

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.

307. A PROMISSORY-NOTE proceeds from the debtor, is signed by him alone, and contains, in form, a promise or engagement to pay, at a certain time and place, to the creditor (or to his order) a certain sum. And an acknowledgment of the receipt of money, accompanied by a promise to pay it when required, is a note under the stamp acts. See below, § 328.

308. Bills are distinguished as of two kinds:—

1. Foreign Bills of Exchange, properly so called; to which there are three parties—drawer, drawee, and payee. These are used in transmitting money from one country to another.

2. Inland Bills, in which also there may be three parties; but sometimes only two—the drawer, requesting the money to be paid to himself, or his order; and the drawee, to whom the request is addressed. These are generally used for settling and constituting a debt in such a form, that the bill may either remain with the original creditor, ready for immediate execution at the time of payment; or be conveyed to another in place of money.

Promissory-notes are the nearest in nature and use to inland bills; being a mere acknowledgment of debt, and engagement to pay to the original creditor; and capable, like the others, of being transferred as money to another person.

The obligation, in any of these terms, completed by the acceptance of the drawee of the bill, or by the subscription of the maker of the note, is transmissible by indorsement; which is either, 1. an order on the back of the instrument, signed by the payee, and directing the amount to be paid to a person named; or, 2. the subscription of the payee's name on the back without any such order; which is called a blank indorsation, and is an authority to the holder of the instrument to demand payment of it when due. Below, § 329.

Besides bills and notes, there is another form of order to transfer money, viz. bank-cheques. These are orders addressed to a banker to pay a certain sum to the bearer of the cheque. There is no day of payment; the order being general: And the presumption of knowledge of dishonour applicable to ordinary bills taken by an indorsee after the day of payment (§ 332), is not held to apply to one receiving a cheque after its date; though that may be a circumstance to weigh with the jury in evidence (*a*). Such instruments are exempt

from the stamp-laws, if truly dated and drawn payable to the bearer on demand, and upon a banker within ten miles (b).

(a) *Rothschild v. Corney*, 9 Barn. and Cress. 390. 1.

(b) 55 Geo. III. c. 184. *Swan*, July 6. 1835; 2 Shaw's App. Ca. 67.

309. 1. *Form and Requisites of Bills and Notes.* The essentials of a bill or note are,—1. The engagement to pay; 2. The person to whom payment is to be made, called the payee; 3. The sum engaged for, which can only be money, not commodities; 4. The time of payment; 5. The stamp.

310. The engagement is by *acceptance* of the *order* or *request* in a bill to pay; or by the words of *promise* in a note. Thus the engagement by note is at once perfect; the engagement by acceptance includes drawing and acceptance.

311. 1. The DRAWING of a bill is a transference to the payee of the fund drawn upon, completed by presentment (a).

The bill must be drawn absolutely and unconditionally: But it is not in this sense held a condition if the bill be drawn in setts payable, "if the others be not paid." It is no bill, if drawn with a condition; for that is contrary to the nature of a bill (b): but such a draft has been held to operate as an assignment intimated (c).

The payment must be in money, not in commodities (d).

The drawer must sign before producing the bill in judgment; but it is enough if his name be in the body of the bill, written by himself (e). Summary diligence will not, however, be given on such a bill (f).

The drawer must sign before any diligence can proceed on the instrument; but he may sign after the death of the acceptor.*

The drawer, by signing the bill, engages conditionally to pay it, should the drawee not accept or not pay; *provided due notice be given to the drawer of the dishonour.*

(a) See Cases of Stewart and others, below, § 1465. (f and g).

(b) Bayley, 13. and cases there cited. 1 Sel. 302. 3 Kent, 76. Thomson, and cases cited by him in note, p. 11. Visc. Garcock, Feb. 1721; M. 1401. Campbell, Bell's Cases, 111. See M'Dowall, June 1731; M. 1541.

(c) See M. 1397, 1399. See below, § 1465.

* Erskine says, a bill without the creditor's name is null. In this he goes too far. It will not authorize summary diligence, but it will sufficiently ground an action, even at the instance of the intended creditor. 3 Ersk. 2, § 28. with Ivory's Notes. Fair, July 11. 1801; M. 1677. Ogilvie, June 28, 1804; M. Bill, App. 1.

(d) Bayley, 7. Lesley, Dec. 16. 1713. Douglas, Feb. 18. 1715; M. 1397. Bruce, Nov. 1729; M. 1399.

(e) Ferguson, July 31. 1758; M. 1443.

(f) A. v. B. July 1750; 1441.

312. The bill may be drawn for another, so as effectually to bind him, if he have by procuration or otherwise granted authority to that effect (§ 321); but if the drawer is not careful to set forth his representative character, he will himself be liable (a). The principal is not liable to the bill-holder, where the agent draws in his own name (b).

(a) Connel, July 5. 1782; M. 1485. Douglas, Nov. 27. 1800; M. Bill, App. 15. Clark, Feb. 22. 1823; 2 S. D. 210.

(b) Telford, Feb. 5. 1822; 1 S. D. 290; reversed, May 26. 1824; 2 Shaw's App. Cases, 220. Leadbitter v. Farrow, 5 Maule and Sel. 345. Ducarry v. Gill, 1 Mo. and Mal. 450.

313. Foreign bills of exchange are generally drawn in sets or duplicates, each being drawn conditionally, "the others not being paid;" and the payee is furnished with two or three duplicates, to provide for the accidental loss of one or more. These the drawee is to answer only alternatively: The first presented is entitled to payment: the discharged document being a good answer to a demand on the others. A banker consequently in discounting a draft, which is one of a set, proceeds on the discounter's credit alone, unless all the set is given up, or indemnity taken against the use of those which do not appear.

314. 2. ACCEPTANCE is indicated by the drawee signing his name to the address; or by adding to his subscription the word "ACCEPTS." Acceptance of a blank will entitle the holder to fill it up with any sum to which the stamp is applicable; so that it shall be effectual to any one acquiring right to the bill, as an onerous indorsee (a). See below, § 321.

To the proper and efficient purposes of a bill, and for summary execution, no other acceptance is available in Scotland, but a written acceptance (b); and although a verbal acceptance may reasonably be thought sufficient as by intimation of the draft, to complete a transfer by draft on the holder of the drawer's fund, this has been decided not to be sufficient in competition (c). Formerly it was held in England that a verbal acceptance was sufficient; but the law now stands, by statute, on the same footing as in Scotland (d).

(a) Smith, Feb. 27. 1824; 2 S. D. 755. See Fairlie, May 12. 1824; 3 S. D. 5.

(b) Hay, Feb. 18. 1822; 3 Murr. 9.

(c) Cullen, June 18. 1833; 11 S. D. 733.

(d) 1 and 2 Geo. IV. c. 78. § 2.

315. To certain effects, however, something less than a written acceptance is admitted to bind the party. 1. Where one has made a written *promise* to accept a bill already drawn, on the faith of which money is advanced: this, although it will not make a negotiable instrument, or authorize summary execution as a proper acceptance, will, as an obligation, bind the drawee, and ground an action against him, by one taking the bill on the faith of it (a). But, 2. a promise to accept a draft not yet drawn has been held not binding except to one induced to advance money on the promise: and even then this has been doubted (b). 3. Where the drawee, having funds of the drawer in his hands, has had the draft presented to him while so indebted for money, he will be bound to answer it; and a protest for non-acceptance or non-payment will, even against competing creditors, be held equal to an assignation intimated. See § 339. and § 1465. and cases there cited (c).

(a) Fraser's Trustees, May 28. 1823; 2 S. D. 346. Pierson v. Dunlop; Cowp. 573. Miln v. Prest, 4 Camp. 393. Johnson v. Collings, 1 East. 98.

(b) Bayley, 144.

(c) Gordon, Dec. 9. 1712; M. 1490. Stewart, Feb. 13. 1724; M. 1463. Mitchel, Nov. 17. 1734; M. 1464. Kippen and Co. Nov. 17. 1768; M. 1495. Spottiswood, March 4. 1778; Ib.

316. Acceptance may be conditional, although the drawing may not, (supra, § 311.); for by the unconditional draft there is an absolute obligation saving the bill from that uncertainty which accords not with the nature of the instrument (a). Such an acceptance becomes absolute when the condition is fulfilled. The bill-holder (porteur) has his option to take a conditional acceptance, or to protest for non-acceptance, and take his recourse instantly against the drawer (b). If he admit a material condition into the acceptance, without notice to the drawer, he discharges him. Every condition or variation on the acceptance must be in writing.

(a) Bayley, 153. 1 Selw. 327. Thomson, 348.

(b) Sproatt v. Mathews, 1 Term Rep. 182. 1 Selw. 328. 1 Stair, 11. § 7.

317. The necessity of making the acceptance conditional may arise from the circumstance of the drawee having, at the time the bill is presented to him, no funds of the drawer, and yet

expecting to be in possession of funds by the arrival of a ship with a consignment, or by a sale of goods in his hands, he may be willing to engage if such should be the case. So a condition of arrival or of sale will be good.

1 Stair, 11. § 7. See cases, Bayley, 135, 153. Thomson, 348. 1 Selw. 328.

318. An acceptance in the character of cautioner is not in effect different from simple acceptance: it imposes no condition on the engagement, and is available only in settling the question of relief, as between joint-accepters, or between drawer and acceptor.

Gibson, Nov. 27. 1753; Elch. *Bill.* App. 54. See M'Kellar, June 7. 1811; F. C. Sharp, June 24. 1808; E. C.

319. The acceptance may vary from the draft in amount: as for a part of the sum drawn for. But the drawer will not be liable in recourse for the balance, if such an acceptance be taken without protest and notice.

Bayley, 158.

320. The acceptance may vary from the draft, in time, or in the mode, or place, of payment. The rule is, 1. That the place must be exclusive by the words *and not elsewhere*, in order to form a condition of the acceptance, and to make the bill payable only at that place; and, 2. That the change must be acquiesced in by the bill-holder.

1 and 2 Geo. IV. c. 78. § 1. Rowe v. Young, House of Lords, July 17. 1820; 2 Bligh, 391.

321. *Procuracion in drawing, accepting, or indorsing.* When one becomes a party to a bill or note by the subscription of his agent duly authorized (§ 312), he is said to act by Procuracion. 1. Such procuracion is most regularly constituted by a written power of attorney, or letter of procuracion; and while unrecalled, or recalled without notice, the writer will be bound by the signature of his representative (*a*). Procuracion may be proved by circumstances inferring acquiescence and implied authority; contrary to our former wholesome rule in Scotland, which required writing to confer such a power. This doctrine was established by a decision of the House of Lords, as conformable to the Mercantile Law of England (*b*). 3. Every limitation of a power so extraordinary must be strictly observed: And although, in the case of a bill signed by the

party himself, third persons are not bound to inquire into the making of the bill ; where the subscription bears to be by procuration, third parties must use due caution in taking the bill, by insisting for a sight of the procuration ; they otherwise run the risk of the powers which it confers (*c*). 4. There is in Partnership an implied procuration in every partner (§ 357.) ; but limited to the trade of the company (*d*). 5. The signing of a blank, or skeleton bill, is an authority to fill up any sum the holder chooses, to the extent which the stamp will cover (*e*).

(*a*) Thomson, 220. Bayley, 383.

(*b*) Davidson, House of Lords, July 4. 1815 ; 3 Dow, 218. See Lawson, Nov. 10. 1823 ; 2 S. D. 502. Porthouse *v.* Parker, 1 Camp. 82. Jones *v.* Turnour, 4 Car. and Payer, 204. Miller, Jan. 22. 1831 ; 9 S. D. 328. Maiklem, Nov. 16. 1833 ; 12 S. D. 53.

(*c*) Attwood *v.* Mannings, 1827 ; 7 Barn. and Cress. 278.

(*d*) 1 Bell, Com. 400. See below, § 356. Green *v.* Deakin, 2 Starkie, 347. Blair Miller, Jan. 22. 1811 ; F. C. Johnson, Sharp, and Co. ; reversed, July 24. 1822 ; 1 Shaw's App. Cases, 244. Turnbull, Feb. 26. 1822 ; 1 S. D. 353.

(*e*) Cases in Bayley, 33. Pagan, July 19. 1703 ; M. 1660. Graham, Jan. 1795 ; M. 1453. See Pothier, § 99. See § 314. *supra*.

322. *Acceptance for honour.* When a bill is presented to the drawee, and not accepted, it is said to be dishonoured ; and may be returned on the drawer, or indorser, with a charge of interest, exchange, and costs. One may be so far interested for the persons thus exposed to loss as to interpose, in order to prevent the return of the bill, and the accumulation of expense, by accepting for the honour of one or other of those whose names stand on the bill. Such an acceptance must be made under protest before a notary and witnesses, the instrument stating the fact, and being without delay sent to the person for whose honour it is made. It is an acceptance not absolute, but only provisional, that if the bill should not be returned dishonoured, but kept till maturity, and then not paid, the acceptor for honour will pay it. And, 1. The acceptor for honour is entitled to demand from the bill-holder such proofs, at the maturity of the bill, as shall enable him to recover against the person for whose honour he has accepted ; and so there must be a formal protest taken by the bill-holder before the bill for the honour of the drawer is paid (*a*). And in case of the acceptor for honour stipulating in his acceptance, not merely a protest, but a *refusal*, the bill must be presented to the drawee, and refused by him (*b*).

2. The person so interposing has recourse against him for

whom he has accepted, if already liable : and against all who are responsible to that person ; but he has no claim against parties subsequent to him (c).

3. The bill-holder may refuse to take an acceptance for honour ; but he does not seem entitled to refuse payment for honour.

(a) Bayley, 136. Hoare v. Cazenove, 1812 ; 16 East. 301. Williams v. Germaine, 7 Barn. and Cress. 468. Mitchell v. Baring, 1829 ; Moodie and Walker, 381. Vandewall v. Tyrrel, 1 Moody and Mal. 87.

(b) Mitchel v. Baring, 10 Barn. and Cress. 4. See below § 336-7. See 2 and 3 Will. IV. c. 98.

(c) Smith v. Nissen, 1 Term Rep. 269. Lambert, ex parte, 13 Ves. 179.

323. *Subscription to bills and notes.* The subscription must be full. If by initials, or marks, it will not warrant summary execution ; but in an action such documents are held admissible on two conditions :—1. that this shall be proved to be the usual mode of subscribing ; 2. that it shall be proved to be genuine. These are points in the action to be made out by the pursuer.

Thomson, July 1729 ; M. 16810. M'Ilwraith, June 23. 1785 ; M. 16820. Monro, Nov. 14. 1820 ; 1 Bell, Com. 390. Stewart, July 11. 1815 ; F. C. Cockburn, Dec. 8. 1815 ; F. C. See M'Intosh, Dec. 9. 1828 ; 7 S. D. 155. Craigie, March 23. 1832 ; 10 S. D. 510.

324. The PAYEE is either, 1. named in the bill, or in the indorsement : or, 2. the bearer may be the person entitled to demand payment, as in bank notes. Uncertainty as to the payee is fatal to the bill (a).

(a) Blanckenhagen v. Blundel ; 2 Barn. and Ald. 417.

325. The debt in a bill or note must be clear, and unquestionable, and pecuniary.

Bayley, 7, 8. Smith v. Nightingale ; 2 Starkie, 375. Thomson, 71.

326. *Term of Payment.* The time of payment is important, as regulating the obligation, and the effect of the instrument. It is either on *demand* ; or at *sight* ; or, on a day certain after *sight* or *presentment* ; or, a day certain after the *date* of the bill ; or, at *usance*, or *double usance*, or *triple* or *half usance* ;—usance being a period, differing according to local custom, for drawing bills from one country on another (a). But if no term be fixed, the presumption is for payment on demand ; and it has been so held in a question on the Stamp Act (b) : though it would seem that days of grace would in such case be allowed (c).

In reckoning time in bills of exchange, *months* are calendar, not lunar (*d*): weeks are computed by days; and days are reckoned with the exclusion of that on which the bill is dated (*e*).

(*a*) Bayley, 201-3. Thomson, 380, 808.

(*b*) Whitlock v. Underwood; 2 Barn. and Cress. 157.

(*c*) Walker v. Attwood; 11 Mod. Rep. 190.

(*d*) Beawes, No. 253.

(*e*) Hague v. French, 3 Bos. and Pull. 173. Campbell v. French, 6 Term Rep. 212.

327. *Days of Grace.* In addition to the term specified, a certain indulgence is granted, called *days of grace*, in all cases where the bill is drawn at usance, or where the term of payment is definite, whether after date or after sight (*a*). When the bill is payable at sight, it is unsettled whether days of grace are allowed; though the weight of authority seems to be for the affirmative (*b*). It is not settled in Scotland (*c*). When the bill is made payable on demand, no days of grace are allowed. The days of grace differ in different countries, but generally are reckoned exclusive of the day on which the bill becomes due. In Great Britain and Ireland three days of grace are allowed, exclusive of the day on which the bill falls due; and when the last day of grace falls on Sunday, or on a day on which, by public authority, no business can be done, payment must be made on the preceding day (*d*).

NOTE.—In England, the rule by usage includes Sunday and Christmas-day; and by statute (39-40 Geo. III. c. 42.) it was extended to Good-Friday. To remove doubts which were still entertained, respecting the necessity of payment, and of protest, on those days, and on days appointed by proclamation for solemn fasts or thanksgivings, it is provided by 7 and 8 Geo. IV. c. 15. (not extending to Scotland), that Christmas, Good-Friday, and all days appointed by proclamation for solemn fasts and thanksgivings, shall, in all such questions, be treated and considered as Sunday.

(*a*) Colman v. Sayer, 1 Barnard, 203. Brown v. Harraden, 4 Term Rep. 148. Janson v. Thomas; Bayley, 78. Tassell v. Lewis. Lord Raymond, 743.

(*b*) Chitty on Bills, 146. 1 Sel. N. P. 352. Colman, ut sup. (*a*).

(*c*) Thomson, 378.

(*d*) 1 Selwyn, N. P. 352. Smith and Payne, June 29. 1786; M. 1612.

328. *The Stamp.* This is regulated by Act of Parliament. Without a stamp of the proper, or higher, value and proper denomination, the bill or note is void; and the stamp cannot be

supplied or altered, if not at first correct (*a*). The amount of stamp on inland bills payable to bearer or order, varies with the time of payment, whether exceeding, or falling short of two months after date, or sixty days after *sight*: And on that matter, 1. the term is reckoned by the date appearing on the face of the bill, whatever may have been the time of issuing the bill (*b*); 2. a bill at two months after sight may be exposed to nullity, if presented so that those two months shall exceed sixty days (*c*).

The stamp on foreign bills applies only to bills made in Great Britain, not to those made abroad (*d*); and it is not on mere probabilities that a bill bearing a foreign date will be held to have been drawn in England (*e*). If really drawn abroad, they are not liable to the British Stamp-Law, nor do the Courts of this country hold it incumbent on them to enforce foreign stamp-laws (*f*). The sum for which the pro rata duty is leviable, is that which is due at the date of the bill, not the amount as augmented by accruing interest (*g*).

No document which does not contain a promise to pay is a note under the Stamp-Acts: When such promise accompanies the acknowledgment of money, it is held a proper note (*h*).

If a bill or note be altered in a material part after it is issued, unless merely for correcting a clerical error, a new stamp is necessary, and the bill is null (*i*).

(*a*) 55 Geo. III. c. 184, § 11–29. 9 Geo. IV. c. 23. 9 Geo. IV. c. 49, § 15. *McIntosh*, May 13. 1830; 8 S. D. 739. *Ettles*, Feb. 15. 1833; reversed, April 5. 1834; W. S. App. Cases.

(*b*) *Upstone v. Marchant*, 2 Barn. and Cress. 10. *Williams v. Jarret*, 5 Barn. and Adol. 32.

(*c*) *Sturdy v. Henderson*, 4 Barn. and Ald. 592.

(*d*) *Jourdain v. Lashbrook*, 7 Term. Rep. 601.

(*e*) *Abraham v. Dubois*, 4 Camp. 269. *Robertson and Co.* July 11. 1822; 1 S. D. 513.

(*f*) *James v. Catherwood*, 3 D. R. 190. *Wynne v. Jackson*, 2 Russell, 352.

(*g*) *Preussing v. Ing*, 4 Barn. and Ald. 204.

(*h*) 1 Illus. 224, and v. iii. p. 118. *Alexander*, Feb. 26. 1830; 8 S. D. 602. *McIntosh*, May 13. 1830. *Ib.* 739. *Pirie*, Feb. 28. 1833; 11 S. D. 473. *Miller*, Dec. 4. 1835; 13 S. D. 117. *Leith Bank*, Jan. 22. 1836; 14 S. D. 332. *Isles*, June 23. 1836; 14 S. D. 996. *Haddin*, June 17. 1838.

(*i*) *Bayley*, 89–96, and cases there cited. *Johnston and Co.* March 7. 1801. See also *McLean v. Morrison*, May 26. 1834; 12 S. D. 613. *Home*, June 7. 1836; 14 S. D. 898.

329. 2. *Negotiable Nature and Transference of Bills and Notes.* By means of indorsement see (§ 308.), bills and notes circulate as paper-money, passing from hand to hand, unaf-

fectured by any latent exception, and with increasing credit at each indorsement. 1. Bills originally payable "to the bearer," or to "a certain person or bearer," may be transferred without indorsement; but of course without any increase of credit (*a*). 2. Bills, although not taken payable *to order*, may, in Scotland, be indorsed (*b*); but it is otherwise in England, France, and America (*c*). 3. Indorsements to a person named, are said to be *in full*; if they are in blank, the bill is payable to the holder (*d*). 4. Indorsement made in pencil has been held good within the custom of merchants (*e*). 5. Bills granted for gaming debt are null in the hands of the original party, and were formerly held to be so even in the hands of an innocent indorsee as against the *loser* (*f*). But no such defence was held competent to a drawer or indorser discounting the bill and receiving money for it (*g*). And now, by recent statute (see above, § 36, No. 4.), the bill seems to be effectual in the hand of a bona fide indorsee; the granter or maker being entitled, on paying to him, to recover from the original payee as money paid on an illegal consideration. In England, an injunction, or an order to cancel, will be granted in Chancery at the suit of the acceptor of a bill for a gaming debt, to prevent it from being indorsed to third parties (*h*). 6. Bills tainted with usury, though null, are not so in the hand of an indorsee for value without notice: But no bill or note payable within twelve months from the date, or not having more than twelve months to run, is null on the ground of usury. See § 36, No. 4.

(*a*) Bayley, 98. Grant *v.* Vaughan, 3 Burr. 1516. Wookey *v.* Poole, 4 Barn. and Ald. 1. as to Exchequer Bills.

(*b*) Crichton *v.* Gibson, Jan. 1726; M. 1446. 3 Illus. 119.

(*c*) Bayley, 29. 2 Kent, 77. 1 Pardessus, 358.

(*d*) Collins *v.* Martin, 1 Bos. and Pull, 648. Peacock *v.* Rhodes, Doug. 636.

(*e*) Geary *v.* Physic, 5 Barn. and Cress. 235.

(*f*) 9 Anne, c. 14, § 1. Shillito *v.* Theed, 7 Bing. 405. Hamilton, May 18. 1832; 10 S. D. 549, and Cases there cited.

(*g*) Edwards *v.* Dick, 4 Barn. and Ald. 212.

(*h*) Lloyd *v.* Gordon, 2 Swans. 180. Wynne *v.* Callender, 1 Russ. 293.

330. The indorsement may be restrictive; as, 1. It may be payable "to A B only," which will prevent him from indorsing it (*a*); 2. The indorsement may be "for my use," in which case it is held that this is not a mere direction to apply the contents to the indorser's use, but a restriction which creates a trust in any one who becomes the indorsee; so that he cannot take it

for the payee's debt, but must hold the contents as the money of the person interposing the restriction (*b*); yet the payee of such a bill may discount it, the presumption being that he acts for his constituent (*c*); or, 3. It may be *without recourse*, in which case no demand can come back on the indorser, who would otherwise be liable; or, 4. A *condition may be annexed* to an indorsation which will be available against the acceptor, if the bill shall be accepted with such condition in the indorsement (*d*).

NOTE.—See *Rothschild v. Corney*, 1829, as to Bankers' Cheques. 9 Barn. and Cress. 388.

(*a*) *Anchor v. Bank of England*, Douglas, 615.

(*b*) *Treuttell v. Barandon*, 8 Taunt. 100. *Sigourney v. Lloyd*, 1828; 8 Barn. and Cress. 622, and cases there cited; confirmed in Exchequer-Chamber, 5 Bing. 525.

(*c*) See *Treuttell*, ut sup. (*b*).

(*d*) *Robertson v. Kensington*, 4 Taunt. 30.

331. Indorsation carries the bill only; but leaves untransmitted the diligence which may have been raised on it; and has no effect in transferring dividends due on the bill out of a sequestrated estate.

Wallace, Hamilton, and Co., June 1821; affirmed, June 23. 1824. 2 Shaw's App. Cases, 467.

332. Indorsation may be made at any time; even after the bill or note is past due (*a*). But whether such indorsation carries the bill discharged of latent exceptions as between the original debtor and creditor, is a question which has been differently viewed in Scotland and in England. In England it has not this effect if made after the day of payment, or when marks of dishonour are on the bill (*b*). In Scotland the decisions have greatly varied. It has been held that indorsation even after the bill is due, when it bears no marks of dishonour, carries the bill free of latent claims (*c*): But when it has been retired, and so marked, and again put into circulation (*d*), or dishonoured, and noted on the bill as such (*e*), the indorsee has been held liable to latent exceptions. When, again, the bill has been indorsed or discounted in circumstances which, in the opinion of a jury, ought to have excited suspicion, and called for inquiry, the indorsee has been held subject to those objections to which the indorser was liable (*f*).

(*a*) *Hubbard v. Jackson*, 4 Bing. 300. *Callow v. Lawrence*, 3 Maule and Sel. 95. So it is in America, 3 Kent, 91.

(*b*) *Bayley*, 118.

(c) *M'Gowan*, Feb. 24. 1826 ; 4 S. D. 498. *Muir and Co.*, March 4. 1831 ; 9 S. D. 535.

(d) *Smith*, May 28. 1829 ; 7 S. D. 670.

(e) *Macdonald*, Dec. 23. 1836 ; 15 S. D. 303.

(f) *Gill v. Cubit*, 3 Barn. and Cress. 466. *Strange v. Wigney*, 6 Bing. 677. *Down v. Halling*, 4 B. and Cress. 330. *Backhouse v. Harrison*, 5 B. and Ad. 1098. See *Macdonald*, ut sup. (e).

333. The scoring and deleting of an indorsation reinstates the indorser, if truly intended so to do.

Adam, Dec. 16. 1827 ; 6 S. D. 244. See *Russel*, Jan. 27. 1824 ; 2 S. D. 648 ; f. n.

The doctrine of procuration applicable to acceptance, holds good in relation to indorsement. See above, § 321.

334. 3. *Negotiation and Mode of enforcing Payment of Bills and Notes*. The negotiation of bills consists of three acts—Presentment ; Protest ; and Notice.

335. 1. PRESENTMENT is the act of shewing or offering at the place of payment a draft to the drawee ; or a bill to the acceptor ; or note to the maker ; that in the one case the bill may be accepted or paid, and in the other payment made.

336. *Presentment for Acceptance*. The presentment of a DRAFT for acceptance, has a double purpose,—to satisfy the bill-holder whether he is to rely on the payment of the debt ; and to preserve *recourse*, or a demand for indemnification against the drawer and indorsers, if the drawee should not accept. And, 1. The presentment must be at the drawee's place of residence, when the bill is made payable there ; and if the drawee has absconded, is not there to be found, and cannot be heard of at the banking houses, the bill is to be held as dishonoured (a). 2. If the drawee has changed his place of residence, the holder must endeavour to find it out and present the bill there (b). 3. If the drawee cannot himself be found, nor his residence discovered, the bill should be presented to some one authorized to act for him (c). 4. If the drawee be dead, the presentment to his heirs may be proper, but does not seem to be necessary if immediate notice be given of the death ; and if the bill be payable at a banker's, a presentment at that banker's is sufficient (d). 5. If, on the bill being presented, acceptance should be refused, this must be shewn by a protest, and notice must be given to the drawer and indorsers. (See § 340.) 6. If the time of payment depend on

the presentment (as in bills payable *after sight*), the bill-holder is bound, within a reasonable time, to present for acceptance (*e*). The *time* of presentment is somewhat discretionary, or controlled only by the general rule, that there must be no undue or unnecessary delay; which is properly a question for the jury (*f*). 7. If the bill be drawn at sight, it need not be presented for acceptance; and yet, as days of grace are in that case allowed, it would seem requisite (*g*). 8. If the bill be payable *on demand*, or if the day of payment be certain, the holder is not required to present it for acceptance, but may present it at once for acceptance and for payment when due (*h*); but, *an agent* must present a bill for *acceptance* (*i*). 9. The presentment must be made at a seasonable time (*k*), and within the known business hours of a banker or merchant's attendance (*l*). 10. The bill may be left for acceptance for twenty-four hours (*m*).

(*a*) Bayley, 173. Anon. Lord Raym. 748, on the evidence of merchants.

(*b*) Collins v. Butler, Strange, 1087. Bateman v. Joseph, 12 East. 433.

(*c*) Frith v. Thrush, 8 Barn. and Cress. 397.

(*d*) Sanderson v. Judge, 2 H. Blackst. 509. Harris v. Packer, 3 Tyrwhit, 370.

(*e*) Pothier, No. 143. Bayley, 181. Falls, June 17. 1766; M. 1593. Muilman v. D'Eguino, 2 H. Blackst. 565.

(*f*) Fry v. Hill, 7 Taunt. 397. Falls and Muilman's Cases, supra (*e*).

(*g*) Bayley, 183.

(*h*) Ferguson, Feb. 16. 1727; M. 1558. Jamieson, June 28. 1749; M. 1494. See Philpot, 3 Car. and Pay. 244.

(*i*) Dunlop, Jan. 16. 1810; F. C.

(*k*) Barclay v. Bailey, 2 Camp. 527. Morgan v. Davison, 1 Starkie, 114.

(*l*) Parker v. Gordon, 7 East. 385. See Robson v. Bennet, 2 Taunt. 388.

(*m*) Bellasis v. Hester, 1 Lord Raym. 281. Hayward v. Bank of England, Strange, 550; Bayley, 186.

337. Presentment for Payment. Bills and notes must, in order to preserve recourse against the other parties, be duly presented for *payment*; and this even where acceptance has been previously refused: And the evidence of such presentment is a notarial protest (*a*). 1. If payable *on demand* (in which case no days of grace are allowed), (§ 327), the presentment must be immediate, and the risk of delay will be with the bill-holder (*b*). If put into circulation, it must be presented within a reasonable time after it is received, which rather seems to be considered as a question of fact for the jury, than of legal construction for the Court (*c*); and in general, it seems to be held that a presentment on the day after receipt by post is enough (*d*).

2. If payable so many days after sight, the bill or note must be presented on the last day of grace after the expiration of that time, reckoned from the day on which the presentment for acceptance took place. 3. If payable at a day certain, the bill or note must be presented on the last day of grace. See above, § 327. 4. It must be presented a reasonable time before the day is out. If regular hours be fixed by usage, they must be observed; if payable at a banker's, bank hours must be observed. See above, § 336, No. 9. 5. The place of payment may be indicated either in the drawing of the bill or in its acceptance. In the drawing, it is commonly indicated by the mere address of the drawee. If any other place be mentioned for payment besides that implied in the address, and the bill have not, when so presented, been accepted, it may be protested in that place for non-payment (*e*). If a particular house be mentioned either in the body of the bill or note, or in a marginal note, or in the acceptance, the presentment for payment must be there (*f*). If the place be mentioned in the acceptance, and without the restrictive words "there only," or "not elsewhere," the acceptance is held to be general, and the presentment for payment need not necessarily be there, but to the acceptor himself. But if the acceptance specify the place with the above restrictive words, the presentment for payment must be at the particular place or house so indicated. And no difference of construction has been admitted of such restrictive specification, whether proceeding from the drawer or from the acceptor (*g*). 6. Bills drawn payable at any other place than the places therein mentioned as the residence of the drawee, if not accepted, are to be protested for non-payment at the place of payment expressed in the draft without any further presentment to the drawee (*h*). 7. If a bill, at so many days after sight, have been presented for acceptance, and refused, but afterwards accepted for honour of the drawer, the presentment for *payment* is correctly made when the bill is at maturity *according to the acceptance for honour*; and this both in a question with the drawer, and with the acceptor for honour (*i*).

(a) Bayley, 186. Thomson, 417. Hoare v. Cazenove, 1812; 16 East, 398; Ellenb. Gibb v. Mather, 8 Bing. 214.

(b) Bayley, 186.

(c) Bayley, 187, and cases there cited. See Williams v. Smith, 2 Barn. and Ald. 496. See Leith Bank, Jan. 22. 1836; 14 S. D. 333.

(d) *Rickford v. Ridge*, 2 Camp. 537.

(e) 2 and 3 William IV. c. 98.

(f) *Ambrose v. Hopwood*, 2 Taunt. 61. *Sanderson v. Bowes, Bayley*, 175. *Dickinson v. Brown*, 16 East, 110, and 112. *Trethcothick v. Edwin*, 1 Starkie, 468.

(g) 1 and 2 Geo. IV. c. 78. *Rowe's Case in House of Lords*, 2 Bligh. 391. *Turner v. Hayden*, 4 Barn. and Cress. 1. *Fayle v. Bird*, 6 Barn. and Cress. 531. *Selby v. Eden*, 3 Bing. 611. *Williams v. Waring*, 10 Barn. and Cress. 2.

(h) 2 and 3 Will. IV. c. 98.

(i) *Williams v. Germaine*, 1827; 7 Barn. and Cress. 468.

338. 2. PROTEST. The protest is a notarial declaration, before witnesses, on presentment (§ 335.), that the bill has been presented; has not been accepted, or not paid; and that the bill-holder is to enforce payment not only against the acceptor (if the protest be for non-payment), but also against the drawer and indorsers. A note is made on the bill at protesting (which is termed noting the bill), and from that note, and from the notary's book, the notary may make out the instrument at any time (a). But the mere note on the bill is insufficient to authorize diligence: The protest must be extended on paper stamped with a rateable duty according to the amount of the bill or note (b). It is signed by the notary, but the subscription of the witnesses is not indispensable (c). And none but a notary can protest a bill; nor can any notary protest a bill drawn or accepted by himself (d).

(a) *Brown and Co. Dec. 8. 1807. Chaters v. Bell*, 4 Espin. 48. *Selwyn, Nisi Pr.* 361.

(b) 55 Geo. III. c. 184. See *Barbour*, May 23. 1823; 2 S. D. 328; and *Napier*, Jan. 17. 1824. *Ib.* 622.

(c) *Inglis*, July 21. 1697; *M.* 16971.

(d) *Barbour*, May 23. 1823; 2 S. D. 328. See *Alexander*, Nov. 28. 1827; 6 S. D. 151, particularly p. 157. *Russell*, Nov. 27. 1827, *F. C.*; 6 S. D. 133. *Allan*, June 5. 1829; 7 S. D. 706. See *Reid*, Nov. 19. 1830; 9 S. D. 31. *McKenzie*, Nov. 23. 1830; *Ib.* 52. *Leith Bank*, Jan. 22. 1836; 14 S. D. 333.

339. The protest is indispensably necessary, not only for recording in order to authorize summary diligence even against the acceptor or maker, but also for recourse against the drawer and indorsers;—and, 1. The want of protest cannot be supplied, even by oath of the party that he knew of the dishonour of the bill; 2. The bankruptcy of the drawee, or acceptor, or maker of the note, will not, without a protest, ground a claim of recourse; 3. A notarial protest of presentment of a draft, where the drawee is possessed of funds of the

drawer, is equivalent to an intimated assignation. See below, § 1465, and cases there cited.

NOTE.—A protest not being necessary in England (except to certain effects under special statutes), questions as to the ambiguity of notice have arisen in England for which there is scarcely room in Scotland.

340. 3. NOTICE. This is the announcement made to those against whom recourse is demandable, *first*, That the bill or note has been dishonoured; and, *secondly*, That recourse is to be taken. The use of it is to enable each, in his order, to take precautions for his safety and indemnification. But it is now settled, that due notice forms an absolute and indispensable condition of the drawer's or indorser's responsibility, whether any loss has arisen from want of notice or not (*a*). 1. Notice must be given of non-acceptance if the bill-holder, though not bound to present for acceptance, does so (*b*). 2. Notice is unnecessary against the acceptor or maker of a note. 3. Neglect to give notice is a discharge to all the other parties in the bill, on the ground that it is implied in the obligation of each indorser, that he shall have such notice: And it is not necessary to shew loss from want of notice; the law presuming it (*c*). It has been questioned whether one who has guaranteed payment of a bill is entitled to notice (*d*). 4. Notice requires to be given within a certain time, different in foreign and in inland bills. The time in *foreign bills* is regulated by the usage of merchants (*e*): And the rules seem to be, That to one residing in the same place, notice must be given before the *expiration of the day after the dishonour*, and so that it may reach the person that day (*f*): That for notice by each successive indorsee to the indorser preceding, a day is allowed after the notice to himself (*g*); but this only on the footing that there has not, in the course of the transmission, been undue delay at any one stage; for if notice to any one indorser has been beyond the day, the drawer and prior indorsers are discharged (*h*): That to persons resident elsewhere, notice must be despatched by the next post; or, if that should be a day of public rest, by the post following. In *inland bills* in Scotland notice within a fortnight is sufficient (*i*): But this extreme latitude is strictly confined to inland bills and notes; and will not apply to bills drawn on or from England or Ireland (*k*). 5. A

bill-holder may be ignorant of the residence of those whose mere names are on the bill;—and all that the law requires in that case is, that he shall use due diligence to discover the residence of the parties, and give notice as soon as it can reasonably be given (*l*). 6. It is sufficient notice, if a letter properly addressed be in due time put into the post-office (*m*); but an error in the address will make it requisite to prove the actual delivery of the letter (*n*). 7. The drawer, by consenting to a delay or indulgence to the acceptor, waives the necessity of notice (*o*).

(*a*) Littlejohn, Dec. 12. 1746; M. 1569, correcting former cases. Langley, June 17. 1748; M. 1574. See also Chitty on Bills, 197–8, and cases cited.

(*b*) Miln, Feb. 10. 1710; M. 1551. Goodal v. Dolley, 1 Term. Rep. 712. Orr v. Maguinis, 7 East, 362. Roscoe v. Hardy, 12 East, 434.

(*c*) See cases, sup. (*a*).

(*d*) Borthwick, June 3. 1830; 8 S. D. 857. See National Bank, Feb. 3. 1836; 14 S. D. 402.

(*e*) 12 Geo. III. c. 72. § 41.

(*f*) Smith v. Mullet, 2 Camp. 208. Jamieson v. Swinton, Ib. 373. See Clarkson's case, Nov. 17. 1831; 10 S. D. 17.

(*g*) Jamieson, ut sup.

(*h*) Marsh v. Maxwell, 2 Camp. 210.

(*i*) 12 Geo. III. c. 72, § 41. 33 Geo. III. c. 74. Thomson on Bills, 500. 1 Bell, Com. 415. Milligan, Feb. 27. 1829; 7 S. D. 489.

(*k*) Reynolds, Feb. 4. 1774; M. 1598. Ferguson and Co. June 17. 1803.

(*l*) Baldwin v. Richardson, 1 Barn. and Cress. 245. Firth v. Thrush, 1828; 8 Barn. and Cress. 387.

(*m*) Hawkes v. Salter, 1817; 4 Bing. 715.

(*n*) Milligan, Feb. 27. 1829; 7 S. D. 489.

(*o*) Campbell, Dec. 28. 1839; 12 S. D. 269.

341. Import of the notice. In Scotland the necessity of a protest gives a clear import to the notice of its having been made. In England several difficulties have occurred as to the import of notice which can occur with us only where no protest has been made. And the rule there adopted is, that the notice must contain all that a protest imports, viz. that the bill was dishonoured, and that the party looks for payment to the indorser (*a*). Bankruptcy is not equivalent to protest (§ 339.), neither is it equivalent to notice; but circumstances necessarily inferring knowledge of the dishonour, and of the intention to demand recourse, will be enough, and the right to notice may be waived (*b*).

(*a*) Salarte v. Palmer, 7 Bing. 530; affirmed in House of Lords, 1 Bing. New Series, 194. See 3 Illus. 122–4.

(*b*) Murray and Son, July 2. 1824; 3 S. D. 202. Allan, Dec. 18. 1827; 6 S. D. 260.

342. *Demand and Diligence on Bills and Notes.* The demand

upon a bill or note is made, 1. against the acceptor, for the contents of the bill, with interest and charges; or, 2. against indorsers for the contents of the bill; and, in the case of a foreign bill, for *exchange*, being the difference of money where drawn and where payable; and also for *re-exchange*, being the damage arising from the dishonour of the bill and the necessity of the bill-holder's having recourse back to the place of drawing.

NOTE.—In America the rule of damage on returned foreign bills is different, and varies in the several States; in some twenty per cent., in others six, seven and a half, &c. See 3 Kent. Com. 116, et seq.

1681, c. 20. Thomson on Bills, 593. Pothier's Cont. de Change, No. 52. and 64; Code de Commerce, No. 167. Pardessus, 461, v. i.

343. The demand on bills or notes may be enforced summarily, without the necessity of an action, by a decree of registration, after the analogy of the decree by consent, § 67. (a). But the person making the demand must either, 1. have the bill to deliver up on payment; or, 2. he must give full indemnity if it should be lost (b).

(a) 1681, c. 20. 1696, 36. 12 Geo. III. c. 72, § 41, 42. 102 Vict. c. 114. Yuill, July 25. 1699; M. 14996.

(b) In England it is necessary to go into Chancery in such a case: *Hansard v. Robinson*, 7 Barn. and Cress. 90.

344. The protest (§ 338.) must be registered in the books of a competent Court, within six months from the date of the bill in case of non-acceptance; or six months from the day of payment, in case of non-payment; and it would seem, that in a case where protest has been taken at once for non-acceptance and non-payment (§ 336. 3.), the day of payment will be the terminus a quo in reckoning the six months (a).

The instrument itself and the record must be free from erasure; but an erasure in the extract was held not fatal to diligence, being in a word unimportant (b).

(a) Yuill, July 25. 1699; M. 14996. See Thomson on Bills, 596.

(b) *Crichton*, Nov. 25. 1830; 9 S. D. 68.

345. A co-accepter of a bill is entitled, on retiring it, to proceed with the diligence to the effect of operating his relief, without any assignation.

Walker v. Johnson, May 29. 1829; 7 S. D. 684.

346. ACCOMMODATION BILLS AND NOTES. Although bills

and notes properly spring from real transactions, and so are the representatives of actual debts, the easy form of their constitution and transmission have led to their being used in raising money on credit for accommodation, without any real debt existing between the drawer and drawee, or with the indorsers. These are also called Accommodation Bills, or Wind Bills, from the fictitious nature of the transaction. And this sort of transaction is neither unlawful nor without use.

347. There are some points in which real and accommodation bills differ :—In a real bill the parties are liable as they stand on the bill : The acceptor is the real debtor ; and the drawer, and each indorser in his order, is surety to the bill-holder. In accommodation bills, the acceptor is the mandatary of the drawer, who requests him to pay ; and on payment he becomes his creditor *ex mandato*, § 225. The bill-holder indeed may have received the bill as a real bill ; but to the original parties it is a mere accommodation, and their rights will be regulated on that footing. The neglect of notice therefore to the drawer will not bar recourse on him, if there be no fund in the drawee's hand ; or no reasonable ground to expect the bill to be honoured. Of this the bill-holder must run the risk if he should neglect to give notice. If the drawer have, *at drawing*, effects with the drawee, it will entitle to notice, as if it were not an accommodation bill. And in the same way, if the drawer have good ground, on any other account, to look for acceptance, this will give him right to notice. Where a bill is drawn for the use of another, the dishonour of it must be intimated.

1 Bell, Com. 386. Thomson on Bills, 559. *Cory v. Scott*, 3 Barn. and Ald. 619. *Norton v. Pickering*, 1828 ; 8 Barn. and Cress. 610. *Henderson*, Nov. 24. 1829 ; 8 S. D. 121 ; F. C. *Dirom*, June 7. 1827 ; 5 S. D. 773. *France v. Lucy*, 1 Ry. and Mo. 341. See *Claridge v. Dalton*, 4 Maule and Sel. 226.

348. Where one signs a bill as cautioner, this addition (whatever effect it may have in a question with him for whom he engages) has none against a third party taking the bill by indorsation.

M'Dougall, Feb. 13. 1810 ; F. C. *Sharp*, June 24. 1808 ; *M. Bill of Exch.* App. 22. *Fergusson*, July 9. 1825 ; 4 S. D. 165.

349. SEXENNIAL PRESCRIPTION. Bills and notes are intended for immediate use, not as securities for permanent

loans: And the want of the ordinary checks on forgery has led to a limitation, by which a bill or note loses all effect as an obligation on the expiration of six years from the time when payment is demandable: *i. e.* from the last day of grace, if payable on a day certain; if on demand, from the date; if at sight, from the last day of grace after presentment, or the day before if the last be a holiday. See below, § 594.

12 Geo. III. c. 72. § 37. and 39.

III. PARTNERSHIP.

1 Stair, t. 16. 3 Ersk. 3. § 18, 30. 2 Bell, Com. 611, et seq. Montagu on Partnership. Gow and Collier on Partnership, 2 Selw. N. P. 1133. 3 Kent, Com. 23. Pothier, Tr. de Societé, tit. 3. p. 533. Merlin, Rep. de Juris. tom. 12. p. 662. Pardessus, tom. 3. p. 1—98. Van Leeuwin, 409. Voet, lib. 17. t. 2.

350. This contract combines the capacities, industry, skill, funds, and credit of several, in the prosecution of a common object of trade, manufacture, or professional employment. It involves the principles of many separate contracts, as Sale, Location, Pledge, Mandate, Trust. Under Partnership may be considered,—1. Partnership, including joint adventure; 2. Joint stock companies; 3. Public chartered companies.

351. PARTNERSHIP may be described as a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit, with a contribution, for that end, of stipulated shares of goods, money, skill, and industry; the stock of the society being held *pro indiviso* in trust for the creditors (§ 353). It is distinguished from joint purchase (see below, § 397). It is distinguished also from community arising from common property (see § 1071), which, though held *pro indiviso*, involves no trust for the creditors (*a*). It is in legal construction held on the one hand to imply an unlimited mandate or procuration to each partner, to bind the company in the line of its trade or employment (*b*), and on the other a guarantee by each, to third parties of all the engagements legally undertaken in the social name.

(*a*) 3 Ersk. 3. § 18. Pothier, Cont. de Societé, No. 2. Pardessus, t. 3. p. 4.

(*b*) Ersk. ut sup. § 20.

352. 1. *Partnership Proper.* This contract has a double

operation;—one, as it affects the immediate parties to the contract; another, as it relates to the public, dealing with the company.

353. 1. *Stock*. The stock of the company, as contributed, and increased or diminished, by the dealings of the company, is not only common, and held pro indiviso by all the partners, but it is vested in them in trust, for the creditors of the company in the first place; and afterwards for division among the partners, according to the shares of each.

2 Bell, Com. 612, 615. Robertson's Creditors, 1744; in 2 Bell, Com. 619. Corrie and Sons, Jan. 24. 1761; M. 14596. Crooks, Jan. 29. 1779; M. 14596. Sime, March 1. 1804; M. *Her. and Mov.* App. 3; in House of Lords, see F. C. for 1812–14, App. 684. Lords of Treasury, Feb. 14. 1809; F. C. See in England, Fox v. Hanbury, Cowp. 445. Skipp v. Harwood, 2 Swan. 586.

354. 2. *Implied Mandate*. Each partner is, by the law, held to be *præpositus negotiis societatis*; and whatever he does in the company's name, or on its credit, in the line of the company's trade, is held to be done for the company (*a*). He is empowered in that line to bind the society by bill or mercantile document, whatever their private contract may be (*b*). Nay, even a fraud committed by a partner in the line of the company trade, binds the company (*c*). But it has been held in England that he is not empowered to bind by deed, as in a mortgage (*d*).

(*a*) 3 Ersk. 3. § 20. Dewar, June 14. 1766; M. 14569. Wallace, June 8. 1821; 1 S. D. 53; affirmed, June 23. 1824; 2 Shaw's App. Cases, 467.

(*b*) Wallace, ut sup. (*a*.) Ex parte Bonbonus, 8 Vesey, J. 540. Hope v. Cust, 1 East, 53. Ridley v. Taylor, 1810; 13 East, 175.

(*c*) Willet v. Chambers, Cowp. 814. Ex parte Balland, 1 Moris and Marsh. Cases in Bankruptcy, 315.

(*d*) Haman v. Jackson, 7 Term. Rep. 207.

355. To the above rule there are exceptions, 1. where the dealing is manifestly not a company matter (*a*); and wherever the debt secured is that of a partner, the onus probandi is laid on the bill-holder to shew the assent of the company (*b*); 2. where the party contracting with the partner has notice of a limitation of power the company is not bound (*c*); 3. Where a guarantee or obligation of surety is entered into, it will not bind the company unless it be in reference to the company's course of trade, or proof be given, of its having been authorized or adopted by the company (*d*). But the full power is implied, where the partners have consented to, or acquiesced

in, the obligation (e); or where a party applies to his own use the bill or obligation of the company, of which he is, as a creditor, fairly possessed or vested, with the power of disposal (f); or where a bill or note of the company has found its way into the hands of an onerous and bona fide holder (g).

(a) See above, § 321. *Blair v. Miller*, Jan. 22. 1811; F. C. *Proudfoot*, Jan. 18. 1825; F. C.; 3 S. D. 443. *Johnson, Sharp, and Co.* in House of Lords, July 24. 1822; 1 *Shaw's App. Cases*, 244. *Blair*, June 11. 1835; 13 S. D. 901. *M'Leod*, June 30. 1836; 14 S. D. 1058. *Duncan v. Lowndes*, 1813; 3 *Camp.* 478. *Hope v. Cust*, 1 *East*, 53. *Swan v. Steel*, 7 *East*. 210. *Wells v. Masterman*, 2 *Espin.* 730. *Green v. Deakin*, 1818; 2 *Starkie*, 347. *Goulding*, ex parte 2 *Glyn.* and *Jam.* 118; affirmed by Lord Lyndhurst in the House of Lords, *Collyer*, 284.

(b) Result of the above cases (a).

(c) *Galway v. Matthew*, 1808; 10 *East*, 264.

(d) *Sandilands v. Marsh*. 2 *Barn. and Ald.* 673. See 3 *Kent, Com.* 47.

(e) *Bonbonus supra.* *Sandilands v. Marsh*, 1819; 2 *Barn.* and *Ald.* 673.

(f) *Ridley v. Taylor*, 13 *East*, 175. Ex parte, *Kirby Buck's Cases*, 511.

(g) *Bonbonus, supra*, 8 *Ves.* 540.

356. 3. *Joint Responsibility.* The partners are jointly and severally liable as guarantees to the public of the company's obligations; and so may be called on individually, on the company failing to pay the debt; the company being first called, and the debt constituted against it. (See also § 371.) In relation to each other, their responsibility is regulated by their contract.

Geddes, June 2. 1827; 5 S. D. 747. See also *Johnson*, Jan. 20. 1824; 2 S. D. 625. *Anon.* Feb. 26. 1741; *Kilk.* 518.

357. 4. The company forms a separate PERSON, 1. competent to maintain its relations with third parties by its separate name or firm, independently of the partners; 2. capable also of holding a lease, but not of holding feudally as a vassal (a); 3. a company having a firm may sue or be sued by it (b); 4. a company having only a descriptive name can appear judicially only by or with some or all of the individual names (c). See below, as to Joint Stock Banking Companies, § 399.

(a) *Denniston*, Feb. 16. 1800; F. C.

(b) *Douglas, Hume, and Co.* June 16. 1792; House of Lords, Dec. 24. 1795. *Thomson*, July 2. 1812; F. C. *Campbell v. Baird*, Feb. 13. 1827; 5 S. D. 335. *Forsyth*, Nov. 18. 1834; 13 S. D. 42. *Wilson*, Jan. 20. 1836; 14 S. D. 262. *Thomson*, Nov. 30. 1836; 15 S. D. 173.

(c) *Culcreugh Cotton Co.* Nov. 27. 1822; 2 S. D. 41. *Scott*, Feb. 23. 1827; 5 S. D. 414. *Commercial Bank*, 28 July 1828; 3 *W. S.* 365. *May*, Nov. 27. 1834; 13 S. D. 94.

358. 5. *Delectus Personæ.* It is strongly implied from the

exuberant trust reposed by the partners in each other, and the confidential nature of the connexion, that no one shall be a partner without the consent of the rest. Hence heirs, assignees, and creditors, are excluded, unless it be otherwise stipulated, or necessarily implied; as from the long duration of the company. In the Roman law, a stipulation to that effect was incompetent.

Dig. lib. 17. tit. 17. Pro Socio. Pothier, Tr. de Societé, § 145. Warner, Jan. 24. 1798; M. 14603; affirmed, 3 Dow, 76. See Royal Bank, Feb. 14. 1770; F. C.; M. *Adjudication*, App. 3.

359. Partnership is either AVOWED or ANONYMOUS. The former is commonly carried on and known by a firm or social name: In the latter, the trade is apparently carried on by an individual, there being latent or sleeping partners behind. The rules applicable to both are the same, on the latent partnership, or those concerned in it, being discovered. See below, § 356.

360. 1. *Constitution of Partnership.* In the constitution of partnership, a distinction is made between questions among the parties themselves, and questions with third parties. As to the parties themselves, there are two questions,—1. Whether there be a contract so constituted as to raise the rights and responsibilities of partners? and, 2. What share of stock and profit each is bound to contribute, or entitled to claim? As to third parties, the only question is, Whether one is bound as a partner? for where he is so, it signifies nothing, in respect to the extent of his liability, what share he holds.

361. 1. *Partnership as between the parties themselves*, is a consensual contract; and on such evidence as the law of Scotland admits in proof of consent, the partners will be entitled to their rights as such, or bound to the public. This may be either, 1. a solemn written contract of partnership, duly authenticated, (§ 19–20); or, 2. a less formal writing; letters exchanged; minutes; articles subscribed by initials, and afterwards acted upon; articles written in the ledger, or otherwise identified with the trade; or, 3. circumstantial proof; or, 4. parole evidence of clerks, agents, or persons dealing with the company (*a*). Even where there is a contract a question may arise whether the transaction in question be a partnership dealing—which will depend, 1. on the construction of the con-

tract; and, 2. on the homologation or adoption of it by the company as a part of their trade (*b*).

(*a*) 3 Ersk. 3. § 18, 21. Voet ad Pand. lib. 17. tit. 1, 2. § 2. Logie, Dec. 30. 1697; M. 14566. Fairholms, Jan. 23. 1725; M. 14558. Livingstone, June 17. 1775; M. 14551. Learmonth and Co. July 2. 1823; 1 Sh. App. Cases, 481. Bland, Jan. 11. 1825; 3 S. D. 419. Dundee Railway Company, Jan. 31. 1832; 10 S. 269. Alderson *v.* Clay, 1 Starkie, Cases, 405. See ex parte Gellar, 1 Rose, 297. Saville *v.* Robertson, 4 Term. Rep. 720.

(*b*) Maxton, Jan. 17. 1839; 1 D. B. M. 367.

362. Where, in a question *between partners*, the contract is established, but the shares left doubtful, and no evidence to clear the doubt, the presumption is for equality of rights, and of responsibility. But this is a presumption of fact only, and may be overcome by evidence, or by indications of a different rule having been agreed to.

Anderson *v.* Russel, May 22. 1828; 6 S. 836. Campbell, May 26. 1829; 7 S. D. 650; reversed in House of Lords, Feb. 14. 1831; 5 W. S. 161. Peacock *v.* Peacock, 2 Camp. 45. and 16 Ves. 56. See Ferguson Jan. 3. 1836; 14 S. D. 871. Buchanan, March 9. 1838; 16 S. D. 824.

363. 2. *Responsibility to third parties*, as a partner, may be incurred, not only by the constitution of a proper partnership; but even where there is no proper constitution of partnership, as between the parties themselves, and no right to the stock created in the person called upon. This may be, 1. by receiving, as a partner or principal, a share of the profits (*a*); or, 2. by an agreement entitling one to share in the profit (*b*); or, 3. by permitting one's name to be used, or credit relied on, as a partner,—as by the name being over the door; or used, or continued, in bills of parcels, checks, &c. (*c*). And in such questions similarity of name, or the continuance of a name in a firm, peculiarly expose to this sort of responsibility (*d*). See next section 364.

(*a*) Bloxham *v.* Pell, 2 Blackst. 999. Grace *v.* Smith, Ib. Waugh *v.* Carver, 2 Hy. Black. 235. Ex parte Rowlandson, 1 Rose, 89. Hesketh *v.* Blanchard, 4 East, 144. Cheape *v.* Cramond, 4 Barn. and Ald. 663. Reid *v.* Hollingshead, 4 Barn. and Cress. 867. Ex parte Chuck, 8 Bing. 469.

(*b*) Waugh, ut sup. Ex parte Hamper, 17. Ves. 412. Ex parte, Chuck, ut sup. McKinlay, Nov. 30. 1830; 9 S. D. 90.

(*c*) Young *v.* Axtell, 1784; 2 H. Blackst. 242. Waugh, ut sup. Williams *v.* Keates, 2 Starkie, 290. Newsome *v.* Coles, 2 Camp. 617. Dickenson *v.* Valpy, Barn. and Cress. 140.

(*d*) Spencer *v.* Billing, 3 Camp. 310.

364. Such responsibility, however, is not incurred by receiving a mere payment, allowance, or wages, proportioned to the profits. So wages may be paid to clerks, commission to a broker, or hire to a lighterman for working a lighter, propor-

tionally to the gains to be made without involving the responsibility of a partner (*a*); and, 2. by sub-contract with one of the partners, a third person may divide with him his share without being liable as a partner (*b*).

(*a*) *Dixon v. Cooper*, 3 Wils. 40.

(*b*) *Fairholm*, Jan. 23. 1725; M. 14558. *Wilkinson v. Frazer*, 4 Esp. 182. *Dry v. Boswall*, 1 Camp. 329. *Waugh v. Carver*, 2 H. Blackst. 235. *Mair v. Glennie*, 4 M. and Sel. 246. *Ex parte Norfolk*, 19 Ves. 457. *Smith v. Watson*, 2 Barn. and Cress. 401. *Geddes v. Wallace*, House of Lords, 2 Bligh, 270. *Ex parte Rowlandson*, 1 Rose, 91.

365. One person cannot make a partnership (*a*). But he may, contrary to the English rule (*b*), be a member of several partnerships without confounding their interests: nay, several persons may, by various combinations of their number, make distinct partnerships for separate objects (*c*).

(*a*) *Nairn*, Nov. 25. 1795; 2 Bell, Com. 626. *Reid*, July 10. 1828; F. C.; 6 S. D.; M. 1120. *Rose*, Feb. 1. 1833; 11 S. D. 344.

(*b*) *Bosanquet v. Wray*, 2 Marsh. 319; Collyer, 383.

(*c*) *Bertrain, Gardner and Company*, Feb. 25. 1795; 2 Bell, Com. 625. *Royal Bank*, Jan. 20. 1813; F. C.; *Buchanan's Cases*, 320; 1 Rose, 462. *Williams*, June 13. 1809; F. C. *Forrester's Creditors*, Feb. 5. 1798. 2 Bell, Com. 529.

366. *Term of Duration*. Partnership may be either for a fixed time; or, indefinite in time, called a partnership at will.

367. A definite term may be fixed for the partnership, either by express limitation of time; or by reference to some event, or expected course of events,—as the duration of a lease of premises. But such limitation must be clearly expressed; it will not be *inferred* from the mere purchase or existence of leasehold property to be used by the company.

1 Bell, Com. 633. *Marshall*, Feb. 23. 1816; F. C. *Crawshay v. Maule*, 1 Wilson's Chan. Cases, 191, 196. *Aitken*, May 18. 1830; 8 S. D. 753. See *Booth*, May 16. 1823; 2 S. D. 311.

368. Partnership without any limitation of time may be dissolved at the will of the parties, or any of them; provided a fair, honest, and equitable discretion be observed, avoiding injury, or the taking of undue advantage. See below, § 378.

3 Ersk. 3. § 26. 3 Pardessus, 158.

369. 2. *Obligations of the Partners*. The partners are bound not only to each other, but to the public.

370. 1. In relation to each other and to the Company, (1.) Each partner is debtor to the company for his share of stock unpaid; and liable to an action on that account. If the share to be contributed by a partner consist of a specific

subject, the contract of partnership is only the *titulus transferendi dominii*; and without delivery the transference to the company is not complete, though, as in the common contract of sale, the risk is with the company. See above, § 87. (2.) A partner becomes debtor to the company, by drawing more of the profit than he is entitled to. (3.) A partner may become a creditor to the company by advancing money beyond his share (*a*); by allowing the profits to which he is entitled to remain undrawn; or a salary, or wages, or an allowance stipulated beyond his share of profit, to remain unpaid. (4.) A partner is bound to give his personal attention and services in the company affairs without recompense, unless it be otherwise stipulated (*b*); and this even in winding up a partnership dissolved by the death of a partner (*c*). (5.) He is bound to obey such calls as may be necessary to meet the losses and exigencies of the company (*d*).

(*a*) *McGhie*, Feb. 18. 1785; *M.* 14668.

(*b*) *Campbell, Rivers and Co.* as reversed in House of Lords, March 3. 1826; 2 *W. S.* 25. *Duncan*, Feb. 8. 1831; 9 *S. D.* 398. *Hunter*, Feb. 18. 1831; 9 *S. D.* 477. See *Berry*, July 7. 1832; 10 *S. D.* 792.

(*c*) *Burden v. Burden*, 1 *Ves.* and *Beames*, 170.

(*d*) *Douglas, Heron and Co.* July 24. 1778; *M.* 14605.

371. 2. In relation to creditors. The partners are liable for all debts established against the company (see above, § 356), and, 1. They may be charged individually on decret or diligence directed against the firm (*a*). 2. If their character as partners be denied, they may be entitled, according to circumstances, to have the charge suspended, with or without caution (*b*). 3. Each partner is universally liable to the creditors of the company, and cannot, therefore, if he himself be a creditor of the company (§ 369), enter into competition with the other creditors (*c*). But, 4. Being liable individually only as guarantee of the company credit, the partners are entitled to relief against the company funds; and so in bankruptcy, the creditors of the company rank on the estate of the individual partners only for what is not paid from the company estate.

(*a*) *Thomson v. Liddel*, July 2. 1812; *F. C.*

(*b*) *Anderson*, Jan. 26. 1810. *Collyer*, June 30. 1810. *Anderson*, May 26. 1836; 14 *S. D.* 834.

(*c*) *Geddes*, in House of Lords, July 24. 1820; 2 *Bligh*, 270.

372. 3. *Dissolution of Partnership.* Partnership is dissolved differently in relation to the partners, and in relation to third parties.

1. *Dissolution in relation to Partners.* A distinction is to be marked between those events which eo ipso dissolve the partnership, and those which only afford a ground or opportunity of dissolution.

373. Expiration of the term stipulated entitles the partners to separate without previous warning inter se; but it does not ipso facto dissolve the company, though that seems to be laid down by English writers (*a*), and also to be the law of France (*b*) and America (*c*). It still subsists by tacit renewal (*d*); and as partnership may at the first be constituted by trading on a particular footing, so the continuance of a trade already begun, is effectual to bind the parties on the same presumed terms; not for a stated period, as at the first, but as a partnership at will or without time.

(*a*) Collyer, 62. Smith, Comp. of Mercantile Law, 9.

(*b*) Pothier, No. 139. 3 Pardessus, 140.

(*c*) 3 Kent, Com. 53.

(*d*) See Dalglish, May 25. 1791; Bell's 8vo. Cases, 490.

374. The marriage of a female partner has in England been held to dissolve the partnership, as otherwise a stranger would be introduced.

Nicol v. Burnaud, 4 Russ. 247; Collyer, 60.

375. The death of any of the partners eo ipso *dissolves* the partnership (leaving the depending contracts to run their course), unless heirs shall be expressly declared to be partners (*a*); or unless the contract shall be so conceived as necessarily to imply a right in heirs; as in a contract exceeding the term of human life (*b*). In such cases the heirs will have a right to be admitted as partners; and they may also be bound by taking up the succession; they cannot of course be compelled (if they do not represent, § 1914,) to become partners without their own consent.

(*a*) 3 Ersk. 3, § 25. Aiton, March 2. 1769; M. 14573; reversed in House of Lords, Dec. 11. 1772. Crawshay v. Maule, 1 Swanst. 509. See Pothier, No. 144; 3 Kent, 55. Code Civ. Art. 1868.

(*b*) Warner, Jan. 24. 1798: M. 14603; affirmed, 3 Dow, 76. Vulliamy v. Noble, 3 Merivale, 614.

376. Insanity is only a *ground* of dissolution; not itself a dissolution of the contract. It may be distinguished as temporary or permanent. The former (as delirium, brain fever, &c.) seems to be no ground of dissolution, but a temporary interruption only of the acting or superintendence of the indi-

vidual: the latter is a ground of dissolution, for the benefit of all concerned; of the person affected by the disease, as well as of the others. But partnership cannot on this ground be dissolved otherwise than by judicial authority, and the exercise of sound judicial discretion.

Sayer v. Bennet, 1 Cox, Cases, 107; 1 Montagu, 16. *Water v. Taylor*. 2 Ves. and Beames, 303. *Wraxham v. Huddleston*, 1 Swanston, 514, note, *Jones v. Noy*, 2 Mylne and Kerr, 125. See Pollock, Dec. 10. 1811; F. C.

377. Insolvency of a partner is a *ground* of dissolution: so is bankruptcy, under the act 1696, 5; such dissolution taking place by a distinct act of the other partners, or by judicial sentence. Sequestration of itself operates as a dissolution in Scotland; and so a commission of bankruptcy in England (*a*). In England it seems now to be settled that, on the issuing of the commission, the dissolution is held to have taken place, with the act of bankruptcy (*b*). No decision on this point has been pronounced in Scotland (*c*).

(*a*) Bell, Com. 634. *Monro*, June 8. 1813; F. C.

(*b*) See *Hunter*, Dec. 9. 1830; 9 S. D. 159.

(*c*) *Ex parte Smith*, 5 Ves. 295. *Dutton v. Morrison*, 17 Ves. 204. *Ex parte Birket*, 2 Rose's Cases, 71.

378. The act of the parties, mutual or individual, may dissolve the partnership in certain circumstances: 1. By mutual consent, whether the appointed term have expired or not, the partnership may be dissolved. 2. By renunciation: one or more of the partners may retire, and so dissolve the company at a moment's notice, where there is no term fixed; or even where there is a term fixed, this may be done on just cause for separating being shewn. The former may be by extrajudicial, the latter will require a judicial act (*a*). But such renunciation must be fair; not for the acquisition of undue advantage; avoiding unnecessary injury; and with due notice, where notice does not increase the peril (*b*).

(*a*) 2 Bell, Com. 631, et seq. *Marshall*, Jan. 20. 1815, and Feb. 23. 1816; F. C.; *Montgomery*, June 17. 1791; M. 14583. *Barr*, May 18. 1802. *Warner*, in the House of Lords, 3 Dow, 85. *Peacock v. Peacock*, 16 Ves. 49. *Featherstonehaugh v. Fenwick*, 17 Ves. 293. *Crawshay v. Maule*, Ib. 197. *Baring v. Dix*, 1 Cox, 213.

See *Instit. Justinian*, c. 8. tit. 26. § 4; *Vinnius*, in *Inst.* 679. *Pothier*, No. 149, et seq.

(*b*) 3 Ersk. 3. § 26. 2 Bell, Com. 632. *Featherstonehaugh v. Fenwick*, 17 Ves. J. 298. *Marshall*, ut supra; *Pothier*, *Société*, § 150; 3 *Pardessus*, 155.

379. The effect of a dissolution of partnership is different

in various circumstances. And, 1. The death of a partner, while it vests in the survivors the power and title to wind up the concern (though without remuneration, § 370), gives to the heirs of the deceased partner his share of the stock, property, and goodwill, after the debts of the concern are provided for (*a*). As to the goodwill of a mercantile concern doubts seem to have been entertained; but the approved doctrine seems to be, that, if it be of a nature to go with the premises, it is saleable for the benefit of all concerned (*b*); that if personal (as in professional partnership), each partner is entitled, on dissolution of the partnership, to proceed with his own exertions, and the right of the survivor cannot be affected (*c*). 2. Dissolution by death, or justifiable renunciation, entitles any partner to insist on immediately stopping the trade, and bringing the stock and establishment to a public sale (*d*). 3. The effect of bankruptcy in dissolving a partnership, when the company itself is bankrupt, is to expose it to Sequestration. When one or more partners as individuals become insolvent, and the partnership is dissolved in consequence (sup. § 377.) the right of the bankrupt partner vests in his creditors, and they can insist on the same course of proceeding as if the partner were dead.

(*a*) *Martin v. Crompe*, Ld. Raym. 340.

(*b*) *Crawshay v. Collins*, 15 Ves. 227. *Crutwell v. Lye*, 17 Ves. 335. *Kennedy v. Lee*, 3 Meriv. 441.

(*c*) *Farr v. Pearce*, 3 Madd. 78. See *Spicer v. James*, Rolls, 1830.

(*d*) *Marshall, Featherstonehaugh*, supra, § 378. *Aitkin's Trus.* May 18. 1830; 8 S. 753. *Stewart*, Nov. 26. 1835; 14 S. D. 72.

380. The division of stock and profit on dissolution, after paying the debts, is to be made according to the stipulated shares: If there be no rate fixed, the presumption is for equality (*a*); which, however, may be altered by evidence, or circumstances from which another arrangement may fairly be inferred. See above, § 362. (*b*). The period of division is at the moment of dissolution, with the benefit or loss on impending transactions; and with liability for debt universally against all the partners, and relief according to their shares.

(*a*) *Struthers*, May 19. 1826; House of Lords, 2 W. S. 153. See 3 *Stair*, 4. § 3. *M'Whirter*, Feb. 4. 1823; 1 S. D. 319.

(*b*) See the cases of *Peacock*, *Anderson*, and *Campbell*, as reversed in the House of Lords, § 362.

381. 2. *Dissolution in relation to the Public.* Besides the act

or sentence of dissolution, there must *be notice*, in order to put an end to the contract and responsibility of the partners, in so far as the public is concerned. And if after dissolution, one allow his name to remain over the shop, or in the firm, he will continue to be liable for the debts of the company, or for bills drawn by the firm, if he have not taken effectual means to bring to a close the credit on which the public has relied.

Williams v. Keats, 2 Starkie, 290. *Dolman*, 2 Car. and Pay. 104. *Brown v. Bush*, 2 Chitty, Rep. 120.

382. The partners cannot be discharged of their responsibility to third parties, unless the partnership be dissolved as between the partners.

383. The dissolution, whether by expiration of time, or by mutual or partial act of the parties, must be communicated to the customers, and to the public, in order to affect third parties (*a*). It has been held in England not to be necessary to give notice of dissolution by the death of a partner, in order to free his representatives from future liabilities (*b*). In Scotland a case occurred in which the court avoided any decision on this general question (*c*). In giving notice there is a difference between that which is requisite for those who have dealt with the company, and for the public generally (*d*).

(*a*) 2 Bell, Com. 639. *Bolton*, Nov. 21. 1786, correcting *Armour*, Nov. 29. 1774; *M.* 14575. 2 Hailes, 600. *Dalglish and Fleming*, May 24. 1791; *M.* 19545; *Bell's* 8vo. Cases, 487.

(*b*) *Lord Eldon in Vulliamy v. Noble*, 3 Meriv. 614.

(*c*) *Kemp*, June 17. 1824; 3 S. D. 104. See *Aitken*, Feb. 4. 1830; 8 S. D. 446.

(*d*) See § 384-5.

384. 1. To customers who have dealt with the company, and for the purpose of changing the credit on which the company has actually proceeded, notice must be given,—either by letter; or by personal communication; or by change of the firm, or of the name in the notes and cheques of a banking-house; or by evidence of a newspaper advertisement having been actually read by the party: It is not enough to shew an advertisement in the Gazette or in the newspapers, with a possibility, or even probability, of the advertisement having been read by the party.

Jenkins v. Blizard, 1 Starkie, 418. *Dunbar*, March 10. 1810; *F. C.* *M'Iver v. Humble*, 16 East, 169. *Barfoot v. Goodal*, 3 Camp. 147. *Grahame*

r. Hope, Peake's Cases, 154. See Rowley v. Home, 3 Bing. 2 Bertram, Feb. 13. 1822; 1 S. D. 290. Sawers, Feb. 24. 1815; F. C. Padon, Dec. 21. 1826; 5 S. D. 175.

385. 2. To the public at large, and for the purpose of counteracting *possible* credit, Gazette and newspaper advertisements, accompanied with all reasonable means taken in the particular circumstances to publish the dissolution, will be enough.

Sawers, ut supra. Godfrey v. Turnbull, 1 Espin. Cases, 371. Williams v. Keates, 2 Starkie, 290. Graham v. Hope, ut supra. Booth v. Quin, 7 Price, 193. Thomson, June 22. 1822; F. C.; 1 S. B. 554. Newsome v. Coles, 2 Camp. 617.

386. It has been held in England that notice is not necessary in dormant partnership; but this is not, in Scotland, to be relied on when the partner's concern in the partnership has been known to any; as there are no means of knowing how far such knowledge and credit may have spread.

Evans v. Drummond, 1801; 4 Esp. 89. Carter v. Whalley, 1 Barn. and Ald. 11. Kay, Jan. 27. 1809; F. C.

387. 4. Winding up the Concern. To one effect the partnership continues to subsist, notwithstanding dissolution, *i. e.* for the winding up of the concern, and terminating all the responsibilities of the company. And, 1. no new debts can be contracted, but only the funds made effectual for answering the demands (*a*). 2. If special stipulation be made as to winding up, and any special powers given for that purpose, they will be effectual. 3. If no arrangement have been made for winding up, the surviving or solvent partners are entitled to act; or if any just cause of objection be stated against them (*b*), a neutral person will be judicially appointed to wind up (*c*). 4. If sequestration be necessary, it is competent on the petition of the surviving partners (*d*). 5. The partners will be liable for the expense of an unsuccessful attempt to enforce a debt alleged to be due to the company (*e*). And 6. the surviving partners alone have the title to pursue for debts due to the company (*f*).

(*a*) Grant, Nov. 15. 1771; M. 14581. Douglas, Heron, and Co. June 16. 1792. Douglas, Heron, and Co. July 10. 1800. Cheyne, Nov. 26. 1828; 7 S. D. 60. Kilgour v. Finlayson, 1 H. Blackst. 155, 158. Abel v. Sutton, 3 Esp. Cases, 108.

(*b*) Harding v. Glover, 18 Ves. 281. Wilson v. Greenwood, 1 Swan. 481.

(*c*) Montagu, 167. 2 Bell, Com. 638, 643.

(d) Campbell, March 3. 1830; 8 S. D. 625.

(e) Roger, Feb. 2. 1838; 16 S. D. 418.

(f) Kinnear, Feb. 12. 1830; 8 S. D. 512.

388. 5. Effect of Special Stipulations. Special stipulations will alter or modify the ordinary rules or effect of the contract, and regulate the rights and interests of the partners, and of their separate creditors; but such private stipulations will not affect the creditors of the company.

389. Special stipulations may be waived or counteracted by the course of practice and dealing between the parties; provided such practice shew plainly an intention to alter or discharge the stipulation.

Geddes, July 24. 1820; House of Lords, 2 Bligh, 270. *Jackson v. Sedgewick*, 1 Swanst. 460.

390. The partners may arrange as they think fit their contributions; the shares of profit or of loss; the time at which a balance is to be struck; and accounts settled with partners retiring, or with the heirs of partners deceasing. The natural period of accounting and striking a balance in such a situation is the moment of dissolution of the partnership. But there is sometimes a stipulation that the shares of retiring or deceased partners shall be regulated by the immediately preceding balance; which is to be taken as the rule, provided it have been acted on by the parties.

Dig. lib. 17. tit. 2. Pro Socio, l. 49. § 2. Hay, July 3. 1800; 1 Bell, Com. 646.

Blair, Feb. 15. 1776; affirmed April 15. 1777; M. 14577. and App. *Society*, No. 1. Monro, June 8. 1813; F. C. Buchanan, June 17. 1800. *Jackson v. Sedgewick*, 1 Wilson, 297.

391. An obligation to refer to arbitration is effectual only if the arbiter or referee be named. And so, 1. an agreement to refer "to neutral persons," will not bar judicial proceedings (a); and, 2. an agreement to refer to the person who shall hold a certain office when a dispute shall arise (as the Lord Advocate or Solicitor-General for the time) is not binding (b).

(a) Magistrates of Edinburgh, Jan. 18. 1770; affirmed Feb. 15. 1770

(b) Buchanan, June 25. 1799; F. C.

392. It is usual in companies of which the shares are transferable, to require certain precautions or conditions for completing the transference of the share; to provide that before transferring a share the first offer shall be made to the company, or that the transfer shall be made in presence of so

many directors, &c. These are held to be intended for the benefit and security of the company; and, if a transfer be conclusively settled between the parties, it will be effectual (as in a question between them) to the effect of shifting the responsibility, although these requisites should be neglected. See below, § 400.

Turnbull, March 1. 1833; 11 S. D. 487.

393. 2. JOINT ADVENTURE, OR JOINT TRADE. A joint adventure, or joint trade, is a limited partnership, confined to a particular adventure, speculation, course of trade, or voyage; and in which the partners, either latent or known, use no firm or social name, and incur no responsibility beyond the limits of the adventure (*a*). It is to be established by the same evidence as partnership (*b*). It is not to be inferred from joint ownership in a ship, unless there has been participation in the mercantile employment of the ship, in which the joint adventure is said to have consisted (*c*).

(*a*) 3 Ersk. 3. § 29. with Ivory's Notes. 2 Bell, Com. 649. See Pothier Societ. No. 54; Collyer, 26. Brown *v.* Gibbon, 5 Br. Parl. Ca. 491. Ex parte, Gellar, 1 Rose, 297. Salomon *v.* Nissen, 2 Term. Rep. 675. Reid *v.* Hollingshead, 4 Barn. and Cress. 867. See Smith *v.* Craven, 1 Crompt. and L. 500. Collyer, 302.

(*b*) See Logan, May 15. 1824; 3 S. D. 15. Ferguson, June 3. 1836; 14 S. D. 71.

(*c*) Logan, *supra* (*b*).

394. A company may be party to a joint adventure; and this to the effect of introducing a preference in favour of the creditors of the adventure over the creditors of the proper company, as to the capital embarked in the joint adventure.

2 Bell, Com. 653. Crooks, Jan. 29. 1779; M. 14596.

395. The liability of the joint adventurers is governed by these rules:—1. Where goods are purchased *for* the joint adventure, the adventurers are liable as partners (*a*). 2. There is no such responsibility for goods, &c. purchased *previously* to the contract, though afterwards brought into stock (*b*). 3. The responsibility is *limited* to the adventure (*c*).

The shares of the adventurers are presumed, as in partnership, (§ 362.) to be equal; but capable of being otherwise arranged (*d*).

The stock of the concern is common property, and (as in partnership proper) is held in trust for the creditors of the concern (*e*).

In dealings within the limits of the concern each partner is *præpositus negotiis societatis*; but he has no implied mandate to bind the partners generally.

(a) *Logie*, Dec. 30. 1697; M. 14566. *Withers, Birch, and Company*, Nov. 16. 1790; 2 Bell, Com. 650. *Wilkie*, Nov. 26. 1799; Ib. 651. *Kinnear*, Feb. 16. 1764; affirmed March 27. 1762. *Gouthwaite v. Duckworth*, 12 East, 421-6.

(b) *Donaldson*, Dec. 29. 1766; M. 14609. *Saville v. Robertson*, 4 Term. Rep. 720. *Gouthwaite*, ut supra. See *Kinnear*, supra.

(c) *Barton v. Hanson*, 2 Camp. 97. *Jardine*, Feb. 16. 1828; F. C.; 6 S. D. 564.

(d) *Ferguson*, June 3. 1836; 14 S. D. 871.

(e) *McCaul*, Jan. 11. 1740; M. 14603.

396. JOINT PURCHASE is to be distinguished from joint trade; as there is in it no partnership.

Hoare v. Dawes, 1780; Doug. 356. *Neilson*, Feb. 1682; M. 14551.

397. OF JOINT-STOCK COMPANIES. The great public benefit resulting from encouragements and facilities to the investment of capital in Joint-Stock Companies for the prosecution of undertakings requiring capital beyond the means and enterprise of an individual, has given great interest to the law applicable to such arrangements. In English practice, many technical difficulties were found to oppose themselves to the free investment of capital in this way; while in Scotland, under a system of jurisprudence which more readily adapts itself to such emergencies, few obstacles of this kind arose. The difficulties to be overcome were these, 1. that in England the company could not sue or be sued without the name of all the partners; 2. that in England the partners could not sue each other for a company matter, without necessarily including a dissolution; 3. that the shares were not assignable to the effect of freeing the retiring partner; 4. that creditors could not certainly know against whom to apply; and, 5. that the responsibility of each was for the whole debts of the concern. In Scotland, none of these objections occurred or were formidable, and the unlimited responsibility of the partners was doubted (a). But the doubts occurring as to such associations in England led to the same general understanding as to the precautions to be taken in both parts of the island.

The matter is now, however, regulated by a general statute, applicable to the whole empire, passed on the report to the House of Commons on the state of the law relative to partnership, 14th July 1837. By this act (1 Viet. c. 73.) the

Queen is empowered to grant, by letters patent, without incorporation (§ 402), certain privileges and immunities to joint-stock companies. These are, 1. that all suits and judicial proceedings in Great Britain, Ireland, or the Colonies, either by or against the company, shall be lawful in the name of an officer to be appointed and registered, but without preventing the plaintiff from conjoining as a defendant any member of the company, for discovery, or in case of fraud : 2. that it shall be lawful, in such letters-patent, to limit the responsibility of members of the company in their persons and property, to a certain extent per share : 3. that the association thus to be privileged shall enter into a deed of partnership, dividing the undertaking into a certain number of shares, and setting forth the name or style of the company, those of the members, the date of commencement of the company, the business or purpose of the company, and the place in which it is to be carried on, with the appointment of two or more officers to sue or be sued : 4. that within three months after the granting of the letters-patent, a return shall be made, according to a schedule in the act, for public registration of the date, names, purpose, place of business, number of shares (each distinguished by a number), the amount of liability of each shareholder, with his name and place of abode, and the names and description of the officers for suing or being sued : 5. that there shall be no change of name, and that, if the place of business be changed, a return shall be made for registration : 6. that every change in the members of the company shall within three months be returned for registration : 7. that any payment made by an individual member whose responsibility is limited, shall be reported and registered with the proper voucher ; and when repaid by the company, such repayment shall be reported and registered : 8. that on the death, &c. of any officer for suing or being sued, another to be appointed, reported, and registered : 9. that the returns in Scotland are to be made to the Register Office, and recorded by the Lord Clerk Register, in the form to be settled by him and the Lords of Session : 10. that no member is to be entitled to profits, or to cease to be responsible as a member, unless his admission, or ceasing to be a member, shall be registered : 11. that judgment or decree shall be effectual against members with limited responsibility only to the extent of such limi-

tation, deducting any registered payment standing at the credit of such member : 12. that when any application for such privileges shall be made and referred to the Board of Trade, a notice shall be inserted three several times in the London Gazette, and in one or two of the newspapers circulating in the county proposed for the place of business, before any report shall be made, or letters-patent granted.

(a) *Stevenson and Co.* Dec. 14. 1757 ; M. 14667. 5 Br. Sup. 340.

398. Under the common law a Joint-Stock Company is contradistinguished from ordinary partnerships by the administration being vested in certain officers or directors elected by the company, and made known to the public by advertisement or otherwise ; the individual partners having no power as *præpositi negotiis societatis* to deal with the public ; and by the shares being transferable according to a mode prescribed by the contract.

399. Joint-Stock Companies have hitherto in Scotland been held lawful, however numerous the parties. And although a Joint-Stock Company cannot in Scotland sue or be sued by the descriptive name, as a private partnership may by its firm ; and although the partners cannot, by subscribing that name, bind the company ; the company have been allowed to sue or be sued by the descriptive name, with the addition of the name of all or some of the partners (a). Joint-Stock banking companies in Scotland were by statute allowed to sue and be sued in the name of their officers, provided they annually entered upon oath the name and firm of the society, and of every partner, with his place of residence, and the name and abode of every manager, &c. at the Stamp-office in Edinburgh (b). This act is not repealed.

(a) See above, § 357. *Culcreuch Cotton Company*, Nov. 27. 1822 ; 2 S. D. 47. *Sea Insurance Company of Scotland*, Feb. 17. 1827 ; F. C. 5 S. D. 375. See *Scott*, Feb. 23. 1827 ; 5 S. D. 413. *Shotts Iron Company*, Jan. 19. 1828 ; 6 S. D. 399. *Glasgow Bank*, 3 *Wilson and Shaw's App. Cases*, 75.

(b) 7 Geo. IV. c. 67.

400. The shares of stock may be transferred, if it be so stipulated in the contract. (See § 358.) The stipulations concerning the transference of shares must, in order to complete the transference, and change the responsibility, as in a question with the company, be observed : But the completion of the bargain and sale, as between the buyer and seller of the share, will, in a question between them, enable the seller to

relief against the buyer, although the company regulations have not yet been complied with. See above, § 392. (a). In order to discharge the seller of the share from his liability to the creditors of the company for future dealings, he must give notice of his retirement (§ 384, 385.)

(a) *Harvey v. Kay*, 1829; 9 Barn. and Cress. 356. *Weatherly*, June 3. 1824; 3 S. D. 92. *East Lothian Bank*; *Ib.* 95. *M'Andrew*, June 11. 1828; 6 S. D. 950. See *Allan and Co.'s Case*, affirmed in House of Lords.

401. PUBLIC, CHARTERED, AND PRIVILEGED COMPANIES.

These companies are of two kinds,—those which hold the character of a corporation, with a privilege of limited responsibility under a royal charter; and those which enjoy a privilege of monopoly under legislative authority.

1. *Chartered Companies*. (See § 397, for privilege by patent.)

402. A royal charter enables a company to hold lands, make by-laws, enjoy the other privileges of a corporation, and trade under a limited responsibility. The shares of such a company are transferable; the company is undissolved by the death or bankruptcy of a partner; and the management and title to pursue are in the officers appointed according to the charter.

2. *Companies privileged by Statute*.

403. To give the privilege of monopoly there must be an Act of Parliament; as in the case of the East India Company.

2 Bell, Com. 656.

IV. OF MARITIME CONTRACTS.

404. In those contracts and arrangements, which relate to the maritime branch of the carrying trade, the object is not only to provide for the safe carriage of merchandize, but also to preserve to the merchant the full power of disposal in sale or mortgage during the transit; to provide for the necessities and accidents which may fall out during the voyage, or at its termination; and to indemnify the merchant or the shipowner for any loss which may arise from the perils of the sea or enemy. The subject may therefore be considered in relation, 1. to the contract of carriage or affreightment; 2. to the partial loss during the voyage by jettison or salvage; 3. to the contracts with the carpenters, seamen, and others, for the repairs and management of the ship; and, 4. to the indemnity by insurance of total or partial loss during the voyage.

Abbot on Merchant Ships and Seamen, 5th ed. Story's edition of Abbot, with American Cases. *Roccus*, de Nav. et Naut. Pothier, Tr. de Charte-Partie. Valin, Com. sur l'Ord. de la Marine. Boulay Paty, Cours du Droit, Maritime. Pardessus, tom. 2. 1 Bell, Com. 538. et seq.

1. *Contract of Carriage, or Affreightment.*

405. AFFREIGHTMENT is a contract of hiring or location (§ 157.), by which an entire ship, or part of it, is let on hire for the carriage of goods, or of persons, or for some other lawful use to which it may be applied. It is a consensual contract (§ 16.) which requires writing only so far as a stamp is imposed; and of course is not confined to any particular form of words: Either a regular charter party (§ 407.) is made out, or an engagement less formal, by letter, or by heads of agreement, signed by the parties, is held sufficient; and often affreightment, especially when not of the whole ship, is left to depend on the bill of lading alone.

The affreightment may be, 1. of the whole ship, either on time or for the voyage; or, 2. of a part, either by the owners of the ship, or by sub-affreightment from one by whom the whole ship is freighted from the owners.

1 Valin, 584. 2 Boulay Paty, 268. 3 Ersk. 3. § 17.

406. 1. SPECIAL AFFREIGHTMENT BY CHARTER-PARTY. Charter-party is the written instrument in which the contract of affreightment is formally expressed (*a*); specifying, 1. the ship in whole or in part; 2. the term during which the ship is let, by time or voyage; 3. the hire or freight; 4. the time of loading and unloading, and the charge to be allowed for detention or demurrage. This instrument requires a stamp (*b*).

NOTE.—There are several technical rules of the law of England relating to the execution of the instrument and the forms of action on charter-parties, which will be found detailed in Abbot, 162. et seq., but which do not apply to Scotland.

(*a*) 2 Juridical Styles, 563. et seq. Abbot, App. No. 7. Scotland v. Wilson, 1 Marshall, 204. Davis v. Reynolds, 1 Starkie, 115.

(*b*) 55 Geo. III. c. 78. Sched. part 1.

407. The Charter-party is executed by the owners or their accredited agent (sometimes also by the master) if hired at the owner's residence; abroad by the master alone, or by an agent duly authorized. It identifies the ship by its name, the name of the master, the burden or tonnage register measurement, and the place where the ship is at the time. But the tonnage stated in description is not conclusive between the parties as to the ship's capacity for carriage (*a*); and if it is intended to confine the engagement on either side to a certain tonnage, it must be specified distinctly, and the owners will be bound to that extent (*b*).

(a) *Hunter v. Fry*, 2 Barn. and Ald. 421.

(b) *Abbot*, 168. 2 Boulay Paty, 345, 351.

408. *Obligations of the Owners and Master.* The obligations under this contract, whether fully expressed or implied in the general agreement, are,

1. That the ship shall be seaworthy, stout, staunch, and strong for the voyage, and furnished with all tackle and apparel necessary for it : and with a fit and proper master and crew (a). Ignorance of defect in the ship is no defence ; nor the most exact survey before setting out (b). In warranting the captain's fitness, his knowledge of the particular ports or perils specified is included (c). The obligation to employ a pilot, rests in Scotland on the principles of mercantile law, not regulated by the English pilotage acts (d). Whether the owners shall be liable for the unskilfulness of the pilot employed, is a question not decided : But at least to another ship suffering by faulty collision, it is no answer for the owner to say his ship was under a pilot's care (e).

2. That the ship shall have the proper clearances and papers for her protection, according to the law and custom of the country to and from which she sails (f).

3. That the ship shall sail with convoy, if stipulated or required at the time ; and that may either be made an express warranty in the charter-party or bill of lading, or advertisement of the ship (g), or it may be left on the implied undertaking during war, and under the operation of those regulations which in most countries form a part of their war policy (h). The convoy must be that regularly appointed for the place of destination ; it must be joined at the rendezvous ordered for vessels for that destination ; its protection must be continued during the voyage, unless prevented by storm or inevitable accident ; and the ship must obtain, as the legitimate proof of the convoy's protection, sailing instructions (i).

4. That the ship shall, at the commencing port, be ready for the cargo at the day appointed ; a failure in which may either discharge the contract, or entitle to damages.

5. That the ship shall sail at the day appointed, wind and weather serving ; but the master must on no account sail in tempestuous weather (k).

6. That the voyage shall be performed according to the rules of good seamanship ; and this comprehends a careful

avoidance of all deviation from the correct voyage, unless compelled by storm, or enemies, or pirates, or the want of water; such deviation lasting no longer than the necessity (*l*).

7. That due preparation shall be made, and care taken of the goods in loading and unloading (*m*). See below, § 345; and,

8. That the goods shall be safely delivered (*n*).

(*a*) Abbot, 218. et seq. Story's edition, 222. 1 Bell, Com. 547. 1 Emerigon, 373. Valin, 1. 3. t. 3. Pothier, Charte-Partie, No. 30. Lyon v. Wells, 5 East, 428. Watson v. Clark, 1 Dow, 336. Wilkie v. Geddes, 3 Dow, 37. Watt v. Morris, 1 Dow, 32. Douglas v. Scougal, 4 Dow, 267. Lawrie, Nov. 9. 1677; M. 10107. Lamont, July 24, 1680; M. 10109. Wedderburn v. Bell, 1 Camp. 1. Eden v. Parkinson, Doug. 734.

(*b*) 1 Valin, 620. Pothier, Charte-Partie, No. 30. Abbot, 218. Lyon's Case, sup. (*a*).

(*c*) Tait v. Levie, 14 East, 481.

(*d*) Pothier, Charte-Partie, No. 31. Abbot, 225. Story's edition of Abbot, 224, note. Levy v. Costerton, 4 Camp. 389.

(*e*) Neptune, 2. 1 Dods. Ad. Rep. c. 466.

(*f*) See 1 Bell, Com. 55.

(*g*) Abbot, 226.

(*h*) 1 Valin, 691. Abbot, 232. 38 Geo. III. c. 57. 43 Geo. III. c. 57.

(*i*) Abbot, 226, 238, and the cases there cited. 1 Bell, Com. 555.

(*k*) Abbot, 225.

(*l*) Abbot, 228. 1 Bell, 556; 2 Pardessus, 49; 2 Kent, Com. 209.

(*m*) Ogilvie and Company, March 4. 1828; 6 S. D. 691. Jones and Company, Feb. 12. 1830; 8 S. D. 495.

(*n*) Abbot, p. 246. Edinburgh and Leith Shipping Company, May 31. 1829. 2 Murr. 136. Armstrong, Jan. 22. 1825; 3 S. D. 464. Bishop, Feb. 19. 1830; 8 S. D. 558. Rae, Feb. 7. 1832; 10 S. D. 303.

409. *Obligations of the Merchant or Freighter.* These are,

1. To furnish a cargo, which implies, (1.) that it is lawful, and the merchant will be liable in damages, if by lading prohibited or uncustomed goods, the ship shall be detained or forfeited (*a*). (2.) That if the ship be freighted rateably, the cargo shall be full; not according to the tonnage in the description, but according to the fair capacity of the ship (*b*); (3.) that if the freight be in a slump sum, the cargo shall be such as at least to cover or secure the freight.

2. To send the cargo ready for embarkation within a reasonable time, if the day be not specially appointed; or on the day fixed by the charter-party: otherwise the master may either hold the agreement as abandoned, and sail on another voyage, or wait and claim damages for detention (*c*).

3. To pay a sum of freight for the whole ship, or rateably, according to the ton, &c.; or a sum for the voyage, or time; or rateably per day, week, month, &c. of the ship's employment (*d*). And,

4. To avoid undue delay in taking delivery (*e*).

- (*a*) Abbot, 270, Story's edition. Ib. note 1.
- (*b*) See above, § 407.
- (*c*) Thomson *v.* Inglis, 3 Camp. 428.
- (*d*) 1 Illus. 268. See below, § 420.
- (*e*) See below, of Lay days and Demurrage, § 431.

410. A receipt for the goods fixes them on the shipowners and master, § 415. But a bill of lading is taken from the shipmaster in most cases ; even where, by hiring on time, the affreighter takes the ship entirely into his own management. It is useful not only to fix the condition of the goods, for which the shipmaster and owners are to be responsible, but to entitle the person who shall hold it to demand delivery of the goods (*a*). It must be given to the shipper or holder of the receipt, in exchange for a previous receipt if granted (*b*).

- (*a*) 1 Valin, 599. Pothier, Charte-Partie, § 17. Abbot, 214. 1 Bell, Com. 544. Haddow *v.* Parre, 3 Taunt. 303. See below, § 415.
- (*b*) Craven *v.* Rider, 6 Taunt. 433 ; 2 Marsh. 127.

411. 2. GENERAL SHIP. The master of a general ship advertised for the voyage, as ready to receive goods is a common carrier.

412. The advertisement is regarded as an offer to receive and carry the goods. It is completed into a special agreement, by fixing the goods, with the master under that advertisement ; and it so becomes binding on the owners. But it is not yet settled whether the special terms of that advertisement are to be taken as a warranty, especially if not repeated in the bill of lading ; as when a ship is advertised to sail with convoy (*a*). The description of the voyage, however, as stated in the advertisement, is held by merchants as a special engagement (*b*). The advertisement entitles a merchant to bring his goods to the ship, and to insist on them being taken on board, unless, 1. the ship has already been filled up ; or, 2. freight to fill the ship has been actually engaged (*c*).

- (*a*) Abbot, 212.
- (*b*) Peel *v.* Pine, 4 Camp. 343.
- (*c*) Thomson, June 15. 1809 ; 1 Bell, Com. 542.

413. RECEIPT. To close the contract there is sometimes an intermediate receipt, sometimes only a bill of lading. The receipt is used to fix the goods with the master and owners, and is a mere acknowledgment given by the mate, or the person in

command of the ship at the time when the goods are put on board. It charges the master and owners with the goods mentioned in it, and binds the contract within the limits of the advertisement. It is generally held sufficient under the implied conditions of the contract, in coasting vessels and smacks, or steam-boats. In more distant voyages, or for the regulation of the delivery of the goods, a bill of lading is taken from the master, and the receipt delivered up: If the master should sign a bill for delivery to another than the holder of the receipt, or the person pointed out by him, he would make himself liable to both parties; the receipt preserving to the shipper his full right to stop in transitu, or transfer the goods, as he may think proper.

Abbot, 214. *Craven v. Rider*, 6 Taunt. 433; 2 Marsh. 127. *Ruck v. Hatfield*, 5 Barn. and Ald. 632.

414. BILL OF LADING. This instrument has two objects,—1. to fix the condition of the goods as received on board; 2. to give a title to some one to demand delivery. It therefore contains a written acknowledgment of the goods received on board, with an obligation to deliver them, “the act of God, the king’s enemies, fire, and all other dangers, and accidents of the seas, &c. of whatever nature and kind soever, excepted.” This instrument requires a stamp, whether the goods are to be exported, or carried coastwise.

Abbot, 214. 2 Juridical Styles, 372. 1 Bell, Com. 542–5. 48 Geo. III. c. 149. Sched. part 1. 55 Geo. III. c. 78. Sched. part 1.

415. The description of the goods in the bill of lading deserves particular care; as the master makes himself and his owners liable for them in the condition mentioned. The goods, if in sound condition, are in the bill stated to be “received in good order,” and the obligation is to deliver them in the like good condition. But if, as frequently happens, the quality or even the quantity is unknown to the master, he usually and properly adds, “quality or quantity unknown,” and then is responsible only for the external and apparent quality.

416. The risks to which the owners under their obligation to deliver are liable, exclude, by the express exceptions of the bill of lading, all perils of the sea and enemy, and inevitable accidents; and even for those risks to which, by the policy of the law, they are liable, their responsibility has been greatly limited by recent statutes. See below, § 435.

417. Bills of lading are, by the law and usage of merchants, negotiable instruments, passing to indorsees and other holders untrammelled by any latent claim or exception; and in order to facilitate the use of them as negotiable instruments, they are made out in sets (commonly of three); one for transmission by post; one to go with the cargo; one for the shipper: And all of them contain a clause, as in foreign bills of exchange (§ 313), that, one being performed, the rest shall be void.

418. In bills of lading the obligation to deliver the goods is either, 1. general, to the bearer, or in blank; or, 2. filled up to a particular person, as consignee, or to his order, or to his assigns; or, 3. to the consigner and his assigns. The consignee named in the bill of lading, or the indorsee of an assignable bill of lading, or the holder of one blank indorsed, is entitled to demand the goods from the master on payment of freight. And the right so conferred will control not only the right of the creditors of the shipper (*a*), but even the shipper's right to stop the cargo unpaid, as in transitu, if the holder of the bill have acquired it for a valuable consideration (*b*), and without notice of no satisfaction having been given for the goods. The same law prevails in America (*c*). Goods shipped without an order may, even after the signing of the bill of lading, be countermanded by the shipper; but not if shipped on order, and a bill granted (*d*).

(*a*) 1 Bell, Com. 198, and 544. Buchanan and Cochran, June 13. 1764; M. 14208. Hastie and Jamieson, April 10. 1770; House of Lords. Bogle, Feb. 2. 1787; F. C.; M. 14216; affirmed. Cuming v. Brown, 1 Camp. 104. Vertue v. Jewell, 4 Camp. 31. Barrow v. Coles, 3 Camp. 92.

(*b*) Abbot, 383. Wright v. Campbell, 4 Burr. 2046. Caldwell v. Ball, 1 Term. Rep. 205. Hibbert v. Carter, Ib. 745. Lickbarrow v. Mason, 1 H. Blackst. 357. Newsom v. Thomson, 6 East, 17. Solaman v. Nissen, 2 Term. Rep. 674. Haille v. Smith, 1 Bos. and Pull. 563.

(*c*) Story's ed. of Abbot, 389, notes 1 and 2, and cases there cited.

(*d*) The Constantia, 6 Rob. Adm. Rep. 32.

419. 7. Affreightment for Carriage of Persons. The hire of a whole ship or passage in a ship for the conveyance of a family or company of persons or an individual is regulated by the same principles with freight for carriage of goods. But it has been thought expedient to put this contract under special regulations for greater safety and accommodation. See above, § 170.

4 Geo. IV. c. 84. 4 Geo. IV. c. 88. 7 Geo. IV. c. 33. 7 and 8 Geo. IV. c. 19. 9 Geo. IV. c. 21, and also c. 76. § 29.

420. 2. *Of Freight.* FREIGHT is the hire due for the carriage of goods, and is either, 1. a gross sum for the voyage; or, 2. a rateable payment per ton of the ship's burden, or according to the size, weight, &c. of the goods transported; or, 3. by time, at so much per month, &c. It includes *primage* or hat-money, a small payment for the master's care; and *petty average*, for towing, beaconage, &c. Sometimes a sum is agreed to be paid "on lading the goods;" but that, strictly speaking, is not freight, nor redemandable on the voyage not being completed.

Andrew v. Moorhouse, 5 Taunt. 435.

421. Freight, besides being stipulated in the charter-party, is always made a condition of delivery of the goods, in the bill of lading, "he or they paying freight." Both on the principles of the contract of carriage, and on this condition, the master has a lien for the freight; but it has been questioned, Whether the master, if he give up the goods without insisting on payment of the freight, does not waive the shipper's obligation for freight, and limit his demand to the person receiving the goods? In several cases, English and Scottish, it has been held, 1. that the condition is not for the shipper's security, and so the personal obligation of the shipper is not discharged, but remains entire under the charter-party (*a*); 2. that when there is no charter-party, but a bill of lading only, the shipper is discharged (*b*); but, 3. in an American case (*c*), the equitable distinction was taken, that where the consigner has the real interest in the goods, the same rule holds whether the goods are sent under a charter-party, or under a bill of lading.

(*a*) Bennet, Dec. 15. 1820; F. C. Kelting, Jan. 16. 1823; 2 S. D. 121. Pillans and Company, Dec. 23. 1825; 4 S. D. 350. Walley v. Montgomery, 3 East, 590. Ward v. Felton, 1 East, 507. Artaza v. Smallpiece, 1 Esp. 23. The Thereza Bonita, 4 Robinson, 236. Cock v. Taylor, 13 East, 399. Moorsom v. Kymer, 2 Maule and Selw. 303. Bell v. Kymer, 5 Taunt. 477. Dougal v. Kemble, 3 Bingham, 383.

(*b*) Drew v. Bird, 1 Mood. and Maule, 156.

(*c*) Barker v. Haven, 17 Johnson's Rep. 234. And see Story's ed. of Abbot, 286, note.

422. The general rule is, that freight is due only for a voyage completed by delivery of the goods at their destined port; for such, by their contract, is the engagement of the shipowners, and such the counter engagement of the merchant. But this

rule admits of certain distinctions and exceptions; a part of the freight being demandable in certain cases, though the whole of what has been undertaken has not been done.

Abbot, 273; Story's ed. *Ib.* note, and 276. *Mashiter v. Duller*, 1 Camp. 84. *Andrew v. Moorhouse*, 5 Taunt. 435. *The Louisa*, 1 Dods, Ad. Rep. 317.

423. 1. Where the ship is lost or disabled, but the goods are saved, the master may tranship the goods in order to convey them to their destination; and so earn his full freight: And he may keep the goods a reasonable time for the purpose of completing the voyage. See below, § 425.

Abbot, 320, and cases there cited and commented on. 1 Bell, Com. 569. 1 Valin, 636. Pothier, *Charte-Partie*, 59. *Luke v. Lyde*, 2 Burr. 887. *Christy v. Row*, 1 Taunt. 300.

424. 2. If the goods have arrived at their destined port damaged, the rules are, 1. That, where the merchant takes the goods, freight is due, without abatement for damage or expense, unless occasioned by fault or insufficiency of the ship (*a*). 2. That the merchant will not be allowed to pick and choose, but must take or leave the whole goods. 3. Where the damage arises from mere accident or irresistible force, it has been doubted whether the merchant may abandon the goods for the freight (*b*); but in Scotland, as the master is liable only for fault or breach of warranty (*c*), it would seem that there is no legal ground for throwing the risk on the owners, and allowing the merchant to abandon the goods for the freight; the owners having fulfilled their contract by carrying the goods to their port (*d*). See next section.

(*a*) *Luke v. Lydel*, 2 Burr. 887. *Lutwedge*, Feb. 12. 1732; *Elchies, Mut. Cont.* 3. See 2 Burr. 885.

(*b*) 1 Valin, 636. Pothier, *Charte-Partie*, § 59. Abbot, 297.

(*c*) *Lawrie*, Nov. 7. 1677; *M.* 10107. *Lamont*, July 24. 1680; *M.* 10109.

(*d*) 1 Bell, Com. 570.

425. 3. If by peril of the sea or hostile power, the ship have stopt short in her voyage, and cannot proceed, or the goods be carried away, freight *pro rata itineris* is due, where the goods are taken by the merchant. This proceeds on an implied new contract, the original contract being left unfulfilled. See above, § 423.

Abbot, 302, et seq. *Luke's case*, *supra*. *Lutwedge*, *supra*. *Wilson*, March 10. 1809; *F. C.* *Baillie v. Mondigliani*, *Marsh. Insur.* 736.

426. 4. If, in the course of the voyage, an obstruction shall

arise, as by blockade, and full advantage shall be derived by the merchant going to another port, as convenient as if the original design were fulfilled, freight will be due, or the loss divided.

The Friends, Creighton, 1 Edwards, 246.

427. 5. If the voyage be divisible into parts, and these be made clear and distinct, freight may be demanded for the part performed.

Taylor and Co. July 9. 1802 ; F. C. ; M. 10113. Mackrell v. Symond, Abbot, 333. Moorsom v. Graves, 2 Camp. 627. Mashiter v. Buller, 1 Camp. 84. De Silvale v. Kendall, 4 Maule and Selw. 37. Gibbon v. Mendez, 2 Barn. and Ald. 17. Andrew v. Moorhouse, 5 Taunt. 435.

428. 6. If part of the cargo be lost, freight is due for what is delivered, where rateably stipulated ; and even where it is not so stipulated, a rateable charge is allowed if the loss be not such as to authorize an abandonment as for a voyage lost.

Abbot, 397.

429. When the undertaking is to carry goods to a certain port, the duration of the voyage is at the risk of the owners ; where it is a contract on time, the duration is at the risk of the merchant (a). Detention during necessary repairs in course of voyage, is regulated by this distinction (b).

(a) Abbot, 279.

(b) Havelock v. Geddes, 10 East, 555. Ripley v. Scaiffe, 5 Barn. and Cress. 167. See also Moorsom v. Greaves, 2 Camp. 627.

430. DEAD FREIGHT is the consideration which, as damages, one who engages to furnish a full lading, and fails to fill up the ship, must pay for the loss which the owners would otherwise suffer by part of the space being left unoccupied. It is not properly freight, but indemnity, grounded on the covenant to fill up the ship (a). Where the freight is rateable on a uniform cargo, there is no difficulty in ascertaining the amount : But where there are different articles to be paid for at different rates, it becomes necessary to take the average on the voyage (b). There is no lien for dead freight without a special bargain.

(a) 1 Bell, Com. 574. Philips v. Rodie, 15 East, 554. Birley v. Gladstone, 3 Maule and Selw. 205. Gladstone v. Birley, 2 Meriv. 401.

(b) Thomas v. Clarke, 2 Starkie, 450.

431. LAY DAYS are the days stipulated for loading and un-

loading ; and DEMURRAGE is the time during which the freighter may detain the ship still longer on certain terms (*a*). These are regulated by the special agreement : in which the expression “working days” excludes Sundays, and holidays at the customhouse ; “running days” includes every day ; and the general expression “days” is held to mean running days, unless usage has otherways settled (*b*).

The lay days for unloading commence on the ship’s arrival at the usual place of discharge. In some places, the port extends far beyond the place of unloading, and it is not on reaching the port in such cases that the lay days begin, but on arriving at the place of discharge (*c*).

Where the usual time is to be allowed for unloading, or where there is no stipulation on that point, the lay and demurrage days are regulated by the custom of the port, and the principles of common law relative to demurrage ; and a delay occasioned by the state of the port, will not fall on the merchant (*d*).

(*a*) Abbot, 180, 183. Story’s Abbot, 184, note.

(*b*) Cochran v. Rethberg, 1800 ; 3 Esp. Cases, 121.

(*c*) Brenton v. Chapman, 7 Bing. 559.

(*d*) 1 Bell, Com. 575. Lannoy v. Wary, House of Lords, 2 Brown’s Par. Cases, 60. Pary, Feb. 28. 1806. Rodgers v. Forrester, 2 Camp. 483. Burmester v. Hodgson, 2 Camp. 488. Hill v. Idle, 1 Starkie, 111. Lawrie, House of Lords, Nov. 10. 1796 ; 6 Brown’s Par. Cases, 474.

432. When lay days and demurrage are stipulated, the shipper’s obligation is absolute, not to detain the ship beyond the days ; and he will be liable for the demurrage, or for the loss arising from further detention, although occasioned by circumstances over which he has no control.

Barret v. Dutton, 4 Camp. 333. Barker v. Hodgson, 3 Maule and Selw. 270. Struck v. Tennant, Abbot, 181. Randall v. Lynch, 12 East, 179. Bessey v. Evans, 4 Camp. 131. The Angerona, 1 Dodson, 382. Leer v. Yates, 3 Taunt. 387. Holt, 35.

433. When demurrage is stipulated while the ship is waiting for *convoy*, it ceases as soon as the convoy is ready to sail (*a*). And demurrage while waiting for a *cargo* ceases when the ship is fully laden and has her clearances ready to sail (*b*). When the vessel is loaded, all future risk is with the ship-owners (*c*).

(*a*) Lannoy v. Werry, Abbot, 184.

(*b*) Jamieson v. Laurie, Nov. 10. 1796 ; 6 Bro. P. C. 474 ; Abbot, 187.

(*c*) Barret v. Dutton, 4 Camp. 333-4.

434. When the ship is detained by the shipper after the demurrage days are expired, the damage is to be fixed according to circumstances. The sum fixed for the demurrage may give a *prima facie* rule for estimating such damage; but not a measure absolute or conclusive.

Moorsom v. Bell, 2 Camp. 616. *The Angerona*, 1 Dod. Adm. Rep. 382.

435. *Responsibility of Owners for Goods.* 1. The owners are responsible under their contract for the goods shipped, in the condition in which they were delivered; barring the perils of the sea, hostile force, and inevitable accident. Under these exceptions are included,—(1.) Such dangers and accidents of the sea, rivers, and navigation, as are unavoidable; as of rocks, sand-banks, collision (*a*). (2.) Capture by the enemy, or by pirates (*b*). (3.) Loss by irresistible force of man (*c*.) (4.) Actual detention by kings, princes, and rulers (*d*.) But where the loss, directly or indirectly, arises from want of skill or faulty navigation (as deviation from the right course), the owners will be liable (*e*).

2. The owners are also liable according to the rules of public policy, grounded on the Edict *Nautæ Caupones*, &c. See above, § 236. et seq.

(*a*) *Abbot*, 252, 257. 1 Bell, Com. 559. *Buller v. Fisher*, 3 Esp. Cases, 67. *Smith v. Scott*, 4 Taunt. 126. *Fletcher v. Inglis*, 2 Barn. and Ald. 315.

(*b*) *Pickering v. Barclay*, *Abbot*, 257. *Barton v. Wolliford*, *ib.* See *Cullen v. Butler*, 5 Maule and Selw. 461.

(*c*) *Brondrett v. Hentigg*, *Holt's Cases*, 149. *Hagedorn v. Whitmore*, 1 Starkie, 157.

(*d*) *Stewart*, Jan. 17, 1810; F. C. *Johnson v. Benson*, 1 Brod. and Bing. 454. *Atkinson v. Ritchie*, 10 East, 534.

(*e*) *Abbot*, 252. et seq. *Roccus*, § 55–56. *Emerigon*, vol. i. p. 532. *Trent and Mersey Navig. Co. v. Wood*, *Abbot*, 257.

436. The responsibility of shipowners is limited by the Legislature, in certain cases, and,

1. The owners of ships occupied in sea voyages are not liable for loss by fire (*a*). But this exemption has been held not to apply to small craft, lighters, and boats, concerned in inland navigation (*b*).

2. Owners are not liable for loss by the fault of the pilot (*c*).

3. Owners are not liable for robbery of gold, silver, and other enumerated articles, unless their nature, quality, and value, shall be declared in writing to the owners, or inserted in the bill of lading (*d*).

4. Owners are liable only to the amount of the value of the ship and freight (*e*). Those exemptions do not extend to masters. The value is to be calculated at the time of the loss or damage; and the value as to freight, is to be only the amount that the ship would have earned, had she completed her voyage (*f*).

(*a*) 26 Geo. III. c. 86. § 2, 3. 52 Geo. III. c. 39. § 50. 53 Geo. III. c. 159. § 2, 4.

(*b*) Hunter and Co. July 12. 1819, 1 Bligh. App. Cases, 573.

(*c*) 6 Geo. IV. c. 125. § 53.

(*d*) 26 Geo. III. c. 86. § 3.

(*e*) 7 Geo. II. c. 15. 26 Geo. III. c. 86. § 1. 53 Geo. III. c. 159.

(*f*) Abbot, 268. Wilson v. Dickson, 2 Barn. and Ald. 2. Cannan v. Raeburn, 1 Bing. 465. Hunter and Co. House of Lords, 1 Bligh. 573. The Dundee, Holmes, 1 Hag. Ad. Rep. 109. Gale v. Lawrie, 5 Barn. and Cress. 156.

2. DOCTRINE OF GENERAL AVERAGE OR CONTRIBUTION, ON THE PRINCIPLES OF LEX RHODIA DE JACTU.

Dig. lib, 14. tit. 2. ad Leg. Rhod. l. 1. Casaregis, Disc. de Commercio, disc. 45, 46. Peckius ad Leg. Rhod. cum notis Vinnii. 2 Valin, 175. 1 Emerigon, 605. Pothier, Tr. des Avaries, § 108. et seq. 2 Pardessus, 159. Kuricke, 188. Abbot, 344. Stevens on Average. Benecks on Indemnity, 165. 3 Kent, Com. 232. Story on Bailments, 370, 371. 1 Bell, Com. 583.

437. The losses which are suffered at sea, when not total, are commonly called average losses; distinguished by the terms particular average, and general or gross average. *Particular average* is the partial loss or damage, directly occasioned by shipwreck, or other accidental misfortune to the ship in its hull, rigging, anchors, &c. or to the cargo, or any part of it. *General average* is a loss accomplished by the hand of man, in the voluntary throwing over of something, for the common benefit of all concerned in the voyage. The former misfortune falls where it lights; the latter is a sacrifice, for indemnification of which all are bound to contribute. The principles according to which the contribution in general average is to be settled, are those of a partnership by necessity; as explained in the *Lex Rhodia de Jactu*, adopted under certain modifications in the several commercial countries of Europe.

438. The requisites to contribution are,—1. That a sacrifice shall have been purposely and advisedly made, by the hand of man, of part of the cargo, or of ship, rigging, &c. for the

common safety; and, 2. that the property of those concerned shall be preserved, or still remain to them.

1. In some of the maritime codes, it is required that there shall be a consultation of those concerned on board; but it is sufficient to raise the right to contribution, if, with such deliberate purpose as time and circumstances permit the sacrifice shall have been resolved upon as necessary to the common safety, in a case of real danger (*a*). And it is not indispensable that the thing shall have been actually thrown overboard, or destroyed; but sufficient if it have been exposed to loss for the common benefit, and have suffered from such exposure (*b*).

2. It is not necessary that the property shall have been saved by *means of the sacrifice*, provided it be saved. Although the sacrifice, by all deemed necessary, or such as all, if present, would have consented to, may have proved at the time needless in the event; yet those whose goods remain to them must contribute on the principles of partnership by necessity. This, however, is contrary to the rules of some maritime codes (*c*).

(*a*) Emerigon, 609. Abbot, 345. Story's ed. ib. vol. 1. Benecke, 169. Birkley v. Presgrave, 1 East, 220.

(*b*) Benecke, 169. et seq.

(*c*) Ib. p. 172 and 179. Cons. del Mare, c. 194. 2 Valin, 194. 1 Emerigon, 616. Code de Com. art. 423.

439. The things sacrificed, or thrown overboard, must have been regularly on board as part of the cargo; and so, 1. there is no contribution for loss of goods stowed on deck; for they are held an encumbrance (*a*), and the sole remedy to the owner is against the master. 2. Goods on board without a bill of lading are *presumed* supernumerary: and are not to be indemnified by average, unless *proved* to be regularly on board (*b*); but if saved, they must contribute. 3. If thrown overboard merely to lighten the ship for the convenience of getting into port, there is no contribution (*c*): But if thrown over to enable the ship to get over a bar as a refuge from the enemy; or for repair necessary to the safety of all concerned; or to be floated from a bank on which she has struck; or to escape from an enemy; contribution will be due. The same doctrine prevails in America (*d*). 4. Where goods are sent on shore in lighters for debarkation, their loss is not average; but if placed in lighters to lighten the ship for the general safety,

contribution will be due (*e*). 5. Masts, &c. cut away and sacrificed for the ship's safety, are average; but not when cut away on account of injury sustained by perils of the sea (*f*). 6. The sacrifice or cutting up of sails, ropes, &c. for stopping a leak, is average (*g*). 7. Damage done in the course of making the sacrifice is average (*h*). 8. The expense of going into port for the general safety, and for unloading, loading, warehouse rent, &c. in order to repair average loss, is average. But the result of many contending opinions, and various regulations on the question of going into port for repairing sea damage, not itself average loss, seems to be that the expense is not average, unless in so far as necessary for safety in prosecuting the voyage, and of no further use to the ship (*i*).

(*a*) 2 Valin, 189. Abbot, 354, and cases there cited of *Meyer v. Deyl*, before Lord Ellenborough, 1803. The same rule in America, *Story's Abbot*, 355. note 1.

(*b*) Cons. del Mare, 92. et seq. *Jugemens d'Oleron*, art. 8. No. 22. 1 Bell, Com. 586.

(*c*) 2 Pothier, *Avaries*, § 146. 1 Bell, Com. 587.

(*d*) 2 Valin, 195. 2 Pothier, *Avaries*, § 145-6. *Plummer v. Wildman*, 3 Maule and Selw. 482. *Story's ed. of Abbot*, 350. note.

(*e*) Valin and Pothier, ut supra. Benecke, 209.

(*f*) Stevens on Average, 15, 16. Benecke, 182. et seq.

(*g*) Stevens on Average 18.

(*h*) Pothier, § 115. 2 Valin, 190. Marshall, 542. Abbot, 334. Benecke, 177.

(*i*) *Da Costa v. Newman*, 2 Term. Rep. 407. *Jackson, v. Charnoch*, 8 Term. Rep. 509. *Power v. Whitmore*, 4 Maule and Selw. 141. *Plummer v. Wildman*, 3 Maule and Selw. 482. Benecke, 191-207.

440. The subjects of contribution are, the cargo; ship; and freight. And,

1. The cargo includes the goods thrown overboard (*a*); those loaded on deck (*b*); luggage in chests and boxes (*c*): But persons or apparel are not liable to contribution (*d*).

2. The ship contributes; deducting stores and provisions, wear and tear, and partial loss (*e*).

3. Freight contributes; deducting wages (*f*).

(*a*) 2 Pothier, *Avar.* § 123.

(*b*) 2 Valin, 189. Stevens, 54.

(*c*) 3 Ersk. 3. § 65.

(*d*) Abbot, 345, 356. Price, ex parte, 4 Taunt. 123. Marshall, 544.

(*e*) Stevens, 55.

(*f*) Ibid, 64.

441. In valuing and apportioning the contribution, the guiding principle is, that the owner of the property sacrificed is to

be placed in the same condition as if his property had been part of what is saved. The rules observed are these:—

1. If the ship reaches her port without further damage, the property sacrificed is to be valued at the market price of the port of delivery, freight, duties, and charges, deducted; and they must bear their share of the contribution (a).

2. The goods which arrive in port undamaged, are taken at their actual value in the port of discharge, deducting charges, &c. (b); if put back, they are taken at the invoice price (c); if stopt short of their destination, at their value where stopt.

3. If the goods saved be damaged after the jettison, the deteriorated value must be taken. The owner of goods lost pays no contribution for them.

(a) Benecke, 286.

(b) Marshall, 546. Stevens, 51. 1 Bell, Com. 590. See 2 Kent, Com. 242.

(c) Abbot, 347. Stevens, 52, 53.

442. The true owner of the goods saved is the person liable to contribution; and the claim may be secured by Lien. If Average be made a condition in the bill of lading, a consignee taking the goods will be liable. But if there be no such condition, and the goods are given up to a consignee, not the owner, without an express or implied contract by him to pay Average, the claim lies only against the consignor.

Scaiffe v. Tobin, 3 Bar. and Ad. 523.

3. OF SALVAGE.

Abbot, 396. Story's edition, 397, note; 400, note. 2 Kent, Com. 245.

443. Salvage is a reward or recompense given to those, by means of whose labour, intrepidity, or perseverance, a ship, or goods, have been saved from shipwreck, fire, or capture. It rests on plain principles of equity and a right of Lien; but the rate of Salvage to be allowed, and the rules applied, are in all countries regulated by particular laws.

12 Anne, c. 18. 26 Geo. II. c. 19. 48 Geo. III. c. 130, 132. 49 Geo. III. c. 122. 53 Geo. III. c. 87. 1 and 2 Geo. IV. c. 75, 76. 6 Geo. IV. c. 117. Kames, Stat. Law, voce *Wreck*, 414.

444. *Persons entitled to Salvage.* One who is not otherwise in duty bound to interfere for the safety of the ship or cargo, is at common law entitled to recompense for his services, in preserving the ship for the owners. But,

1. The *master* and *crew* have no right to salvage; for they

are bound to exert themselves to the utmost for the service and safety of the ship. There is an exception, however, to this rule, in the case of rescue after capture ; for capture puts an end to the contract of the master and crew. The saving or rescue of the ship, by the master or seamen, from mutiny, does not come under this exception ; for their service is not thereby terminated (*a*).

2. The *passengers* are held entitled to salvage, if they continue with the ship after they might have left it, and exert themselves for its safety (*b*).

3. A pilot is not in general entitled to salvage ; but extraordinary exertions of skill, or courage, or intrepidity, may raise his professional charge to salvage (*c*).

4. A claim as joint salvor must be supported by evidence of the necessity for interference (*d*).

5. No operation, previous to recapture, will entitle a ship which is not present, to claim salvage ; neither will a ship, merely for being in sight at recapture, have any share, unless it be a King's ship (*e*).

6. Co-operation will give a joint right ; but if merely constructive, it will not (*f*). See below, p. 167.

7. It has been doubted whether a convoy is entitled to salvage for recapture of one of the fleet (*g*).

(*a*) *The Two Friends*, 1 Rob. Adm. Ca. 271. *The Beaver*, 3 Rob. Adm. 292. *Governor Raffles*, 1813 ; 2 Dod. Adm. 14. *Trelawney, Lake*, 4 Rob. Adm. 223.

(*b*) *The Two Friends*, ut supra. *Newman v. Walters*, 3 Bos. and Pull. 612.

(*c*) *The Joseph Harvey*, 1 Rob. Adm. 306. *The Sarah*, ib. 313 note.

(*d*) *The Maria*, 1 Edw. 175. *Bellona*, 1 Edw. 63.

(*e*) *The Sparkler*, 1 Dod. Adm. 359.

(*f*) *La Belle Coquette*, 1 Dod. Adm. 20. *Wanstead*, Morton, 1 Edw. Adm. Cases, 268. *The Union*, 1 Dod. Adm. 346.

(*g*) *The Wight*, 5 Rob. Adm. Cases, 315.

445. The occasions on which salvage is due are, 1. Shipwreck ; 2. Recapture : and, 3. Derelict.

1. Shipwreck. When goods are saved from shipwreck, they may be retained for payment of the salvage (*a*). The provisions for compelling persons in certain public situations on the shores of the island, and ships in the neighbourhood, to give aid, and regulating the mode in which their salvage is to be decided, extend to Scotland (*b*). But the act for compelling other persons to give aid, and regulating

their salvage, not extending to Scotland (*c*) ; this matter is left to the common law.

2. Recapture. A material change has been made by statute on the former rule with regard to salvage of ships retaken from the enemy. Formerly, if a vessel had, on capture, been condemned as prize, or was carried by the enemy *infra præsidia*, the original owner was completely divested of his property, and the recaptor entitled to keep the subject retaken (*d*). But by statutes the owner is entitled to restitution on payment of salvage, at whatever period the recapture may have taken place (*e*). To this, however, by the policy of the prize acts, there is an exception of ships taken by the enemy, and set forth as ships of war while in their hand ; when retaken, they are deemed prize, not subject to restitution on salvage (*f*).

Co-operation in recapture will, as already said, give joint right (see § 444 No. 6.) ; and, (1.) a privateer actually co-operating with a King's ship, if not officiously, will be held a joint salvor (*g*) ; (2.) a King's ship in sight at the capture is entitled to salvage (*h*) ; but, (3.) King's boats sent in pursuit are not held entitled, unless they actually assist in the capture (*i*) ; and, (4.) where the co-operation or recapture is by the convoy ship, the question will depend on the degree of blame imputable to the convoy in first allowing the capture (*k*).

3. Derelict. Property derelict is not under the English salvage acts, and there is no restraint as to the rate of salvage. It will therefore be allowed, according to the merits of the case (*l*).

(*a*) *Hartford v. Jones*, 1 Lord Raym. 393.

(*b*) 12 Anne, c. 18. Commiss. of Customs, May 25. 1810.

(*c*) *Baring v. Day*, 8 East, 57. 48 Geo. III. c. 130.

(*d*) *L'Actif*, 1 Edward, Adm. Rep. 185.

(*e*) 13 Geo. II. c. 4. § 18. 17 Geo. II. c. 34. § 20. 29 Geo. II. c. 34. § 24. *The Santa Cruz*, 1 Rob. Adm. Rep. 68.

(*f*) 45 Geo. III. c. 73. *L'Actif*, 1 Edw. Adm. Rep. 185.

(*g*) *The Wanstead*, 1 Edw. 269. *The Union*, 1 Dod. 346.

(*h*) *The Sparkler*, 1 Dod. 359. *The Bellona*, 1 Edw. 68.

(*i*) *La Belle Coquette*, 1 Dod. 18.

(*k*) *The Wight*, 5 Rob. Adm. Rep. 315.

(*l*) *The Gage*, 6 Rob. Adm. Rep. 173. *The Lambton*, *ib.* 275, note. Lord Nelson, 1 Edw. Ad. Rep. 79.

446. The amount of salvage is left to judicial determination in the case of Derelict and Shipwreck ; in the case of Recapture, the rate is regulated by statute (after many changes), at

one-eighth for the Royal Navy and King's armed ships ; one-sixth for private ships.

NOTE.—In Mr Justice Story's edition of Abbot, p. 400, will be found a correct list of the leading cases in England and America, relative to salvage, in questions, 1. of derelict ; 2. of recapture ; 3. of rescue ; 4. of distress.

4. CONTRACTS FOR REPAIRS AND FURNISHINGS TO SHIPS.

447. Contracts for repairs and furnishings to ships may be made with the owners ; with the shipshusband ; or with the master : and the owners are liable for stores and repairs pro rata when the contract is with themselves ; singuli in solidum, when the order is by the master or shipshusband.

Gleadon *v.* Tinkler, Holt, 586. Baldney *v.* Ritchie, 1 Starkie, 338.

448. Liability for such repairs and furnishings is regulated by the following rules ; 1. That the register does not furnish evidence to charge one as owner for furnishings or repairs, unless it be shewn that the registry was made by his authority. The question always is, on whose credit was the work done ? (*a*). So it is in America also (*b*). 2. That a purchaser is not liable for orders given by, and furnishings previously made to, the seller of the ship ; nor the seller for furnishings made on the order of the purchaser, though still the seller's name is left on the register (*c*). 3. That for orders by the master, the actual owners, or those whose names are, with their own knowledge or consent, left still on the register, are liable (*d*). 4. The lessee of a ship for the voyage, or on time, is liable for furnishings on the master's order (*e*). 6. Mortgagees in possession, formerly held liable as owners, are now by statute freed, provided their character as mortgagees is stated in the book of registry, and in the certificate (*f*).

(*a*) Frazer *v.* Hopkins, 2 Taunt. 5. Smith *v.* Fuge, 3 Camp. 456. Resusse *v.* Myers, *Ib.* 475. Young *v.* Brander, 8 East. 102. Briggs *v.* Wilkinson, 7 Barn. and Cres. 39. Reeve *v.* Davis, 1 Ad. and Ell. 312.

(*b*) Story's Abbot, 63, note 1.

(*c*) Young *v.* Brander, 8 East. 10. Trewhella, *v.* Rowe, 11 East. 435.

(*d*) Gleadon, *supra*. Westerdell *v.* Dale, 7 Term. Rep. 306. Menzies and Goalen, Feb. 22. 1805, and Ogilvy, Jan. 1. 1805 ; 1 Bell, Com. 52. note.

(*e*) Vallejo *v.* Wheeler, Cowp. 144. Rich *v.* Coe, *Ib.* 636. Fraser *v.* Hopkins, 2 Taunt. 5. Tinkler *v.* Walpole, 14 East, 226. Cooper *v.* South,

4 Taunt. 802. *Fraser v. Marsh*, 13 East, 238. *Jennings v. Griffiths*, 1 Ryan, and Moody, 42. *Baker v. Buckle*, 7 Moore, 349.

(f) 4 Geo. IV. c. 41. § 43. 6 Geo. IV. c. 110. § 45.

5. CONTRACTS FOR SERVICES IN RELATION TO SHIPS.

The persons whose services are employed relative to a ship are the shipshusband, the master, and the seamen.

449. 1. SHIPSHUSBAND. He is the agent, or commissioner, for the owners. (See above, § 219. 6.) He may be a part-owner, or a stranger. His powers are by a mandate, or written commission by the owners, or by verbal appointment; the latter chiefly where he is also part-owner (a). His duties are, 1. To arrange every thing for the outfit and repair of the ship—stores, repairs, furnishings; to enter into contracts of affreightment: to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishings, stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money wherewith to pay them. 3. He may receive the freight; but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest, without special authority (b). 5. He cannot give authority to a law agent that will bind his owners for the expenses of a lawsuit (c). 6. He cannot delegate his authority (d).

(a) 3 Ersk. 3. § 33. 1 Bell, Com. 508.

(b) *French v. Backhouse*, 5 Burr. 2727. *Bell v. Humphries*, 2 Starkie, 345.

(c) *Campbell v. Stein*, House of Lords, June 5, 1818; 6 Dow, 134.

(d) *Forbes*, Dec. 13. 1822; 2 S. D. 87.

450. 2. SHIPMASTER. By ancient sea-laws the shipmaster was required to be a part-owner; and by some modern codes he must be examined and passed as sufficiently skilful: But in this country the only requisites are, 1. the appointment of the owners; and, 2. that he must be a British subject. The master is employed as under a contract of hiring, but his office implies an important mandate—the exercitorial power, § 231. 2. (a).

The master is seldom appointed by written contract; but by verbal agreement with the owners or shipshusband. His name must be entered in the register and in the certificate at

first registration of the ship ; and no change is to be made of the master without an alteration in the certificate and on the register ; the master giving bond for safe-keeping of the certificate. His duties to the owners are undertaken, by the mere act of taking his place as master ; and so, in relation to third parties, he is vested with exercitorial power and authority (*b*).

The exercitorial power confers on the master, 1. the sole direction of the course and conduct of the ship. 2. the power to freight the ship abroad ; not at home, without express authority (*c*). 3. Power, when the ship is advertised for general freight, to receive goods on board (*d*). 4. As to the outfitting of the ship, his powers are, *at home*, superseded by those of the shipshusband ; but his power is implied, unless the owners take the management, or there be a shipshusband appointed (*e*). *Abroad*, the master is the accredited agent of the owners, in fitting out, victualling, and manning the ship ; in ordering necessities ; and even in borrowing money for necessities, although he may have been provided with money by the owners (*f*). He has power to hypothecate the ship for necessities ; and his fault or neglect in performing his duties, binds the owners to the extent of the value of the ship (*g*). 5. The master has no authority to *sell* either ship or cargo ; unless under the pressure of the most extreme, absolute, and well-proved necessity ; otherwise the sale is null, and the owner will get back his property on payment of salvage (*h*).

In all these points the master himself is bound.

The owners may dismiss the masters at once, and absolutely ; leaving him to his remedy at law.

(*a*) 1 Stair, 12. § 18. 3 Ersk. 3. § 43. 5. Abbot, 90 ; Story's Edition, 92. note 1. 1 Bell, Com. 505.

(*b*) Lord Meadowbank, in *Ayton v. Brown*, 1 Bell, Com. 524.

(*c*) Abbot, 50. et seq. 100.

(*d*) Abbot, 93. 5.

(*e*) Lindsay and Allan, June 18, 1800 ; *M. Mandate*, App. 2. Stewart, Nov. 10. 1813 ; House of Lords, 2 Dow, 29. Webster v. Seekamp, 4 Barn. and Ald. 352.

(*f*) *Rocher v. Busher*, 1 Starkie, 27.

(*g*) *Ellis v. Turner*, 8 Term. Rep. 531. *Rinquist v. Ditchell*, Abbot, 98. *Cary v. White*, 1 Brown's Par. Cases ; Abbot, 104.

(*h*) *The Fanny and Elmira*, 1 Edw. 117. *Parmenter v. Todhunter*, 1 Camp. 541. See the *Gratitudine*, 3 Rob. 263. *Cannan v. Maeburn*, 1 Bing. 243. *Robertson v. Clark*, 1 Bing. 445. *Hale, v. R. Ex. Ass. Co.* 3 Taunt. 755. See American Cases, Story's Abbot 10, note 1.

451. SEAMEN. By a recent statute, the former statutes relative to merchant seamen, are repealed, and the system placed on a new footing (*a*). This statute has two objects; 1. to secure to seamen, on the one hand, the benefit of a simple and equitable written contract, with exact payment of their wages, and summary and effectual means of recovering them; and, on the other, strict enforcement of the duties of seamen: and, 2. to establish a regular office of registry for merchant seamen, with a system of apprenticeship by which the supply may be kept continually full of skilful seamen, and proper care be taken of the interest and safety of seamen while in foreign parts.

Questions may arise as to seamen's wages, in the decision of which it is necessary to have recourse to general principles of jurisprudence. Thus, according to the common maxim, "Freight is the mother of wages;" so that total loss during the voyage forfeits wages (*b*). This is a rule founded on policy for the additional security of ship and cargo. But it is subject to several exceptions; as when the voyage is lost by the fault of the owners; if the ship be seized for debt; if forfeited for having smuggled goods; if the ship returns without a cargo; and even when the ship is wrecked, but part of it brought home; the seamen are not to be deprived of all consideration for their services (*c*).

The seaman has two remedies for his wages,—a personal action on the contract, and a lien on the ship to her last plank (*d*); and on this right (especially as exemplified in the case of the *Neptune*), although the seaman may lose his personal action for wages if the owners earn no freight, he will have his claim against the ship or its vestiges.

(*a*) 5 and 6 Will. IV. c. 19. See 1 Illus. 562. for an abstract of it.

(*b*) Abbot, 451. Story, 1 Ed. 457. Ill. note 1.

(*c*) The *Neptune*, 1 Hag. Ad. Rep. 227.

(*d*) *Madonna d'Idra*, 1811, 1 Dod. 37; *Neptune*, 1824, 1 Hag. Adm. Rep. 227.

6. CONTRACTS OF BOTTOMRY AND RESPONDENTIA.

3 Ersk. 8. § 17. Abbot, 119. Marshall, 733. Park, 410. 2 Valin, 1. and 9. Pothier, Cont. à la Grosse Avanture. 2 Emerigon, 377. 3 Boulay Paty. 1-227. 2 Pardessus, Droit Com. 203. 3 Kent, Com. 353. et seq. 1 Bell, Com. 530.

452. These are contracts for money lent to the owners of ship or cargo at home, or to the master in a foreign country,

on the condition, that if the subject on which the money is lent be lost; by sea-risk or superior force of the enemy, the lender shall lose his money: and that, if the voyage shall be successful, the money lent shall be repaid, with a certain profit or consideration for interest and risk, called marine interest. For repayment the person of the borrower is bound; and also, in bottomry, the ship: In respondentia, the goods (in certain cases) are hypothecated to the lender.

The master has no power to borrow on such contracts in a home port, *i. e.* within the British empire (*a*); unless where there is a dissension among the owners, and a necessity of borrowing for the minority's share of the outfit (*b*).

(*a*) 1 Stair, 12. § 18. 3 Ersk. 3. § 44. 1 Bell, Com. 528-9. Abbot, 103. 123. The Gratitude, 3 Rob. Adm. Rep. 255, 278. The Rhadamanthe, 1 Dod. Adm. 201.

(*b*) Park, 414. 2 Valin, 10. 1 Bell, Com. 531.

453. The form of the obligation is that of a bond, or of a bill; expressing the *sum* borrowed or credit given, with the marine interest; the *subject* on which the money is taken; and the *risk*, with its commencement and termination (*a*). A verbal agreement to give security on the ship will not do. And a bill of exchange is held as evidence that the ship was not intended to be pledged (*b*).

(*a*) See the form in Abbot, App.

(*b*) Halket, ex parte 19 Ves. 473.

454. Subjects of the Contract. There must be something at hazard on the voyage, in order to validate this contract. This may be the ship, with its furniture, the cargo, or the freight (*a*). But wages cannot be made the subject of Bottomry (*b*).

(*a*) Marshal, 742. The Jacob, 4 Rob. Adm. Rep. 245.

(*b*) Marshal, 747.

455. Bottomry Loans are, strictly speaking, the creatures of necessity alone, in the providing for or extricating the ship. The master cannot make an effectual transaction if there should be circumstances which do not evince such necessity; as for a debt of his own (*a*); or in security of a debt already existing on personal credit (*b*).

(*a*) Abbot, 127. The Gratitude, 3 Rob. Adm. Rep. 272.

(*b*) The Augusta, 1 Dods. A. R. 283.

456. The distinguishing peculiarities of these contracts are, 1. The Risk run ; and, 2. The Marine Interest : and, 3. The Security.

1. Risk. This alone gives validity to the stipulation for marine or higher interest. Where the voyage is not begun, and no risk run, the transaction resolves into a common loan at lawful interest. When the borrower has no interest at stake in ship, goods, or freight, there is no marine interest. After the risk is over, the sum due on the contract bears only lawful interest. But if the risk have once begun, and the ship or goods in the bond have been exposed but for a moment to hazard, the marine interest is due (*a*). The risks are commonly specified in the bond. They are the same with those undertaken in a policy of insurance. It is not necessary that they should be set down in the bond ; or even that the bond be expressly conditional ; being understood and implied when the nature of the bond clearly appears (*b*). But in a question as to the risk run the ship is held not to be totally lost, however much injured, if she reach the end of the voyage (*c*).

2. Marine Interest. The amount depends on the estimate made of the risk—for it is not so properly, or solely, interest, as *pretium periculi*. But that estimate may be exorbitant and oppressive under the pressure of the necessity which justifies the transaction ; and courts of justice, though unwillingly, may undoubtedly interfere to reduce any such exorbitant charge (*d*). When the condition of the bond is fulfilled, the sum advanced and the maritime interest stipulated are demandable and become an absolute debt ; on which the ordinary legal interest runs (*e*).

3. Security. (1.) In Bottomry the lender has a privilege or claim on the ship itself, and on the freight. He is entitled to apply in Admiralty to have a sale of the ship for his payment. And in distributing the proceeds among those who may appear to claim, the last bottomry creditor in point of date is entitled to be preferred, as having furnished the means of preserving the ship for the benefit of all previous lenders, "*salvam fuit totius pignoris causam*"(*f*). This preference, however, is given only when the loan has been made to the master abroad on necessity ; for a later bond by the owners will not thus be preferred (*g*). But (2.) In Respondentia on goods

which are intended for the market, there can be no hypothecation inconsistent with that object (*h*).

The risk and security which so intimately enter into the nature of this transaction lead to the question of the effect of average on the lender : and, 1. He seems liable to general average ; so as to be bound to contribute, from the money which is saved to him by the sacrifice, to the indemnification of the sufferer (*i*). 2. He is, of course, liable to simple average, in so far as it may diminish the subject of his security.

(*a*) 2 Emerigon, 491. 3 Boulay Paty, 74. et seq.

(*b*) *Simonds v. Hodgson*, 3 Barn. and Ad. 59, reversing the decision of the Common Pleas, in 6 Bing. 120.

(*c*) *Thomson v. R. Exch. Ass. Co.*, 1 Maule and Selw. 31.

(*d*) *Zodiac*, 1 Hag. Adm. Rep. 320.

(*e*) 2 Pardessus, 273. 3 Boulay Paty, 80. Marshall's dictum on this point seems not to be law, v. 2. p. 752.

(*f*) Casaregi, Disc. 16. 2 Valin, 11. 1 Boulay Paty, 116, 143. and t. 3. 154. Abbot, 128. Rhadamanthe, 1 Dods. 201. Sydney Cove, 2 Dods. 1.

(*g*) Rhadamanthe, ut sup.

(*h*) 2 Black. 458. Park. 615. Marshall, 743. *Busk v. Fearon*, 4 East, 319.

(*i*) *Pothier, Con. à la Grosse*, No. 91. 3 Boulay Paty, 220. Marshall, 760.

6. CONTRACT OF INSURANCE.

Pothier, Tr. du Cont. d'Assurance. Emerigon, Tr. des Assurances, vol. ii. Valin, Com. sur l'Ordonnance de la Marine, vol. ii, 1 3. tit. 6. 3 Boulay Paty, 233. Park on Insurance. Marshall on Insurance. 2 Selw. Nisi Pr. 940. 2 Kent, Com. 253. Miller on Insurance. 1 Bell, Com. 598. Phillip's (of America) Law of Insurance.

457. Insurance is a contract to indemnify against possible or probable loss, in consideration of a sum or premium paid, or held to be paid. The insurer, or underwriter, undertakes, for certain risks, or perils, of the sea, fire, death, &c., to which the party insured may be exposed ; being assured, in doing so, that he is free from such other risks as may either arise from the natural or actual condition of the subject, or out of a deviation from the usual course of peril.

It is essential to the contract of insurance that there shall be a subject in which the insured has an interest ; a premium given, or engaged for ; and a risk run.

458. 1. SUBJECT. The subject insured must be a thing at hazard. And it is held to be so, although it may have already perished, if this be unknown at entering into the insurance. And in all policies, to avoid such questions, the words " lost or not lost," are inserted : so, when a ship or person abroad, or

a house in a distant part of the country, is insured, in the belief of their being still extant, the insurance is effectual.

459. It is not necessary that the subject should already belong to the insured : it is enough if it exist *in spe* ; as profit to be earned (*a*) ; the produce of a fishing voyage (*b*) ; or freight, the interest commencing with the ship breaking ground (*c*). The merchant himself, who sends his goods by sea, has an insurable interest in any advances made to the shipmaster, provided the same be insured as freight, or the repayment made to depend on the earning of freight (*d*).

(*a*) Grant *v.* Parkinson, Marsh. 97.

(*b*) Addison and Son, May 23. 1797 ; M. 7077.

(*c*) Montgomery *v.* Eggington, 3 Term. Rep. 362. Warre *v.* Miller, 1825 ; 4 Barn. and Cress. 538.

(*d*) De Silvale *v.* Krudal, 4 Maule and Selw. 37. Andrew *v.* Moorhouse, 5 Taunt. 435. Mansfield *v.* Maitland, 4 Barn. and Ald. 582. See Winter *v.* Holdiman, 1831 ; 2 Bar. and Ad. 649.

460. The insurance must be of a lawful subject of trade. Thus, smuggled goods cannot be insured ; nor contraband of war : Neither can seamen's wages (*a*) ; nor what is paid in place of wages (*b*). Enemy's property is not insurable ; and so, if war have begun before the policy is effected, it is null (*c*) : if war break out afterwards, no action will lie on the policy while the war continues, but its effect will revive on peace (*d*). But although a good policy when made, it will not protect against *British capture* if war break out (*e*).

(*a*) Park, 353, et seq. Marshall, 55, et seq. Jenkins *v.* Power, 6 M. and Sel. 282.

(*b*) Webster *v.* De Tastet, 7 Term. Rep. 157.

(*c*) Brandon *v.* Nesbit, 6 Term. Rep. 23. Bristow *v.* Towers, Ib. 35. Killner *v.* Le Mesurier, 4 East. 396. Flindt *v.* Waters, 15 East, 260.

(*d*) Furtade *v.* Rogers, 3 Bos. and Pull. 191.

(*e*) See Furtade's Case.

461. The subject insured must be one in which the insured has an interest ; but that interest need not be specified in the policy (*a*) : And this is enforced by the statutes against wager-policies ; and against policies for covering illegal and criminal voyages. Those statutes prohibit assurances " by way of wagering or gaming," and assurances " interest or no interest ; or without further proof of interest than the policy." (See below, § 482) (*b*). The interest must be proved otherwise than by the words of the policy (*c*). But these rules, in marine insurances, apply only to the ships of the Crown, or of its sub-

jects ; not to foreigners (*d*). The effect of stopping in transitu a cargo insured, has, in one special case, been held to destroy the policy, as annihilating the vendee's interest under it (*e*). But this does not decide the general question.

(*a*) Brown, Feb. 2. 1810. House of Lords, July 14. 1814 ; 2 Dow, 367. See also *Godsal v. Boldero*, 9 East, 72. *Crowley v. Cohen*, 3 Bar. and Ad. 478.

(*b*) 19 Geo. II. c. 37. 14 Geo. III. c. 48. Park, 393. *Murphy v. Bell*, 4 Bing. 567. *Paterson v. Powell*, 9 Bing. 320.

(*c*) *Murphy v. Bell*, 4 Bing. 567.

(*d*) *Theluson v. Fletcher*, Doug. 301. *Nantes v. Thomson*, 2 East, 385.

(*e*) *Clay v. Harrison*, 10 Barn. and Cress. 99, and see foot-note.

462. 2. RISK. The subject must be actually at risk ; or it must be bona fide believed to be so. And,

1. It must be a risk not occasioned by the fault or crime of the insured ; so, in life insurance, death by duelling, suicide, or the hands of justice, are not risks under a policy for the benefit of the person or his family whose life is in question ; though by special stipulation some of these risks may be included.

2. Certain risks are, by special agreement or usage, excepted out of the underwriter's responsibility. In marine insurance, stores, and certain perishable articles, are by memorandum excepted, unless there be total loss, or stranding, or loss to an amount beyond the average damage to perishable commodities in such a voyage (*a*). So extra risks, in ordinary fire policies, are excepted ; and certain diseases in life insurance.

3. The risk must have arisen within the time specified, or event referred to, in the express or implied agreement of the parties (*b*).

(*a*) *Smith*, May 16. 1823 ; 2 S. D. 309. See below, § 489.

(*b*) *Park*, 28. *Marshall*, 207.

463. 3. PREMIUM. This is the consideration given, at entering into the contract, for the engagement to make future indemnification. It is presumed to be paid ; the policy bears the receipt of it ; and, as between the contracting parties, it is held as paid ; entering, as matter of account, into their respective relations with the policy broker.

Marshall, 341. 1 *Bell*, Com. 590.

1. *Of Maritime Insurance.*

464. 1. Maritime insurance is a contract of indemnity

against loss by perils of the sea, fire, enemies, pirates, arrests by kings or states, barratry.

465. 1. *Constitution of the Contract.* Although this ranks as a consensual contract, a written instrument, on stamped paper, is by statute requisite to its constitution (a).

In practice there is a previous note of the contract, called a SLIP, made out for the purpose of collecting the consents of underwriters to the proposed policy. It is intermediate and temporary, and held only to contain a confidential expression of the intention of the persons who sign by their initials to subscribe the policy. But to each party, while the policy is unsigned, there is locus pœnitentiæ. The *slip* has no force as a contract of insurance; and has been held ineffectual to shew even priority of subscription (b).

Another preliminary proceeding is frequent, which has a different effect. Great insurance companies acting by agents at a distance, empowered to take risks, and engage that policies shall be sent, bind the company by their intermediate engagement; and an action is competent for delivery of the policy (c).

(a) 35 Geo. III. c. 63. 55 Geo. III. c. 84. Marshall, 289. Park, 47. Liddel and Brunton, Dec. 17. 1811; 1 Bell, Com. 603. Mills, March 13. 1826; 4 S. D. 575.

(b) Liddel and Brunton, ut supra. Rodgers v. M'Cartney, Park, 45. Marsden v. Reid, 3 East, 575.

(c) Mills, May 13. 1826, and House of Lords, 3 W. S. 218. Christie, Feb. 10. 1825; 3 S. D. 360.

466. *Stamp.* The policy must be duly stamped when effected. The stamp cannot afterwards be supplied; nor can the agreement be materially altered, after it has been fully executed and completed (a).

But to this rule there is, by the statute itself, an exception, that the policy may be altered before the determination of the risk is known (b); provided, 1. that the original premium shall exceed the rate of ten shillings per cent. on the sums insured; 2. that the thing insured shall have remained the property of the original insurer; 3. that there shall be no prolongation of the term of insurance, or extension of the voyage; and, 4. that no additional sum shall be insured by the alteration. Under this exception, an alteration of the time of sailing has been allowed (b); and even of the voyage itself, where the ship was detained beyond the stipulated time of sailing (c).

But it has not been permitted to alter the insurance from “ship and outfit” to “ship and goods,” as being an entire change on “the thing insured” (*d*). A correction of an innocent mistake is held no alteration (*e*); and even a waiver of the warranty of seaworthiness has been held no alteration requiring a new stamp (*f*).

(*a*) 35 Geo. III. c. 63. 55 Geo. III. c. 184. *Roderick v. Hovil*, 3 Camp. 103. See *Rippiner v. Wright*, 2 Barn. and Ald. 478. *Hubbard v. Jackson*, 4 Taunt. 169.

(*b*) 35 Geo. III. c. 63. § 13. *Kensington v. Inglis*, 8 East, 273. *Ramstrom v. Bell*, 5 Maule and Selw. 267. *Ridsdale v. Shedden*, 4 Camp. 107.

(*c*) *Brockelbank v. Sugrue*, 1 Bar. and Ad. 81.

(*d*) *Hill v. Patten*, 8 East, 373. See 9 East, 351.

(*e*) *Robinson v. Touray*, 1 Maule and Selw. 217. *Sawtell v. Lowdon*, 5 Taunt. 359.

(*f*) *Weir v. Aberdeen*, 2 Barn. and Ald. 325.

467. **POLICY.** This is an ill drawn and very loosely expressed instrument; but, in all its material points, now settled by precedents. The general rules applicable to this instrument are, 1. That it shall be construed according to its plain sense and meaning, as collected from the terms made use of, taken in their ordinary and popular meaning; unless either by the known usage of trade, or by the force of the context, they are to be understood in a peculiar or technical sense (*a*). 2. That part of it being printed and part written, the definite meaning fixed on the former is to be taken; the latter construed according to the obvious intention of the persons who have selected them (*b*).

The contents of the policy are, 1. the name of the party insured, or of his agent; 2. the name of the ship; 3. the subject insured; 4. the voyage or time insured; 5. the perils which the underwriters undertake, with the memorandum restricting the general undertaking; 6. the date and subscription.

(*a*) *Robertson v. French*, 4 East, 135. *Hunter v. Leathly*, 10 Barn. and Cress. 871.

(*b*) Dict. Lord Ellenborough, 4 East, 136.

468. *Name.* By statute in 1788 (*a*), every policy is void in which there does not appear the name of the persons interested; or of the consignor or consignee; or of the person residing in Great Britain who shall receive the order for, and effect such policy; or of him who shall give the order to the agent employed to effect the insurance. It is not enough that the policy bears the name of the master or broker, as such; but

it is sufficient if there be the name of one employed to represent a true interest, by effecting the policy (*b*). It is not necessary that an agent shall be named as such (*c*). A broker who is not general agent for the insured, is within the statute, if described as agent (*d*).

(*a*) 28 Geo. III. c. 56.

(*b*) *Bell v. Gilson*, 1 Bos. and Pull. 345.

(*c*) *De Vignier v. Swanston*, 1 Bos. and Pull. 346.

(*d*) Same case.

469. *Name of the ship.* The ship is described by her name and the name of the master. This is for the purpose of identifying the risk; and so, 1. if the name of ship or captain should be mistaken, without any doubt as to the identity, this would not be fatal; though, to prevent all dispute on that subject, it is commonly added, "or by whatever other name the ship shall be called," and "whoever else shall go as captain." Under such a clause an innocent mistake, when there is clear proof of the identity of the ship intended by the parties, does not vacate the policy (*a*). 2. Goods may be insured by the policy, generally, as goods on board ship or ships, provided they shall be afterwards identified as those understood by the parties. This has been long settled (*b*).

(*a*) *Watt*, Jan. 23. 1782; *M. 7074. Le Mesurier v. Vaughan*, 6 East, 382; *Park*, 21.

(*b*) *Kewley v. Ryan*, 2 H. Blackst. 343.

470. *Subject.* Generally speaking, the subject of marine insurance is the ship or the cargo; but under this is comprehended as fit subjects of insurance, the freight to be earned by the ship, and the profits to be effected on the sale of the cargo; and besides these the bottomry and respondentia interests that may exist with regard to either. And,

1. Whatever be the subject, it must be so clearly described that there may be no doubt as to identity.

2. The ship must be identified as above stated (§ 469); and when insured, with "the body tackle, boats, and other furniture;" this will comprehend the provisions on board at the date of the policy (*a*).

3. The goods are identified by the ship, or by their marks or other description. When the insured does not know by what ship the goods are to be sent, he insures goods by "ship or ships;" and as there are many occasions on which both

ship and goods are unknown, in such cases a valid insurance may be effected “on goods to be afterwards declared and valued by ship or ships,” the declaration being made by shewing an embarkation of goods for behoof of the insured (*b*). When goods are mentioned generally, it is held to apply only to such as are exposed to the ordinary risks, as being loaded on deck, or usually so loaded (*c*).

4. Profits may be insured under that general term (*d*).

5. Freight may be insured, provided it is done expressly (*e*); and under freight may be covered the benefit one derives from carrying his goods in his own ship (*f*). See above § 459.

6. Bottomry and Respondentia interests may be insured, but they must be so specified, and will not be covered by an insurance on goods (*g*).

7. Although it is indispensable that the insured have an interest in the voyage, it is not necessary to specify the nature of such interest in the policy (*h*).

(*a*) Brough v. Whitmore, 4 T. R. 206.

(*b*) Robinson v. Touffay, 3 Camp. 158. Harman v. Kingston, Ib. 150.

(*c*) Blackett v. Royal Exch. Ass. Co. Tywhitry. Da Costa v. Edmonds, 4 Camp. 142.

(*d*) Eyre v. Glover, 3 Camp. 276, and 16 East, 218. Grant v. Parkinson, Park, 402. Barclay v. Cousins, 2 East, 544.

(*e*) Baillie v. Magdiliani, Park, 90. Taylor v. Wilson, 15 East, 324. Barclay v. Stirling, 5 Maule and Sel. 6.

(*f*) Flint v. Fleming, 1 Barn. and Ald. 45.

(*g*) Glover v. Black, 3 Burr. 1394. Phillips on Ins. 65.

(*h*) Carruthers v. Sheddon, 6 Taunt. 14. Crowley v. Cohen, 3 Barn. and Ad. 478.

471. *Voyage or Time insured.* There must be no uncertainty as to the commencement and termination of this risk (*a*). And,

1. VOYAGE. The points of departure and arrival must be clearly set forth in respect both of time and of place.

Commencement. The expression “at and from,” covers all perils while the ship lies at the place mentioned (*b*); as beginning on the ship with the time mentioned; or date of the policy, if no time be stated; or if “from a port,” with her breaking ground: With the ship being ready for her cargo, if the insurance is on freight (*c*): With the loading, if the insurance be of goods; not, however, to cover goods already on board before the commencement of the risk (*d*), unless either so specified, or plainly implied (*e*). At and from an island or

district, protects a ship sailing from port to port in that island or district for loading, if the whole be held as one place (*f*).

The *course* of the voyage must be according to the order of ports and places, and for the purpose mentioned in the policy, or as sanctioned by usage (*g*).

Termination of Voyage. When the insurance is to a district or island, the voyage (as to the ship), determines at the first port at which she stops to unload (*h*), unless a stipulation be added, insuring her to her port of discharge; goods are protected till arrival at the port of delivery. The usual termination for the ship is "till moored twenty-four hours in good safety," which means, that if no loss or damage happens within the twenty-four hours (or a term of quarantine), for which the underwriters are liable, they are discharged (*i*). On goods the policy usually is "till safely landed," which covers them till landed in the way which usage sanctions (*k*).

2. In a policy on TIME, the period is by statute restricted to twelve months (*l*); and in construing the policy, the Courts have gone as far as possible in favouring the intention of the parties (*m*).

(*a*) Park, 28. Phillips, 161. 2 Selw. N. P. 949.

(*b*) Rotch v. Edie, 6 Term. Rep. 413. Palmer v. Marshal, 8 Bing. 79.

(*c*) Williamson v. Innes, 8 Bing. 81.

(*d*) Langhorn v. Hardy, 4 Taunt. 628. Spittle v. Woodman, 2 Taunt. 416. Horneyor v. Lushington, 15 East, 46. Mellish, v. Alnut, 2 Maule and Sel. 106.

(*e*) Bell v. Hobson, 16 East, 240. Gladstone v. Clay, 1 Maule and S. 118.

(*f*) Camden v. Cowley, 1 Black. 417. Cruickshanks v. Janson, 2 Taunt. 301. Warre v. Miller, 4 Barn. and Cr. 538.

(*g*) Robertson, Nov. 16. 1790; M. 7100. Beatson v. Haworth, 6 Term. Rep. 530. Bottomly v. Bovil, 5 Barn. and Cr. 210. Jolly v. Whitmore, 5 Barn. and Ald. 45. Hammond v. Reid, Ib. 72. Clason v. Simmonds, 6 Term. Rep. 533, note. Andrews v. Mellish, 5 Taunt. 446. Hissleton v. Alnut, 1 Maule and Sel. 46.

(*h*) Camden v. Anderson, 1 Black. 417.

(*i*) Maples v. Eanus, 2 Strange, 1243. Angerstein v. Bell, Park, 55.

(*k*) Tierwy v. Ethrington, 1743; approved of by Lord Mansfield, 3 Burr. 348. Henry v. R. Ex. Ass. Co. 2 Bos. and Pull. 430. Stewart v. Bell, 5 Barn. and Ald. 238.

(*l*) 35 Geo. III. c. 63. § 2.

(*m*) Park, 99.

472. *Risks.* These are, (1.) Perils of the sea; by winds and waves, lightning and tempest, rocks, sands, collision of ships, &c. (*a*): but damage by indirect consequence is not included (*b*),—a species of worm infesting the rivers of Africa was held not a loss by sea peril (*c*). Damage to living animals by agitation of the waves, has been held loss by peril of the sea (*d*).

(2.) Fire. It is not every loss that happens at sea which is covered by insurance; but fire is expressly included in the policy, and is covered by the insurance (*e*), provided, as to goods, it do not arise from the unfit condition of the goods at embarkation (*f*).

(3.) Enemies. This applies to capture by public enemies in war; and in a question of insurance, it is not necessary that there should be condemnation, or even carrying intra præsidia (*g*); for the insurer is liable whether the property be changed by the capture or not. The cases may be either of total or partial loss, as the ship or goods are recaptured and restored or not (*h*); but the insurer is liable to the loss in both cases.

(4.) Detention of Princes, &c. By kings, princes, and people, is meant not enemies merely, but those in amity also; and not a riotous assembly of people, but a national act (*i*).

(5.) Jettison. The damage or loss suffered in this way is covered by the usual words of the policy, and indeed is strictly a loss by dangers of the sea (*k*); and the claim for indemnity is not limited to the strict case of average contribution, as stated above (§ 437, et seq.), but extends to all jettison, ex justa causa (*l*).

(6.) Barratry. This is a peril brought into the policy by special stipulation; for it may be said to be inconsistent with the true relations of the parties that insurers should answer for the fraud of those appointed by the insured. See below, § 479.

(7.) Other Perils. Difficulties having arisen as to many cases not included under the words of the policy, a sweeping clause of "all other perils" was introduced. This comprehends such a case as a ship fired on by mistake from a British cruiser (*m*); or a ship in dock blown over by a land breeze (*n*).

Memorandum. The difficulty of distinguishing between loss by tear and wear, or by the natural quality and inscrutable decay of certain commodities, has led to the exception by a memorandum, saving the underwriter from all partial losses on corn, fish, salt, fruit, flour, and seed, except by jettison or stranding of the ship; and from partial loss under a certain rate on sugar, tobacco, hemp, flax, hides and skins, unless by general average or stranding. The chief doubt relates to stranding (*o*); and, 1. the ship must be rendered immoveable

on the strand; 2. the stranding must be occasioned by some extraordinary or accidental occurrence, and not merely by the ship taking the ground in the usual course in a tide, river, or harbour; though in doing so she should be injured by some hard substance. Such an accident, however, may give indemnification for loss on goods not within the memorandum. In questions under the memorandum two distinct occasions of loss are not to be combined to bring up the average with the per-centage; nor is the total loss of some part of the goods under the memorandum to be reckoned as a partial loss on the whole (*p*).

The subscription of the policy must be either, 1. by the party himself undertaking the risk, hence called Underwriter; or, 2. by one authorized to sign for him by written authority or mandate, or at least sanctioned by acquiescence; 3. the subscription is often made by one acting as agent or broker for many underwriters.

(a) 1 Emerig. 12. Marshall, 214. Park, 31, 102. 2 Selw. N. P. 952, 968. Smith v. Scott, 4 Taunt. 126. Buller v. Fisher, 3 Esp. 67. Fletcher v. Inglis, 2 Barn. and Ald. 315. Hahn v. Corbet, 2 Bing. 205.

(b) Powel v. , 5 Maule and Sel. 431.

(c) Kohl v. Parr, Park, 105.

(d) Lawrence v. Aberdeen, 2 Barn. and Ald. 107. Gabay, 3 Barn. and Cr. 793.

(e) Gordon v. Rimington, 1 Camp. 123. Busk, v. R. Ex. Ass. Co. 2 Barn. and Ald. 73.

(f) Boyd v. Dubois, 3 Camp. 133.

(g) Goss v. Withers, 2 Burr. 694. Marshall, 493.

(h) Hamilton v. Murdery, 2 Burr. 1189. Bainbridge v. Nelson, 10 East, 328. Patterson v. Ritchie, 4 Maule and Selw. 393.

(i) Marshall, 437. Touteng v. Hubbard, 3 Bos. and Pull. 301. Nesbit v. Lushington, 4 Term. Rep. 783. Brown v. Carstairs, 3 Camp. 161.

(k) Marshall, 546.

(l) Butler v. Wildman, 3 Barn. and Ald. 398.

(m) Cullen v. Butler, 5 Maule and Selw. 461.

(n) Phillips v. Barber, 5 Barn. and Ald. 161. Napier, May 18. 1825; 4 S. D. 19.

(o) See Cases, 1 Illus. 314-316; and v. iii. p. 142, Hoffman.

(p) See Beneck, 464; and Davy v. Milford, 15 East, 559.

473. 2. OBLIGATIONS OF THE INSURED. The insured proposes to the insurer a sea-worthy ship, engaged in a lawful voyage, and safe previous to the time at which the insurance is to commence: The insurer taking all this for granted, estimates the dangers of the sea and enemy, takes into view all circumstances affecting the risk, all floating rumours and political speculations—and fixes, as in a wager, the sum at which he will take the risk of indemnifying the insured for loss. The

former of these being conditions precedent, are incumbent on the insured; and if not true, or not observed, the insurance is null. The latter are points of information for calculating the perils of the voyage, and, so far as the knowledge of them depends on the insured, affect the contract only if mistated or concealed, being material to the risk (*a*). Thus, besides an obligation to pay the premium (§ 463), the insured is under obligations, 1. in respect to Representation; and 2. in respect to Warranty.

(*a*) See 1 Illus. 298, et seq.; and 3 Illus. 139, et seq. See below, § 474–5. *McDowal v. Frazer*, Doug. 247.

474. 1. *Representation*. Insurance is a contract of good faith, in which the insurer, in calculating the risks to be run, is greatly to rely on the statement of the insured. The statement is called a Representation, which, whether fraudulent or innocent, if material to the risk, must be true, or complied with, otherwise there is no insurance (*a*). In respect to materiality, which is a question for the jury on the evidence of persons conversant with the subject, it is of chief importance to ascertain whether the statement was an inducement to undertake the risk (*b*). There must be no misrepresentation; no false insinuation; no concealment of circumstances material to the risk (*c*); no false ground of speculation suggested by the representation of the insured, however innocent (*d*). So an error, or misleading of the underwriter as to the day of sailing, will be fatal (*e*); or as to sailing with convoy, or making a running voyage (*f*); or as to the arrival of the ship (*g*): All intelligence, in the sense of mercantile men on such points, must, if material, be disclosed (*h*). But there are some points which it is not necessary to describe or mention;—as the draught of water of the ship; or depth of a harbour; or common reports and matter of general notoriety; or public and political speculations and events (*i*). Neither is the insured bound to state particulars relating to the ship, her age, built, construction, repairs, &c. (*k*). The doctrine that a misrepresentation to the first underwriter in a material point is a misrepresentation to all, though held in one case in England, is to be received with much hesitation, and with strict regard to time and circumstances (*l*). The information must not be

conjectural where the knowledge is certain; nor given as certain when it is conjectural. (*m*).

(*a*) 3 Boulay Paty, 507. Marshall, 450. 3 Kent, Com. 282. 2 Selw. 1007. Carter *v.* Boehm, 3 Burr. 1909.

(*b*) Flynn *v.* Headlam, 1820; 9 Barn. and Cress. 693.

(*c*) Grieve, 1782; M. 7086. Keay, Nov. 28. 1783; M. 7088. Scougall, May 18. 1798; M. 7091. Gillespie and Co. June 24. 1803; M. 7095. Allan, same date; M. 7092. Adam and Mathie, May 22. 1804; F. C. Bogle, same date. Bowker and Co. Feb. 9. 1810; F. C. Morrison, Jan. 18. 1811; F. C. Henderson, Feb. 20. 1812; 1 Dow, 324. Lambe, Feb. 15. 1815. Kinloch, June 14. 1815. Rickards *v.* Murdoch, 10 Barn. and Cress. 527. Elton *v.* Larkins, 8 Bing. 198.

(*d*) Marshall, 449. Park, 283. 1 Bell, Com. 619. Lindenau *v.* Desborough, 8 Barn. and Cress. 586, in Life Insurance. M'Dowal *v.* Frazer, Doug. 247, Rickards *v.* Murdoch, 10 Barn. and Cress. 540.

(*e*) Stirling and Robertson, Feb. 8. 1819; affirmed, July 19. 1822; 1 Shaw's App. Cases, 238. Denniston and Co. May 22. 1817; affirmed, April 5. 1821; 1 Shaw's App. Cases, 22. Stewart, Jan. 19. 1779; F. C.; M. 7080. 5 Brown's Sup. 488; 2 Hailes, 818. Kinloch, Jan. 22. 1813; F. C.; Hill, June 10. 1809; F. C.; reversed, 2 Dow, 263. Smith, March 9. 1810; F. C. Colby *v.* Hunter, 1 Mood. and Mal. 81. Nelson *v.* Salvador, ib. 309.

(*f*) Reid and Co. June 25. 1813; reversed, 4 Dow, 97. Bain, Scougall, Kinloch, Morrison, &c. supra (*c*). Shoolbred *v.* Nutt, Park, 346. Haywood *v.* Rogers, 4 East, 590. Edwards *v.* Footner, 1 Camp. 530.

(*g*) Kirby *v.* Smith, 1 Barn. and Ald. 672. Lynch *v.* Hamilton, 3 Taunt. 37.

(*h*) Durrel *v.* Bederly, Holt. 283.

(*i*) Paterson and Co. June 15. 1792; 1 Bell, Com. 281. Thomson, June 20. 1781; M. 7085; 2 Hailes, 881.

(*k*) Haywood *v.* Rogers, 4 East, 596. Freeland *v.* Glover, 7 East, 464.

(*l*) Pawson *v.* Watson, Cowp. 785. Brine *v.* Featherstone, 4 Taunt. 869. Forrester *v.* Pigon, 1 Maule and Selw. 13.

(*m*) Stewart, Jan. 19. 1779. Kinloch, June 14. 1815.

475. 2. *Warranty*. This is an absolute condition, express or implied, relative to the state or circumstance of the subject insured; which, if not true, or not complied with, defeats the insurance, whether material to the risk or not.

The distinction between representation and warranty is to be particularly marked.

M'Dowal *v.* Frazer, Doug. 247. M'Morran, and Co. 1815, as decided in House of Lords, 3 Dow, 255.

A warranty may be, 1. affirmative, as that a ship was safe on a particular day; or, 2. promissory, that the ship shall proceed with the convoy, or sail on a day certain, &c.; and whether of the one nature or of the other, they are either, 1. Express; or, 2. Implied.

Park, 476, Marshall, 353. 1 Bell, Com. 616, &c.

476. Express Warranties. These are in the body of the

policy, or on the face, or margin, or bottom of the instrument, or in some print or writing incorporated with the policy (*a*). Those warranties are, 1. to *sail* on a day certain. This imports that the ship shall be ready to sail, unmoored, and on her actual voyage (*b*): Such warranty must be literally complied with (*c*). 2. To *depart* on a certain day, is that she shall be out of port on that day (*d*). 3. Safety of the ship on the day of signing the policy, warrants her safe not at the moment of sailing, but sometime during that day (*e*). 4. A policy on a ship “at and from” is a warranty that the ship is at the place mentioned, or will be there shortly, and a delay of arrival will be fatal (*f*). 5. To sail with convoy, imports that she shall sail from the rendezvous with a convoy for the voyage, of the regular naval force appointed by government for that purpose (*g*); and that she shall keep with the convoy during the voyage (*h*).

NOTE.—See as to Express Warranties by the American law (agreeing in most points with the above), Phillips’ Ins. 124, et seq.

(*a*) *Bean v. Stuport*, Doug. 11. *Worsley v. Wood*, 6 Term. Rep. 710. *Routledge v. Burrel*, 1 H. Black. 254.

(*b*) *Nelson v. Salvador*, 1 Mood. and Mal. 309. *Wright v. Shiffner*, 11 East, 514. *Lang v. Anderson*, 3 Barn. and Cress. 495. *Pettigrew v. Pringle*, 3 Barn. and Ald. 526. *Graham v. Barns*, 5 Barn. and Ald. 1011.

(*c*) *Denniston and Co.* May 22. 1817; affirmed, 1 Shaw’s App. Cases, 23. *Dunmore and Co.* June 27. 1786; M. 7101; 2 Hailes, 996. *Monteith*, Dec. 10. 1788; M. 7105. *Stirling and Robertson*, July 19. 1822; 1 Shaw’s App. Cases, 238. *Pettigrew v. Pringle*, and cases there cited, sup. (*b*).

(*d*) *Moir v. R. Ex. Ass. Co.* 3 Maule and Selw. 461.

(*e*) *Blackhurst v. Cockell*, 3 Term. Rep. 360.

(*f*) *Hull v. Cooper*, 14 East. 479. See *Freeman v. Taylor*, 8 Bing. 139.

(*g*) *Hibbert v. Pigow*, Park, 498. *Audley v. Duff*, 2 Bos. and Pul. 111. *Lilly v. Ewer*, Doug. 72. *D’Eguino v. Bewick*, 2 H. Black. 551. *Anderson v. Pitcher*, 2 Bos. and Pul. 169.

(*h*) *Jeffrey v. Legendre*, 4 Mod. Rep. 58.

477. Implied Warranties. The chief implied warranty, and the most important, is,

1. Seaworthiness. It implies that the ship shall be stout, staunch, and strong for the voyage (*a*); well and sufficiently rigged; and with a proper master and crew (*b*). (See above, § 408.). Seaworthiness is presumed; so as to lay the onus probandi on the underwriters (*c*). In order to make out this defence, it will not refute the presumption, should the underwriter prove that the ship became unseaworthy after the risk began (*d*): But if the ship spring a leak, or go down with-

out adequate cause, it will overcome the presumption, and infer want of seaworthiness (e). See below, § 478.

(a) *McKellar*, Nov. 15. 1810; *F. C. Watt*, May 10. 1813; 1 *Dow*, 23. *Douglas v. Scougal*, 4 *Dow*, 269. *Harvey*, March 2. 1818; 1 *Murr.* 302-313. *Thomson*, June 3. 1826; 4 *S. D.* 670.

(b) *Wilkie*, in *House of Lords*, 3 *Dow*, 57. *Clifford v. Hunter*, 1 *Mood.* and *Mal.* 103. *Wedderburn v. Bell*, 1 *Camp.* 1. *Law v. Hollingsworth*, 7 *Term. Rep.* 160. *Shore v. Bentall*, 7 *Barn. and Cress.* 798. *Forshaw v. Chabert*, 3 *Beanu and Bing*, 158.

(c) *Smith*, March 9. 1810; *F. C. Cairns*, March 17. 1820; 2 *Mur.* 256.

(d) *Potts, Cook, and Potts*, Feb. 15. 1815; 3 *Dow*, 24.

(e) *Parker*, Feb. 15. 1815; 3 *Dow*, 23. *Douglas*, May 17. 1816; 4 *Dow*, 269.

2. Warranty against Deviation. This is not like seaworthiness a condition precedent; but a promissary warranty: and it resolves into a defence grounded on a departure from the engagement *not to deviate*. See below, § 492.

Effect of Warranty. Warranty being an absolute condition, it follows, 1. That express warranties must be literally fulfilled, and that it is not a good answer to say, that the state of things was represented truly according to the belief of the insured; for no ignorance or bona fides is an answer to the fact, that the condition has not been observed on which alone the insurance was made. 2. That it is not enough under the warranty of seaworthiness that the insured has had the ship carefully inspected, or fully and expensively repaired. If the ship in point of fact be not seaworthy, no previous care or bona fides is an answer to the failure of the condition. 3. That it is no defence against breach of warranty against deviation, that the insurer guarded with his utmost vigilance against it. 4. That the insurer is not bound to disclose what is the subject of a warranty.

478. OBLIGATION OF THE UNDERWRITER. The engagement of the underwriter is to make good the loss arising from any of the risks insured against, as already enumerated, § 470. and 472. Among those perils Barratry is peculiar.

479. Barratry. Although it appears inconsistent that underwriters on a ship should be liable for the wrongs done to the owner by a master and crew selected by himself, the importance of full indemnity has led to an express stipulation in all policies, that the underwriters “are contented to bear” losses from “barratry of the master and mariners”—*i. e.* those

which proceed from any fraudulent and illegal act by which the interest of the owners shall suffer (*a*). And,

1. The act must be fraudulent. When the master runs off with the ship, or enters into any smuggling concern, or evades duties to the loss of the ship, or sinks or deserts the ship, or criminally delays or defeats the voyage; all such acts done with a criminal intention are barratry (*b*).

NOTE.—By the law of France, negligence of the master or crew is barratry.

2. The master or crew alone can commit barratry (*c*), and against none but the owners or general freighters (*d*).

3. If the master be owner he cannot commit barratry against himself; neither can it be the ground of claim against the underwriters if consented to by the owner (*e*).

4. Barratry may be committed by the owners or master against the general freighter; or with consent of the freighters against the owner; if unknown to the party injured (*f*).

5. A difficulty has been raised as to barratry by a master, himself a *part*-owner only: But it would seem that no exception could be taken against the claim of the other part-owners not participant in or consenting to the act, more than to the claim of a freighter on the barratry of the owner, or of the owner on barratry with consent of the freighter (*g*).

6. The loss must take place on barratry during the voyage or time limited by the policy; though not necessarily in the very act of barratry (*h*).

7. In a policy on goods it is a total loss from the moment that the goods are taken out of the possession of the assured. It is not necessarily so as to the ship (*i*).

(*a*) 1 Emerigon, 366. 2 Valin, 80. Pothier, Assur. No. 65. Abbot, Story's Edition, 138. Marshall, 515. Park, 137. 2 Selw. N. P. 974. Phillips, Ins. 230. 3 Kent, Com. 305. Lockyer v. Offley, 1 Term. Rep. 352. Vallyo v. Wheeler, Cowp. 143. Earl v. Rowcroft, 8 East. 134. Hucks v. Thornton, Holt, 30.

(*b*) See cases under (*a*). Knight v. Cambridge, 8 East, 135. Ross v. Hunter, 4 Term. Rep. 38. Phyn v. R. Ex. Ass. Co. 7 Term. Rep. 505.

(*c*) Nutt v. Bourdeaux, 1 Term. Rep. 323. Everth v. Hannan, 6 Taunt. 375.

(*d*) Vallyo, ut sup. (*a*). Soares v. Thornton, 6 Taunt. 627.

(*e*) Ross v. Hunter, 4 Term. Rep. 33. Hamma v. Brown, 2 Strange, 1173. Nutt, ut sup. (*c*).

(*f*) Vallyo, ut sup. Boutflower, v. Wilmer, Lee, Ch. Jus. 2 Selw. 976.

(*g*) See cases in preceding note.

(*h*) Lockyer v. Offley, 1 Term. Rep. 251.

(*i*) Dixon v. Reid, 5 Barn. and Ald. 597. Falkner v. Ritchie, 2 Maule and Selw. 290.

480. TOTAL LOSS is an expression not to be taken strictly ; as if it were requisite to a claim of indemnity under the contract, that the ship should go to the bottom, or the goods be entirely lost. Insurance is a contract for commercial indemnity ; and a ship is constructively held to be totally lost where it cannot be repaired, so as to proceed on her voyage, at a reasonable expense (a) ; or goods totally lost, where the object of the voyage is defeated. This effect of the contract necessarily implies (in cases where the loss is total, only constructively), that the wreck of the ship or the vestiges of the goods shall be given up or abandoned to the underwriter. 1. Where the loss is manifestly and absolutely total (as where a ship is sunk, and never heard of again), there is no further question but whether it be a loss within the policy : There is no room or necessity for abandonment (b). 2. Where the insurance is on freight, no abandonment is necessary (c). 3. Where the loss is only constructively total (as where portions of the wreck are left, but useless to the insured), the claim for indemnification must be accompanied by abandonment. See below, § 485.

(a) *Allan v. Sugrue*, 1828 ; 8 Barn. and Cress. 561. *Thomson*, Feb. 24. 1823 ; 3 Murr. 294. See *Dixon and Falkner*, sup. § 479 (i).

(b) *Mullet v. Shedden*, 13 East, 304. *Mellish v. Andrews*, 15 East, 13. *Bondroit v. Hentig*, Holt, 149. *Cambridge v. Anderston*, 2 Barn. and Cress. 691.

(c) *Idle v. R. Ex. Ass. Co.* ; 8 Taunt. 755. *Green v. R. Ex. Ass. Co.* 6 Taunt. 68. *Mount v. Harrison*, 4 Bing. 388.

481. Total loss may be *valued* or *not valued*. In the one case, the policy is called a valued policy ; in the other, an open policy. In the one, the amount is fixed which the parties agree to be the value on a loss ; in the other, proof must be given of the amount. But there is no difference between them as to the question whether the loss be total or partial.

Lewis v. Rucker, 2 Burr. 1171. *Thelluson v. Fletcher*, Doug. 315. *Allan v. Sugrue*, 8 Barn. and Cress. 561.

482. In a *valued* policy, the sum specified is demandable on a total loss occurring, where there is no fraud ; and where the policy does not exclude proof of interest (see above, § 461) ; investigation being open to the insurer, to ascertain whether there be fraud. At first, it was conceived that the provisions of the statute of 19 Geo. II. c. 37, comprehended all valued

policies ; but it was afterwards settled that it includes only those in which all proof of interest was dispensed with.

Lewis v. Rucker, 2 Burr. 1167. *Grant v. Parkinson*, 4 Burr. 1966. *Murphy v. Bell*, 4 Bing. 567.

483. In an *open* policy, proof must be given by the assured of the extent of the loss ; the rules as to the adjustment of which will be found below, § 506–7.

484. ABANDONMENT is a relinquishment to the underwriter, in a case of loss constructively total, of all right, title, and claim, to what may be saved ; leaving it to him to make the most of it for his own benefit.

NOTE.—In some countries the right to abandon is limited to certain definite cases. In *Hamburgh*, only when the ship is missing : In *France*, on capture, total shipwreck, or stranding and wreck, or arrest of princes : In *Great Britain and America*, it is admitted in all cases where perils within the policy occasion loss of the ship ; or of the voyage, in an insurance of goods.

485. The case for abandonment, generally stated, is, where the voyage is lost, or not worth pursuing ; where the thing is so damaged that it is of little or no value to the owner ; where the salvage to be paid is very high ; where the articles saved are not worth the freight ; where further expense is necessary, to a greater amount than the insured will defray, or the insurer undertake (*a*). But more particularly,

1. *Capture* is *prima fronte* a total loss, for abandonment ; provided the cause of capture or detention be a risk within the policy. See below, § 487.

2. *Sea Risk*. Here the loss entitles the insured to abandon for total loss, not only where there is certainty, but where there is great probability, of total loss. But a distinction is to be observed between ship and cargo. Insurance of the ship is for indemnity by loss of the ship *on* the voyage : Insurance of the cargo is for indemnity of loss of the goods or of the intended market ; it is insurance of the cargo *and* of the voyage. Defeat of the voyage is total loss to the merchant ; but it is not a total loss to the owner of the ship (*b*). But as to goods, it cannot be said in absolute terms, where there is an exception freeing the underwriters from particular average, that loss or retardation of the voyage is a total loss for abandonment ;

unless some such great injury or damage be sustained by the subject of insurance, as to render it of no value, or such as to entitle the insured to abandon (c).

(a) 1 Marshall, 593. Park, 228. 1 Bell, Com. 608. Brown, June 2. 1813. 1 Dow, 349. Lord Mansfield, in *Goss v. Withers*, 2 Burr. 697. *Milles v. Fletcher*, Doug. 230. *Hamilton v. Mendez*, 2 Burr. 1198.

(b) *Fitzgerald v. Pole*, 5 Br. Par. Ca. 137. Willis, 641. *Falkner v. Ritchie*, 2 Maule and Selw. 290. *Girnon v. R. Ex. Ass. Co.*, Holt, 49. *Doyle v. Dallas*, 2 Mad. and Mal. 48.

(c) *Anderson v. Wallis*, 2 Maule and Selw. 240. *Thomson v. R. Ex. Ass. Co.*, 16 East, 214. *Wilson v. R. Ex. Ass. Co.*, 2 Camp. 623. *Naylor v. Taylor*, 9 Barn. and Cress. 718. *Hudson v. Harrison*, 3 Brod. and Bing. 97.

486. The insured cannot be compelled to abandon. But when entitled to do so, he must give notice within a reasonable time; that is to say, the earliest opportunity (a). Although not compelled to abandon, however, he cannot claim for a constructively total loss without abandoning (b). He is not bound to do so till he has an opportunity of having correct information (c): But the underwriters are entitled in the meanwhile to take precautions against further damage.

(a) *Mitchell v. Edie*, 1 Term. Rep. 608. *Hunt v. R. Ex. Ass. Co.* 5 Maule and Selw. 47. *Mellis v. Andrews*, 15 East, 13. *Barker v. Blakes*, 9 East, 283. *Davy v. Mitford*, 15 East, 563.

(b) *Roux v. Salvador*, 1 Bing. N. S. 526.

(c) *Read v. Bonham*, 3 Brown and Bing. 147. *Girnon*, ut sup. § 485.

487. It is sometimes a question whether the abandonment is conclusive;—as where a ship has been captured but is restored; or has been reported as lost. There are two points of importance, 1. notice of abandonment; 2. acceptance; and,

1. Notice of abandonment is a mere offer, which becomes a contract, transferring the property and settling the interest of the parties, when it is accepted. But before acceptance, if what appeared a total loss becomes not so; as by recapture, recovery, or partial preservation, the policy then is for indemnity only of a partial loss (a).

2. When the notice is accepted, the contract is irrevocable, the property is transferred, and the underwriters must stand by the abandonment (b).

(a) 1 Illus. 312, 313. *Randall v. Cochran*, 1 Ves. sen. 98. *Thomson v. Rowcroft*, 4 East, 131. *Case v. Davidson*, 5 Maule and Selw. 79. *Kerswill v. Bishop*, 2 Tyr. 602. *Sharp v. Gladstone*, 7 East, 30.

(b) *Bainbridge v. Nelson*, 1 Camp. 237; 10 East, 329. *Robertson, Forsyth, and Co. House of Lords*, *Buchanan's Rep.* 73; 2 Dow, 474. *Paterson v. Ritchie*, 4 Maule and Selw. 393. *Brotherson v. Barber*, 5 Maule and Selw. 418. *Parry v. Aberdeen*, 9 Barn. and Cress. 411.

488. The state of things on occasion of a loss constructively total, accompanied by abandonment, exposes the underwriters to abuses. The ship or goods injured, but still worth something, are in the power of a master and crew selected by the insured, while the underwriters are at a distance. But, 1. the master, though he continues accountable to the owners, is liable to the underwriters as their agent in case of abandonment (*a*). And the rule of his conduct is, that he can sell ship or cargo only in a case of absolute necessity, and in the exercise of a prudent discretion, as if there were no insurance; or when the ship cannot be repaired at the place where she lies, or the necessary supply of money obtained; or where goods cannot find freight to their market, or are so damaged that they cannot be sent on, or from their nature and condition, cannot be kept for an opportunity (*b*).

(*a*) *Idle v. Royal Exchange Assurance Company*, 8 Taunt. 755. See *Read v. Bonham*, 3 Brod. and Bing. 147 and 151 note. *Somes v. Sugrue*, 4 Car. and Pay. 276.

(*b*) See Cases under (*a*). *Roux v. Salvador*, 1 Bing. New Series, 526. *Cambridge v. Anderson*, 2 Barn. and Cress. 691. *Robertson v. Clarke*, 1 Bing. 445. *Doyle v. Dallas*, 1 M. and Rob. 48. *Gardner v. Salvador*, ib. 116. *Freeman v. E. India Co.* 5 Barn. and Ald. 617. *Morris v. Robinson*, 3 Barn. and Cress. 196.

489. ii. PARTIAL OR AVERAGE LOSS includes damage by stranding; striking on a rock; collision by inevitable accident; loss of boats, masts, yards, &c. by force of the wind and waves; loss while the vessel is before the wind, or lying to the sea; capture, though recaptured; loss in defence, &c. against enemy. Among these, stranding has given occasion to frequent questions from the mention of it in the memorandum clause; where certain perishable articles are excepted from the insurance, unless on general average, or the "stranding of the ship." See above, § 472, p. 183.

Park, 162. 1 Bell, Com. 611. See below, as to the rules of Adjustment, § 507.

490. *Return of Premium.* Where no risk is run the provision must be returned; where the risk is once begun it is not returnable; and where the assured have been guilty of fraud, they are barred *personali exceptione* from asking back the premium; while fraud by the insurer will entitle the insured to restitution of the premium. So,

1. Where any warranty relative to the state or condition of the ships has not been observed, and there is no fraud, the premium is returnable (*a*).

2. Where the voyage has never been begun, there is a return of premium. See below, § 495.

3. For short interest there is a return of premium; as for goods stated in the policy, not sent; or short profits; but there can be no return for the goods being of less value (*b*).

4. When the policy is void without fault; as by war, before signing, but unknown at the time (*c*).

5. When the policy is on an entire voyage, and it has begun, there can be no return of any part of the premium (*d*). But if two or more distinct voyages are included, and any of them not begun, there will be a partial return (*e*).

6. Fraud on either part will affect the right to premium—so fraudulent misrepresentation will bar the claim for a return after the commencement of the voyage, on account of the absence of risk; and so also fraud of the underwriter will ground an action for recovery of what has been paid (*f*).

7. Sometimes the parties stipulate in the policy for a return of the premium, or part of it, in certain cases. This, of course, forms the rule between them (*g*).

(*a*) *Feise v. Parkinson*, 4 Taunt. 640. *Colby v. Hunter*, 1 Mood. and Mal. 81. *Penson v. Lee*, 2 Bos. and P. 330.

(*b*) *Park*, 562. *Eyre v. Glover*, 16 East, 218. *Horney v. Lushington*, 15 East, 46.

(*c*) *Oom v. Bruce*, 12 East, 225. *Huntig v. Stamforth*, 5 Maule and Sel. 122.

(*d*) *Tyrie v. Fletcher*, Cowp. 666. *Berman v. Woodbridge*, Doug. 751. *Langhorn v. Cologan*, 4 Taunt. 330. *Tait v. Levi*, 14 East, 481. *Moses v. Pratt*, 4 Camp. 297.

(*e*) *Stevenson v. Snow*, 3 Burr. 1237. See *Lang v. Allan*, Marsh. 370.

(*f*) *Wilson v. Dunkel*, 3 Burr. 1361. *Tyler v. Horne*, Park, 329. *Carter v. Boehm*, 3 Burr. 1909.

(*g*) *Aguilar v. Rodgers*, 7 Term. Rep. 421, &c. *Audley v. Duff*, 2 Bos. and P. 111. *Kellner v. Le Mesurier*, 4 East, 396. *Dalglish v. Brook*, 15 East, 295. *Hunter v. Wright*, 10 Barn. and Cress. 714.

491. *Defence of the Underwriter.* The underwriters are discharged of the contract, 1. by misrepresentation or concealment on the part of the insured: and, 2. by breach of warranty; or, 3. by deviation.

The two former have already been considered. Misrepresentation of material facts, and breach of all such warranties as are conditions precedent, annul the contract *ab initio*.

Breach of promissory warranties, and deviation, do not thus annul the contract ; but discharge all further operation of the policy. In the former cases, the risk never has begun, and there is a right to demand return of the premium, unless the insured has been guilty of gross fraud ; in the latter, the risk having been once begun, there is no return of premium. See above, § 490.

492. *Deviation.* The risk is calculated on the regular course of the voyage ; and it is an implied warranty that this course shall be observed. The rules are,

1. That, from the moment of deviation, the rest of the risk under the policy is discharged, while the underwriter is liable for loss previously incurred (*a*).

2. As a breach of warranty, deviation must *actually* have taken place, in order to ground the defence of the underwriter. Instruction or intention to deviate is therefore not enough, if the vessel has not reached the diverging point. If a voyage to a given place be insured, and when the ship sails it is not intended actually to go to that place, she is held not to have sailed on the voyage insured, though lost in the fair way of that voyage : (See § 495.) But when the ultimate termini of the voyage on which the ship sails are the same as those described in the policy, it is held that the voyage is the same up to the point of divergence ; and that if the voyage terminate before reaching that point, there has been only an *intention* to deviate. Total loss, therefore, before the dividing point is covered ; while, in case of partial loss, evidence must be shewn of the proportion of damage occurring before that point (*b*).

3. If a deviation have once been made, for however short a time or space, the return of the ship in safety to her course will not revive the policy, so as to subject the underwriter for subsequent loss (*c*).

(*a*) *Green v. Young*, 2 Raym. 840.

(*b*) *Kewley v. Ryan*, 2 Hy. Blackst. 343. *Foster v. Wilmer*, 2 Str. 1249. *Marsden v. Read*, 3 East, 572. *Heselton v. Allnut*, 1 Maule and Sel. 66. *Hare v. Trevis*, 7 Barn. and Cress. 14.

(*c*) *Wilson*, March 7. 1776 ; reversed, 7 Brown's Parl. Cases, 459. *Hammond v. Reid*, 4 Barn. and Ald. 72. *Jolly v. Whitmore*, 5 Barn. and Ald. 45. *Hibbert v. Phyn*, 4 Camp. 150. *Middlewood, v. Blasas*, 7 Term. Rep. 162. See *Woolridge v. Boyd*, Doug. 15.

493. According to the fair construction of the policy, 1. it is a deviation to depart from the shortest and safest course of

the voyage; or (where it is a known and ordinary voyage) from the usual course (*a*). 2. Inverting the order in which the policy allows the ship to call, or touch, or enter port (*b*) is deviation, unless altered according to any known, regular, and settled course (*c*). 3. Where there is no order of successive ports fixed by the policy,—to invert the geographical order, unless sanctioned by usage, is deviation (*d*). 4. So also to go to a port mentioned in the policy, but out of the order of the voyage, or for a purpose different from that specified, and not subordinate to the voyage described (*e*). 5. To stay at any port an unusual time is a deviation; but leave to touch at a port is leave also to trade there, if there be no delay thereby occasioned (*f*). 6. To linger unreasonably, and for purposes not in the policy, is a deviation (*g*). 7. These questions of delay are for the jury (*h*).

(*a*) *Relly v. Royal Exchange Ass. Co.*, 1 Burr. 348. *Bond v. Nutt*, Cowp. 601. *Hibbert v. Phyn*, 4 Camp. 150. *Davis v. Garrett*, 6 Bing. 716.

(*b*) *Clason v. Simmons*, 6 Term. Rep. 533, note. *Andrews v. Mellish*, 5 Taunt. 546.

(*c*) *Beatson v. Haworth*, 6 Term. Rep. 530.

(*d*) *Gairdner v. Senhouse*, 3 Taunt. 16.

(*e*) *Jolly v. Whitmore*, 5 Barn. and Ald. 45. *Bottomly v. Boyl*, 5 Barn. and Cr. 210. *Hammond v. Reid*, 4 Barn. and Ald. 72.

(*f*) *Williams v. Shee*, 3 Camp. 469. *Rainer v. Bell*, 9 East, 195. *Laroche v. Oswin*, 12 East, 131. *Langhorn v. Allnutt*, 4 Taunt. 511.

(*g*) *Inglis v. Vaux*, 3 Camp. 447. See *Jolly*, sup. (*e*).

(*h*) *Langhorn*, Case Sup. (*f*).

494. *Justification of a Change.* Departure from the course may be justified, 1. by necessity, provided the new direction into which the ship is forced is pursued in the direct course (*a*). 2. Such necessity is pleadable from stress of weather, or approach of an enemy, or inevitable accident, or compulsion by a King's ship (*b*). 3. To go into port for a supply of water or necessary provisions is not a deviation; even though goods should be taken in, provided this does not, directly or indirectly, increase the risk (*c*). 4. To join convoy is a necessity justifying deviation from the usual course (*d*). 5. To avoid a port which has become hostile, or has been laid under embargo will justify a deviation, provided the voyage is not relinquished, and another destination taken; but if the voyage be relinquished, the underwriters are freed (*e*). In such a case it may seem most prudent to go into the next port, and there do the best possible for all concerned; but this, if not provided

for (which it generally is), will not be a voyage under the policy (*f*). Whether the interruption be a risk within the policy, entitling the insured to abandon, is a different question (*g*). 6. Letters of marque will entitle a merchant ship to chase an enemy, but not to cruise (*h*); nor to lie-to for bringing the prize into harbour; all deviations of this kind requiring special license (*i*). 7. A delay of the voyage, or deviation from the course, to save or aid a ship in distress, or to save life, seem to be justifiable (*k*), but not for the purpose of saving goods wrecked.

(*a*) *Lavabre v. Wilson*, Doug. 284.

(*b*) *Smith v. McNeil*, 2 Dow, 538. *Delaney v. Stodart*, 1 Term. Rep. 22. *O'Reilly v. Gonne*, 4 Camp. 249. *Scott v. Thomson*, 1 New Rep. C. P. 181. *Driscoll v. Bovil*, 1 Bos. and Pull. 313. *Foster v. Christie*, 11 East, 205. See *Phelp v. Auldjo*, 2 Camp. 350.

(*c*) *Rainer v. Bell*, 9 East, 195.

(*d*) *D'Aguilar v. Tobin Holt*, 185, 11 East, 22.

(*e*) *Parkins v. Tunno*, 2 Camp. 59. 11 East, 22.

(*f*) Same case, *Blackenhagen v. London Assurance Company*, 1 Camp. 454, and note.

(*g*) See the cases on this subject, collected and commented on in Phillips, 262-276.

(*h*) *Jolly v. Walker*, Park, 448.

(*i*) *Parr v. Anderson*, 6 East, 202. *Lawrence v. Sydebotham*, 6 East, 45.

(*k*) See Mr Justice Lawrie in *Lawrence v. Sydebotham*, supra (*i*). See an American case, *Mason v. Ship Blaireau*, 2 Cranst. 268. Phillips, 198.

495. If the voyage insured have never been entered upon, but the vessel have sailed on a different voyage entirely, the risk is not run, the policy is annulled, and the premium must be returned. (See above, § 490.) And although, where a vessel is insured *at a* port, and preparations have been begun for the voyage insured, the risk is begun, and a subsequent deviation will discharge the policy without giving a right to a return of premium; yet if preparations for a *different* voyage have been begun, and the ship is afterwards lost at the port before sailing, the policy will be discharged without any return of premium.

Cunningham's case, in House of Lords, July 7. 1819; 1 Bligh, 87.

496. *Proof of Loss*. The claim of the insured involves two points. 1. That the loss has happened within the policy; and, 2. That it is either total loss; or, if the policy is not valued, a partial loss to the amount claimed. The burden of proving these points lies on the insured; and,

1. The great rule is, that the best proof is to be given which can, in the circumstances, be had (*a*).

2. The log-book and protests must be shewn to the underwriters ; but they, if extant, are not properly evidence, unless, by the loss of better evidence, they become necessary. They may be used to contradict the master or mate ; and the log-book, on the whole, is a check rather than proof (*b*).

3. The same holds as to protests : They are not proofs, but may be used as checks to contradict other proofs, and may occasionally supply the loss of the log-book, if they bear that book to have been shewn to the magistrate (*c*).

4. Surveys may be made evidence by being sworn to.

5. Parole evidence is competent ; as of the master, &c., where there is no interest (*d*).

(*a*) Ferrier, June 29. 1809 ; F. C.

(*b*) Carlton, Jury Court, 1 Murr. 32. Cairns, 2 Murr. 218.

(*c*) Senat v. Porter, 7 Term. Rep. 158.

(*d*) Thomson, 3 Murr. 247.

497. Proof afforded in these modes,—that the ship sailed with the cargo insured ; that she never arrived at her port ; and that she was reported to be lost and the crew saved—is held sufficient proof of loss, without the necessity of calling, or proving the absence of the crew.

Koster v. Reed, 6 Barn. and Cress. 19. See also Ferrier, *supra*, § 496 (*a*).

498. *Adjustment*. In adjusting losses, it is necessary to distinguish between valued and open policies, § 481, et seq.

499. 1. The adjustment on a *valued* policy is at the sum expressed, if there be proof of interest, or such proof at least not excluded, and no fraud, § 482.

McNair, Feb. 13. 1772 ; reversed, Feb. 15. 1773 ; M. 7106. 5 Brown's Sup. 486. 1 Hailes, 465. Wilson, Dec. 2. 1783 ; M. 7107. 1 Bell, Com. 614, note. Young, Feb. 6. 1798 ; M. 7115. Rhand, Dec. 21. 1804 ; F. C. ; M. Insurance, App. 27.

500. 2. In adjusting losses on an *open* policy (§ 483), the general rules are,—

501. 1. That in a total loss the ship is taken as at the commencing port, stores, wages advanced, and premium of insurance, included. The loss on freight is the amount of the manifest, or freight list, covered with the premiums, &c. The loss on the cargo is estimated by the invoice price, with charges, premium, broker's commission, and charges of moving.

Stevens on Average. Benecke on Indemnity.

503. 2. In a partial loss, the value of the ship is to be taken, deducting one-third from new materials and labour.

Stevens on Average, 158. Benecke, 48. 449. Palmer v. Blackburn, 1 Bing. 61. Poingdestre v. Royal Exchange Assurance Co. 1826; 1 Ry. and Moo. 378.

504. In valuing the cargo, two methods are followed:—1. The invoice is taken, with premium, &c.; and the nett proceeds of the sale of the damaged goods are deducted; or, 2. The amount of the sales is compared with a pro forma account of the same goods taken as if sound. The former is called a salvage loss on the analogy of salvage; what is paid being as a redemption from total loss. The latter method avoids involving the underwriter in a falling or rising market; the market price of the sound and of the damaged commodity being said to be the scales in which to weigh the depreciation.

Stevens on Average. Benecke, 424, et seq.

505. *Reinsurance*. Although there can be no insurance without an interest, it is not necessary that the insured shall be owner of the thing insured. An underwriter who has insured a ship or goods has an unquestionable interest in the voyage; which, on the common principles of indemnity, he is entitled to protect by insurance. And, accordingly, in most of the countries of Europe, and in America, underwriters are allowed to secure themselves against the loss which they may dread under a policy which they have entered into, by opening a policy with other insurers to reassure him against loss (*a*). But the dread of the insane speculations of the time of Geo. II. led to a statute by which this remedy was forbid, except on occasions of the insolvency or bankruptcy of the insurer, or in case of his death; confining it, in short, as a remedy only to creditors or executors (*b*).

There are two sorts of Reinsurance:—

1. That sort which was contemplated in the above-mentioned statute—and is a reinsurance to the *underwriter*, or a policy against any loss that may arise under a subsisting policy. Such a policy, unless in the excepted cases, is unlawful, not only when effected by a native, but when entered into with a foreigner (*c*).

2. Another form of Reinsurance is by the *assured* against the possible insolvency of the underwriters on his policy. And this, although not falling under the prohibition of the statute, seems never to have come into practice in this country (*d*), and indeed is better effected by double insurance. See next section.

(*a*) 1 Emerigon, No. 8. 1 Valin, 65. Pothier, Assur. No. 96. Phillip, Ins. 55. Marshall, 143.

(*b*) 19 Geo. II. c. 37, § 4.

(*c*) Andre v. Fletcher, 2 Term. Rep. 161.

(*d*) Marshall, 145.

506. *Double Insurance*. This is a remedy to the *insured*; who effects insurance of the same risk with more than one set of underwriters. He may sue on both policies to the effect of complete indemnity (*a*). And,

1. He cannot draw full indemnity under both policies; for that would amount to a wager policy in the one or the other.

2. The policies are all considered as making only one policy, and there is contribution and relief among the several underwriters; the underwriters who pay being entitled to come into the place of the insured to receive rateable contribution from the others (*b*).

(*a*) Davis v. Gildart, Marsh. 148.

(*b*) Davis, sup. (*a*). Godin v. London Ass. Co. 2 Burr. 489.

2. Insurance against Fire.

Marshall, 784. Park, 653. 2 Selw. N. P. 1056. 3 Kent, Com. 370.

508. A policy of insurance against fire is a contract for indemnity against losses by fire, occurring within the time limited in the policy, in consideration of a sum paid, or of an annual payment. The contract must be by policy on stamped paper. But the agreement may be so conclusively fixed before delivery of the policy, as to ground an action for implementing it by the furnishing of a regular policy.

37 Geo. III. c. 90. 55 Geo. III. c. 184. 3 and 4 Will. IV. c. 23. Christie, Feb. 10. 1825; F. C.; 3 S. D. 519. Albion Fire and Life Insurance Company, June 27. 1828; House of Lords 3 W. S. App. Cases, 218.

509. There can be no lawful policy of insurance against fire without an *interest*. It would be a wager policy of the most dangerous description. The interest may be as proprietor;

as creditor ; as pledgee of goods ; as holder of a lien ; as factor with a balance due ; as a consignee having made advances.

14 Geo. III. c. 48. Marshall, 790. Park, 654. 1 Bell, Com. 625.

510. The *Risk* is, of fire, or of loss by means of fire, within the stipulated period, and not excepted in the policy.

1. All damage produced by fire consuming or damaging the property, is to be indemnified under the policy. But, it is not held a loss by fire if there be no ignition ; as in heat by effervescence, or injury by the overheating of a flue (*a*).

2. There is in the policy an exception of fire occasioned by the invasion of a foreign army, or by usurped power, or civil commotion (*b*). See below, § 513. No. 3.

(*a*) Austin v. Drew, 4 Camp. 360 ; 2 Marsh. 130. Tarlton v. Staniforth 5 Term. Rep. 695 ; affirmed in Exchequer Cham. 1 Bos. and Pull. 470.

(*b*) Drinkwater v. London Assurance Co. 2 Wilson, 363. Langdale v. Mason, Park, 657.

511. Incidental loss or damage is within the policy ; as damage in the removal of furniture ; or by the falling of a wall injured by the fire ; or by water used to extinguish a fire (*a*). But it is doubtful whether one insuring his house possessed by a tenant can claim for rent as part of his loss (*b*).

(*a*) Johnston, Nov. 25. 1828 ; 7 S. D. 53. 4 Murr. 189.

(*b*) 1 Bell, Com. 167. 3 Kent, Com. 372.

512. The efficacy of the policy is limited to a certain day. Sometimes by the policy fifteen days beyond the proper day of expiration are added, during which it is provisionally declared that the policy shall subsist on payment of the premium. And it has been held that this only gives an option to the insured to continue the insurance, by paying the premium within the fifteen days, notwithstanding any intervening loss ; provided the office had not already given notice that they would not renew the contract.

Salvin v. James, 6 East, 571.

513. Insurance offices against fire generally issue printed proposals, which are by reference incorporated with the policy. And,

1. It is a stipulation common in such proposals, that the insured shall, before claiming for loss, produce a certificate of

good character from the ministers, &c. of the parish. The wrongful refusal of such certificate has sometimes given rise to a question whether it be indispensable: And it has been held an absolute condition (*a*).

2. Another condition commonly stipulated in the proposal is, that the insured shall give notice of any other insurance effected on the subject, so as to afford the means of contribution, otherwise the policy shall be void. This condition also is effectual (*b*).

3. Another stipulation is against loss by invasion, foreign enemy, or military or usurped power; and in more recent proposals loss from "riot, tumult, and civil commotion" is added as an exception from the undertaking. This condition saves the underwriters from losses by invasion or by riot (*c*). But there is a remedy under the Riot Act, and underwriters paying such a loss may sue in the name, and with consent, of the insured (*d*).

(*a*) *Oldman v. Beweck*, 2 H. Blackst. 572. *Worsley v. Wood*, 6 Term. Rep. 710. *Tarlton v. Staniforth*, 5 Term. Rep. 695.

(*b*) *Marshall*, 788.

(*c*) *Drinkwater v. London Assurance Co.* Marsh. 790. *Langdale v. Mason*, Ib. 791.

(*d*) *Mason v. Sainsbury*, Marsh. 794. *Clark v. Inhabit. of Blithing*, 2 Barn. and Cress. 254.

514. The doctrine of Warranty and Representation applies to the case of Fire Insurance as well as Marine. See above, § 474, 475.

1 Bell, Com. 616, 627. *M'Morran*, 3 Dow, 257. *Bufe v. Turner*, 6 Taunt. 338. *Wood v. Worsley*, 2 H. Blackst. 574. *Dobson v. Sotheby*, 1 Moo. and Mal. 90.

515. Fire policies are not properly valued policies. They limit, but don ot measure, the liability for loss. The loss must be proved, and every possible means of detecting fraud exposed (*a*). The settlement is on the principle of an average loss (§ 489), not on the principle of abandonment (§ 430). The underwriter pays not for what has been expended, but only for what is lost to the amount of the sum insured (*b*),—which may be ascertained judicially, or by arbitration, or amicably.

NOTE.—The act of 14th Geo. III. c. 78, in the 83d section, provides, that insurance offices may, on the requisition of any one interested, insist on seeing the money of such insurance laid out on rebuilding. Although this be a public act, it is an English, or more properly a *London* act, and does not extend to Scotland. See *Bisset v. R. Ex. Ass. Co.* Nov. 22. 1821; 1 S. D. 165.

(a) Bisset, Nov. 29. 1821; 1 S. D. 187.

(b) Hercules Ins. Co. July 27. 1836; 14 S. D. 1137.

516. Fire policies are in England not assignable at law, but they are in equity: they are assignable in Scotland, provided the interest goes with them.

2 Marshall, 800. 1 Bell, Com. 629. Lynch v. Dalzell, 3 Brown's Parl. Cases, 497. Sadlers v. Badcock, 2 Atk. 554.

517. Floating policies against fire. Factors, warehousemen, printers, and others, who have great stores of goods entrusted to them, find it of great advantage to have their warehouses protected against loss by fire, as affording safety to those who employ them. For that purpose they effect a general or floating insurance, applicable to all goods that may be in their warehouse. And although the owner of the goods cannot, under such a policy, be said to be a party to the contract, the insured is allowed to sue on the policy, if he can shew that, by contract, or usage, or the course of dealing, he is liable to the owner for the goods. There are other policies effected on similar views, but still more extensive, upon goods belonging to the insured, or with him in trust, in all or any of the warehouses, cellars, or granaries, in a certain city: To these the same general doctrine applies.

Donaldson v. Manchester Ins. Co. March 2. 1836; 14 S. D. 601.

3. *Insurance upon Lives.*

518. Insurance of lives is a contract, not of indemnity, like sea and fire insurance, but of mutual risk; where one engages to pay a certain sum in the event of the death, or an annuity during the life, of a particular person, in consideration of a premium paid at once, or periodically.

519. The policy must be stamped.

55 Geo. III. c. 184.

520. There can be no valid insurance on life without a pecuniary interest; the policy being limited to the interest, and the insured is not entitled to recover more than the amount of it (a). A father has no insurable interest in the life of his son (b). In a policy opened by one on his own life, his family has an interest sufficient; and as it is assignable, it is useful as a fund of credit. After the creditor is satisfied from another

source, such a policy is available to the debtor ; or to his creditors generally. It is sometimes made absolute during the whole life of the person insured ; sometimes only for a certain number of years.

(a) 14 Geo. III. c. 48. § 1, 2, 3.

(b) *Halford v. Keymer*, 1830 ; 10 Barn. and Cress. 724. *Schondler v. Ware*, 1 Camp. 487. *Innes v. Equit. Ass. Co.* 10 Bar. and Cr. 727.

521. A creditor has an interest in his debtor's life, in so far as the payment or security of the debt may depend on the continuance of his life. And he may either himself open a policy on his debtor's life, paying the premium ; or he may get assigned to him a policy opened by the debtor on his own life (a). A policy of the former kind has been held to fall, on the debt being paid, from another source (b) : But there seems to be much reason to question the principle of this decision ; and in cases where the creditor has drawn a dividend from his debtor's estate, insurance offices settle with the insured for the whole sum, and not merely for the balance as in an indemnity.

The interest is not to be reckoned by the actual value of the life ; or diminished to the creditor by collateral securities : While the debt subsists the policy is good, leaving the collateral securities to be otherwise available (c).

(a) *Lindenau*, 8 Barn. and Cress. 586.

(b) *Godsal v. Boldero*, 9 East, 72. *De Morgan on Probabilities*, 244.

(c) *Dwyer v. Edie*, Park, 639 ; *Marshall*, 778. *Anderson v. Edie*, Park, 640 ; *Marsh.* 776. *Godsal v. Boldero*, ut supra.

522. The same rule prevails with respect to representation and warranty as in other insurance. Every material fact must be disclosed. It will not relieve from the effect of failure to disclose, that the omission was innocent ; and it is a question for the jury whether it be material (a). The warranty is commonly regulated by a special clause, excluding lives in which there are certain diseases (b).

(a) *Ross v. Bradshaw*, 1 Black. 312. *Lindenau v. Desborough*, 8 Barn. and Cress. 586. *Everett v. Desborough*, 1829 ; 5 Bing. 503. *Forbes and Co.* March 9. 1832 ; 10 S. D. 451.

(b) *Ross and Bradshaw*, 1 Blackst. 312. *Willis v. Poole*, Park, 650 ; *Marsh.* 771. *Watson v. Mainwaring*, 4 Taunt. 763. *Borthwick*, July 1837 ; 15 S. D. 1306.

523. There is usually a clause declaring that death at sea, or by suicide, duelling, or the hand of justice, shall not be held

as a risk under the policy. Such events have been held, even without express stipulation, fatal to an insurance effected by the guilty person, and not available even to his creditors (*a*). But the objection will not annul a policy effected by a third party interested. Death in a foreign country, unless excepted, is a risk under the policy.

(*a*) *Bolland v. Disney*, 3 Russ. 351, as reversed in the House of Lords, July 9. 1836.

IV. CONCLUSION OF CONVENTIONAL OBLIGATIONS.

524. CONSTRUCTION OF CONTRACTS. With all the care which can be taken, disputes will arise as to the meaning of contracts; and construction is the art of collecting from proper indications what the parties held out to each other as their meaning and intention in the contract, and what, in concluding their contract, they mutually agreed to, understood, and relied on.

Words expressive of engagement, when proved by a writing executed at the time, furnish the clearest of all indications of intention.

Wherever this precaution of writing has not been followed, and witnesses are to be relied on, the object of the inquiry at the trial must be to get from them as nearly as possible the words made use of.

In either case, where the words are ascertained, the great rule is, that those words, according to their plain meaning and obvious intent, are to be taken as conclusive of the mutual intention of the parties: and that constructive or explanatory evidence is to be admitted only where the words are ambiguous and the agreement uncertain (*a*).

There are two kinds of ambiguity; which are to be dealt with differently: 1. an ambiguity patent or apparent on the face of the contract, which, unless it can be solved by the context and nature of the contract, may be fatal; 2. a latent ambiguity, arising not from the words, but in their application; and in this case, extraneous evidence is admissible to clear up the difficulty.

But in bargains there is so much taken for granted, so loose a confidence, so vague an adoption of usage, so great uncertainty as to the ordinary understanding in such cases,