of the creditor to take his money; 3. a sum in medio in a competition by multiplepounding; 4. a demand for money, suspended. The risk is with him who is in fault—or who consigns only a part—or in improper hands selected by himself. The consignatory must keep the sum consigned in safety till called for; and is not entitled to part with it; and as a counterpart is not liable for interest. But now consignation is made in banks, and bank interest is due.

1 Stair, 13. § 6. 3 Ersk. 1. § 31. Scott, July 28, 1665; M. 10118. Mowat, Feb. 15. 1673; *Ib.*

VI. CONTRACT OF MANDATE AND OF FACTORY.

1 Stair, 12. 3 Ersk. 3. § 31. Pothier Tr. du Cont. de Mandat. 1 Bell, Com. 476. Jones, Bailment, 52. Paley on Principal and Agent. Story on Bailments, 101. 2 Kent, 568. Van Leeuwen, b. iv. c. 26.

216. Mandate is a consensual contract, completed by acceptance of the mandate. The mandate and the acceptance may both be proved by parole evidence ; or by writing ; or by circumstances.

217. Mandate was in the Roman law, and is still in Scotland, a binding contract, by which one empowers another to manage any business for him without hire. But it has with us been almost superseded by agency or FACTORY, which is the employment of another for hire, to do business, as factor for the employer.

3 Ersk. 3. § 31. 3 McDonald, July 5. 1821 ; 1 S. 102. Paley, Principal and Agent, 117. Davidson v. Robertson, July 4. 1805. 3 Dow, 218. 2 Kent, Com. 613.

218. 1. *Gratuitous Mandate* is constituted by consent, and, 1. binds the mandatory who accepts to execute the order express or implied ; to account for his intromissions ; and to restore what is entrusted to him ; 2. empowers him to do all that is necessary to fulfil the order ; 3. entitles him to reimbursement of his advances or outlays, and relief from his engagements, but gives him no right to remuneration ; and, 4. leaving the property and risk of the things entrusted to him with the mandant, it entitles the mandant to revoke the mandate rebus integris.

NOTE.—The law of Scotland does not recognise a distinction, which seems to be admitted in England, between nonfeasance and malfeasance ; and which mainly proceeds on the ground that an engagement without consideration is a pactum nudum, which will not sustain an action. See above, § 64. See this peculiar doctrine of English law discussed in the authorities cited below.

3 Ersk. 3. § 35. 40. See Pothier, Mand. No. 38. Jones on Bailment, 93. 2 Kent. 569. Story on Bailment, 118.

219. 2. *Factory* or *Agency*. In this more useful relation, where the agent receives an adequate reward for his exertions, it is important to distinguish between general and special agency ; both as in relation to the parties themselves and to the public : The one raising a general credit ; the other requiring special powers.

1. *General Factor.* A factor for a merchant residing abroad, is held as his general agent ; and as such is responsible to the merchants here for the price of goods furnished to his principal on his order (*a*). In the same way, one who, acting as factor for a merchant, has been recognised by him in a train of dealings as his general representative, will, by his engagements for his principal within the scope of an agent's authority, bind him, although he may have received special instructions ; but still this power will be restrained and qualified by the character of power, as derived from many instances, and within the fair scope of those dealings (*b*).

2. *Limited Agents* are persons employed in a particular line,—as a riding agent, a collecting agent, a law agent. Their powers are similar to those of a factor, but limited to the particular line entrusted to them. And,

(1.) Brokers are limited agents, employed in the negotiation of contracts relative to property, not entrusted to their custody ; having power to bind their principals, in relation to the particular transaction, by the entry in their books, and the passing of “ Bought and sold notes” between the parties, reserving to the principal a power of objecting to the credit of the buyer. See § 105 (*c*). And this office of a broker, though sometimes confounded with that of factor, is carefully to be distinguished ; as he is in no shape empowered to bind the principal without particular mandate (*d*), or the possession of the goods (*e*).

(2.) Stockbrokers who buy and sell in the public funds, or in the funds of joint stock companies, are special agents. Provincial stockbrokers take orders for the purchase or sale of stocks in London or elsewhere ; they employ brokers of their own selection as correspondents to execute those orders for buying or selling at a distance which they transmit : they are directly liable for the correct execution of those orders, and cannot relieve themselves by shifting the responsibility to those whom they employ, and of whom their employers know nothing.

(3.) Shipbrokers employed in the buying and selling and freighting of ships, are special agents ; they adjust the terms of venditions, charter-parties, and bills of lading, and settle with passengers the room and terms of their passage.

(4.) Insurance-brokers are also special agents for effecting insurance, selecting proper underwriters, arranging the premium and terms of the policy, and keeping an account on the one hand with the assured, and on the other with the underwriters, debiting or crediting each with the premium, as middleman for settling the payment of it.

(5.) Supercargoes are special agents, but coming very near to the character of general factor; being presumed to be invested with full power over the cargo and its destination, and the investment of the proceeds for a return: being so accredited by the possession of the goods (*f*).

(6.) A Ship's-husband is a special agent to act with regard to a particular ship as ship-broker: to manage the outfit, and provide necessaries, and to settle the freight and charter-party. But he holds no general authority even to insure the ship. See below, § 449.

(7.) Procurator to draw or accept bills is a special agent, whose powers must be examined in order effectually to bind the principal. See below, § 321.

(8.) Wharfingers, though with possession of goods, are special agents; having no power beyond their particular business or special mandate (*g*).

(9.) A Traveller or Rider for a manufacturing or mercantile house is a limited agent. His powers are regulated by his appointment, but he has a tacit mandate, by custom, to receive payment for his principal, and to take orders for him, to the effect of binding him to performance (*h*).

(10.) A Law-agent is not a general but a limited agent. The adverse party is not entitled to rely on him as holding a general authority. 1. As between the agent and client, a mandate must be proved; by writing, correspondence, delivery of papers, signing of papers in an action conducted by the agent, revising or approving of the agent's papers or proceedings, or paying his accounts (*i*). But it is not enough that proceedings have been publicly carried on by the agent in the client's name (*k*), nor that one has given information to an agent relative to a suit, unless he has authorised him to act for him (*l*). 2. In relation to third parties, the agent may employ a sub-agent when necessary (*m*). 3. The powers of a law agent are those necessary or usual in that business or employment. A

power to recover payment of debt is held to confer a discretionary power in the use of diligence (*n*); but a messenger has no such power, nor is he entitled to receive payment (*o*). Neither agent nor counsel has with us, as in England, power to enter into a reference of the cause in which he is employed (*p*). 4. He is responsible for professional negligence or want of skill (see above, § 154), as in not using the due means for recovering a debt; not duly negotiating a bill; using a wrong stamp; not objecting to an insolvent cautioner in a suspension; taking a bad and informal security; laying an action on a wrong statute or section of a statute (*q*).

(*a*) Burgess, July 2. 1829; 7 S. D. 824.

(*b*) Fenn v. Harrison, 3 Term Rep. 757; Whitehead v. Tuckett, 15 East. 400.

(*c*) Hodson v. Davis, 2 Camp. 530.

(*d*) Baring v. Corrie, 2 Barn. and Ald. 137. See Dyster, ex parte, 2 Rose, Cases, 351. See Black and Company, June 22. 1820; 2 Shaw, Ap. Cases, 188. Whitehead v. Tuckett, 15 East. 400.

(*e*) Pickering v. Busk, 15 East. 38.

(*f*) Davidson v. Gwynne, 12 East. 396.

(*g*) Monk v. Whittenbury, 2 Barn. and Ad. 484.

(*h*) Milne, June 14. 1803; M. 8493. James, Wood and James, 3 S. D. 167; and in House of Lords, 2 Shaw's App. Cases, 219.

(*i*) Campbell, June 29. 1821; Murdoch, 2 W. S. 568; Miller, May 31. 1821; Young, May 28. 1823.

(*k*) Balfour, July 5. 1833.

(*l*) Scott, Dec. 8. 1831. Tod and Wright, Jan. 31. 1823.

(*m*) Kerr, May 3. 1816; 1 Mur. 69. Robertson, Dec. 19. 1823; 2 S. D. 599. M'Ara, Dec. 9. 1825; 4 S. D. 296. Gordon, June 19. 1826; Ib. 708. Megget, June 17. 1828; 6 S. D. 981. See Wallace, June 25. 1828; 6 S. D. 1018.

(*n*) M'Kenzie, Jan. 14. 1830.

(*o*) Sanderson and Campbell, May 17. 1833.

(*p*) Livingston, Feb. 23. 1830.

(*q*) Highgate, Feb. 12. 1823; 2 S. D. 204. Pentland, June 28. 1833. M'Farlan, June 26. 1834. Morison, June 2. 1826; 4 S. D. 656. Brown, May 21. 1829; 7 S. D. 626. Carruthers, June 6. 1829; Ib. 712. Clerk, Shaw's Sup. House of Lords, 89. M'Leod, Jan. 22. 1835. Haldane, March 3. 1836. Frame, June 9. 1836.

220. Obligations of the Factor. The agent must perform what he undertakes, or what the mandant or principal is entitled to rely upon as undertaken; otherwise he will be liable in damages.

But there is an *exception* to this, where by illness or inevitable accident the agent is prevented from performing the undertaking. See authorities cited in § 218.

221. He must act with the care and diligence of a man of ordinary prudence in the line of the employment.

222. He must account to the mandant or principal for his

administration, and pay over, restore, or give up to him, all that he may have received in his name, or as acting for him (*a*). But, acting with due precaution, he is not liable for the buyer's insolvency, unless on a *del credere* commission (*b*); as to which see below, § 286.

In accounting, or in paying money, the rules are, 1. That the agent must, in remitting money, follow any directions given by the principal, or take the risk of the remittance (*c*): 2. That he must, when no directions are given, remit through a chartered bank, or at least a banker reputed at the time to be in good credit; or follow the mercantile custom or local usage (*d*): 4. That if he pay into his own general account, he will be liable to the risk of the banker's failure (*e*): 5. That if he put his own name as drawer or indorser on the bill by which the money is sent, he will be liable as indorser (*f*).

(*a*) Ford, July 20. 1738; M. 4065. Chalmers, March 8. 1766; M. 8489; 1 Hailes, 8. Wilson, Jan. 27. 1786; M. 4066.

(*b*) Watson, July 2. 1822; 1 S. D. 536.

(*c*) Warwick *v.* Nokes, Peake, 67.

(*d*) Baines, Dec. 1. 1795; Bell's Cases, 223. M'Kenzie's Trustees, Dec. 12. 1822; F. C.; 2. S. D. 82. Knight *v.* Lord Plymouth, 3 Atkin, 480.

(*e*) Massey *v.* Banner, 1 Jac. and Walker, 241.

(*f*) Le Feuvre *v.* Lloyd, 1 Marsh. 318. See Lucas *v.* Groning, 2 Marsh. 460. Scott, Jan. 15. 1795; M. 10101; Bell's Cases, 138. Goupy *v.* Harden, 2 Morr. 254.

223. He must answer for delegates named by him, whether with or without permission: If named without permission, he must answer absolutely; if with permission, he will be safe, if in bona fide he believed the delegate to be competent and solvent.

Thomson and Duncan, July 16. 1754; 5 Brown's Sup. 276.

224. Obligations of the Mandant or Employer. The mandant is bound to fulfil the engagements undertaken by the mandatary within the limits of his powers; and so to relieve the mandatary.

Stewart, Nov. 10. 1813; 2 Dow, 29. Murray, Nov. 28. 1827; 6 S. D. 147. Thomson, May 20. 1823; 2 S. D. 320. M'Braire, March 23. 1826; 2 W. S. App. Cases, 66.

225. The rules observed as to the factor's power are,

1. That where the terms are express, the limits are absolute (*a*).

2. That his power and his duty be regulated by the or-

dinary acts and skill and knowledge of persons in that line (*b*); that where any power is necessary or reasonable to be exercised, in order to the accomplishment of the purpose, it is implied (*c*); and that a factor at a distance, and in difficult circumstances, will be discharged if he act with sound discretion (*d*).

3. That a factor has power to sell or even to pledge the goods of his principal for advances. See below, § 229.

4. That mercantile mandates are extended, restrained, or qualified, and, in general, are aided by the settled rules and usage of trade (*e*).

5. That in cases of partial execution it is necessary to distinguish, whether the mandate be indivisible, or such as may be executed effectually in parts.

6. That, under due observance of the distinction between general authority and limited powers, third parties are entitled to deal with a factor as principal; either in purchasing the goods in his hands; or in taking them in pledge; or in advancing money on a consignment of them. But,

7. No one is entitled to trust a limited agent beyond the strict limits of his employment, without calling for and perusing the authority by which his powers are extended. And no sub-factor or third party is entitled to rely on possession of goods given him by the agent, as raising a lien, or resulting right of retention, for a general balance (*f*). See below, § 229.

(*a*) York Building Co. Nov. 14. 1764; M. 4054. Alexander, July 8. 1687; M. 10085. Young, July 28. 1716; M. 10088. Drummond, Nov. 25. 1824; 3 S. 315. Halleby, June 23. 1830; 5 Murr. 325. Bridges, Nov. 22. 1831; 10 S. 43. Horsfall, *v.* Fauntleroy, 1830; 10 Barn. and Cress. 755.

(*b*) Chapman *v.* Walton, 10 Bing. 62.

(*c*) Gordon, Nov. 2. 1750; Elch. *Factor*, 9 Brown, Jan. 26. 1779; M. 5593. Molle, Dec. 13. 1811; F. C. Thomson, Feb. 20. 1823; 2 S. 320.

(*d*) Hay, June 4. 1675; M. 10083. O'Reilly, Hill, May, and Co. June 9. 1821; 1 S. 60. Pease and others, May 22. 1821; 1 S. D. 23. Auchie and Co. July 4. 1822; *Ib.* 538.

(*e*) Austen and Co. July 4. 1822; 1 S. D. 538; Shirreff, March 14. 1828; 4 Murr. 454. Stein's Assignees, Nov. 21. 1828; 7 S. D. 47. Shirreff, March 14. 1828; 4 Murr. 454 and 468.

(*f*) McCall and Co. May 18. 1824; 2 Shaw's App. Cases, 188. Johnson and Manly, Jan. 31. 1826; 4 S. D. 407.

226. The mandant is bound to reimburse the mandatary of his advances; to pay the stipulated or common hire; or in absence of stipulation or usage, the quantum meruit; and to repair any direct damage sustained by the mandatary in the performance of the mandate.

NOTE.—Trustees are strictly mandataries according to the principles of the gratuitous contract, and not entitled to recompense without express agreement. See below, of Trust, § 1991, et seq.

3 Ersk. 3. § 38. Duchess of Buccleugh, July 1. 1712; M. 4062. Smith, Feb. 8. 1715; Ib. Campbell, Dec. 6. 1752; 5 Brown's Sup. 802. Pitcairn, July 27. 1775; M. 3161. 2 Hailes, 650. Boyes, March 6. 1822; House of Lords, 1 Shaw's App. Cases, 121.

227. Risk. The risk of goods, &c. is with the mandant or principal, unless fault be established against the factor.

228. Recall of Mandate. The factory or mandate, as having relation to the public as well as to the parties, may be recalled: 1. by revocation as between the parties, if done tempestivé; though that may not be sufficient to affect third parties, unless accompanied by notice (*a*): 2. by death, which is revocation (*b*). But transactions begun previous to the death may go on, and those done in ignorance of the death are effectual (*c*): 3. by renunciation, if not made re infecta: 4. by appointment of a new factor or agent to do the same act: But, 5. the mandate seems to subsist notwithstanding supervening insanity (*d*).

(*a*) Borthwick, Dec. 1676; 3 Brown's Sup. 115.

(*b*) Lord Duffus, Feb. 2. 1628; M. 3166.

(*c*) Campbell, Dec. 7. 1826; 5 S. D. 86; 3 W. S. 384.

(*d*) Pollock, Dec. 10. 1811; F. C.

229. INSTITORIAL POWER is an implied mandate raised by acquiescence, or common usage, in several situations.

1. *Consignment*. It is a frequent arrangement in trade to consign goods to a likely market, getting perhaps an advance of money on them, or being allowed to draw bills on the faith of the consignment. A mandate is implied empowering the consignee to sell the goods at the price and time most expedient in his judgment (*a*); and if the consignee have made, or got, advances, on the goods, or accepted bills, his mandate to sell is held to subsist and to be assignable, till he is reimbursed or relieved (*b*). This rests on common law in Scotland; but in England a factor has such power only by act of parliament (*c*). A wharfinger has no such implied power. See above, § 219.

(*a*) O'Reilly, Hill, May, and Co. June 9. 1821; 1 S. D. 60. Ure and Miller, Jan. 31. 1818; 1 Bell, Com. 479.

(*b*) Broughton, Dec. 17. 1814; F. C. Gillies, June 10. 1828; 4 S. D. 939. See cases supra, § 224 (*e*).

(*c*) 4 Geo. IV. c. 83. as amended by 6 Geo. IV. c. 94.

230. 2. *Procuracion*. When acts of management have been recognised by the principal (as in the drawing and endorsing

of bills by a clerk, or in receipts by clerks for shop accounts), a mandate, authorizing the person whose acts are so recognised, is implied.

Davidson, House of Lords, July 4. 1815; 3 Dow, 218. Bayley on Bills, 226. Thomson, p. 318. See below, § 321-2. Murray, Feb. 28. 1827; 6 S. 147.

231. 3. *Institor and Exercitor*. When one places another at the head of an establishment, he is held to bind himself by the dealings of such substitute. Of this the following are examples:—

(1). *Præpositura*. A wife is *præposita negotiis domesticis*; or authorized to bind her husband in any trade, &c. which she superintends with his acquiescence. See below, § 1566 (a). And a similar authority is held to be given to the person placed at the head, or in management of the domestic establishment (b).

(2). *Exercitor*. One in the command of a ship has an implied power to bind his principal. See below, § 450 (c).

(3). *Institor*. The person who has the management of a shop has a presumed general authority to bind his principal by his proper acts of administration as shopkeeper (d).

(4). *Bank Agency*. Institorial power as applied to banks has raised many questions; with regard to which distinctions seem admissible between the managers and officers at the proper domicile of the bank, and agents or branch establishments at a distance. In the former case, the public is entitled to trust to the full unlimited institorial power, in dealing with any officer placed in the apparent trust of receiving money: in the latter, the agent or manager has certain general powers, but which are to be admitted with great caution, and rather to be taken as a limited agency, regulated by the terms of his appointment,—the principal being liable only for acts done by the agent in the proper character of agent (e).

See below, § 290.

(a) 1 Ersk. Pr. 6. § 15; Inst. § 20. Buchanan, June 17. 1828; 6 S. D. 986; but see Purves, June 13. 1628; M. 4049.

(b) Hamilton, Feb. 22. 1825; 3 S. D. 572.

(c) 1 Stair, 12. § 18. 3 Ersk. 3. § 43. Abbot on Ships, 97. 1 Bell, Com. 505. Lindsay, June 18. 1800; M. *Mandate*, App. 2.

(d) 1 Stair, 12. § 19. 3 Ersk. 3. § 46. 1 Bell, Com. 480. Bruce and Co. Dec. 10. 1765; M. 4056. Wilson, Dec. 17. 1675; M. 6021. Anderson v. Sanderson, 2 Starkie, 204.

(e) Paisley Bank, June 30. 1798; 1 Bell, Com. 480. Watson, May 15. 1806; M. *Mandate*, App. 3; and House of Lords, March 26. 1813; 1 Dow, 40. Normand, July 4. 1823; 2 S. 482.

VII. RESPONSIBILITY FOR NEGLECT, ACTUAL OR PRESUMED.

3 Ersk. Pr. 1. § 8. 3 Ersk. i. § 21. Sir W. Jones, *Bailments*. Pothier, Ap. to Tr. des Oblig. Story on Bailments, 9, et seq. Kent, v. ii. p. 559, et seq. 1 Bell, Com. 458. 6 Toullier, 239. Thomasius de usu practico doctrinæ de culparum prestatione in contractibus, tom. ii. p. 1006.

232. The general rule respecting Risk, in the contracts already explained (with the exception of Sale) is, “*Res perit domino.*” In sale, on the principles already explained (§ 87.), the risk is with the buyer; in location, with the lessor (§ 153.); in commodate, with the lender (§ 198.); in pledge, with the debtor (§ 204.); and in mandate (§ 225.), with the employer. But this doctrine of risk applies to the case of *accidental* loss only, not to that in which there is a *fault*, either actual or presumed. Where there is fault, the great rule is, that he by whose fault or neglect the loss has arisen, is liable for the consequences. The proper method of applying this practically is by the verdict of a jury: but lawyers (especially where jury trial has not prevailed) have endeavoured to frame a set of artificial rules for measuring due diligence and care. These attempts have reference to the several degrees of reliance, which, in the several contracts, it is necessary or convenient that parties should repose in each other’s diligence in the performance of their part. And the principles on which this depends resolve into the two doctrines of, 1. Diligence prestable in the ordinary course of contracts; and, 2. The peculiar responsibility of common carriers.

233. 1. DILIGENCE PRESTABLE. In order to settle a scale, by which to regulate the degree of care, or diligence, to be observed in the several contracts, and to which lawyers might in their reasonings refer, two extreme points have been fixed, with a middle point or average. The one extreme is the vigilance of a miser, or, at least, of a very prudent and careful man: The other, the prodigality of a spendthrift, amounting to folly in one’s own affairs, and approximating to fraud in the management of another man’s concerns: The middle point is the ordinary diligence of a man of ordinary prudence. Neglect of the middle or average care and attention is called *culpa levis*: The want of extreme vigilance is called *culpa levissima*: The want of that care, which even careless and prodigal persons observe in their own affairs, is called *culpa lata, dolo proxima*.

Story on Bailments, 8 to 31.

234. The general rules for applying the scale are these :—

1. That in contracts, beneficial only to the owner (as deposit, § 208, and gratuitous mandate, § 218), the possessor of the property is bound to good faith, and liable for culpa lata only. But this must, of course, be much regulated by circumstances, since what, in some cases and with some persons, may be held an innocent omission and no other than what was to be expected, will, in other circumstances and with other persons, be gross and faulty neglect (*a*).

This obligation to care may be enlarged, 1. by officiousness in undertaking the trust; or, 2. practically, where the public is entitled to rely on the skill of a professional or official person (*b*).

2. In contracts reciprocally beneficial, the care of a man of ordinary prudence is required, and culpa levis will ground responsibility;—as against the hirer in location; the creditor in pledge; the mandatary in factory; and the partners in society (*c*).

3. In contracts beneficial only to him who has the possession (as commodate), vigilance is required; and the possessor is liable for slight neglect, or culpa levissima (*d*).

4. The regular rule of responsibility is altered, 1. by fraud, which at all times grounds responsibility; 2. by forcible or faulty withholding of possession; and, 3. by public policy, in the cases included under the next section.

NOTE.—These general rules, though long established, are not very precise; and indeed, a priori, it is scarcely possible to fix a criterion or rule of care. The general direction in point of law already alluded to, § 231. with the verdict of a jury on the particular circumstances of each case, will best determine questions of this sort.

(*a*) Story, 41 to 97, and 123 to 137.

(*b*) *Shiells v. Blackburn*, 1 H. Blackst. 158. *Wilkinson v. Coverdale*, 1 Esp. 74. See Story, 131, and 119, 123. 2 Kent, Com. 539.

(*c*) Story, 222, 263, 281.

(*d*) Story, 163.

235. 2. RESPONSIBILITY OF COMMON CARRIERS, &c. The ordinary rule of responsibility under the obligations of the contract, is enlarged in certain cases supposed to be peculiarly exposed to the dangers of collusion and carelessness. The rule is, that common carriers, innkeepers, and stablers, are responsible

for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God, or of the King's enemies. This policy was established in Rome by the Prætor's edict. It has been adopted by most of the nations of modern Europe who have recognised the Roman law. In England it has been referred to the custom of the realm. The object is safety to employers on occasions in which the danger of collusion and fraudulent association is imminent: And, to this end, a presumption has been introduced, That fraud or negligence has occasioned the loss; to which the only admissible answer is evidence that the loss has proceeded from an act of God, or of the King's enemies.

Dig. lib. 4. tit. 9. Nautæ Caupones, Stabularii. 1 Domat, 16. § 1. 1 Stair, 13. § 3. 3 Ersk. 1. § 28. Jones, 103. et seq. Forward v. Pittard, 1 Term Rep. 27. Story, 303, 317. 2 Kent, 592, 598.

236. 1. Persons subject to the rule. All persons are subject to the rule, who, in the capacity of Carriers, Innkeepers, or Stablers, hold themselves out to the public generally as trustworthy in those employments, and undertake all its responsibilities for hire (*a*).

1. Public carriers by water, or masters and owners of merchant ships, employed in transporting goods generally for hire; smacks; passage-boats; canal-boats; steam-packets; barges; ferry-boats; lighters; are within this description (*b*).

2. Land carriers, waggoners, carriers, mail and stage-coach owners, canal and railway carriers, taking a price for carriage; carters and porters who offer themselves for hire to carry goods from one part of a city to another (*c*). Hackney coachmen are not within the rule, unless when employed as carriers, and paid for carriage (*d*).

3. Wharfingers have sometimes been said to be under the rule, almost in the character of carriers; but this does not seem to be settled. Wharfingers and warehousemen are on the same footing; and unless where (as sometimes happens) the wharfinger or warehouseman combines the character of carrier or lighterman, his liability seems to be only under the contract (*e*).

4. Innkeepers, vintners, and stablers, are liable for things placed under their charge, or that of their servants, or brought

by guests or employers within the house or premises (*f*). But to this there is an exception, 1. where the guest undertakes specially the care of his own effects (*g*); which will not, however, be inferred from merely locking up the articles for greater security (*h*): And, 2. where persons are not properly innkeepers, but letters of lodgings, they seem not to be within the rule: though the question is not settled (*i*).

5. In the great carrying establishment of the post-office, instead of the policy of this law, penal statutes have been enacted to enforce and secure vigilance in the officers employed (*k*). But although the Postmaster-general and the establishment are not liable, postmasters who carry on the details of this business are bound by all the liabilities of their contract (*l*).

(*a*) 3 Ersk. 1 § 20. with Ivory's notes. 1 Bell, Com. 466. Jones, Bailment, 106. Story, 322. 2 Kent, Com. 598. Morse *v.* Slue, 1 Vent. Rep. 190, 238.

(*b*) Ersk. Jones and Story, ut sup. 1 Illus. 154, 166. Bain, Feb. 15. 1825; 3 S. D. 533. Coggs *v.* Bernard. 2 Lord Raymond, 917. Hyde *v.* Trent Nav. Co. 5 Term Rep. 389.

(*c*) 1 Bell, Com. 467. Ewing, July 1687; M. 9235. Manners, Dec. 2. 1769; M. 9245. Jones, Bailm. 104-6. Middleton *v.* Fowlis, 1 Salkeld, 282. Forward *v.* Pittard, 2 Term Rep. 27. Clark *v.* Gray, 4 Esp. 177. 1 Selwyn, *Nisi prius*, 324. note. Harris *v.* Packwood, 3 Taunt. 264. Story, Bailment, 322. 2 Kent, 598.

(*d*) Upshore *v.* Aidee, Comyn's Rep. 25; 1 Selwyn, N. P. 323; Jeremy, Law of Carriers, 13.

(*e*) Ross *v.* Johnson, 5 Burr. 2825. 1 Bell, Com. 467, note 6. Story, 293. Sidaways *v.* Todd, 2 Starkie, 400. Garside *v.* Trent Nav. Co. 4 Term Rep. 581. Webb and Others, 8 Taunt. 443.

(*f*) 3 Ersk. 1. § 29. 1 Bell, Com. 469. White, Dec. 4. 1661; M. 9233; 2 Brown's Sup. 294. Master of Forbes, Feb. 17. 1687; M. 9233. Chisholm, Dec. 10. 1714; M. 9241; 4 Brown's Sup. 906. Hay, Feb. 13. 1801; M. Nautæ, &c. App. 1. Williamson, June 1. 1810; F. C. Meikle, Feb. 16. 1813; F. C. Hagart, March 16. 1832; 10 S. D. 506. Calye's Case, 8 Coke, 32. York *v.* Grindstone, 1 Salk. 388. Thomson *v.* Laing, 3 Barn. and Ald. 283. Bennet *v.* Miller, 5 Term Rep. 273.

(*g*) See Gooden, Jan. 19. 1700; M. 9237. Hay, June 24. 1704; M. 9238. Farnworth *v.* Packwood, 1 Starkie, 249. Burgess *v.* Clements, 4 Maul. and Sel. 306. Kent *v.* Shuckard, 1831; 2 Bar. and Ad. 803. Richmond *v.* Smith, 1828; 8 Barn. and Cress. 9. Jones *v.* Taylor, 1 Ad. and Ell. 522.

(*h*) 1 Stair, 13. § 3.

(*i*) May, Feb. 16. 1694; M. 9236. Leslie, July 19. 1700; 4 Brown's Sup. 494. Watling, June 10. 1825; 4 S. D. 83.

(*k*) 12 Ch. II. c. 35. 1 Vict. c. 32, 33, 34. Whitefield *v.* Dispenser. Cowp. 754. Farries against Elder, June 21. 1799; F. C.; M. 10103. Ivory's Erskine, p. 601. note.

(*l*) Story, Bailments, 302. 2 Kent, Com. 610.

237. 2. *Extent of Responsibility.* The rule is, that persons thus responsible must restore the thing in the same condition in which it was received, barring inevitable accident (*a*); and

that they will be liable for damage by total, or by temporary, loss (*b*).

(*a*) 1 Stair, 13. § 3. 3 Ersk. 1. § 28. 1 Bankt. p. 379. § 1. 1 Bell, Com. 470. Buller, N. P. 70. Sir W. Jones, Bailment, 104.

(*b*) Ogilvie, Crichton, and Walker, March 4. 1828; 6 S. D. 691.

238. Neither Robbery nor Theft is, in Scotland, held to be inevitable accident. The great object of the policy of the rule is to guard against the collusion to which employers are thus exposed, and the presumption is that co-operation, not mischance, has led to the loss (*a*). And yet in one case, where there was no room for suspicion, Robbery was held a good defence (*b*).

NOTE.—In England and in America the carrier or innkeeper is regarded as an insurer.

(*a*) 1 Bell, Com. 470, note 1. See cases of *Master of Forbes*, Chisholm, and *Gooden*, *supra*; and *Brouster*, *infra*.

(*b*) Watling, June 10. 1825; 4 S. D. 83.

239. Fire is, in Scotland, held an inevitable accident in the sense of the law, so as to free the carrier or innkeeper from responsibility, unless where fraud or collusion can be shewn (*a*). It is otherwise in England and in America (*b*).

(*a*) *McDonnel*, Dec. 15. 1809; F. C.; *Ivory's Ersk.* p. 600, note.

(*b*) *Forward v. Pittard*, 1 Term Rep. 27. *Hyde v. Trent and Mersey Navigation Co.* 5 Term Rep. 389.

240. Fraud and negligence of servants are no excuse: Servants are identified with their master, and the policy of the law is to protect against them, and all possibility of collusion (*a*). But the goods must be delivered to servants regularly, and so as to charge the master (*b*).

(*a*) 1 Stair, 13. § 3. *Garnet v. Willan*, 5 Barn. and Ald. 53.

(*b*) *Howey and Co.* June 23. 1826; F. C.; 4 S. D. 752.

241. Perils of the sea excuse only when unavoidable, as rocks, sand-banks, or collision by force of the winds. They furnish no defence if the ship or goods be exposed to danger by unskillfulness, or by deviation from the proper course of the voyage.

1 Bell, Com. 558. et seq. *Abbot*, 257. *Trent and Mersey Navig. Co. v. Wood*, *Abbot*, 257. *Buller v. Fisher*, 3 Esp. 67. *Smith v. Scott*, 4 Taunt. 126.

242. The value, which, in our old law, was ascertained by oath in litem alone, is now to be investigated by all fair sources of evidence.

1 Bell, Com. 471. Brouster, June 5. 1707; M. 9239. M'Ausland, Feb. 6. 1787; M. 9246. Williamson, June 21. 1816; F. C. But see Scott, May 16. 1827; 5 S. D. 669.

243. 3. *Limitation of Responsibility.* The responsibility established on principles of public policy only formerly limited by contract, is limited now by legislative enactment.

244. The responsibility for carriage was formerly limited by special contract, either express; or implied, from notice, and the requiring of an additional payment to compensate greater risk. This had, to a certain extent, been admitted as effectual, on the principle of implied assent, not of mere notice: in which respect the Scottish rule was more correct than the English. But the various and difficult questions which arose on the construction of notices, and on the evidence of their being communicated to the parties, led to legislative regulation (*a*).

The Legislature has limited the responsibility of *shipowners* in several respects, as to which, see below, § 435. The responsibility of mail-contractors, stage-coach proprietors, or other common carriers by land, is limited as to gold or silver coin, or gold or silver manufactured or unmanufactured, watches, clocks, trinkets, jewellery, bank notes, deeds, &c. whether delivered for carriage on hire, or accompanying passengers, when beyond the value of L.10; unless the description and value be declared, and an increased charge paid at the commencement of the carriage (*b*). In such cases, the carrier may charge an additional sum, according to a table to be affixed in his office, which shall be sufficient notice; he is bound to give a receipt if required. They cannot limit their responsibility for other articles by any notice; but special contracts are not affected by the act.

(*a*) 1 Bell, Com. 472. et seq. Whitehead, Nov. 16. 1667; M. 10074. Bain, Dec. 4. 1824; 3 S. D. 362. Chatto and Co. July 24. 1827; 4. Murr. 353. Moving v. Tod, 1 Starkie, 72. Leison v. Holt, 1 Starkie, 187. Clerk v. Gray, 4 Esp. 177. Cobden v. Bolton, 2 Camp. 108. Kerr v. Willan, 2 Starkie, 53. Davis v. Willan, 2 Starkie, 279. Munn v. Baker, ib. 255. Rowley v. Horne, 3 Bing. 2. Beck v. Evans, 16 East. 247. Wilson v. Freeman, 3 Camp. 527. Bodenham v. Bennet, 4 Price, 31. Clayton v. Hunt, 3 Camp. 27. Harris v. Packwood, 3 Taunt. 264. Marsh v. Horne, 5 Barn. and Cress. 322.

(*b*) 1 William IV. c. 68. See 1 Illus. 491. Bradley v. Waterhouse, 1 Moody and Mal. 154.

III. CONTRACTS RELATIVE TO CREDIT AND PECUNIARY TRANSACTIONS.

1. *Cautionary Obligations or Surety.*

1 Stair, 17. § 3. et seq. 3 Ersk. Pr. 3. § 21. 3 Ersk. 3. § 61. 1 Bell, Com. 347.

245. CAUTIONARY is an accessory obligation or engagement, as surety for another, that the principal obligant shall pay the debt or perform the act for which he has engaged, otherwise the cautioner shall fulfil the obligation or pay the debt. The design of the cautioner's interposition, however, is not to save the creditor from the necessity of demanding and enforcing payments from his debtor, but to insure him against loss, if these measures should fail to procure satisfaction. When the creditor wishes to lay on the cautioner the burden of execution against the debtor, he takes him bound as joint obligant (above, § 56); the effect of which is to deprive the cautioner of the benefit of discussion. See § 247, 252.

The cautioner's engagement implies, 1. that the cautioner is bound for the whole debt (*a*). 2. that the principal obligant shall be required to perform his engagement, before the surety shall be compellable to answer; § 252. 3. that satisfaction or extinction of the principal obligation shall discharge the cautioner: And, 4. that the cautioner, engaging at the request, or for the benefit, of the principal debtor, shall, if compelled to fulfil his engagement, have relief or indemnification against the principal.

(*a*) Grant, July 6. 1721; M. 14633. See above, § 52; below, § 257.

246. Cautionary is proper or improper. Proper, where the engagement is avowedly as cautioner: Improper, where both surety and principal are bound as principals; in which case the rights of a cautioner are renounced as to the creditor, but reserved as to the principal debtor.

3 Ersk. 3. § 61. in fin. Montgomery, June 18. 1713; M. 3586.

247. In the application of terms, *Adpromissor* is a surety in addition to the original obligant; *Expromissor* is a new debtor substituted in place of the original debtor, who is thereby discharged.

248. *Cautionary Obligations in General.* A cautionary ob-

ligation is commonly an engagement of friendship, and gratuitous; and in an old case it was held *pactum illicitum* for the cautioner to stipulate for a valuable consideration (*a*): But this would probably be otherwise determined now, since the principles of insurance have come to be better understood (*b*), and it is a daily practice to engage for the credit of others, on commission.

Cautionary obligations, correctly speaking, can be proved only by writing, duly executed according to the requisites of the statutes (§ 19. et seq.) (*c*); or recognised as a privileged writ (*d*).

NOTE.—By the law of England, the contract of surety is required to be in writing. The 4th section of the statute of frauds provides, that “no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c. of another person, unless the agreement on which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

(*a*) King, Jan. 24. 1711; M. 9461.

(*b*) See 1 Bell, Com. 376. 2 More’s Stair, lxxv. and below, § 282. *Ex parte Admy. Cowper*, 460.

(*c*) Auchinleck, Nov. 26. 1580; M. 12382. Deuchars, Jan. 19. 1672; M. 12386. Reid, Dec. 6. 1758; M. 12344. Crichton, July 21. 1772; 5 Brown’s Sup. 640; 1 Hailes, 483. Wallace, Nov. 25. 1782; M. 17056. Walker, Dec. 9. 1785. Edmonston, June 23. 1786; M. 17057; 2 Hailes, 992. Paterson, Jan. 1810; F. C.

(*d*) Angus, June 2. 1749; Elch. *Cautioner*, 18.

249. Exceptions are admitted to the above rule.

1. An improbative writing, or an oath on reference will establish the obligation, where the creditor has, with the knowledge of the cautioner, proceeded in reliance on his engagement, and *rei interventus* has taken place (*a*), (§ 26).

2. Although parole proof will not, otherwise than as above mentioned, be admitted to establish cautionary for future furnishings (*b*), yet where the cautioner’s engagement is an integral part of a contract competent to be proved by parole evidence, the same proof is admitted of the cautionary obligation (*c*).

3. A writing of which the subscription is acknowledged, is good evidence of cautionry (*d*).

(*a*) Brown, Nov. 28. 1794; Bell, 115. Sinclair, Jan. 15. 1795; Bell, 140. Hunter, Feb. 17. 1824; 2 S. D. 716. Grant, Feb. 8. 1827; F. C.; 5 S. D.

317. Campbell, June 4. 1752; Elch. *Cautionry*, 22. Brebner, Jan. 18. 1803; M. 17060. Robertson and Co. Dec. 11. 1821; 1 S. D. 204. Grant, Feb. 8. 1827; 5 S. D. 317. Taylor, June 10. 1836; 14 S. D. 945.

(b) M'Ewan, Feb. 13. 1816; F. C.

(c) Gibb, July 26. 1751; Elch. *Cautioner*, 19. Carruthers, Nov. 13. 1812; F. C. Rhind, Feb. 20. 1816; F. C. Bell, Nov. 13. 1812. See M'Ewan, *ut supra*.

(d) See Brown's Com. in Bell's fol. Cases, 115. Sinclair, Feb. 3. 1795. 3 Illus. 72.

250. A cautionary obligation offered conditionally is effectual only on compliance with the condition—as an offer to be cautioner for a composition to be paid to creditors in which the consent of all concerned is an implied condition (a). So an obligation to be signed by several is not binding on those who sign first, unless all have signed; but if the signature of the others be not expressly or manifestly a condition, and a bank or creditor has been induced to rely on the names of those who have already subscribed, they will be bound (b).

(a) Calerugh Cotton Co. Nov. 21. 1823; 2 S. D. 513.

(b) Blair, July 1. 1836; 14 S. D. 1069.

251. *Nature, Extent, and Construction of Cautionary Obligations.* Cautionry as an accessory obligation, 1. may be less extensive than the principal obligation; as for a part only: 2. it cannot be more extensive, though it may be more strict (a); 3. there must be a subsisting obligation against the principal, though not necessarily such as lawyers call perfect; a natural obligation, though it will not sustain action against the principal, may be made good against the cautioner (b): 4. the cautioner is entitled in all other respects to plead every defence which the principal debtor has against the demand (c): 5. the extinction of the principal discharges the accessory engagement (d): 6. cautionary obligations are very strictly interpreted, though not so literally as to evade the true and fair construction of the engagement. See below, § 285 (e). 7. There must, at entering into the engagement, be perfect fairness of representation, so far as the creditor is concerned, otherwise the cautioner will be free (f). 8. Where any precautionary stipulations are made, or plainly implied, they must be strictly observed, otherwise the cautioner will be free (g).

(a) 3 Ersk. 3. § 64–5. Pothier, des Oblig. No. 368–377. Lady Charteris, June 14. 1649; 1 Brown's Sup. 387. Ewing, Feb. 25. 1681; 3 Brown's Sup. 398. See Booth, May 16. 1823; 2 S. D. 211

(b) 3 Ersk. 3. § 64. Crichton, Dec. 1612; M. 2074. Hepburn, Feb. 2.

1700; M. 2076. Shaw, Nov. 28. 1623; M. 2874. Taylor, Feb. 11. 1748 M. 16813.

(c) Johnston, July 8. 1680; M. 2076. Nimmo, Feb. 2. 1700; M. 2076. Innes, Feb. 8. 1728; M. 2079. Crichton, *supra* (b). Halyburton, July 12. 1735; M. 2073. Herdman, Dec. 9. 1699; M. 2078.

(d) Doull, Dec. 19. 1695; M. 2077. Low, May 22. 1812; 2 More, Stair, p. cxi.

(e) Dick, Nov. 30. 1697; M. 2090. Hamilton, June 18. 1706; M. 2091. Forbes, Dec. 9. 1735; Elch. *Caut.* 4. also 14 and 15. Glasgow University, Nov. 18. 1790; Bell's Cases, 134. Houston, March 4. 1820; F. C. Coult's Case, questionable, July 12. 1749; M. 17040; Elch. *Cautioner*, 18; Kilk. 63. Forbes, June 10. 1829; 7 S. D. 732. Walker, May 18. 1821; 1 S. D. 21. Cochrane and Co. June 22. 1821; Ib. 82. Fraser, June 25. 1822; 1 S. D. 524. Sime, Jan. 13. 1834; 2 S. D. 516.

(f) Smith, Jan. 14. 1829; 7 S. D. 244. Fishmongers Co.; 1 Dow, 294. *Pidcock v. Bishop*, 3 Barn. and Cress. 605. Stein's Assignees, Feb. 12. 1833; 11 S. D. 373.

(g) Dick, Hamilton, and Forbes, *ut supra* (e).

252. The benefit of Discussion (*beneficium ordinis*) is a co-llary to the accessory nature of the engagement (§ 246), the cautioner being entitled to insist, 1. that the creditor shall first call upon and (in law language) *discuss* the principal debtor; if the cautioner have not expressly or virtually dispensed with this right; and, 2. that he shall give the cautioner all the benefit and relief derived from the principal debtor's estate.

1 Stair, 17. § 5. 3 Ersk. 3. § 61. Smith, July 8. 1626; 1 Brown's Sup. 34. Ritchie, July 30. 1629 Ib. 308. Crosbie, Nov. 20. 1627; 1 Brown's Sup. 238.

253. Discussion has been held to import not merely a *demand* of payment, but enforcement of it, by registered denunciation of the principal, and warrant to imprison, though actual imprisonment is not required; by pointing, or arrestment and forthcoming, of his moveables; or by adjudication of his heritable estate (a.) But there is a tendency to relax this rule; and, 1. it is a sufficient answer to a demand for discussion, that the principal debtor is out of the kingdom, and has no estate or effects in it (b); or, 2. that he is bankrupt, and his estate sequestrated (c); or, 3. that the cautionary obligation is judicial, as in a suspension, or advocacion, or for loosing of arrestment (d); or, 4. that the cautioner is bound in a bill as cautioner (e); or, 5. that he is bound as co-principal, as in a bank-credit bond (f).

(a) 1 Stair, 17. § 5. 3 Ersk. 3. § 61.

(b) Elams, Dec. 7. 1757; F. C.; M. 2110.

(c) Galloway, July 1. 1825; 4 S. D. 132. Buchanan, March 4. 1831; 9 S. D. 557.

(d) Dickie, Dec. 1743; M. 2110.

(e) M'Dougall, Feb. 13. 1810; F. C.

(f) Montgomery, June 18. 1713; M. 3586.

254. The right of discussion entitles the cautioner to insist on the application by the creditor, of all money of the debtor coming into his hand, and of all securities, direct and indirect, which he holds over the estate of the debtor, and which are not appropriated to other debts. But it has been held that a landlord having a cautioner bound for rent, is not obliged to have recourse to the ruinous diligence of sequestration on his hypothec, before coming on the surety; it being the chief use of the surety to avoid this necessity (a). The exercise of the right, however, may be stipulated by the cautioner (b); and the cautioner may, on payment, demand an assignation to the hypothec. See below, § 270.

(a) M'Queen, June 11. 1811. Grant, Feb. 8. 1827; 5 S. D. 317.

(b) M'Kenzie, May 12. 1827; 5 S. D. 597.

255. Relief is a right on the part of the cautioner to indemnification against the principal debtor. It rests on two grounds: 1. an equitable right to require the creditor to communicate the full benefit of his contract; and, 2. an obligation ex mandato (§ 216) of the principal debtor, for whose benefit the cautioner has engaged. By the former, the cautioner is entitled to an assignation of the debt and diligence; and, on satisfying the creditor, comes into his place, and may proceed as principal creditor. By the latter, he is entitled in his own person to take legal measures for his relief against threatened distress, or against the possible consequences of the failing condition of the principal debtor.

3 Ersk. 3. § 65. Thomson, Jan. 19. 1627; M. 2113. Kinloch, June 13. 1822; 1 S. B. 529. Simson, Feb. 23. 1826; 4 S. D. 487. Boswell, Feb. 23. 1836; 14 S. D. 554. See the old cases of Lesly, Jan. 10. 1665; M. 2111. Rigg, Nov. 7. 1676; M. 3353. Wood, Dec. 12. 1695; M. 3355. Wait, Dec. 31. 1697; M. 3356.

256. *Discharge of Cautioner.* The cautioner may be discharged directly; or indirectly and consequentially.

257. (1.) By direct discharge, the cautioner may be freed while the principal debtor continues bound.

258. (2.) By satisfaction, or payment, or expiration, or extinction of the principal obligation, the cautioner is discharged as well as the principal.

Forbes, Dec. 1735; Elch. *Cautioner*, 4.

259. (3.) The cautioner is freed by an essential change, consented to by the creditor without the knowledge or assent of the cautioner, either on the principal obligation or transaction, or in respect to the person relied on.

Houston, May 22. 1829; 3 W. S. 392. Hammond, June 24. 1812. Thomson, June 22. 1822. Kemp, June 17. 1824. Wallace, Jan. 13. 1825; 3 S. D. 433. Scott, Feb. 14. 1834; 12 S. D. 447. Padon, Dec. 21. 1826; F. C.; 5 S. D. 175.

260. (4.) By the creditor discharging the principal debtor, or compounding the debt, without the cautioner's assent, the cautioner is freed (*a*); unless such discharge shall be so qualified as not to injure the cautioner's claim of relief (*b*).

(*a*) Doull, Dec. 19. 1695; M. 2077. Wingate, Dec. 4. 1829; 8 S. D. 186. Hall *v.* Wilcox, 2 Mood. and M. 58.

(*b*) Leitch, July 10. 1680; M. 2077. Smith, Nov. 22. 1821; F. C.; 1 S. B. 169.

261. To the above rule (§ 260) there is an exception in bankruptcy. When in England a commission of bankruptcy has been issued against the principal debtor, or in Scotland sequestration has been awarded, 1. the creditor may by acquiescence allow the debtor to be discharged, or even as a *debitum justitiæ*, concur in the discharge, without freeing the cautioner (*a*): and 2. the creditor may agree to a composition in bankruptcy without discharging the cautioner, provided the cautioner has been previously called on to satisfy the debt,—the creditor being entitled after such notice to take what he can get (*b*).

(*a*) Anderson, May 25. 1821; F. C. Brown *v.* Carr, 7 Bing. 508.

(*b*) Whitelaw, May 20. 1814; F. C. See also Aikman, Nov. 24. 1835.

262. The cautioner is not freed by the creditor merely forbearing, or abstaining from enforcing payment; but he will be freed by the creditor agreeing to “give time” to the debtor, beyond the limits of the original obligation, so as to tie up the cautioner, by virtue of that agreement, from having the same remedy he might otherwise have had.

Fleming, May 24. 1823; 2 S. D. 336. Hume, Jan. 12. 1830; 8 S. D. 295. Farquharson, June 6. 1826; 4 S. D. 676. Sheriffs, Nov. 19. 1824; 3 S. D. 303. M'Cartney, June 4. 1830; 8 S. D. 862. Rees *v.* Barrington, 2 Ves. jun. 240. English *v.* Darbey, 2 Bos. and Pull. 61. Goring *v.* Edmonds, 6 Bingham, 95. Philpot *v.* Bryant, 4 Bing. 717. Glendinning, 1819, 1 Illus. 189. Samuel *v.* Howarth, 3 Meriv. 272. Combe, 8 Bing. 156. Orme, 3 Illus. 115.

263. The cautioner is freed by the creditor's extreme neglect of legal proceedings against the principal obligant (*a*),

especially if such proceedings have been already begun against the estate of the principal (*b*); or by omission to complete or to take advantage of a security in competition (*c*), or by undue neglect in negotiating a bill (*d*). But mere delay to institute proceedings will not, in the common case, liberate the cautioner; nor the discontinuance of personal diligence commenced against the principal debtor; nor delay or forbearance in enforcing a right of hypothec against a tenant (*e*).

(*a*) Smith, June 24. 1829; 7 S. D. 789. Smith, Nov. 26. 1829; 8 S. D. 124.

(*b*) 3 Ersk. 3. § 66. 1 Bell, Com. 359–361. Boyes, Jan. 10. 1738; Elch. *Caut.* 7. McMillan, Jan. 21. 1729; M. 3390. Sinclair, Nov. 9. 1744. Anderson, May 25. 1811; F. C. Wallace, Jan. 13. 1825.

(*c*) Storie, June 3. 1830; 8 S. D. 853. Fleming, May 24. 1823; 2 S. D. 336. House of Lords, May 23. 1826; 2 W. S. App. Cases, 277.

(*d*) National Bank, Feb. 3. 1836; 14 S. D. 402.

(*e*) See above, § 254.

264. The cautioner is freed by the creditor giving up funds over which he has a right of retention (*a*); or renouncing any security over the debtor's estate without the cautioner's consent (*b*); or neglecting to claim on an estate, on which the cautioner was entitled to rely (*c*).

(*a*) Hamilton, July 4. 1628; M. 2087; 1 Brown's Sup. 158. Wallace, Jan. 13. 1825; 3 S. D. 433. Stirling, June 13. 1821, in House of Lords; 1 Shaw's App. Cases, 37.

(*b*) Wallace, Jan. 25. 1717; M. 3389. Boyes, Jan. 10. 1738; 5 Brown's Sup. 209.

(*c*) Fleming, May 23. 1826; 2 W. S. App. Cases, 277. Wingate, Dec. 4. 1829; 8 S. D. 185. Hume, *supra*, § 262. M'Tavish, Dec. 7. 1830; 4 W. S. App. Cases, 410. Drummond, Feb. 5. 1836; 14 S. D. 437.

265. When the creditor has imprisoned or apprehended the debtor, it does not seem to invalidate his claim against the cautioner that he has afterwards liberated the debtor (*a*). The cautioner will still be liable to the creditor, although the debtor shall have escaped from prison; but he will not be liable to the magistrates on their paying the debt to the creditor; on the contrary, they must indemnify him if he should be called on (*b*).

(*a*) McMillan, Jan. 21. 1729; M. 3390. Graham, July 16. 1730; M. 3364.

(*b*) Magistrates of Dundee, Jan. 24. 1668; M. 3348.

266. Cautionary obligations may be recalled in certain cases; as, 1. where one engages for a cash credit, he may, by giving notice to the bank, stop further advances on his responsibility; 2. a cautioner for a bank agent, trustee, factor loco tutoris, &c. may put an end to his responsibility on reasonable notice, and

proper measures taken for recalling the power delegated on his credit ; but, 3. a cautioner for an absolute obligation cannot withdraw without taking the debtor in his own hand ; nor, 4. can a cautioner for a certain term of years (as in a lease) withdraw his security.

267. *Joint Cautionary Engagements.* Although co-cautioners are each ultimately liable to the creditor for the whole debt, they are, in the first instance, entitled to the Benefit of Division, provided they have not expressly renounced that benefit. By this, each is liable only for his own proportion, while the other cautioners are solvent (§ 63.) ; and parole evidence, or circumstantial proof, is competent to one co-obligant against another, to prove that he is only a cautioner.

3 Ersk. 3. § 63. Drummond, Feb. 3. 1697 ; M. 12329. Smollett, Feb. 21. 1793 ; M. 12354.

268. In the Roman law, the obligation of co-cautioners was undertaken by the *stipulatio*, in which each answered or engaged for the whole debt. The consequence was, 1. that each was liable ; *singuli in solidum* : and, 2. that there was not in law any obligation or ground of action to the several cautioners against each other, but on any one of them paying the debt it was extinguished, and all the rest of the cautioners discharged. Two remedies in equity were afterwards introduced ; the *Beneficium Divisionis*, by which any one might insist on the others being called on to pay their share ; and the *Beneficium cedendarum actionum*, by which any one cautioner, on paying the debt, was entitled to require the creditor to assign his right to him (*a*). This is not *necessary* with us ; and on that ground it was once held that an assignation could not be demanded (*b*). But it is now settled that an assignation *may* be demanded (*c*).

(*a*) Inst. lib. 3. tit. 21. § 4. de Fidejussoribus. Dig. 46. t. 1. l. 39. Cod. lib. 8. tit. 14. l. 11. de Fidejussoribus.

(*b*) 3 Ersk. 3. § 68.

(*c*) Erskine, Jan. 14. 1780 ; M. 1386 ; as corrective of the older cases, M. 3355-6.

269. (1.) The relief or remedy arising to co-cautioners *inter se*, cannot be impaired or discharged by the creditor without discharging the co-cautioners.

3 Ersk. 3. § 68. 1 Illus. 197. Skirling, March 1686 ; 2 Brown's Sup. 94. Dingwall, Dec. 22. 1693 ; 4 Brown's Sup. 107. See Nicholson, July 23. 1708 ; M. 3357. Wallace, Jan. 25. 1717 ; M. 3389 ; Smith, *supra*, § 260 (*b*).

270. (2.) But where any one of the co-cautioners seeks relief against the others, he must communicate, 1. the benefit of any deduction or *ease*, which may have been allowed to him in paying the debt; 2. the benefit of any security which he may hold over the estate of the principal (*a*). But this does not hold if the cautioners be bound, each for a specific sum (*b*). Where a cautioner, who holds a collateral security, is creditor in other debts, he is not bound to renounce the benefit of his security (*c*); and a personal guarantee by a third party to any of the cautioners he is not bound to communicate (*d*).

(*a*) 3 Ersk. 3. § 70. 1 Bell, Com. 348. et seq. 1 Illus. 199. Fisher's Creditors, Dec. 18. 1778; F. C.; M. 2134. Campbell, July 18. 1775; F. C.; M. 2132. Milligan, May 20. 1802; F. C.; M. 2140. and *Cautioner*, App. 2. Nicol, June 16. 1807.

(*b*) Lawrie, June 6. 1823; F. C.; 2 S. D. 368.

(*c*) Campbell, July 18. 1775; 2 Hailes, 2132.

(*d*) Coventry, June 16. 1830; 8 S. D. 924.

271. (3.) Cautioners may be bound in the same or in several deeds; and at the same time, or at separate times. The general rule is, that cautioners are entitled to mutual relief, whether their obligation be in one or in several deeds, being all bound for behoof of the debtor, and at his request. But,

272. Where cautioners are already bound, and new cautioners are introduced, it is held, 1. That if this be only at the desire of the debtor, and not of the former cautioners, the new cautioner is bound as if he had been originally a co-cautioner, and has no other relief than such a cautioner has: 2. That if he be introduced at the request of the former cautioners, or with their assent or acquiescence, to relieve them from a demand, he is cautioner for them, and will have total relief against them (*a*). The view taken in Chancery in England is different (*b*); but it was rejected in the Court of Session (*c*).

(*a*) 1 Bell, Com. 351. 1 Illus. 200-1. Murray, Dec. 15. 1722; affirmed, March 31. 1723; 1 Robertson's App. Cases, 465. Lockhart, Dec. 19. 1738; Elchies, *Caut.* 9. Wallace, Feb. 27. 1685; M. 14642. Pollock, July 10. 1745; Kilk. 117; M. 2125. Loch, Dec. 18. 1701; M. 14644. Smeiton, Nov. 15. 1792; F. C.; M. 2138.

(*b*) Craythorne, 14 Ves. 160.

(*c*) Lennox, May 18. 1815; F. C.

273. *Judicial Cautionry*. Cautionary obligations are employed in judicial proceedings, 1. to secure the efficacy of jurisdiction, or to relieve from arrestment or inhibition; 2. to secure debts brought under suspension in the course of execution or

diligence ; 3. to secure the person of the debtor for the purpose of personal execution by imprisonment when in *meditatione fugæ*, or when indulged by an incarcerating creditor with temporary liberation.

274. 1. *Caution judicio sisti*. This is caution to abide judgment, within the jurisdiction of the Court. It is exacted from persons in *meditatione fugæ* (see below, § 2400) ; and, under a recent statute, the pursuer of a *cessio bonorum* may, on such caution, procure a personal protection or warrant of liberation (*a*). By the ordinary form of the bond the cautioner undertakes that the defender shall appear to answer to any action to be brought within six months ; and it has sometimes been held that this entitles the creditor to have the person of the defender produced in Court, open to personal diligence (*b*). But this is not the lawful effect of the bond ; and it would appear that the cautioner would not be held to forfeit his bond, if the debtor were pointed out within Scotland, although he were in prison, or had taken sanctuary, or procured a personal protection (*c*).

The creditor is not bound to call on the cautioner till the decree is about to be extracted (*d*), and must allow him a reasonable time to present the debtor (*e*).

The obligation *de judicio sisti* is discharged, 1. by death of the debtor (*f*) ; 2. by notice to the creditor, with presentment of the debtor's person in Court (*g*) ; 3. by presentment on the creditor's requisition ; 4. by decree extracted, without requisition to present the debtor (*h*).

(*a*) Heron, Dec. 16. 1773 ; M. 8550 ; 2 Hailes, 556. British Linen Company, Dec. 7. 1765 ; M. 2054. See Scott, Dec. 6. 1775 ; M. 2057 ; 2 Hailes, 663. 6 and 7 Will. IV. c. 56. § 1, 15.

(*b*) Tasker, Feb. 27. 1802. M. *Caution jud. sisti*. Ap. 2. and Cowan, Nov. 28. 1797 ; M. 2061. seem both questionable.

(*c*) See Watt, Dec. 10. 1828 ; 7 S. D. 177.

(*d*) Alexander, Nov. 29. 1823 ; 2 S. D. 541.

(*e*) Fell, Feb. 16. 1830 ; 8 S. D. 543.

(*f*) Park, Jan. 6. 1680 ; 3 Brown's Sup. 318.

(*g*) Lindsay, Nov. 26. 1633 ; M. 2031. M'Culloch, Feb. 20. 1666 ; M. 369. Stevenson, March 11. 1812 ; F. C.

(*h*) Telfer, Dec. 15. 1774 ; M. 2054. Brown, June 24. 1790 ; M. 2059. Stewart, July 8. 1809 ; F. C.

275. 2. *Caution judicatum solvi*. In proper maritime cases the defender was formerly bound to find caution *de judicio sisti et judicatum solvi* (*a*). But now it is incompetent for the Sheriff, in exercise of his Admiralty jurisdiction, to re-

quire such caution from any defender domiciled in Scotland ; unless special grounds, stated in the interlocutor, shall make it necessary (*b*).

The effect of this caution is, 1. That the cautioner is absolutely liable for all that shall be found due to the pursuer ; 2. That where caution is found in the Sheriff Court, he is not discharged by suspension presented to the Court of Session (*c*) ; 3. That he is not relieved by decree of absolvitor, till such judgment shall be final ; and, 4. That the death of the party is no liberation to the cautioner (*d*).

(*a*) 1681. c. 16. 1 William IV. c. 69. § 23. Rowand, Jan. 9. 1755 ; M. 2043. Herries, March 7. 1755 ; 5 Brown's Sup. 295. British Linen Company, Dec. 7. 1765 ; M. 2054. Cockburn, Feb. 28. 1776 ; 5 Brown's Sup. 407.

(*b*) 1 and 2 Vic. c. 119. § 22.

(*c*) Myles, Dec. 1. 1797 ; M. 2063.

(*d*) Dundas, Jan. 27. 1744 ; M. 2040.

276. 3. Caution in Suspension and Advocation. This security to the creditor is given, 1. in suspension (which is a stay or sist of diligence already in the course of execution), by caution for the principal sum in the charge, with expenses ; 2. in advocation (which is an appeal from an inferior Judge to the Court of Session), the caution is only for the expense in the inferior Court, and in the Court of Session (*a*). The cautioner is not bound till his caution is accepted, and may, in the interim, withdraw on the debtor's insolvency (*b*). The cautioner's obligation, both in suspension and in advocation, is not merely personal for the suspender or advocator ; but is continued as surety for the heir on the death of the debtor (*c*).

(*a*) 6 Geo. IV. c. 121. § 41. Act of Sed. June 14. 1799. 1 and 2 Vict. c. 86. § 3. and 4. and Act of Sed. Dec. 24. 1838.

(*b*) Stewart, Feb. 7. 1786 ; M. 2157.

(*c*) Act of Sed. Jan. 29. 1650. Wilson, Jan. 20. 1826 ; 3 Illus. 116.

277. 4. Caution by Bond of Presentation is used when a creditor having personal diligence ready to be executed, or his debtor actually apprehended, or in prison, grants an indulgence, on condition of the debtor presenting himself at an appointed time as free as at the time of giving the indulgence ; otherwise to pay the debt. The cautioner undertakes that the debtor shall be personally presented, at a particular place, and on a day and hour specified. 1. The bond is satisfied, and the cautioner freed by the debtor's death. 2. He is freed for

a time by the debtor's sickness, or by inevitable accident ; provided the debtor be presented as soon as the impediment is removed ; 3. if the debtor be imprisoned by another creditor, it seems to be sufficient to give notice to the holder of the bond of his place of confinement (*a*). But it will not free the cautioner that the debtor is under protection or in sanctuary (*b*).

(*a*) Polstead, July 7. 1681 ; M. 1807. 1 Illus. 206. 1 Bell, Com. 385.

(*b*) Henderson, July 22. 1710 ; M. 1809.

278. The bond of presentation is strictly, but not judaically interpreted, and the most rigid compliance with the condition is required.

M'Gowan, Nov. 27. 1829 ; 8 S. D. 142. M'Farlane, June 10. 1834 ; 12 S. D. 699.

279. *Letters of Credit and Recommendations.* A Letter of Credit is a mandate (§ 216.) authorizing the person addressed to pay money, or furnish goods, to another, on the credit of the writer. When bought at a banker's, it constitutes a debt against the writer ; and, being a draft on the person addressed, it goes, when answered, into account between him and the writer, but raises no debt to the person paying against the payee. When given for accommodation, and without value paid, it raises, on being answered, a debt not only against the holder of the letter who receives the money, but also against the writer *ex mandato*, in favour of the person addressed, who has paid the money. A person going abroad gets a power to draw on the writer's correspondent to a certain amount—or a trader, entering into a new line of trade, or settling in a new place, gets a letter of credit or recommendation to dealers in that market—and the chief difficulty is to distinguish between a letter pledging the writer's credit and a mere introduction, under which the person addressed is to follow his own discretion in giving credit.

280. Generally stated, where a Letter of Recommendation specifies a sum as the limit of credit to be allowed to the bearer ; or when it applies specially to a transaction, or dealing, or course of dealing, in which credit is necessary, and is accompanied by an assurance of safety, it will be held as a guarantee (*a*).

More particularly, the rules seem to be these :—1. That

when a representation is made as to character or credit in consequence of, and in answer to, inquiries, the expressions used are to be construed largely in favour of the person making such representation, so as not, without great difficulty, to entrap him into a guarantee (*b*).

2. That if the person making the representation states what he knows to be false, to the effect of inducing another to deal with the person recommended he will be held liable as by a guarantee (*c*).

3. That a mere introduction, conceived in general terms of confidence or approbation of the character, conduct, and credit of the person as one with whom it is safe to deal, is held to be only recommendation; not superseding further inquiry or the exercise of a sound discretion; and not amounting to a guarantee (*d*).

4. That when, instead of being thus limited, there is a distinct specific transaction mentioned, with an assurance that it may be safely entered into, it is more easily to be held a guarantee of that particular dealing (*e*).

5. That a letter of credit covers only future dealings, unless the contrary be very clearly expressed (*f*).

(*a*) 1 Bell, Com. 372.

(*b*) 1 Illus. 207-210. Haycroft v. Creasy, 2 East. 92. Ranken, May 15. 1812; F. C.

(*c*) Balfour and Co. March 8. 1815; Pasley, 3 Term Rep. 51. Eyre, 1 East. 318. Foster, 6 Bing. 396. Corbet v. Brown, 8 Bing. 33.

(*d*) Kembles, March 31. 1831; 9 S. D. 648. Ranken, ut sup. (*b*).

(*e*) Corbet v. Brown, 8 Bing. 33. Hunter, Feb. 17. 1824; 2 S. D. 716. Frazer, June 25. 1822; 1 S. D. 562.

(*f*) Dykes, June 3. 1825; 4 S. D. 70.

281. Verbal Introductions follow the same rules in general (*a*). But the greater readiness and confidence with which one speaks in conversation of a friend's situation and circumstances, not only has with us required such assurances to be much more express and specific than when expressed in writing: but this consideration has in England led to a statute, whereby no action is maintainable by reason of any representation or assurance of credit, unless made in writing, and signed by the party to be charged therewith (*b*).

(*a*) Haycroft, ut sup. § 280 (*b*). Hunter, Ib. (*c*). M'Low v. Richardson, 1 Maule and Selw. 557.

(*b*) 9 Geo. IV. c. 14. § 6.

282. *Mercantile Guarantees.* Guarantees, used in mercan-

tile transactions, are either applicable to a special future transaction ; or prospectively to a specific course of dealing. If intended to cover previous dealings, it must be clearly expressed. A guarantee correctly should be in writing. But it may be by parole, provided it be followed by *rei interventus*, without which it will not be conclusively binding. (See § 248.) And it is not unlawful, nor unfrequent in practice, to allow a commission or per-centage for engaging in such a guarantee.

1 Bell, Com. 376. *Ex parte Adney*, Cowp. Rep. 460.

283. These engagements may be either, 1. Permanent and continuing guarantees ; or, 2. Limited by Stipulation, in respect of the transaction, of the person, or of the time.

284. Continuing Guarantees. 1. One engaging for *any* dealing of another, trusts entirely to his discretion, and will be liable to any amount of his dealings. 2. Even when such a guarantee is limited to a certain sum, it is binding not for one dealing to that amount only, but for successive dealings (*a*). But, 3. Where such expressions are accompanied by any clear indications that a particular transaction only is in contemplation, it will be held as limited, and not as a continuing guarantee (*b*). 4. A bank-credit bond is of the nature of a continuing guarantee, being for all sums to be advanced or engaged for till the credit be recalled (see § 299) ; and a letter guaranteeing an over-draft on the credit, was held to be on the same footing (*c*).

(*a*) *Merle v. Wells*, 2 Camp. 414. *Mason v. Pritchard*, ib. 436. *Bastow v. Bennet*, 3 Camp. 220. *Allan v. Kenning*, 9 Bing. 618.

(*b*) *Baird*, Nov. 21. 1835 ; 14 S. B. 41. *Melville v. Hayden*, 3 Barn. and Cress. 593. *Kay v. Groves*, 6 Bing. 276.

(*c*) *Sir W. Forbes and Co.* June 4. 1830 ; 8 S. D. 865. See also *Houston and Co.* July 3. 1834 ; 12 S. D. 879.

285. Limited Guarantees. The rule of construction of all such engagements, and of their limitation, is very rigid. (See above, § 251.). Being *strictissimi juris*, 1. a limitation to future dealings is presumed, and unless the terms are such as to include existing debts, it will not cover them (*a*) ; 2. a limitation to a particular transaction is conclusive ; 3. limitation to a person is strictly to be observed (*b*) ; 4. limitation in time is neither to be extended nor abridged (*c*) ; but, 5. the usage of trade will be held as qualifying the construction (*d*) ; 6. a guarantee

for a certain amount of goods has been held not to restrict the dealing, but to cover it to that amount (*e*).

(*a*) *Glyn v. Hertel*, 3 Taunt. 208. *Smith*, Jan. 14. 1829; 7 S. D. 244.

(*b*) *Stewart*, May 31. 1803. *Phillip*, Feb. 21. 1809; F. C.

(*c*) *McLaggan and Co.* Nov. 19. 1813; F. C. *Douglas and Co.* Dec. 24. 1814; F. C. *Merle v. Wells*, 2 Camp. 413. *Mason v. Pritchard*, *ib.* 436. *Bastow v. Bennet*, 3 Camp. 220. *Melville v. Hayden*, 3 Barn. and Ald. 593. *Bacon v. Chesny*, 1 Starkie, 192.

(*d*) *McLaggan's Case*, *supra* (*c*). *Samuel v. Howorth*, 3 Merivale, 272. *Combe v. Wolfe*, 8 Bing. 156.

(*e*) *Kinross*, Dec. 18. 1687; 3 Brown's Sup. 212.

286. *Del Credere Guarantee*. This is an engagement by a factor, bank-agent, insurance-broker, or other mandatary, for the solvency of persons who purchase from, or deal with, him in the concerns of his principal. The consideration for such engagement is an additional allowance by higher commission on the transaction. This guarantee is constituted, 1. by express agreement; or, 2. by accepting of, or charging, or acquiescing in *del credere* commission. The factor is entitled to his commission immediately on the sale; the event being collateral.

1 Bell, Com. 377. Fell on Guarantees.

287. *CAUTIONARY OBLIGATIONS PROSPECTIVE*. Cautionary obligations are most commonly made use of for securing a precise and subsisting debt: But they are also applied most usefully in many situations of trust, where the engagements and transactions are prospective. In such prospective engagement, while the cautioner is not exposed to the danger of any situation or transaction not fairly in contemplation of the parties at entering into the contract, he is not entitled to withdraw suddenly, and without due notice.

288. From the nature of a prospective engagement, 1. There are some situations in which a duty of care and vigilance is incumbent on the creditor for protection of the cautioner, as in the care to be taken of an Apprentice (*a*); and, 2. When the cautioner happens to die during the time contemplated, the cautionary obligation is continued on the heir, not only for the debt incurred during the original cautioner's life, but prospectively for the intromissions or advances after the heir's succession (*b*).

(*a*) *Allan*, June 17. 1663; M. 2088. And see below, § 290 and 295.

(*b*) *University of Glasgow*, Nov. 18. 1790; M. 2106; *Bell's Cases*; 2 Hailes, 1091.

289. An important point in all such prospective obligations by cautioners is, the extent of the obligation ; and,

1. The ordinary obligation is for *future* intromissions, the principal being trusted on the faith of the cautioner.

2. It may be otherways stipulated, and it is to be remarked particularly, whether the words are so broad as to extend to *past* as well as to future dealings, or acts of administration (*a*).

3. It is an absolute condition implied in the cautioner's engagement, that the creditor shall deal fairly with him, and not mislead him into any engagement for deficiencies undisclosed (*b*).

4. There must also be perfect fairness in the cautioner's engagement (*c*).

5. Where the obligation of the cautioner is general and unlimited, for all loss by the acts of the principal debtor, declaring that the cautioner shall not be liable in more than a certain sum ; the cautionary obligation is held to be a *covering* security, entitling the creditor to apply to all his other resources before coming on the cautioner (*d*). It seems to be different where the intromissions themselves are limited in amount (*e*).

6. The cautionary obligation for intromissions under a particular employment, lease, &c. is confined to the particular extent and character of intromissions under that collateral contract (*f*).

(*a*) Kinnear, Nov. 8. 1776 ; 3 Brown's Sup. 102. Magistrates of Edinburgh, Aug. 1. 1766 ; 1 Hailes, 109. Smith, as remitted from House of Lords, Jan. 14. 1829 ; 7 S. D. 244. Dykes, June 3. 1825 ; 4 S. D. 70.

(*b*) Smith's case, *supra* (*a*).

(*c*) Same case.

(*d*) Maxton, and Borthwick, below, § 292.

(*e*) See Kinross, Dec. 18. 1677 ; 3 Brown's Sup. 212.

(*f*) College of Glasgow, Nov. 18. 1790 ; Bell's Cases, 134.

290. 1. *Cautioner for Bank Agent.* In order to be secured against the fraud, malversation, or negligence of their agents, and generally for their agents' intromissions, banks take one or more sureties, bound either without limitation, or for a particular sum.

1 Bell, Com. 362. 2 Jurid. Styles 65-8.

291. This being a prospective and continuing guarantee, the bank and the cautioners are reciprocally bound in duties to each other : the cautioners directly, for solvency, fidelity, and care ; the bank, directly, for perfect fairness in the contract (*a*),

and indirectly, for due vigilance in that superintendence which the nature of the trust prevents the cautioner from assuming (*b*). See below, § 295.

(*a*) *Smith against Bank of Scotland*, in the House of Lords, 1 Dow, 272.

(*b*) *British Linen Co.* July 1773; 5 Brown's Sup. 409. Anonymous case, 1 Dow, 296. *Thomson*, Jan. 29. 1822; 1 S. B. 303; reversed, House of Lords, June 11. 1824; 2 Shaw's App. Cases, 316; *Leith Bank*, May 12. 1830; 8 S. D. 721.

292. Where the cautionry is without restriction, the debt of the principal is the debt against the cautioner. Where the sum is restricted, but the obligation not limited, it is a *covering* security, and the creditor may apply all the debtor's resources, in the first place, before making his demand.

Maxton, Jan. 17. 1777; F. C.; *Tait*, 5 Brown's Sup. 408. *Borthwick*, Jan. 29. 1819; F. C.; affirmed, March 27. 1822; 1 Shaw's App. Cases, 131.

293. It is commonly covenanted, that the amount of the debt against the cautioner shall be fixed by a stated account, signed by the accountant, and this is sufficient to fix the sum for which summary diligence may proceed. See above, § 68.

Fisher, Feb. 11. 1824; 2 S. D. 695.

294. If heirs are bound, the obligation transmits ipso jure, as a continuing guarantee, against the heir, on the death of the original cautioner. See above, § 288.

295. 2. *Cautioner for a Trustee or other official person.* This proceeds on the principles already explained; and, 1. Where the trustee is under the Sequestration Act, there are certain duties prescribed, the palpable breach of which the creditors have it in their power to check; and neglect of fair superintendence in this respect was in one case held to bar the demand against the cautioner (*a*). But this has been disapproved of, and the creditors held entitled both to the protection of the provisions of the statute on the one hand, and to the full benefit of the surety on the other, undischarged by any actual or presumed neglect on the part of the creditors, or of the committee of their number (*b*). In one case, in the sequestration of a land estate, where the creditors had not bestowed due vigilance in checking the intrusions of a judicial factor, it was held that the cautioner was freed (*c*). But the more recent case of *M'Taggart* (*b*), is against that decision; and in cases of extrajudicial trusts, this was not held a good de-

fence to the cautioner (*d.*) 2. Where, in a private trust, the cautioner prescribes the rules of vigilance, or of accounting, and these are neglected, the cautioner is free (*e.*)

(*a.*) Duncan, Dec. 13. 1826 ; 5 S. D. 111 and 115. Eadie, Feb. 3. 1829 ; 7 S. D. 356. Dalzell, Feb. 1821 ; 9 S. D. 434.

(*b.*) M'Taggart, April 16. 1835 ; 1 Sh. and M'L. 553.

(*c.*) Pringle, July 10. 1834 ; 12 S. D. 918.

(*d.*) Creighton, Feb. 6. 1838.

(*e.*) Forbes, June 10. 1829 ; 7 S. D. 732. See the old cases, Dick, Nov. 30. 1697 ; M. 2090. Hamilton, June 18. 1706 ; M. 2091. Wallace and Bailie, Feb. 20. 1707 ; M. 2096.

296. 3. *Caution for a Messenger-at-arms.* For the due execution of his duty, a messenger finds caution in the Court of the Lord Lyon, "for the damage, interest, and expense, which the lieges shall sustain through the negligence, fraudulent or informal execution, of the messenger."

1587, 46. Form of the bond in Lyon Office.

297. This gives action not only to the employer of the messenger, but to any person suffering oppression or damage by his illegal proceedings as a messenger (*a.*) ; not when he acts, or is employed to act, as an agent. It gives action also to the Lord Lyon for his fees (*b.*)

The responsibility of the cautioner is confined to the messenger's acts in that character alone (*c.*), and in point of extent, 1. where a special act of diligence is to be done (as to point a cargo, or arrest a debt), the cautioner will be liable only for what is lost by the messenger's failure in duty ; but, 2. where he is employed generally to do diligence for recovery of debt, the cautioner is not allowed to go into an inquiry as to the probable inefficacy of the diligence, but the law holds the debt to be the measure of the damage (*d.*).

(*a.*) Grant, July 8. 1758 ; F. C. ; M. 2081 ; affirmed, March 7. 1759 ; Kennedy, Dec. 13. 1821 ; 1 S. B. 228.

(*b.*) M'Intosh, Nov. 1824 ; 3 S. D. 270.

(*c.*) Welsh, Jan. 18. 1781 ; M. 8893. Frazer, Jan. 28. 1831 ; 9 S. D. 345.

(*d.*) Chatto, June 17. 1811. See also Dean, Jan. 17. 1803, affirmed June 17. 1803 ; M. 11765.

298. 4. *Caution for a Notary.* Such cautioner engages for the notary's "honest and faithful administration of his office conform to law" (*a.*). Not only fraud, but also want of skill in the proper office of notary, will subject the cautioners (*b.*). But the cautioner is not liable for what is not strictly the business of a notary (*c.*).

(*a.*) Bond lodged in Court of Session.

(b) Stevenson, May 16. 1818 ; 1 Bell, Com. 366.

(c) Stevenson, ut supra.

299. 5. Cautionary Obligation for a Cash-account. A cash-account with a bank is a credit allowed to a person named ; in virtue of which he may pass cheques on the bank, draw bills, and operate in all the various ways in which he might have operated, if he had actually had money deposited in the bank. The loan is made as the money may be required : The repayment is by the replacing of money as funds come in. The debt is in perpetual fluctuation. The credit and loan are secured by a bond for such amount of debt, not exceeding a certain limited sum, as shall ultimately arise on a balance of the deposits and drafts.

300. This engagement is undertaken by a bond, in which the account and all the operations on the credit are stipulated to be in the name of the person for whose benefit the credit is provided ; but he and his cautioners are all bound jointly and severally as principals, (§ 56.) ; the cautioners expressly renouncing the *beneficium ordinis* (§ 252).

301. A cautioner interposing in a bank-credit already granted, will be liable for sums advanced before as well as after the date of his bond, provided there be a fair disclosure of the state of the account, or a distinct stipulation as to past advances ; § 289.

302. It is in such bonds stipulated, that, to the effect of authorizing a valid charge, the amount of the debt shall be ascertained by a signed account extracted from the bank-books. The amount so ascertained will be sufficient to authorize summary execution ; but the account so referred to is not to be held *conclusive* between the parties ; the banker will only thereby have the benefit of caution in a suspension, should any objection be stated against the charge.

303. In balancing the account, all sums due to the bank, or which the bank shall engage for on account of the person in whose name the account is kept, by orders, drafts, receipts, letters of credit, and accepted, indorsed, or discounted bills, or in any other manner of way, will be included. And although, in the account on which the charge is given, some of those engagements should still be depending on bills in the circle, the result as they afterwards fall may be brought to augment the balance.

Liddel against Sir W. Forbes and Co. July 1820 ; 1 Bell, Com. 369.

304. The bank cannot discharge, destroy, or forfeit collateral securities, without freeing the co-obligants in the bond ; but, on the other hand, is not bound to do diligence against the person who holds the credit.

1 Bell, Com. 367. et seq. See above, § 256. et seq.

For the septennial limitation of cautionary obligations, see below, § 603.

II. BILLS OF EXCHANGE AND PROMISSORY-NOTES.

Thomson on Bills of Exchange. Bayley on Bills. Chitty on Bills. Selwyn's *Nisi Prius*, 1838. 3 Kent. Com. on American law, 71. Pothier, *Cont. de Change*. Code de Commerce, liv. i. tit. 8. 1 Pardessus *Droit Com.* 327. Merlin *Repert. de Jurisp.* tom. vii. p. 395. Van Leeuwen, 439. 1 Bell, Com. 286.

305. Bills are to be viewed not only as obligations of simple form and ready execution, but as part of the circulating medium of the country ; by means of which, manufacturers and merchants turn credit into a negotiable shape, and are enabled to proceed with their dealings as if paid in cash for their goods, while the buyer is indulged with a delay of payment till the returns of trade fill his hands. The subject is so extensive, and the adjudged cases so numerous, that it may be sufficient here to lay down the general principles which regulate the doctrine ; referring to the institutional writers who have fully treated the matter.

Bills and Notes are properly mercantile instruments ; but the use of them has not with us, as in some countries, been restricted to mercantile men ; and they have been largely introduced into the ordinary intercourse of life. In that use of them the same rules are applied as in the strict mercantile employment of the instrument.

306. A BILL OF EXCHANGE is a letter of request, addressed by the writer, or DRAWER, of it, to another called the DRAWEE, desiring him, at an appointed time and place, to pay a certain sum to a third person, called PAYEE; or to the drawer himself, or to the person whom he shall authorize to receive it. The subscription of the Drawee to the address of this letter is the ACCEPTANCE of the order ; or the undertaking to pay the money as ordered : And such acceptance completes the obligation.