The Student's Kent.

AN ABRIDGMENT

OF

KENT'S COMMENTARIES

ON

AMERICAN LAW.

BY

EBEN FRANCIS THOMPSON.

WITH AN INTRODUCTION

BY

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PREFACE.

KENT'S COMMENTARIES on American Law deservedly hold a high place in the legal literature of this country. The work comprises a series of lectures delivered by Hon. James Kent before the students in the Law Department of Columbia College. It is marked by a deep and varied learning and a graceful style. The multiplication of excellent text-books upon special topics of the law has rendered elaboration in a work of its kind less necessary. It is thought that in an abridged form it may better meet the wants of the student and lawyer, to whom a frequent recurrence to first principles is of advantage. The writer has aimed to abridge and to retain all that is most valuable to the student, omitting only that which is less essential. In many instances the exact language of Judge Kent has been retained, but in some cases a more concise style has been adopted. I am indebted for wise suggestions to Judge Nelson and to W. A. Williams, Esq., and H. L. Nelson, Esq., of the Worcester Bar. The original arrangement by lectures has been followed, and the figures in the running titles refer to the original pages of Judge Kent's work.

E. F. THOMPSON.

WORCESTER, MASS., *January*, 1886.

INTRODUCTION.

It is desirable that the pathway of legal study should be made as clear as possible, and in whatever way this is done the student is the gainer thereby. The very copiousness of the learning of many treatises, admirable for a full investigation of each of their special topics, is often a hindrance to the student in his efforts to grasp elementary principles. The Commentaries of Chancellor Kent abound in learning and graceful diction, but that great work nevertheless may be thought by many somewhat too diffuse in its style for the beginner, who may not readily distinguish essentials from statements which are comparatively unimportant or merely cumulative.

In his abridgment, Mr. Thompson has succeeded admirably in presenting concisely and clearly the elements of our law as stated in the original, and in noting its more general modifications since Chancellor Kent's time.

I believe that this volume will not only be of great service to the student and to the profession, but will

be useful to those who have not an ample leisure for extended study and may desire to learn something of the leading principles of our elementary law. At the same time it will naturally tend to increase the interest in and demand for the larger and more complete work.

T. L. NELSON.

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PART I.

OF THE LAW OF NATIONS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.

By this law we are to understand that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other.

There is a natural and a positive law of nations. By the former, every state in its relations with other states is bound to conduct itself with justice, good faith, and benevolence.

The law of nations is a complex system composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct of nations; of a collection of usages, customs, and opinions, the growth of

civilization and commerce, and of a code of conventional or positive law.[1]

The most refined states among the ancients seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons and property as lawful prize.

The Romans exhibited much stronger proofs than the Greeks of the influence of regular law, and there was a marked difference between those nations in their intercourse with foreign powers. It was a principle of the Roman government that none but a sworn soldier could lawfully fight the enemy, and in many instances the Romans showed that they excelled the Greeks by the observance of better principles in their relations with other nations.

A purer system of public morals was cultivated and gained ground in the Roman state. The cruelties of Marius in the Jugurthan war, when he put part of the inhabitants of a Numidian town to the sword and sold the rest for slaves, were declared by Sallust[2] to be a proceeding *contra jus belli*. At the zenith of the Roman power, the enlarged and philosophical mind of Cicero was struck with extreme disgust at the excesses in which his countrymen indulged their military spirit. He justly discerned that mankind were not intended, by the law and constitution of their nature as rational and social beings, to live in eternal enmity with each other, and he recommends, in one of the most beautiful and perfect ethical codes to be met with among the remains of the ancients, the virtues of humanity, lib-

[1] 2 Mason's Rep. 448, Story, J.

[2] Sal. Jug. ch. 91.

erality, and justice towards other people as being founded in the universal law of nature.

The irruption of the northern tribes of Scythia and Germany overturned all that was gained by the Roman law, annihilated every restraint and all sense of national obligation; and civil society relapsed into the violence and confusion of the barbarous ages. Mankind seemed to be doomed to live once more in constant distrust or hostility, and to regard a stranger and an enemy as almost the same. Piracy, rapine, and ferocious warfare deformed the annals of Europe. The manners of nations were barbarous, and their maxims of war cruel.

The Emperor Charlemagne made distinguished efforts to improve the condition of Europe by the introduction of order and the propagation of Christianity; and we have cheering examples during the darkness of the Middle Ages of some recognition of public law by means of alliances and the submission of disputes to the arbitrament of a neutral power. Mr. Ward enumerates five institutions existing about the period of the eleventh century which made a deep impression upon Europe, and contributed in a very essential degree to improve the law of nations.[1] These institutions were: the feudal system; the concurrence of Europe in one form of religious worship and government; the establishment of chivalry; the negotiations and treaties forming the conventional law of Europe; and the settlement of a scale of political rank and precedency.

Of all these causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community. The in-

[1] Ward's History of the Law of Nations, vol. i. 322–328.

fluence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The history of Europe, during the early periods of modern history, abounds with interesting and strong cases to show the authority of the church over turbulent princes and fierce warriors, and the effect of that authority in meliorating manners, checking violence, and introducing a system of morals which inculcated peace, moderation, and justice.

The influence of chivalry was beneficial upon the laws of war. It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonorable. It dictated humane treatment to the vanquished, courtesy to enemies, and the virtues of fidelity, honor, and magnanimity in every species of warfare. The introduction and study of the civil law must also have contributed largely to more correct and liberal views of the rights and duties of nations. It was impossible that such a refined and wise system of municipal and ethical jurisprudence as the Roman law could have been taught in universities and schools, and illustrated by a succession of eminent civilians who were worthy of being associated with the Roman sages, without at the same time producing a great effect upon the public mind. From the thirteenth to the sixteenth century all controversies between nations were adjudged by the rules of the civil law.

Treaties, conventions, and commercial associations had a still more direct and visible influence in the

formation of the great modern code of public law. They gave a new character to the law of nations, and rendered it more and more of a positive or instituted code.

The efforts that were made upon the revival of commerce to suppress piracy and protect shipwrecked property show a returning sense of the value and of the obligations of national justice.

The progress of moderation and humanity in the treatment of prisoners is to be imputed to the influence of Christianity and of conventional law establishing a general and indiscriminate exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose. It is a practice of no very ancient introduction among the states of Europe, it was not of very familiar use in the age of Grotius, and it succeeded the elder practice of ransom.

The custom of admitting resident members at each sovereign's court was another important improvement in the security and facility of national intercourse.[1]

Thus stood the law of nations at the age of Grotius. It consisted of a series of undigested precedents without order or authority.

Grotius has, therefore, been justly considered as the father of the law of nations. His object was to digest in one systematic code the principles of public right, and to supply authorities for almost every case in the conduct of nations; and he had the honor of reducing the law of nations to a system, and of producing a work which has been resorted to as the standard of authority in every succeeding age.

Among the disciples of Grotius, Puffendorf has always held the first rank.

[1] Prescott's Hist. Ferdinand and Isabella, vol. i. 352.

The summary of the law of nations by Professor Martens is a treatise of great practical utility. Bynkershoeck's treatise on the law of war has always been received as of great authority on that particular branch of the law of nations.

The most popular and the most elegant writer on the law of nations is Vattel, whose method has been greatly admired.

We now appeal to more accurate, more authentic, more precise, and more commanding evidence of the rules of public law, by a reference to the decisions of those tribunals to whom in every country the administration of that branch of jurisprudence is specially intrusted.

The dignity and importance of this branch of jurisprudence cannot fail to recommend it to the deep attention of the student, and a thorough knowledge of its principles is necessary to lawyers and statesmen, and highly ornamental to every scholar who wishes to be adorned with the accomplishments of various learning. A comprehensive and scientific knowledge of international law is highly necessary not only to lawyers practising in our commercial ports, but to every gentleman who is animated by liberal views and a generous ambition to assume stations of high public trust.

LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

NATIONS are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners.

This perfect equality and entire independence of all distinct states is a fundamental principle of public law. It is a necessary consequence of this equality that each nation has a right to govern itself as it may think proper, and no nation is entitled to dictate a form of government or religion or a course of internal policy to another. No state is entitled to take cognizance or notice of the domestic administration of another state or of what passes within it as between the government and its own subjects.[1] The interference of Russia, Prussia, and Austria in the internal government of Poland, and first dismembering it of large portions of its territory, and then finally overturning its constitution and destroying its existence as an independent power, was an aggravated abuse of national right. Every nation has an undoubted right to provide for its own safety, and take due precaution against distant as well as impending danger: the right

[1] Grotius, De Jure Belli et Pacis, b. 1, c. 3, sec. 8; Vattel, Droit des Gens, b. 2, c. 4, sec. 54; Rutherforth's Inst. b. 2, c. 9.

of self-preservation is paramount to all other considerations.[1]

It is sometimes a very grave question when and how far one nation has a right to assist the subjects of another who have revolted and implored that assistance. It is said [2] that assistance may be afforded consistently with the law of nations in extreme cases, as when rulers have violated the principles of the social compact and given just cause to their subjects to consider themselves discharged from their allegiance. Vattel mentions the case of the Prince of Orange as a justifiable interference, because the tyranny of James II. had compelled the English nation to rise in their defence and call for his assistance. The right of interposition must depend upon the special circumstances of the case. It must be submitted to the guidance of eminent discretion, and controlled by the principles of justice and sound policy.

The assistance that England gave to the United Netherlands when they were struggling against Spain, and the assistance that France gave to this country during the war of our revolution, were justifiable acts, founded in wisdom and policy.

Nations are at liberty to use their own resources in such manner and to apply them to such purposes as they may deem best, provided they do not violate the perfect rights of other nations, nor endanger their safety, nor infringe the indispensable duties of humanity. They may contract alliances with particular nations and grant or withhold particular privileges in their discretion.

[1] Vattel, b. 2, c. 4, sec. 49, 50; Kluber, Droit des Gens, c. 1, p. 75; Grotius, b. 2, c. 1.

[2] Vattel, b. 2, c. 4, sec. 56; Rutherforth, b. 2, c. 9; Grotius, b. 2, c. 25, sec. 8; Puff. b. 8, c. 6, sec. 14.

And it is well to be understood, at a period when alterations in the constitutions of governments and revolutions in states are familiar, that it is a clear position of the law of nations that treaties are not affected, nor positive obligations of any kind with other powers or with creditors weakened, by any such mutations.[1] So if a state should be divided in respect to territory its rights and obligations are not impaired.[2]

The extent of jurisdiction over the adjoining seas is often a question of difficulty and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory, and the sea-coast adjoining it, and the navigable waters included in bays and between headlands and arms of the sea, belong to the sovereign of the adjoining territory as being necessary to the safety of the nation and to the undisturbed use of the neighboring shores.[3] No nation has any right of jurisdiction at sea except it be over the persons of its own subjects, in its own public and private vessels. The vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs.

Every vessel in time of peace has the right to consult its own safety and convenience, and to pursue its own course and business, without being disturbed when it does not violate the rights of others.[4] It is difficult

[1] Grotius, De Jure, b. 2, c. 9, sec. 8; Puff. Droit de la Nature et des Gens, par Barbeyrac, tome 2, liv. 8, c. 12, sec. 2, 3; Burlamaqui, Nat. and Pol. Law, vol. ii. part 4, c. 9, sec. 16; Rutherforth, b. 2, c. 10.

[2] Rutherforth, b, 2. c. 10.

[3] Grotius, b. 2, c. 2, sec. 12. — c. 3, sec. 7; Puff. b. 3, c. 3, sec. 4. — b. 4, c. 5, sec. 3 and 8; Vattel, b. 1, c. 22, 23.

[4] The Marianna Flora, 11 Wheaton, 38.

to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories; and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends.[1]

As the end of the law of nations is the happiness and perfection of the general society of mankind, it enjoins upon every nation the punctual observance of benevolence and good-will, as well as of justice, towards its neighbors.[2] This is equally the policy and the duty of nations. They ought to cultivate a free intercourse for commercial purposes, in order to supply each other's wants, and promote each other's prosperity. The variety of climates and productions on the surface of the globe, and the facility of communication, by means of rivers, lakes, and the ocean, invite to a liberal commerce, as agreeable to the law of nature, and extremely conducive to national amity, industry, and happiness.[3] The numerous wants of civilized life can only be supplied by mutual exchange between nations of the peculiar productions of each. But as every nation has the right, and is disposed to exercise it, of judging for itself, in respect to the policy and extent of its commercial arrangements, the general freedom of trade, however reasonably and strongly it may be inculcated in the modern school of political economy, is but an imperfect right, and necessarily subject to such regulations and restrictions as each nation may think proper to prescribe for itself.

[1] Azuni, Maritime Law of Europe, vol. i. p. 206.
[2] Vattel's Prelim. sec. 12, 13, b. 2, c. 1, sec. 2, 3.
[3] Vattel, b. 2, c. 2, sec. 21.

Every state may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations with whom it deals such distinctions and particular privileges as it may deem conducive to its interest.[1] No nation has a right in time of peace to interfere with, or interrupt, any commerce which is lawful by the law of nations, and carried on between other independent powers, or between different members of the same state. The claim of the Portuguese, in the height of their maritime power in India, to exclude all European people from commerce with Asia, was contrary to national law, and a just cause of war. Treaties of commerce, defining and establishing the rights and extent of commercial intercourse, have been found to be of great utility; and they occupy a very important title in the code of national law.

Every nation may enter into such commercial treaties and grant such special privileges as they think proper, and no nation to whom the like privileges are not conceded has a right to take offence, provided those treaties do not affect their perfect rights. A state may enter into a treaty by which it grants exclusive privileges to one nation and deprives itself of the liberty to grant similar privileges to any other. Thus Portugal, in 1703, by her treaty with England, gave her the monopoly of her wine trade. Every nation is bound, in time of peace, to grant a passage for lawful purposes over their lands, rivers, and seas, to the people of other states, whenever it can be permitted without inconvenience; and burdensome conditions ought not to be

[1] Puff. b. 4, c. 5, sec. 10; Vattel, b. 1, c. 8, sec. 92, 97; Marten's Summary of Law of Nations, 146, 148; 1 Chitty on Commercial Law, 76–81; Canning's Letters to Gallatin, Sept. 11, Nov. 13, 1826; Gallatin to Canning, Sept. 22, Dec. 28, 1826; Clay to Gallatin, Nov. 11, 1826.

annexed to the transit of persons and property. A nation possessing only the upper parts of a navigable river is entitled to descend to the sea without being embarrassed by useless and oppressive duties or regulations.

When foreigners are admitted into a state upon free and liberal terms the public faith becomes pledged for their protection. The courts of justice ought to be freely open to them as a resort for the redress of their grievances. But strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law. It has sometimes been made a question how far one government was bound by the law of nations and independent of treaty to surrender upon demand fugitives from justice who, having committed crimes in one country, flee to another for shelter. It is declared by some of the most distinguished public jurists[1] that every state is bound to deny an asylum to criminals, and upon application and due examination of the case to surrender the fugitive to the foreign state where the crime was committed.

Ambassadors form an exception to the general case of foreigners resident in the country, and they are exempted absolutely from all allegiance and from all responsibility to the laws of the country to which they are deputed. As they are representatives of their sovereigns and requisite for negotiations and friendly intercourse, their persons, by the consent of all nations, have been deemed inviolable, and the instances are

[1] Grotius, b. 2, c. 21, sec. 3, 4, 5, and Heineccius' Com. h. t.; Burlamaqui, vol. ii. part 4, c. 3, sec. 23–29; Rutherforth, b. 2, c. 9, vol. 2, p. 496; Vattel, b. 2, c. 6, sec. 76, 77; Questions de Droit, tit. "Etranger," par Merlin; P. Voet, de Statutis, p. 297; Marten's Law of Nations, b. 3, c. 3, sec. 23; 3 Keble, 785; 2 Vent. 314.

rare in which popular passions or perfidious policy have violated this immunity.

A government may in its discretion lawfully refuse to receive an ambassador, and without affording any just cause for war, though the act would probably excite unfriendly disposition unless accompanied with conciliatory explanations. It is a well-grounded custom that any engagement which the minister shall enter into is of no force among sovereigns unless ratified by his principal.[1]

Consuls are commercial agents appointed to reside in the sea-ports of foreign countries with a commission to watch over the commercial rights and privileges of the nation deputing them. Consuls have been multiplied and extended to every part of the world where navigation and commerce can successfully penetrate, and their duties and privileges are now generally limited and defined in treaties of commerce or by the statute regulations of the country which they represent. The laws of the United States on the subject of consuls and vice-consuls[2] specially authorize them to receive the protests of masters and others relating to American commerce, and they declare that consular certificates under seal shall receive faith and credit in the courts of the United States. It is likewise made their duty, where the laws of the country permit, to administer on the personal estates of American citizens, dying within their consulates and leaving no legal representative; and to take charge of and secure the effects of stranded American vessels in the

[1] Bynk. Quæst. Jur. Pub. lib. 2, c. 7; Vattel, b. 2, c. 12, sec. 156; Martens, b. 2, c. 1, sec. 3; 1 Dodson's Adm. Rep. 244.

[2] Acts of Congress, 14th April, 1792, c. 24; February 28, 1803, c. 62.

absence of the master, owner, or consignee; and they are bound to provide for destitute seamen within their consulates, and to send them at the public expense to the United States.

It is made the duty of American consuls and commercial agents to reclaim deserters and discountenance insubordination, and to lend their aid to the local authorities for that purpose, and to discharge seamen cruelly treated.[1] No nation is bound to receive a foreign consul unless it has agreed to do so by treaty, and the refusal is no violation of the peace and amity between the nations. A consul is not such a public minister as to be entitled to the privileges appertaining to that character, nor is he under the special protection of the law of nations. Considering the importance of the consular functions, and the activity which is required of them in all great maritime ports, and the approach which consuls make to the efficacy and the dignity of diplomatic characters, it was a wise provision in the Constitution of the United States which gave to the Supreme Court original jurisdiction in all cases affecting consuls, as well as ambassadors and other public ministers, and the federal jurisdiction is understood to be exclusive of the state courts.[2]

[1] Act U. S. 20 July, 1840, c. 23, sec. 11, 17.

[2] 5 Serg. & Rawle, 545; 3 Pickering, 80; 7 Peters' U. S. Rep. 276; 1 Green's N. J. Rep. 107.

LECTURE III.

OF THE DECLARATION AND OTHER EARLY MEASURES OF A STATE OF WAR.

In the last lecture we considered the principal rights and duties of nations in a state of peace; and if those duties were generally and duly fulfilled, a new order of things would arise and shed a brighter light over the history of human affairs. Peace is said to be the natural state of man, and war is undertaken for the sake of peace, which is its only lawful end and purpose.[1]

The right of self-defence is part of the law of our nature, and it is the indispensable duty of civil society to protect its members in the enjoyment of their rights both of person and property. This is the fundamental principle of the social compact. An injury either done or threatened to the perfect rights of the nation or of any of its members, and susceptible of no other redress, is a just cause of war. If one nation be bound by treaty to afford assistance in a case of war between its ally and a third power, the assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes, arise whether the government which is to afford the aid is to judge for itself of the justice of the war on the part of the ally, and to make the right to assistance depend upon its own judgment.

1 Cic. De Off. 1, 11, 23; Grotius, b. 1, c. 1; Burlamaqui, part 4, c. 1, sec. 4; Vattel, b. 4, c. 1.

A nation which has agreed to render assistance to another is not obliged to furnish it when the case is hopeless, or when giving the succors would expose the state itself to imminent danger.

In the ancient republics of Greece and Italy the right of declaring war resided with the people, who retained in their collective capacity the exercise of a large portion of the sovereign power. Among the ancient Germans it belonged to the popular assemblies,[1] and the power was afterwards continued in the same channel and actually resided in the Saxon Witenagemote.[2] But in the monarchies of Europe, which arose upon the ruins of the feudal system, this important prerogative was generally assumed by the king as appertaining to the duties of the executive department of government. When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations is a war between all the individuals of the one and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments; and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other.[3] When hostili-

[1] Tacit. De M. G. c. 11.

[2] Millar's View of the English Government, b. 1, c. 7.

[3] Grotius, b. 3, c. 3, sec. 9. — c. 4, sec. 8; Burlamaqui, part 4, c. 4, sec. 20; Vattel, b. 3, c. 5, sec. 70.

ties have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy, found within the territory on the breaking out of the war. According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war.[1] It was provided by *Magna Charta* that, upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached "without harm of body or goods" until it be known how English merchants were treated by the enemy; and "if our merchants," said the charter, "be safe and well treated there, theirs shall be likewise with us." It has been deemed extraordinary that such a liberal provision should have found a place in a treaty between a feudal king and his barons. But however strong the current of authority in favor of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitively settled in favor of the ancient and sterner rule, by the Supreme Court of the United States.[2]

Though this decision established the right contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend upon a special act of Congress. The practice, so common in modern Europe, of imposing embargoes at the breaking out of hostility, has appar-

[1] Grotius, b. 3, c. 9, sec. 4. — c. 21, sec. 9; Bynk. Quæst. Jur. Pub. c. 2, and 7; Martens, b. 8, c. 2, sec. 5.

[2] Brown *v.* U. S. 8 Cranch, 110; Ibid. 228, 229; 1 Gallison, 563.

ently the effect of destroying that protection to property, which the rule of faith and justice gives to it when brought into the country in the course of trade, and in the confidence of peace. Reprisals by commission or letters of marque and reprisal granted to one or more injured subjects in the name and by the authority of the sovereign, is another mode of redress for some specific injury which is considered to be compatible with a state of peace and permitted by the law of nations. The case arises when one nation has committed some direct and palpable injury to another, as by withholding a just debt or by violence to person or property, and has refused to give any satisfaction.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy at the declaration of war, rests very much upon the same principles as that concerning enemy's tangible property found in the country at the opening of the war. One of the immediate and important consequences of the declaration of war is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. It follows as a necessary consequence of the doctrine of the illegality of all intercourse or traffic without express permission that all contracts with the enemy made during war are utterly void. In the investigation of the rules of the modern law of nations, particularly with regard to the field of maritime capture, reference is generally and freely made to the decisions of the English courts. They are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States on all the leading points of national law.

Many of the most important principles of public law have been brought into use and received a practical application and been reduced to legal precision, since the age of Grotius and Puffendorf; and we must resort to the judicial decisions of the prize tribunals in Europe and in this country for information and authority on a great many points, on which all the leading text-books have preserved a total silence. The complexity of modern commerce has swelled beyond all bounds the number and intricacy of questions upon national law, and particularly upon the very comprehensive head of maritime capture.

LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

It becomes important, in a maritime war, to determine with precision what relations and circumstances will impress a hostile character upon persons and property; and the modern international law of the commercial world is replete with refined and complicated distinctions on this subject. It is settled that there may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country in regard to his commercial transactions connected with that establishment. This same principle, that for all commercial purposes the domicile of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. The *animus manendi* (intention of remaining) appears to have been the point to

be settled. The presumption arising from actual residence in any place is that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety.[1] When the residence is once fixed, and has communicated a national character to the party, it is not divested by a periodical absence, or even by occasional visits to his native country.[2] A national character, acquired by residence, may be thrown off at pleasure by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi* (without the intention of returning); and such an intention is essential, in order to enable the party to reassume his native character.[3] In the law of nations, as to Europe, the rule is that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade.

National character may be acquired in consideration of the traffic in which the party is concerned. If a person connects himself with a house of trade in the enemy's country in time of war, or continues, during a war, a connection formed in time of peace, he cannot protect himself by having his domicile in a neutral country. But though a belligerent has a right to con-

[1] The Bernon, 1 Rob. Rep. 86.

[2] 1 Acton, 116; 9 Cranch, 414, Marshall, Ch. J.; The Freundschaft, 3 Wheaton, 14.

[3] The Indian Chief, 3 Rob. Rep. 12.

sider as enemies all persons who reside in a hostile country, or maintain commercial establishments there, whether they be by birth neutrals, or allies, or fellow-subjects, yet the rule is accompanied with this equitable qualification: that they are enemies *sub modo* only, or in reference to so much of their property as is connected with that residence or establishment.

The next mode in which a hostile character may be impressed, according to the doctrine of the English courts, is by dealing in those branches of commerce which were confined in time of peace to the subjects of the enemy. There can be no doubt that a special license granted by a belligerent to a neutral vessel to trade to her colony, with all the privileges of a native vessel, in those branches of commerce which were before confined to native subjects, would warrant the presumption that such vessel was adopted and naturalized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property. Sailing under the flag and pass of an enemy is another mode by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privileges of a foreign character, she must expect at the same time to be subject to the inconveniences attaching to that character; this rule is necessary to prevent the fraudulent mask of enemy's property.

Having thus considered the principal circumstances which have been held by the courts of international law to impress a hostile character upon commerce, it may be here observed that property which has a hostile character at the commencement of the voyage cannot change that character by assignment while it is *in transitu*, so as to protect it from capture. This

would lead to fraudulent contrivances, to protect the property from capture, by colorable assignments to neutrals. During peace a transfer *in transitu* may be made; but when war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as it was at the time of the shipment, until actual delivery. So property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy.[1] The prize courts will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts in this country. The great principles of national law were held to require that, in war, enemy's property should not change its hostile character *in transitu;* and that no secret liens, no future elections, no private contracts looking to future events, should be able to cover private property while sailing on the ocean.[2] All reservations of risk to the neutral consignors, in order to protect belligerent consignees, are held to be fraudulent; and these numerous and strict rules of the maritime jurisprudence of the prize courts are intended to uphold the rights of lawful maritime capture, and to prevent frauds, and preserve candor and good faith in the intercourse between belligerents and neutrals.

[1] The Anna Catharina, 4 Rob. Rep. 107; The Sally Griffiths, 3 Rob. Rep. 300, *in notis*.

[2] The Frances, 1 Gallison, 445; 8 Cranch, 335, 359, S. C.

LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN RELATION TO EACH OTHER.

THE end of war is to procure by force the justice which cannot otherwise be obtained; and the law of nations allows the means requisite to the end. The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security.

Grotius, even in opposition to many of his own authorities, and under a due sense of the obligations of religion and humanity, placed bounds to the ravages of war, and maintained that many things were not fit and commendable, though they might be strictly lawful; and that the law of nature forbade what the law of nations (meaning thereby the practice of nations) tolerated. He held that the law of nations prohibited the use of poisoned arms, or the employment of assassins, or violence to women, or to the dead, or making slaves of prisoners;[1] and the moderation which he inculcated had a visible influence upon the sentiments and manners of Europe.

There is a marked difference in the right of war carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or de-

[1] Grotius, b. 3, c. 4, 5, 7.

struction of private property is essential to that end, and it is allowed in maritime wars by the law and practice of nations. The general usage now is, not to touch private property upon land without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation.

Cruelty to prisoners and barbarous destruction of private property will provoke the enemy to severe retaliation upon the innocent. Retaliation is said by Rutherforth [1] not to be a justifiable cause for putting innocent prisoners or hostages to death; for no individual is chargeable, by the law of nations, with the guilt of a personal crime, merely because the community of which he is a member is guilty. Vattel speaks of retaliation as a sad extremity, and it is frequently threatened without being put in execution, and, probably, without the intention to do it, and in hopes that fear will operate to restrain the enemy. Although a state of war puts all the subjects of the one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy. It was the received opinion in ancient Rome in the times of Cato and Cicero [2] that one who was not regularly enrolled as a soldier could not lawfully kill an enemy. But the law of Solon, by which individuals were permitted to form associations for plunder, was afterwards introduced into the Roman Law, and has been transmitted to us as part of their system.[3] During

[1] Rutherforth's Inst. b. 2, c. 9.
[2] Cic. De Off. b. 1, c. 11.
[3] Dig. 47. 22. 4; Bynk. Quæst. Jur. Pub. b. 1, c. 18.

the lawless confusion of the feudal ages, the right of making reprisals was claimed and exercised without a public commission. It was not until the fifteenth century that commissions were held necessary, and were issued to private subjects in time of war, and that subjects were forbidden to fit out vessels to cruise against enemies without license.[1]

Such hostilities without a commission are, however, contrary to usage and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy unless committed in time of peace. In order to encourage privateering it is usual to allow the owners of private armed vessels to appropriate to themselves the property, or a large portion of the property, they may capture; and to afford them and the crews other facilities and rewards for honorable and successful efforts. The right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives under the grant of the state. When a prize is taken at sea it must be brought with due care into some convenient port for adjudication by a competent court; though strictly speaking, as between the belligerent parties, the title passes and is vested when the capture is complete; and that was formerly held to be complete when the battle was over and the *spes recuperandi* (hope of recovery) was gone. If a captured ship escapes from the captor or is retaken, or if the owner ransoms her, his property is thereby revested.

Sometimes circumstances will not permit property

[1] Code des Prizes, tome i. p. 1; Martens on Privateers, p. 18; Robinson's Collectanea Maritima, p. 21.

captured at sea to be sent into port, and the captor, in such cases, may either destroy it or permit the original owner to ransom it. The effect of a ransom is equivalent to a safe conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruisers to respect the safe conduct thus given. The safe conduct implied in a ransom bill requires that the vessel should be found within the course prescribed and within the time limited by the contract, unless forced out of her course by stress of weather or unavoidable necessity.[1] The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were restored to their former state upon coming again under the power of the nation to which they formerly belonged.[2] When, therefore, property taken by the enemy is either recaptured or rescued from him by the fellow-subjects or allies of the original owner, it does not become the property of the recaptor or rescuer as if it had been a new prize, but it is restored to the original owner by right of postliminy upon certain terms. Movables are not entitled, by the strict rules of the laws of nations, to the full benefit of postliminy unless retaken from the enemy promptly after the capture; for then the original owner neither finds a difficulty in recognizing his effects nor is presumed to have relinquished them. Real property is easily identified, and therefore more completely within the right of postliminy; and the reason for a stricter limitation of it in respect to personal property arises from its transitory nature, and the difficulty of identifying it, and the consequent presumption that the original owner

[1] Pothier, Traité du Droit de Propriété, No. 134, 135.
[2] Institutes, 1, 12, 5.

had abandoned the hope of recovery.[1] In respect to real property the acquisition by the conqueror is not fully consummated until confirmed by the treaty of peace, or by the entire submission or destruction of the state to which it belonged.[2] In a land war, movable property, after it has been in complete possession of the enemy for twenty-four hours (and which goes by the name of booty, and not prize), becomes absolutely his, without any right of postliminy in favor of the original owner.

It is also a rule on this subject, that if a treaty of peace makes no particular provisions relative to captured property, it remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The right of postliminy no longer exists after the conclusion of the peace.[3] Every power is obliged to conform to these rules of the law of nations relative to postliminy where the interests of neutrals are concerned. But in cases arising between her own subjects, or between them and those of her allies, the principle may undergo such modifications as policy dictates.

[1] Vattel, b. 3, c. 14, sec. 209.
[2] Puff. Droit de la Nature, par Barbeyrac, liv. 8, c. 6, sec. 20.
[3] Vattel, b. 3, c. 14, sec. 216.

LECTURE VI.

OF THE GENERAL RIGHTS AND DUTIES OF NEUTRAL NATIONS.

THE rights and duties which belong to a state of neutrality form a very interesting title in the code of international law. They ought to be objects of particular study in this country, inasmuch as it is our true policy to cherish a spirit of peace, and to keep ourselves free from those political connections which would tend to draw us into the vortex of European contests. A nation which would be admitted to the privileges of neutrality must perform the duties it enjoins. Even a loan of money to one of the belligerent parties is considered to be a violation of neutrality.[1] A fraudulent neutrality is no neutrality. A neutral has a right to pursue his ordinary commerce, and he may become the carrier of the enemy's goods, without being subject to any confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property. As the neutral has a right to carry the property of enemies in his own vessel, so, on the other hand, his own property is inviolable, though it be found in the vessels of enemies. But the general inviolability of the neutral character goes further than merely the protection of neutral property. It protects

[1] Pickering's Letter to Pinckney, Marshall, and Gerry, March 2, 1798; 9 Moore's C. B. Rep. 586.

the property of the belligerents when within the neutral jurisdiction. It is not lawful to make neutral territory the scene of hostility or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.[1]

If a belligerent cruiser inoffensively passes over a portion of water lying within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. The right of refusal of a pass over neutral territory to the troops of a belligerent power depends more upon the inconvenience falling on the neutral state than upon any injustice committed to the third party, who is to be affected by the permission or refusal. It is no ground of complaint against the intermediate neutral state if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent. A neutral has no right to inquire into the validity of a capture except in cases in which the rights of neutral jurisdiction were violated; and in such cases the neutral power will restore the property if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor.[2]

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port

[1] Grotius, b. 3, c. 4, sec. 8, note 2; Bynk. b. 1, c. 8; Vattel, b. 3, c. 7, sec. 132; Burlamaqui, vol. 11, part 4, c. 5, sec. 19.

[2] The Arrogante Barcelones, 7 Wheaton, 496; Austrian Ordinance of Neutrality, Aug. 7, 1808, art. 18; 5 Wheaton, 390.

and sell it.[1] The neutral power is, however, at liberty to refuse this privilege, provided the refusal be made, as the privilege ought to be granted, to both parties or to neither. But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel beyond the limits of the neutral jurisdiction.

It is also a principle of the law of nations relative to neutral rights that the effects of neutrals found on board of enemy's vessels shall be free. The two distinct propositions, that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board of an enemy's vessel were to be restored, have been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded in the law of nations.[2] The rule, as it was observed by the court, rested on the simple and intelligible principle that war gave full right to capture the goods of an enemy, but gave no right to capture the goods of a friend.

[1] Bynk. b. 1, c. 15; Vattel, b. 3, c. 7, sec. 132; Martens, b. 8, c. 6, sec. 6; 5 Mason's Rep. 77.

[2] The Nereide, 9 Cranch, 388.

LECTURE VII.

OF RESTRICTIONS UPON NEUTRAL TRADE.

THE principal restriction which the law of nations imposes upon the trade of neutrals is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes. Such goods are denominated contraband of war. In the time of Grotius some persons contended for the rigor of war and others for the freedom of commerce.

As neutral nations are willing to seize the opportunity which war presents of becoming carriers for the belligerent powers, it is natural that they should desire to diminish the list of contraband as much as possible. Grotius distinguishes[1] between things which are useful only in war, as arms and ammunition, and things which serve merely for pleasure, and things which are of a mixed nature and useful both in peace and war. He agrees with other writers in prohibiting neutrals from carrying articles of the first kind to the enemy as well as in permitting the second kind to be carried. As to articles of the third class, which are of indiscriminate use in peace and war, as money, provisions, ships, and naval stores, he says that they are sometimes lawful articles of neutral commerce, and sometimes not, and the question will depend upon circumstances ex-

[1] Grotius, b. 3, c. 1, sec. 5.

isting at the time. They would be contraband if carried to a besieged town, camp, or port.

In a naval war, it is admitted that ships and materials for ships become contraband, and horses and saddles may be included.[1] The modern established rule is that provisions are not generally contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which produces them.

Another circumstance to which some indulgence is shown by the practice of nations is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it, are directly contraband.

It is the *usus bellici* which determine an article to be contraband; and as articles come into use as implements of war which were before innocent, there is truth in the remark that as the means of war vary and shift from time to time, the law of nations shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying uses of war. When goods are once clearly shown to be contraband, confiscation to the captor is the natural consequence. A neutral may also forfeit the immunities of his national character by violations of blockade; and among the rights of belligerents there is none more clear and incontrovertible or more just and necessary in the application than that which gives rise to the law of blockade.

[1] Rutherforth's Inst. b. 1, c. 9.

The law of blockade is, however, so harsh and severe in its operation that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence, and the neutral must have had due previous notice of its existence.

A blockade must be existing in point of fact, and in order to constitute that existence there must be a power present to enforce it. All decrees and orders declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void and have no sanction in public law. The occasional absence of the blockading squadron, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension and the reason of it be known; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade and as a mere fraud.[1] But if the blockade be raised by the enemy, or by applying the naval force, or part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. When a blockade is raised voluntarily or by a superior force it puts an end to it absolutely; and if it be resumed, neutrals must be charged with notice *de novo*, and without reference to the former state of things, before they can be involved in the guilt of a violation of the blockade.[2] The object of a blockade is not merely to prevent the importation

[1] 1 Rob. Rep. 72; 1 Rob. Rep. 130; 3 Rob. Rep. 155; 6 Rob. Rep. 116, 117.

[2] 2 Caines' Rep. 1; Letter Sec. of State to Mr. King, 20 Sept., 1799; 6 Rob. Rep. 112.

of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. The modern practice does not require that the place should be invested by land as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications.[1] It is absolutely necessary that the neutral should have had due notice of the blockade in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power; or constructively, by notice to his government, or by the notoriety of the fact.

A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may with impunity break the blockade whenever he pleases and slip in without obstruction. If that were to be permitted it would be impossible that any blockade could be maintained.

The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always, *primâ facie*, implicated in the guilt of the owner or master of the ship; and it lays with them to remove the presumption, that the vessel was going in for the benefit of the cargo, and with the direction of the owner.[2] There are other acts of illegal assistance afforded to a belligerent, besides supplying him with contraband goods, and relieving his distress under a blockade. Among these acts, the conveyance of hostile despatches

[1] 3 Rob. Rep. 397. — 299, note.

[2] 1 Rob. Rep. 67. — 130; 3 Rob. Rep. 173; 4 Rob. Rep. 93; 1 Edw. Rep. 39.

is the most injurious, and deemed to be of the most hostile and noxious character. A distinction has been made between carrying despatches of the enemy between different parts of his dominions, and carrying despatches of an ambassador from a neutral country to his own sovereign. The effect of the former despatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that the communications are of a hostile nature. In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The exercise of the right of visitation and search must be conducted with due care and regard to the rights and safety of the vessel.[1] If the neutral has acted with candor and good faith, and the inquiry has been wrongly pursued, the belligerent cruiser is responsible to the neutral in costs and damages, to be assessed by the prize court which sustains the judicial examination.

A neutral is bound, not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character.[2] The most material of these documents are the register, passport or sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading.

[1] 2 Wheaton, 327; 2 Mason's Rep. 439.
[2] Answer to Prussian Memorial, 1753.

LECTURE VIII.

OF TRUCES, PASSPORTS, AND TREATIES OF PEACE.

HAVING considered the rights and duties appertaining to a state of war, I proceed to examine the law of nations relative to negotiations, conventions, and treaties which either partially interrupt the war or terminate in peace. A truce or suspension of arms does not terminate the war, but is one of the *commercia belli* which suspends its operations. These conventions rest upon the obligation of good faith, and as they lead to pacific negotiations, and are necessary to control hostilities, and promote the cause of humanity, they are sacredly observed by civilized nations. A particular truce is only a partial cessation of hostilities. But a general truce applies to the operations of war, and if it be for a long or indefinite period of time it amounts to a temporary peace, which leaves the state of the contending parties and the questions between them remaining in the same situation as it found them. A truce binds the contracting parties from the time it is concluded, but it does not bind the individuals of the nation so as to render them personally responsible for a breach of it, until they have had actual or constructive notice of it. A truce only temporarily stays hostilities, and each party to it may, within his own territories, do whatever he would have a right to do in time of peace. At the expiration of the truce hostilities may recommence without any fresh declara-

tion of war.[1] A passport or safe conduct is a privilege granted in war, and exempting the party from the effects of its operation during the time, and to the extent, prescribed in the permission. It flows from the sovereign authority; but the power of granting a passport may be delegated by the sovereign to persons in subordinate command.[2] He who promises security by a passport is morally bound to afford it against any of his subjects or forces, and to make good any damage the party might sustain by a violation of the passport. It is stated that a safe conduct may be revoked by him who granted it, for some good reason; for it is a general principle in the law of nations that every privilege may be revoked when it becomes detrimental to the state.

The object of war is peace, and it is the duty of every belligerent power to make war fulfil its end with the least possible mischief, and to accelerate by all fair and reasonable means a just and honorable peace. Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, it is morally obligatory upon the legislature to pass the law, and to refuse to do so would be a breach of public faith. There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty.

A treaty of peace is valid and binding on the nation if made with the present ruling power of the nation or the government *de facto*. Other nations have no right to interfere with the domestic affairs of any particular nation or to examine and judge of the

[1] Vattel, b. 3, c. 16, sec. 260. [2] Vattel, b. 3, c. 17.

title of the party in possession of the supreme authority. They are to look only to the fact of possession.[1]

The effect of a treaty of peace is to put an end to the war and to abolish the subject of it. A treaty of peace leaves everything in the state in which it finds it if there be no express stipulation on the subject. The peace does not affect private rights which had no relation to the war. A treaty of peace binds the contracting parties from the moment of its conclusion, and that is understood to be from the day it is signed.

Treaties of every kind when made by the competent authority are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. As a general rule the obligations of treaties are dissipated by hostility.

With respect to the cession of places or territories by a treaty of peace, though the treaty operates from the making of it, it is a principle of public law that the national character of the place agreed to be surrendered by treaty continues as it was under the character of the ceding country until it be actually transferred. To complete the right of property, the right to the thing and the possession of the thing must be united. This is a necessary principle in the law of property in all systems of jurisprudence.

[1] Vattel, b. 4, c. 2, sec. 14.

LECTURE IX.

OF OFFENCES AGAINST THE LAW OF NATIONS.

THE violation of a treaty of peace or other national compact is a violation of the law of nations, for it is a breach of public faith.[1] Nor is it to be understood that the law of nations is a code of mere elementary speculation without any efficient sanction. It is a code of present, active, durable, and binding obligation. As its great fundamental principles are founded in the maxims of eternal truth, in the immutable law of moral obligation, and in the suggestions of an enlightened public interest, they maintain a steady influence notwithstanding the occasional violence by which that influence may be disturbed. The law of nations is placed under the protection of public opinion. It is enforced by the censures of the press and by the moral influences of those great masters of public law who are consulted by all nations as oracles of wisdom, and who have attained by the mere force of written reason the majestic character, and almost the authority, of universal lawgivers, controlling by their writings the conduct of rulers, and laying down precepts for the government of mankind. The offences which fall more immediately under its cognizance, and which are the most obvious, the most extensive, and the most injurious in their effects, are the violations of safe con-

[1] Vattel, b. 2, c. 15, sec. 221; Resolution of Congress, Nov. 23, 1781.

duct, infringements of the rights of ambassadors, and piracy. A safe conduct or passport contains a pledge of the public faith that it shall be duly respected, and the observance of this duty is essential to the character of the government which grants it. The statute law of the United States has provided, in furtherance of the general sanction of public law, that if any person shall violate any safe conduct or passport granted under the authority of the United States, he shall on conviction be imprisoned not exceeding three years and fined at the discretion of the court.[1] The same punishment is inflicted upon those persons who infringe the law of nations by offering violence to the persons of ambassadors and other public ministers, or by being concerned in prosecuting or arresting them or their domestic servants.[2]

Piracy is robbery or a forcible depredation on the high seas without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility.[3] Pirates have been regarded by all civilized nations as the enemies of the human race and the most atrocious violators of the universal law of society.[4] A pirate who is one by the law of nations may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges.[5] An alien under the sanction of a national commission cannot commit

[1] Act of Congress, April 30, 1790, sec. 27; U. S. Rev. Stat. sec. 4062; 1 Baldwin's C. C. U. S. Rep. 234.

[2] U. S. Rev. Stat. 4063, 4064.

[3] 5 Wheaton, 153.

[4] Cic. in Verrem, lib. 5; 3 Inst. 113.

[5] Bynk. Quæst. Jur. Pub. c. 17; Sir Leoline Jenkins' Works, vol. i. 714.

piracy while he pursues his authority. [The remainder of this lecture is devoted to a consideration of the slave-trade, which, thanks to the enlightenment and progress of the age, has ceased to form an important topic of international law.]

PART II.

OF THE GOVERNMENT AND CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

THE government of the United States was erected by the free voice and joint will of the people of America for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union! It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The Constitution and jurisprudence of the United States deserve the most accurate examination, and an historical view of the rise and progress of the Union, and of the establishment of the present Constitution as the necessary fruit of it, will tend to show the genius and value of the government and prepare the mind of the student for an investigation of its powers. The association of the American people into one body politic took place while they were colonies of the British empire and

owed allegiance to the British crown. The people of the New England colonies were very early in the habit of confederating together for their common defence, as their origin and their interests were the same, and their manners, their religion, their laws, and their civil institutions exceedingly similar, they were naturally led to a very intimate connection, and were governed by the same wants and wishes, the same sympathies and spirit. This association may be considered as the foundation of a series of efforts for a more extensive and more perfect union of the colonies. The confederacy subsisted, with some alterations, for upwards of forty years, and for part of that time with the countenance of the government in England. It was not dissolved until the year 1686, when the charters of the New England colonies were in effect vacated by a commission from King James II.[1]

The people of this country, after the dissolution of this earliest league, continued to afford other instructive precedents of association for their safety. A congress of governors and commissioners from other colonies, as well as from New England, was occasionally held, to make arrangements for the more effectual protection of our interior frontier, and we have an instance of one of these assemblies at Albany in 1722.[2] But a much more interesting congress was held there in the year 1754, and it consisted of commissioners from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland, and it was called at the instance of the lords commissioners for trade and the plantations to take into consideration the best means of defending America, in

[1] Hutchinson's History of Massachusetts, vol. i. p. 126, note.
[2] Smith's History of New York, vol. i. p. 171.

case of a war with France, which was then impending. One of the colonies (Massachusetts) expressly instructed her delegates to enter into articles of union and confederation with the other colonies for their general security in peace as well as in war. The convention unanimously resolved that a union of the colonies was absolutely necessary for their preservation. But times were not yet ripe, nor the minds of men sufficiently enlarged, for such a comprehensive proposition; and this bold project of a continental union had the singular fate of being rejected, not only on the part of the crown, but by every provincial assembly. It was probably supposed, on the one hand, that the operation of the union would teach the colonies the secret of their own strength and the proper means to give it activity and direction; while on the other, the colonies were jealous of the preponderating influence of the royal prerogative. The great value of a federate union of the colonies had, however, sunk deep into the minds of men. The assertion by the British parliament of an unqualified right of binding the colonies in all cases whatsoever, and specifically of the right of taxing them without their consent, and the denial by the colonies of the right of taxation without representation, and the attempt of the king and parliament to enforce it by the power of the sword, were the immediate causes of the American Revolution. Soon after the first unfriendly attempt upon our chartered privileges by the statute for raising a revenue in the colonies by means of a stamp duty, a congress of delegates from nine colonies was assembled at New York in October, 1765, upon the recommendation of Massachusetts; and they digested a bill of rights in

which the sole power of taxation was declared to reside in their own colonial legislatures.[1]

This was preparatory to a more extensive and general association of the colonies, which took place in September, 1774, and laid the foundations of our independence and permanent glory. The more serious claims of the British parliament, and the impending oppressions of the British crown at this last critical period, induced the twelve colonies which were spread over this vast continent from Nova Scotia to Georgia to an interchange of opinions and views, and to unite in sending delegates to Philadelphia, "with authority and directions to meet and consult together for the common welfare."

In May, 1775, a congress again assembled at Philadelphia, and was clothed with ample discretionary powers. The delegates were chosen, as those of the preceding congress had been, partly by the popular branch of the colonial legislatures when in session, but principally by conventions of the people in the several colonies.[2] They were instructed to "concert, agree upon, direct, order, and prosecute" such measures as they should deem most fit and proper to obtain redress of American grievances; or, in more general terms, they were to take care of the liberties of the country.[3] Soon after this meeting Georgia acceded to and completed the confederacy of the thirteen colonies. Hostilities had already commenced in the province of Massachusetts, and the claim of the British parliament to an unconditional and unlimited sovereignty

[1] 2 Belknap's N. H. 326; Journals N. Y. Assembly, Oct. 1765; Marshall's Life of Washington, vol. ii. App. No. 5; Pitkin's Pol. and Civil Hist. of U. S. vol. i. p. 178–186, App. 7, 8, 9.

[2] Journals of Congress, May, 1775, p. 69–74.

[3] Journals of Congress, May, 1775, vol. i. p. 74.

over the colonies was to be asserted by an appeal to arms. The Continental Congress, charged with the protection of the rights and interests of the people of the united colonies, and intrusted with the power and sustained by the zeal and confidence of their constituents, prepared for resistance. They published a declaration of the causes and necessity of taking up arms, and proceeded immediately to levy and organize an army, to prescribe rules for the government of their land and naval forces, to contract debts, and emit a paper currency upon the faith of the Union; and gradually assuming all the powers of national sovereignty, they at last, on the fourth day of July, 1776, took a separate and equal station among the nations of the earth, by declaring the united colonies to be free and independent states. This memorable declaration, in imitation of that published by the United Netherlands on a similar occasion, recapitulated the oppressions of the British king, asserted it to be the natural right of every people to withdraw from tyranny, and, with the dignity and fortitude of conscious rectitude, it contained a solemn appeal to mankind in vindication of the necessity of the measure. By this declaration, made "in the name and by the authority of the people," the colonies were absolved from all allegiance to the British crown, and all political connection between them and Great Britain was totally dissolved. The general opinion in favor of the importance and value of the Union appears evident in all the proceedings of Congress; and as early as the declaration of independence, it was thought expedient for its security and duration to define with precision, and by a formal instrument, the nature of our compact, the powers of Congress, and the residuary sovereignty of the states.

On the 11th of June, 1776, Congress undertook to digest and prepare articles of confederation. But the business was attended with much embarrassment and delay, and, notwithstanding these states were then surrounded by the same imminent dangers, and were contending for the same illustrious prize, it was not until the 15th of November, 1777, that Congress could so far unite the discordant interests and prejudices of thirteen distinct communities as to agree to the articles of confederation. The powers of Congress, as enumerated in the articles of confederation, would perhaps have been competent for all the essential purposes of the Union, had they been duly distributed among the departments of a well-balanced government, and been carried down through the medium of a national judicial and executive power to the individual citizens of the Union. The exclusive cognizance of our foreign relations, the rights of war and peace, and the right to make unlimited requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the states. But in imitation of all former confederacies of independent states, either in ancient Greece or in modern Europe, the articles of confederation carried the decrees of the federal council to the states in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow, and it has proved pernicious or destructive to all other federal governments which adopted the principle. The former confederation of this country was defective, in not giving complete authority to Congress to interfere in contests between the several states, and to protect each state from internal violence and rebellion. The first effort to relieve the people of

this country from a state of national degradation and ruin came from Virginia, in a proposition from its legislature in January, 1786, for a convention of delegates from the several states to regulate our commerce with foreign nations. The proposal was well received in many of the other states, and five of them sent delegates to a convention which met at Annapolis in September, 1786.[1] This small assembly, being only a partial representation of the states, and being deeply sensible of the radical defects of the system of the existing federal government, thought it inexpedient to attempt a partial, and probably only a temporary and delusive, alleviation of our national calamities. They concurred therefore in a strong application to Congress for a general convention to take into consideration the situation of the United States, and to devise such further provisions as should be proper to render the federal government not a mere phantom as heretofore, but a real government, adequate to the exigencies of the Union. All the states except Rhode Island acceded to the proposal, and appointed delegates who assembled in a general convention at Philadelphia in May, 1787.

After several months of tranquil deliberation the convention agreed on the plan of government which now forms the Constitution of the United States. The peaceable adoption of this government, under all the circumstances which attended it, presented the case of an effort of deliberation combined with a spirit of amity and of mutual concession which was without example.

[1] Life of Alex. Hamilton, by his Son, vol. i. p. 284–305; Hamilton Papers, by Dr. Hawkes, vol. i. p. 428; N. Y. Journals Senate and Assembly, July 20, 21, 1782.

LECTURE XI.

OF CONGRESS.

THE power of making laws is the supreme power in a state, and the line of separation between that and the other branches of the government ought to be marked very distinctly and with the most careful precision. The Constitution of the United States has effected this purpose with great felicity of execution, and in a way well calculated to preserve the equal balance of the government and the harmony of its operations. It has not only made a general delegation of the legislative power to one branch of the government, of the executive to another, and of the judicial to the third, but it has specially defined the general powers and duties of each of those departments.

It will be the object of this lecture to review the legislative department; and I shall consider this great title in our national polity under the following heads: (1.) The constituent parts of Congress; (2.) The mode of their appointment; their joint and separate powers and privileges; (3.) Their method of enacting laws with the qualified negative of the president.

(1.) By the Constitution[1] all legislative powers therein granted are vested in a congress consisting of a senate and house of representatives. One great object of this separation of the legislature into two houses acting separately and with coördinate powers is to de-

[1] Art. 1, sec. 1.

stroy the evil effects of sudden and strong excitement, and of precipitate measures springing from passion, caprice, prejudice, personal influence, and party intrigue, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies.

(2.) The senate of the United States is composed [1] of two senators from each state, chosen by the legislature thereof for six years, and each senator has one vote. If vacancies in the senate happen by resignation or otherwise during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

The senate has been, from the first formation of the government, divided into three classes, and the rotation of the classes was originally determined by lot; and the seats of one class are vacated at the expiration of the second year, and one third of the senate are chosen every second year.[2]

The house of representatives is composed of members chosen every second year by the people of the several states, who are qualified electors of the most numerous branch of the legislature of the state to which they belong. The qualifications of electors of the most numerous branch of the legislature in the several state governments generally are that they be of the age of twenty-one years and upwards, and free resident male citizens of the state in which they vote.

The representatives are directed to be apportioned among the states according to numbers, which is determined by adding to the whole number of free persons, including those bound to service for a term of years and exclusive of Indians not taxed, three fifths of all

[1] Art. 1, sec. 3. [2] Const. U. S. art. 1, sec. 3.

other persons.[1] The number of representatives cannot exceed one for every thirty thousand, but each state is entitled to have at least one representative. The actual enumeration or census of the inhabitants of the United States is to be made every ten years, and the representatives newly apportioned upon the same under a new ratio, according to the relative increase of the population of the states.[2] Each house is made the sole judge of the election returns and qualifications of its members.[3] A majority of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members.

Each house likewise determines the rule of its proceedings, and can punish its members for disorderly behavior, and with the concurrence of two thirds expel a member.[4] Each house is likewise bound to keep a journal of its proceedings, and from time to time publish such parts as do not require secrecy. The members of both houses are likewise privileged from arrest during their attendance on Congress and in going to and returning from the same, except in cases of treason, felony, and breach of the peace,[5] and what is still more important, no member can be questioned out of the house for any speech or debate therein.[6] The house of representatives has the exclusive right of originating all bills for raising revenue, and this is the only privilege that the house enjoys in its legislative character which is not shared equally by the other; and even those bills are amendable by the senate in its discretion.[7]

[1] Const. U. S. art. 1, sec. 2.
[2] Const. U. S. art. 1, sec. 2.
[3] Const. U. S. art. 1, sec. 5.
[4] Const. U. S. art. 1, sec. 5.
[5] Const. U. S. art. 1, sec. 6.
[6] Const. U. S. art. 1, sec. 6.
[7] Const. U. S. art. 1, sec. 7.

Each house is an entire and perfect check upon the other in all business appertaining to legislation; and one of them cannot even adjourn, during the session of Congress, for more than three days, without the consent of the other, nor to any other place than that in which the two houses shall be sitting.[1] The powers of Congress extend generally to all subjects of a national nature. It will be sufficient to observe generally that Congress is authorized to provide for the common defence and general welfare, and for that purpose, among other express grants, they are authorized to lay and collect taxes, duties, imposts, and excises; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states and with the Indian tribes; to declare war and define and punish offences against the law of nations; to raise, maintain, and govern armies and a navy; to organize, arm, and discipline the militia; and to give full efficacy to all the powers contained in the Constitution.

Some of these powers, as the levying of taxes, duties, and excises, are concurrent with similar powers in the several states; but in most cases these powers are exclusive because the concurrent exercise of them by the states separately would disturb the general harmony and peace, and because they would be apt to be repugnant to each other in practice and lead to dangerous collisions. The rules of proceeding in each house are substantially the same. The ordinary mode of passing laws is briefly as follows:[2] —

(3.) One day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required.

[1] Const. U. S. art. 1, sec. 5.

[2] Standing Rules and Orders, House of Rep. 1795, Francis Childs.

Every bill must have three readings previous to its being passed, and these readings must be on different days, and no bill can be committed or amended until it has been twice read. Such little checks in the forms of doing business are prudently intended to guard against surprise or imposition. In the house of representatives, bills, after being twice read, are committed to a committee of the whole house, when the speaker leaves the chair and takes a part in the debate as an ordinary member, and a chairman is appointed to preside in his stead. When a bill has passed one house it is transmitted to the other, and goes through a similar form, though in the senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated; and if the two houses cannot agree, they appoint committees to confer together on the subject. When a bill is engrossed, and has passed the sanction of both houses, it is transmitted to the president of the United States for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on their journals, and proceeds to reconsider the bill.

If, after such reconsideration, two thirds of that house should agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and if approved by two thirds of that house it becomes a law. But in all such cases, the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are entered on the journals.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same becomes a law equally as if he had signed it, unless Congress, by adjournment in the mean time, prevents its return, and then it does not become a law.[1]

[1] Const. U. S. art. 1, sec. 7.

LECTURE XII.

OF JUDICIAL CONSTRUCTIONS OF THE POWERS OF CONGRESS.

I PROCEED to consider the cases in which the powers of Congress have been made the subject of judicial investigation.[1] (1.) Congress has declared by law that the United States were entitled to priority of payment over private creditors and in the distribution of the estates of deceased debtors. In Fisher *v.* Blight[2] the authority of Congress to pass such laws was drawn in question. The principle was here settled that the United States are entitled to secure to themselves the exclusive privilege of being preferred as creditors to private citizens, and even to the state authorities, in all cases of the insolvency or bankruptcy of their debtor. It was only a priority of payment which, under different modifications, was a regulation in common use; and a *bonâ fide* alienation of property, before the right of priority attached, was admitted to be good. The next case that brought into discussion this question of priority was that of the United States *v.* Hooe.[3] It was there held that the priority to which the United States were entitled did not partake of the character of a lien on the property of public debtors. The priority only applied to cases where the debtor had become actually and notoriously

[1] Story's Comm. Const. U. S. vol. i. pp. 382–442.
[2] 2 Cranch, 358.
[3] 3 Cranch, 73.

insolvent, and being unable to pay his debts had made a voluntary assignment of all his property, or having absconded or absented himself his property had been attached by process of law. Afterwards, in Harrison *v.* Sterry,[1] it was held that in the distribution of a bankrupt's effects, the United States were entitled to their preference, although the debt was contracted by a foreigner in a foreign country, and the United States had proved their debt under a commission of bankruptcy. The insolvency which was to entitle the United States to a preference was declared in Prince *v.* Bartlett[2] to mean a legal and known insolvency, manifested by some notorious act of the debtor pursuant to law. The United States have accordingly a preference as creditors to the extent above declared in four cases, namely: (1.) In the case of the death of the debtor without sufficient assets; (2.) Bankruptcy, or legal insolvency, manifested by some act pursuant to law; (3.) A voluntary assignment by the insolvent of all his property to pay his debts; (4.) In the case of an absent, concealed, or absconding debtor whose effects are attached by process of law.

(2.) The next question which called forth a construction from every part of the government as to the implied powers of Congress was whether Congress had power to incorporate a bank. If the end be legitimate and within the scope of the Constitution, all means which are appropriate and plainly adapted to this end and which are not prohibited are lawful; and a corporation was a means not less usual, nor of higher dignity, nor more requiring a particular specification, than other means. A national bank was a convenient, a useful, and essential instrument in the prosecution of

[1] 5 Cranch, 289. [2] 8 Cranch, 431.

the fiscal operations of the government. It was clearly an appropriate measure, and while the Supreme Court declared it to be within its power and its duty to maintain that an act of Congress exceeding its power was not the law of the land, yet if a law was not prohibited by the Constitution, and was really calculated to effect an object intrusted to the government, the court did not pretend to the power to inquire into the degree of its necessity. The court therefore decided that the law creating the Bank of the United States was one made in pursuance of the Constitution, and that the branches of the national bank, proceeding from the same stock and being conducive to the complete accomplishment of the object, were equally constitutional.

(3.) The construction of the powers of Congress relative to taxation was brought before the Supreme Court in 1796 in the case of Hylton *v.* the United States.[1] By the Act of June 5, 1794, Congress laid a duty upon carriages for the conveyance of persons, and the question was whether this was a *direct* tax within the meaning of the Constitution. If it was not a direct tax, it was admitted to be rightly laid under that part of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout[2] the United States; but if it was a direct tax it was not constitutionally laid, for it must then be laid according to the census, under that part of the Constitution which declares that direct taxes shall be apportioned among the several states according to numbers.[3] On appeal to the Supreme Court it was decided that the tax on carriages was not a direct tax within the letter

[1] 3 Dal. Rep. 171.
[2] Const. U. S. art. 1, sec. 8.
[3] Const. U S. art. 1, sec. 2.

or meaning of the Constitution, and was therefore constitutionally laid.

(4.) Congress has the exclusive right of preëmption to all Indian lands lying within the territories of the United States. This was so decided in the case of Johnson *v.* M'Intosh.[1]

(5.) By the Constitution of the United States, Congress was, by general laws, to prescribe the manner in which the public acts, records, and judicial proceedings of every state should be proved, and the effect thereof in every other state. In pursuance of this power, Congress, by the Act of May 26, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared that they should have such faith and credit given to them in every court within the United States as they had by law or usage in the courts of the state from which the records were taken. Under this act it was decided in the case of Mills *v.* Duryee[2] that if a judgment duly authenticated had, in the state court from whence it was taken, the faith and credit of the highest nature, namely, record evidence, it must have the same faith and credit in every court. It was declaring the effect of the record to declare the faith and credit that were to be given to it. The Constitution intended something more than to make the judgments of the state courts *primâ facie* evidence only. It contemplated a power in Congress to give a conclusive effect to such judgments. A judgment is therefore conclusive in every other state, if a court of the particular state in which it was rendered would hold it conclusive.

(6.) Congress has authority to provide for calling forth the militia, to execute the laws of the Union,

[1] 8 Wheaton, 543. [2] 7 Cranch, 481.

suppress insurrections, and repel invasions; and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.[1]

The president of the United States is to be commander of the militia, when called into actual service. The Act of February 28, 1795, authorized the president, in case of invasion, or of imminent danger of it, to call forth such number of militia most convenient to the scene of action as he might judge necessary. During the War of 1812 the authority of the president of the United States over the militia became a subject of doubt and difficulty, and of a collision of opinion between the general government and the governments of some of the states. These embarrassing questions, and the high authority by which each side of the argument was supported, remained unsettled by the proper and final decision of the tribunal that is competent to put them to rest, until the case of Martin *v.* Mott,[2] in 1827. In that case it was decided and settled by the Supreme Court of the United States that it belonged exclusively to the president to judge when the exigency arose in which he had authority under the Constitution to call forth the militia, and that his decision was conclusive upon all other persons.

(7.) The authority of Congress to appropriate public moneys for internal improvements has been much discussed on public occasions, and between the legislative and executive branches of the government; but the point has never been brought under judicial consideration.

[1] Const. U. S. art. 1, sec. 8.

[2] 12 Wheaton, 19.

In the inaugural address of President Adams, on the 4th of March, 1825, he alluded to this question, and his opinion seemed to be in favor of the constitutional right and of the policy and wisdom of the liberal application of the national resources to the internal improvement of the country. He intimated that speculative scruples on this subject would probably be solved by the practical blessings resulting from the application of the power, and the extent and limitations of the general government in relation to this important interest settled and acknowledged to the satisfaction of all.

This declaration may be considered as withdrawing the influence of the official authority of the president from the side on which it has hitherto pressed, and adding it to the support of the preponderating opinion in favor of the competency of the power claimed by Congress.

LECTURE XIII.

OF THE PRESIDENT.

THE title of the present lecture may conveniently be examined in the following order: —

(1.) The unity of this department; (2.) The qualifications required by the Constitution for the office of president; (3.) The mode of his appointment; (4.) His duration; (5.) His support; (6.) His powers.

(1.) By the Constitution it is ordained that the executive power shall be vested in a president.[1]

The object of this department is the execution of the law; and good policy dictates that it should be organized in the mode best calculated to attain that end with precision and fidelity. A comprehensive knowledge of the great interests of the nation, in all their complicated relations and practical details, seems to be required in sound legislation; and it shows the necessity of a free, full, and perfect representation of the people in the body intrusted with the legislative power. But when laws are duly made and promulgated, they only remain to be executed. No discretion is submitted to the executive officer.

Unity increases not only the efficacy, but the responsibility, of the executive power.

Every act can be immediately traced and brought home to the proper agent.

There can be no concealment of the real author, nor,

[1] Const. U. S. art. 2, sec. 1.

generally, of the motives of public measures, when there are no associates to divide or to mask responsibility.

(2.) The Constitution requires [1] that the president should be a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution, and that he have attained the age of thirty-five years, and have been fourteen years a resident within the United States. Considering the greatness of the trust, and that this department is the ultimately efficient executive power in government, these restrictions will not appear altogether useless or unimportant. As the president is required to be a native citizen of the United States, ambitious foreigners cannot intrigue for the office, and the qualification of birth cuts off all those inducements from abroad to corruption, negotiation, and war, which have frequently and fatally harassed the elective monarchies of Germany and Poland, as well as the Pontificate at Rome.

(3.) The mode of his appointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the Constitution; and if ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a president.

The Constitution, from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of a president directly and immediately to the people; but it has confided the power to a small body of electors, appointed in each state, under the direction of the legislature; and to close the opportunity as much as possible against negotiation, intrigue, and corruption, it has

[1] Const. U. S. art. 2. sec. 1, clause 5.

declared that Congress may determine the time of choosing the electors and the day on which they shall vote, and that the day of election shall be the same in every state.[1] This security has been still further extended by the act of Congress[2] directing the electors to be appointed in each state within thirty-four days of the day of election.

The Constitution[3] directs that the number of electors in each state shall be equal to the whole number of senators and representatives which the state is entitled to send to Congress, but no senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector.

These electors meet in their respective states at a place appointed by the legislature thereof, on the first Wednesday of December, in every fourth year succeeding the last election, and vote by ballot for president and vice-president (for this last officer is elected in the same manner and for the same period as the president), one of whom, at least, shall not be an inhabitant of the same state with the electors. They name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they make distinct lists of all persons voted for as president and of all persons voted for as vice-president, and of the number of votes for each, which lists they sign and certify, and transmit, sealed, to the seat of the government of the United States directed to the president of the senate. The president of the senate, on the second Wednesday of February succeeding every meeting of the electors, in the presence of both houses of Congress, opens all the certificates

[1] Const. U. S. art. 2, sec. 1, clause 4. [2] Act March 1, 1792.
[3] Const. U. S. art. 2, sec. 1, clauses 2 and 3.

and the votes are then to be counted. The Constitution does not expressly declare by whom the votes are to be counted and the result declared.

The person having the greatest number of votes of the electors for president is president if such number be a majority of the whole number of electors appointed; but if no person have such a majority, then, from the persons having the highest number, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately by ballot the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. If the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.[1]

The person having the greatest number of votes as vice-president is vice-president if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority of the whole number is necessary to a choice; and no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.[2] In case of the removal

[1] Amendment U. S. Const. art. 12.
[2] Amendment U. S. Const. art. 12.

of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the office, the same devolve on the vice-president; and except in cases in which the president is enabled to reassume the office, the vice-president acts as president during the remainder of the term for which the president was elected.

(4.) The president, thus elected, holds his office for the term of four years,[1] a period perhaps reasonably long for the purpose of making him feel firm and independent in the discharge of his trust, and to give stability and some degree of maturity to his system of administration.

(5.) The support of the president is secured by a provision in the Constitution, which declares[2] that he shall, at stated times, receive for his services a compensation that shall neither be increased nor diminished during the period for which he shall have been elected; and that he shall not receive, within that time, any other emolument from the United States, or any of them.

(6.) Having thus considered the manner in which the president is constituted, it only remains for us to review the powers with which he is invested. He is commander in chief of the army and navy of the United States, and of the militia of the several states when called into the service of the Union.[3] The command and application of the public force to execute the law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristic of

[1] Const. U. S. art. 2, sec. 1.
[2] Const. U. S. art. 2, sec. 1, clause 7.
[3] Const. U. S. art. 2, sec. 2.

this department that they have always been exclusively appropriated to it, in every well-organized government upon the earth. The president has the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The president has also the power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur.[1] The president is the efficient power in the appointment of the officers of government. He is to nominate, and, with the advice and consent of the senate, to appoint, ambassadors or public ministers and consuls, the judges of the Supreme Court, and all other officers whose appointments are not otherwise provided for in the Constitution; but Congress may vest the appointment of inferior officers in the president alone, in the courts of law, or in the heads of departments.[2] In addition to all the precautions which have been mentioned, to prevent abuse of the executive trust, in the mode of the president's appointment, his term of office, and the precise and definite limitations imposed upon the exercise of his power, the Constitution has also rendered him directly amenable by law for maladministration. The inviolability of any officer of government is incompatible with the republican theory as well as with the principles of retributive justice. The president, vice-president, and all civil officers of the United States, may be impeached by the house of representatives for treason, bribery, and other high crimes and misdemeanors, and, upon conviction by the senate, removed from office.[3]

[1] Const. U. S. art. 2, sec. 2. [2] Const. U. S. art. 2, sec. 2.
[3] Const. U. S. art. 2, sec. 4.

LECTURE XIV.

OF THE JUDICIARY DEPARTMENT.

As the judiciary power is intrusted with the administration of justice, it interferes more visibly and uniformly than any other part of government with all the interesting concerns of social life. Personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice. In the survey which is to be taken of the judiciary establishment of the United States, we will in the present lecture consider: (1.) The judges, in relation to their appointment, the tenure of their office, and their support and responsibility; (2.) The structure, powers, and officers of the several courts.

(1.) The Constitution [1] declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." In this respect it is mandatory upon the legislature to establish courts of justice commensurate with the judicial power of the Union. The president is to nominate, and, by and with the advice and consent of the senate, to appoint, judges of the Supreme Court, and all other officers whose appointments are not therein otherwise provided for, and which shall be established by law. This mode is peculiarly fit and proper in respect to the judiciary department. The just and

[1] Const. U. S. art. 3, sec. 1.

vigorous investigation and punishment of every species of fraud and violence, and the exercise of the power of compelling every man to the punctual performance of his contracts, are grave duties, not of the most popular character, though the faithful discharge of them will certainly command the calm approbation of the judicious observer. The fittest men would probably have too much reservedness of manners and severity of morals to secure an election resting on universal suffrage.

By the Constitution of the United States[1] "the judges, both of the supreme and inferior courts, are to hold their offices during good behavior; and they are at stated times to receive for their services a compensation, which shall not be diminished during their continuance in office." The tenure of the office, by rendering the judges independent, both of the government and people, is admirably fitted to produce the free exercise of judgment in the discharge of their trust.

(2.) The federal judiciary being thus established on principles which are essential to maintain that department in a proper state of independence, and to secure the pure and vigorous administration of the law, the Constitution proceeded to designate, with comprehensive precision, the objects of its jurisdiction. The judicial power extends[2] to all cases in law and equity arising under the Constitution, the laws, and treaties of the Union; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies

[1] Const. U. S. art. 3, sec. 1.

[2] Const. U. S. art. 3, sec. 2, Amendments Const. art. 11.

between two or more states; to controversies between a state, when *plaintiff*, and citizens of another state, or foreign citizens or subjects; to controversies between citizens of different states and between citizens of the same state, claiming lands under grants of different states; and between a state or citizens thereof and foreign states; and between citizens and foreigners. With these general remarks on the constitutional principles of the judiciary department and the objects of its authority we proceed to a particular examination of the several courts of the United States as ordained by law.

(1.) The Supreme Court was instituted by the Constitution, which ordained that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish." [1] But it received its present organization from Congress, for the Constitution had only declared, in general terms, that there should be a Supreme Court, with certain original and appellate powers. It consists of a chief justice and eight associate justices, any six of whom shall constitute a quorum.[2] The Supreme Court is also armed with that superintending authority over the inferior courts which ought to be deposited in the highest tribunal and *dernier ressort* of the people of the United States.

(2.) The circuit courts are vested with original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity where the matter in dispute exceeds $500 exclusive of costs, and the United States are plaintiffs, or an alien is a party, and the suit is between a citizen of the

[1] Const. U. S. art. 3, sec. 1.

[2] Revised Statutes U. S. sec. 673.

state where the suit is brought and a citizen of another state.

(3.) The district as well as the circuit courts are derived from the power granted to Congress by the Constitution of constituting tribunals inferior to the Supreme Court.[1] The United States is at present divided into fifty-eight districts.

(4.) The state courts are, in some cases, invested by acts of Congress with cognizance of cases arising under the laws of the United States. The principal officers of the courts are attorneys and counsellors, clerks and marshals. Attorneys and counsel are regularly admitted by the several courts to assist the parties in their pleadings, and in the conduct of their causes in those cases in which the parties do not appear and manage their own causes personally, as they are expressly permitted to do.[2]

Besides the ordinary attorneys the statute has directed that a meet person learned in the law be appointed to act as attorney-general of the United States, and besides special and incidental duties it is made generally his duty to prosecute and conduct all suits in the Supreme Court in which the United States are concerned, and to give his advice and opinion upon questions of law when required by the president or the heads of the departments. Clerks are appointed by the several courts. They have the custody of the seal and records, and are bound to sign and seal all process and to record the proceedings and judgments of the courts.

Marshals are analogous to sheriffs at common law.

[1] Const. U. S. art. 1, sec. 8.

[2] Act of Congress Sept. 24, 1789, sec. 35.

They are appointed for each judicial district by the president and senate for the term of four years, but are removable at pleasure; and it is the duty of the marshal to attend the district and circuit courts, and to execute within the district all lawful precepts directed to him, and to command all requisite assistance in the execution of his duty.

LECTURE XV.

OF THE ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

THE Constitution of the United States is an instrument containing the grant of *specific* powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly or by necessary implication. The powers vested in the state governments by their respective constitutions, or remaining with the people of the several states prior to the establishment of the Constitution of the United States, continue unaltered and unimpaired except so far as they are granted to the United States. We are to ascertain the true construction of the Constitution, and the precise extent of the residuary authorities of the several states, by the declared sense and practice of the governments respectively when there is no collision; in all other cases, when the question is of a judicial nature, we are to ascertain it by the decisions of the Supreme Court of the United States; and those decisions ought to be studied and universally understood, in respect to all the leading questions of constitutional law. The determination of the Supreme Court of the United States, in every such case, must be final and conclusive, because the Constitution gives to that tribunal the power to decide, and gives no appeal from the decision. The original jurisdiction of the Supreme Court is very lim-

ited, and it has been decided that Congress has no power to extend it.[1] It is confined by the Constitution to those cases which affect ambassadors, other public ministers, and consuls, and to those in which a state is a party;[2] and it has been made a question whether this original jurisdiction of the Supreme Court was intended by the Constitution to be exclusive. The Judiciary Act of 1789 seems to have considered it to be competent for Congress to vest concurrent jurisdiction, in those specified cases, in other courts.[3]

(1.) The Supreme Court has appellate jurisdiction, in certain cases, over final decisions in the state courts. The judicial power of the United States is declared to extend to all cases arising under treaties made under the authority of the United States.

The exercise of appellate jurisdiction was not limited by the Constitution to the Supreme Court. Congress might create a succession of inferior tribunals, in each of which it might vest appellate as well as original jurisdiction.

All the enumerated cases of federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct or control the regular administration of justice. The appellate power, in all these cases, is founded on the clearest principles of policy and wisdom, and is deemed requisite to fulfil effectually the great and beneficent ends of the Constitution.

(2.) Another question which was largely discussed and profoundly considered by the Supreme Court was

[1] 1 Cranch, 137. [2] Const. U. S. art. 3, sec. 2.
[3] Act Congress Sept. 24, 1789, sec. 13.

touching its authority to issue a *mandamus*, when not arising in a case under its appellate jurisdiction, and when not required in the exercise of its original jurisdiction. In the case of Marbury *v.* Madison,[1] the plaintiff had been nominated by the president, and, by and with the advice and consent of the senate, had been appointed a justice of the peace for the District of Columbia; and the appointment had been made complete and absolute by the president's signature to the commission, and the commission had been made complete by affixing to it the seal of the United States. The secretary of state after all this withheld the commission, and the withholding of it was adjudged to be a violation of a vested legal right, for which the plaintiff was entitled to a remedy by *mandamus;* and the only question was, whether the *mandamus* could constitutionally issue from the Supreme Court.[2] There was no doubt that the act applied to the case, and gave the power, if the law was constitutional; but the court was of opinion that the act in this respect was not warranted by the Constitution, because the issuing of a *mandamus* in this case would be an exercise of original jurisdiction not within the Constitution, and Congress had not power to give *original* jurisdiction to the Supreme Court in other cases than those described in the Constitution.

(3.) The Constitution gives the Supreme Court original jurisdiction in those cases in which a state shall be a party.

(4.) The appellate jurisdiction of the Supreme Court exists only in those cases in which it is affirmatively given.

In the case of Wiscart *v.* Dauchy,[3] the Supreme

[1] 1 Cranch, 137. [2] 12 Peters, 524. [3] 3 Dallas, 321.

Court considered that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the Constitution in a qualified manner. The Supreme Court was to have appellate jurisdiction, "with such exceptions and under such regulations as Congress should make," and if Congress had not provided any rule to regulate the proceedings on appeal, the court could not exercise an appellate jurisdiction, and if a rule be provided the court could not depart from it.

(5.) The Constitution says that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States, and it has been made a question as to what was a case arising under a treaty.

(6.) The Judiciary Act of 1789 required, on error or appeal from a state court, that the error assigned appear on the face of the record and immediately respect some question affecting the validity or construction of the Constitution, treaties, statutes, or authorities of the Union. Under this act it is not necessary that the record should state in terms the misconstruction of the authority of the Union or that it was drawn in question, but it must show some act of Congress applicable to the case to give to the Supreme Court appellate jurisdiction.

(7.) The appellate jurisdiction may exist though a state be a party, and it extends to a final judgment in a state court on a case arising under the authority of the Union.

LECTURE XVI.

OF THE JURISDICTION OF THE FEDERAL COURTS IN RESPECT TO THE COMMON LAW AND IN RESPECT TO PARTIES.

(1.) It has been a subject of much discussion whether the courts of the United States have a common law jurisdiction, and if any, to what extent. In the case of the United States *v.* Worrall,[1] in the Circuit Court at Philadelphia, the defendant was indicted and convicted of an attempt to bribe the commissioner of the revenue; and it was contended, on the motion in arrest of judgment, that the court had no jurisdiction of the case, because all the judicial authority of the federal courts was derived either from the Constitution or the acts of Congress made in pursuance of it, and an attempt to bribe the commissioner of the revenue was not a violation of any constitutional or legislative prohibition. In answer to this view of the subject it was observed that the offence was within the terms of the Constitution, for it arose under a law of the United States, and was an attempt by bribery to obstruct or prevent the execution of the laws of the Union. This case settled nothing as the court was divided.

The case of the United States *v.* Hudson and Goodwin[2] brought this great question in our national jurisprudence for the first time before the Supreme

[1] 2 Dallas, 384. [2] 7 Cranch, 32.

Court of the United States. The question there was whether the Circuit Court of the United States had a common law jurisdiction in cases of libel. The defendants had been indicted in the Circuit Court in Connecticut for a libel on the president of the United States, and the court was divided on the point of jurisdiction. A majority of the Supreme Court decided that the circuit courts could not exercise a common law jurisdiction in criminal cases; to exercise criminal jurisdiction in common law cases was not within their implied powers, and it was necessary for Congress to make the act a crime, to affix a punishment to it, and to declare the court which should have jurisdiction.

It was competent for Congress to confide to the circuit courts jurisdiction of all offences against the United States; and it has given to them exclusive cognizance of most crimes and offences cognizable under the authority of the United States. The words of the eleventh section of the Judiciary Act of 1789 were that the circuit courts should have "exclusive cognizance of all the crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct."

There are many crimes and offences, such as offences against the sovereignty, the public rights, the public justice, the public peace, and the public policy of the United States, which are cognizable under its authority, and in the exercise of the jurisdiction of the United States over them the principles of the common law must be applied in the absence of statute regulations.

It was accordingly concluded that the circuit courts had cognizance of all offences against the United

States, and what those offences were depended upon the common law applied to the powers confided to the United States; that the circuit courts having such cognizance might punish by fine and imprisonment where no punishment was specially provided by statute. In the case of United States *v.* Coolidge [1] the decision was for the defendant, and consequently against the claim to any common law jurisdiction in criminal cases. Mr. Du Ponceau, in his "Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States," maintains that we have not under our federal government any common law considered as *a source* of *jurisdiction;* while on the other hand the common law, considered merely as the *means* or *instrument* of exercising the jurisdiction conferred by the Constitution and laws of the Union, does exist, and forms a safe and beneficial system of national jurisprudence. The courts cannot derive their *right to act* from the common law. They must look for that right to the Constitution and law of the United States. But when the general jurisdiction and authority is given, as in cases of admiralty and maritime jurisdiction, *the rules of action* under that jurisdiction, if not prescribed by statute, may and must be taken from the common law, when they are applicable, because they are necessary to give effect to the jurisdiction.

The Supreme Court of the United States, in Robinson *v.* Campbell,[2] went far towards the admission of the existence and application of the common law to civil cases in the federal courts.

(2.) The jurisdiction of the federal courts *ratione personarum*, and depending on the relative character of the litigant parties, has been the subject of much

[1] 1 Gallison, 488. [2] 3 Wheaton, 212; 10 Wheaton, 159, S. P.

judicial discussion. The Constitution gives jurisdiction to the federal courts of all suits between aliens and citizens and between resident citizens of different states,[1] and we have a series of judicial decisions on that subject. If the case arises under the Constitution, laws, or treaties of the Union, it is immaterial who may be parties, for the subject matter gives jurisdiction; and if it arises between aliens and citizens, or between citizens of different states, it is immaterial what may be the controversy, for the character of the parties gives jurisdiction. In Bingham *v.* Cabot,[2] the Supreme Court held that it was necessary to set forth the citizenship of the respective parties, or the alienage when a foreigner was concerned, by positive averments, in order to bring the case within the jurisdiction of the Circuit Court.

The case of Osborn *v.* The Bank of the United States[3] brought into view important principles touching the constitutional jurisdiction of the federal courts where a state claimed to be essentially a party. The court decided that the circuit courts had lawful jurisdiction, under the act of Congress incorporating the national bank, of a bill in equity brought by the bank for the purpose of protecting it in the exercise of its franchises, which were threatened to be invaded under a law of the State of Ohio; and that as the state itself could not be made a party defendant, the suit might be maintained against the officers and agents of the state who were intrusted with the execution of such laws.

[1] 4 Wash. Cir. Rep. 101. [2] 3 Dallas, 382. [3] 9 Wheaton, 738.

LECTURE XVII.

OF THE DISTRICT AND TERRITORIAL COURTS OF THE UNITED STATES.

THE district courts act as courts of common law, and also as courts of admiralty.

A distinction is made in England between the instance and the prize court of admiralty. The former is the ordinary admiralty court, but the latter is a special and extraordinary jurisdiction ; and although it be exercised by the same person it is in no way connected with the former, either in its origin, its mode of proceeding, or the principles which govern it. To constitute the prize court, or to call it into action in time of war, a special commission issues, and the court proceeds summarily, and is governed by general principles of policy and the law of nations. The division of the Court of Admiralty into two courts is said not to have been generally known to the common lawyers of England before the case of Lindo *v.* Rodney ; and yet it appears from the research made in that case that the prize jurisdiction was established from the earliest periods of the English judicial history. But notwithstanding this early decision in favor of the plenary jurisdiction of the district courts as courts of admiralty, there was great doubt entertained in this country, about the year 1793, whether the district courts had jurisdiction under the Act of Congress of 1789 as prize courts. The Supreme Court put an

end at once to all these difficulties about jurisdiction by declaring that the district courts of the United States possessed all the powers of courts of admiralty, whether considered as instance or as prize courts. I shall consider: (1.) Its character as a prize court; (2.) As a court of criminal jurisdiction in admiralty; (3.) The division line between the admiralty and courts of common law; (4.) Its powers as an instance court of admiralty; (5.) Its jurisdiction as a court of common law, and clothed also with special powers.

(1.) Jurisdiction of prize courts. The ordinary prize jurisdiction of the admiralty extends to all captures in war made on the high seas. "I know of no other definition of prize goods," said Sir William Scott, in the case of the Two Friends,[1] "than that they are goods taken on the high seas, '*jure belli*,' out of the hands of the enemy." The prize jurisdiction also extends to captures in foreign ports and harbors.[2] Though the prize be unwarrantably carried into a foreign port and there delivered by the captors upon security, the prize court does not lose its jurisdiction over the capture and the questions incident to it.[3]

(2.) Criminal jurisdiction of the admiralty. The ordinary admiralty and maritime jurisdiction exclusive of prize cases embraces all civil and criminal cases of a maritime nature, and though there does not seem to be any difficulty or doubt as to the proper jurisdiction of the prize courts, there is a great deal of unsettled discussion respecting the civil and criminal jurisdiction of the District Court as an instance court, and possessing, under the Constitution and Judiciary Act of 1789, admiralty and maritime jurisdiction.

[1] 1 Rob. Rep. 228. [2] Doug. Rep. 613, note. [3] 4 Rob. Rep. 135.

It appears that though the general cognizance of all cases of admiralty and maritime jurisdiction as given by the Constitution extends equally to the criminal and civil jurisdiction of the admiralty, as known to the English and maritime law when the Constitution was adopted, yet that without a particular legislative provision in the case the federal courts do not exercise criminal jurisdiction as courts of admiralty over maritime offences.

(3.) Division line between the jurisdiction of the admiralty and of courts of common law. There has existed a very contested question and of ancient standing touching the proper boundary line between the jurisdiction of the courts of common law and those of admiralty. The admiralty jurisdiction in England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers, and arms of the sea as far as the tide ebbed and flowed. The extent of the jurisdiction of the district courts, as courts of admiralty and maritime jurisdiction, was very fully examined, and with great ability and research, by the Circuit Court of the United States for Massachusetts, in the case of De Lovio *v.* Boit.[1] It was maintained that in very early periods the admiralty jurisdiction, in civil cases, extended to all maritime causes and contracts, and in criminal cases to all torts and offences, as well in ports and havens within the ebb and flow of the tide as upon the high seas; and that the English admiralty was formed upon the same common model, and was coextensive in point of jurisdiction, with the maritime courts of the other commercial powers of Europe. It appeared from an historical review of the progress of the controversy for jurisdic-

[1] 2 Gallison, 398.

tion, which lasted for two centuries, between the admiralty and the courts of common law, that the latter, by a silent and steady march, gained ground and extended their limits until they acquired concurrent jurisdiction over all maritime causes, except prize causes, within the cognizance of the admiralty.

It has been made a question, what were "cases of admiralty and maritime jurisdiction" within the meaning of the Constitution of the United States. It is not in the power of Congress to enlarge that jurisdiction beyond what was understood and intended by it when the Constitution was adopted, because it would be depriving the suitor of the right of trial by jury which is secured to him by the Constitution in suits at common law; and it is well known that in civil suits of admiralty and maritime jurisdiction the proceedings are according to the course of the civil law, and without jury.

In the case of the United States *v.* La Vengeance,[1] a French privateer was libelled in the District Court of New York for an attempt to export arms from the United States to a foreign country contrary to law. She was adjudged to be forfeited to the United States. The decree, on appeal to the Circuit Court, was reversed. On a further appeal to the Supreme Court of the United States, it was contended that this was a criminal case, both on account of the manner of prosecution and the matter charged; and, therefore, that the decree of the District Court was final; and that it ought likewise to have been tried by a jury in the District Court; and that, if it was even a civil suit, it was not a case of admiralty and maritime jurisdiction. To render it such, the cause must arise wholly upon

[1] 3 Dallas, 297.

the sea, and not in a bay, harbor, or water within the precincts of any county of a state. But the Supreme Court decided that it was a civil suit, not of common law, but of admiralty and maritime jurisdiction. The seizure was on the waters of the United States. The process was *in rem*, and did not in any degree touch the person, and no jury was necessary.

(4.) The extensive and superior claims of the American courts of admiralty, as courts of civil maritime jurisdiction, we have had occasion already to consider; but according to the English jurisprudence the instance court takes cognizance only of things done, and contracts not under seal made *super altum mare* (upon the high sea), and without the body of any county. This of course excludes all creeks, bays, and rivers, which are within the body of some county; and if the place be the sea-coast, then the ebbing and flowing of the tide determines the admiralty. The cause must arise *wholly* upon the sea, and not within the precincts of any county, to give the admiralty jurisdiction. Suits for seamen's wages are cognizable in the admiralty, though the contract be made upon land, provided it be not a contract under seal; and this is intended for the ease and benefit of seamen, for they are all allowed to join in the suit, and all the persons on board below the rank of the master are comprehended in the description of mariners.[1]

(5.) The jurisdiction of the District Court, when proceeding as a court of common law, extends to all minor crimes and offences cognizable under the authority of the United States, and which are not strictly of admiralty cognizance; and to all seizures on land

[1] 1 Salk. Rep. 34; Str. Rep. 761, 937; 1 Lord Raym. 398; 3 Lev. 60; Com. Dig. tit. Adm. E. 15; 2 Lord Raym. 1044, 1206.

and on waters not navigable from the sea, and to all suits for penalties and forfeitures there incurred, and to all suits by aliens for torts done in violation of the law of nations, or of a treaty, and to suits against consuls and vice-consuls; and to all suits at common law where the United States sue.[1]

(6.) Territorial courts. The Constitution confers upon the government of the United States sovereign power over its territories. Congress has enacted that "The Supreme Court and district courts respectively of every territory shall possess chancery as well as common law jurisdiction," and that a district court should be held in each of the three districts of each territory by one of the three justices of its Supreme Court.

[1] Judiciary Act, Sept. 1789, sec. 9.

LECTURE XVIII.

OF THE CONCURRENT JURISDICTION OF THE STATE GOVERNMENTS.

(1.) As to the concurrent powers of legislation in the states: It was observed in "The Federalist"[1] that the state governments would clearly retain all those rights of sovereignty which they had before the adoption of the Constitution of the United States, and which were not by that Constitution exclusively delegated to the Union. The alienation of state power or sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the states would be absolutely and totally contradictory and repugnant. In Sturgess *v.* Crowninshield[2] the chief justice of the United States observed that the powers of the states remained, after the adoption of the Constitution, what they were before, except so far as they had been abridged by that instrument. It would seem that the concurrent power of the legislation in the states is not an independent, but a subordinate and dependent power, liable in many cases to be extinguished, and in all cases to be postponed, to the paramount or supreme

[1] No. 32. [2] 4 Wheaton, 193.

law of the Union whenever the federal and the state regulations interfere with each other.[1]

(2.) As to the concurrent power of the states in matters of judicial cognizance: in No. 82 of the "The Federalist" it is laid down as a rule that the state courts retained all preëxisting authorities, or the jurisdiction they had before the adoption of the Constitution, except where it was taken away, either by an exclusive authority granted in express terms to the Union, or in a case where a particular authority was granted to the Union and the exercise of a like authority was prohibited to the states, or in the case where an authority was granted to the Union with which a similar authority in the states would be utterly incompatible. A concurrent jurisdiction in the state courts was admitted in all except those enumerated cases, but this doctrine was only applicable to those descriptions of causes of which the state courts had previous cognizance, and it was not equally evident in relation to cases which grew out of the Constitution. State courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States; yet to all these cases the judicial power of the United States extends by means of its appellate jurisdiction.

[1] 2 Story's Com. 367–398.

LECTURE XIX.

OF CONSTITUTIONAL RESTRICTIONS ON THE POWERS OF THE SEVERAL STATES.

We proceed to consider the extent and effect of certain constitutional restrictions on the authority of the separate states. "No state," says the Constitution,[1] "shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on tonnage; keep troops or ships of war in time of peace; enter into any agreement or compact with another state or with a foreign power; or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

(1.) Bills of credit. Bills of credit are declared to mean promissory notes or bills issued by a state government, exclusively on the credit of the state, and intended to circulate through the community as money redeemable at a future day, and for the payment of which the faith of the state is pledged.[2] The issuing

[1] Art. 1, sec. 10. [2] 4 Peters, U. S. Rep. 410; 11 Peters, 257.

of such bills by the State of Missouri under the denomination of certificates was adjudged to be unconstitutional.

(2.) No state can pass any *ex post facto* law. In Calder *v.* Bull [1] it was held that the words *ex post facto* laws were technical expressions, and meant every law that made an act done before the passing of the law and which was innocent when done, criminal; or which aggravated a crime and made it greater than it was when committed; or which changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.

(3.) No state can control the exercise of any authority under the federal government. The state legislatures cannot annul the judgments nor determine the extent of the jurisdiction of the courts of the Union. No state tribunal can interfere with seizures of property made by revenue officers under the laws of the United States.

(4.) No state can pass any law impairing the obligation of contracts. In Fletcher *v.* Peck [2] the court declared that when a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law could not divest those rights, nor annihilate or impair the title so acquired. The words of the Constitution were construed to comprehend equally executory and executed contracts. A grant is a contract executed, and a party is always estopped by his own grant. It was in this case accordingly declared that

[1] 3 Dallas, 386. [2] 6 Cranch, 87.

the estate held under the Act of 1795 having passed into the hands of a *bonâ fide* purchaser for a valuable consideration, the State of Georgia was constitutionally disabled from passing any law whereby the estate of the plaintiff could be rendered void.

(5.) No state can pass naturalization laws. By the Constitution of the United States Congress has power to establish a uniform rule of naturalization. If each state can naturalize upon one year's residence when the act of Congress requires five, of what use is the act of Congress, and how does it become a uniform rule? In Chirac *v.* Chirac,[1] the chief justice of the United States observed that it certainly ought not to be controverted that the power of naturalization was vested exclusively in Congress.

(6.) The states cannot impose a tax on the national bank or its branches, or on national stock. In M'Culloch *v.* State of Maryland[2] it was adjudged that the state governments had no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

(7.) The state governments have no jurisdiction in places ceded to the United States. The state governments may likewise lose all jurisdiction over places purchased by Congress by the consent of the legislature of the state, for the erection of forts, dock-yards, light-houses, hospitals, military academies, and other needful buildings.[3]

(8.) The construction of the power of Congress to regulate commerce among the several states. In the case of the United States *v.* The Brigantine William,[4] in the District Court of Massachusetts, in September,

[1] 2 Wheaton, 269.
[2] 4 Wheaton, 316.
[3] Const. U. S. art. 1, sec. 8.
[4] 2 Hall's Law Journal, 255.

1808, it was objected that the embargo act[1] was unconstitutional, for that Congress had no right, under the power to regulate commerce, thus to annihilate it by interdicting it entirely with foreign nations. But the court decided that the embargo act was within the constitutional provision. A still graver question was presented for the consideration of the federal judiciary, in the case of Gibbons *v.* Ogden,[2] decided by the Supreme Court of the United States in February term, 1824. That decision went to declare that several acts of the Legislature of New York, granting to Livingston and Fulton the exclusive navigation of the waters of the state in vessels propelled by steam, were unconstitutional and void acts, and repugnant to the power given to Congress to regulate commerce, so far as those acts went to prohibit vessels licensed under the laws of Congress for carrying on the coasting trade from navigating the waters of New York. The court construed the word "regulate" to imply full power over the thing to be regulated, and to exclude the action of all others that would perform the same operation on the same thing.

[1] Act Congress 22 Dec. 1807.

[2] 9 Wheaton, 1.

PART III.

OF THE VARIOUS SOURCES OF THE MUNICIPAL LAW OF THE SEVERAL STATES.

LECTURE XX.

OF STATUTE LAW.

MUNICIPAL law is a rule of civil conduct, prescribed by the supreme power of a state. It is composed of written and unwritten, or statute and common law. Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.

The principle in the English government, that the parliament is omnipotent, does not prevail in the United States; though if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government. The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void. The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. It has accordingly become a settled principle in the legal polity of this country that it belongs to the

judicial power, as a matter of right and duty, to declare every act of the legislature, made in violation of the Constitution, or of any provision of it, null and void. There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. Generally speaking, statutes are public; and a private statute may rather be considered as an exception to a general rule. It operates upon a particular thing or private persons. It is said not to bind or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no general saving clause of the rights of third persons. The title of the act and the preamble to the act are, strictly speaking, no parts of it.[1] They may serve to show the general scope and purport of the act, and the inducements which led to its enactment. They may at times aid in the construction of it,[2] but generally they are loosely and carelessly inserted, and are not safe expositors of the law. It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute taken and compared together.[3] The real intention, when accurately ascertained, will always prevail over the literal sense of terms.[4] The words of a statute, if of common use, are to be taken in their natural and ordinary signification and import;[5] and if technical words are used, they are to be

[1] 1 W. Black. Rep. 95; 6 Mod. 62.

[2] 10 Co. 23, 24 b; 2 H. Black. 463, 500.

[3] Co. Lit. 381 a; Marshall, Ch. J., 12 Wheaton, 332; 2 Scammon's Ill. Rep. 224.

[4] Thompson, Ch. J., 15 Johnson, 380; 14 Mass. R. 92.

[5] 1 Wheaton, 326.

taken in a technical sense, unless it clearly appears from the context or other parts of the instrument that the words were intended to be applied differently from their ordinary or their legal acceptation.[1]

Several acts *in pari materia* (in a like matter) and relating to the same subject are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system.[2] Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed the legislature intended to make any innovation upon the common law further than the case absolutely required. This has been the language of the courts in every age. In the construction of statutes the sense which the contemporary members of the profession had put upon them is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege*.[3] (A contemporaneous exposition is strongest in law.) Statutes that are remedial and not penal are to receive an equitable interpretation, by which the letter of the act is sometimes restrained and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or be repealed. Though the offence be committed before the expiration of the act, the party cannot be punished

[1] 9 Vermont R. 269.

[2] 1 Burr. Rep. 445; Doug. Rep. 27; 4 Co. 4; 4 Term R. 447, 450; 5 Term R. 417; Dwarris on Stats. 699; 15 Johnson, 380, S. P.

[3] Vaughn Rep. 169; 1 Cranch, 299; 1 Wheaton, 304; 6 Wheaton, 264.

after it has expired unless a particular provision be made by law for the purpose.[1] If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute. The great object of the maxims of interpretation is to discover the true intention of the law.

[1] 1 Wm. Black. Rep. 451; 7 Wheaton, 551; 4 Dallas, 372; 2 McCord's Rep. 1; Anon. 1 Wash. Cir. Rep. 84; 1 Stewart's Ala. Rep. 347; 11 Pick. Rep. 350; 2 Bailey's S. C. Rep. 584; 4 Yates, 392; Wharton, Dig. 709, n. 6; 1 Hill's N. Y. Rep. 324.

LECTURE XXI.

OF REPORTS OF JUDICIAL DECISIONS.

HAVING considered the nature and force of written law and the general rules which are applied to the interpretation of statutes, we are next to consider the character of unwritten or common law and the evidence by which its existence is duly ascertained. The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the legislature.

A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received from time to time the sanction of the courts of justice without any legislative act or interference.

The best evidence of the common law is to be found in the decisions of the courts of justice contained in numerous volumes of reports and in the treatises and digests of learned men.

The reports of judicial decisions contain the most certain evidence and the most precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts and brought within the same reason.

The oldest reports extant on the English law are the Year Books, which consist of eleven parts or vol-

umes, written in law French, and extend from the beginning of the reign of Edward II. to the latter end of the reign of Henry VIII., a period of about two hundred years.

The reports of Dyer relate to the reigns of Henry VIII., Edward VI., Mary, and Elizabeth. Plowden's Commentaries embrace the same period as the reports of Dyer.

Lord Coke's Reports, in thirteen parts, are confined to the reigns of Elizabeth and James, and deservedly stand at the head of the ancient reports, as an immense repository of common law learning.

Hobart's Reports in the time of James I. were printed in 1646, and subsequently were revised by Lord Chancellor Nottingham.

Croke's Reports of Decisions in the Reigns of Elizabeth, James, and Charles are a work of credit and celebrity among the old reporters.

The reports of Yelverton are a small collection of select cases in the latter part of the reign of Elizabeth and the first part of that of James.

In the reign of Charles II. the most distinguished of the reports are those of Chief Justice Saunders. From the era of the English Revolution the reports increase in value and importance; and they deal more in points of law applicable to the great change in property and the commerce and business of the present times.

A still deeper interest must be felt by the American lawyer in the perusal of the judicial decisions of his own country. Our American reports contain an exposition of the common law as received and modified in reference to the genius of our institutions. We have hitherto spoken of the reports of cases in the courts of

common law. But the system of equity is equally to be found embodied in the reports of adjudged cases, and the rules and usages of the Court of Chancery are as fixed as those which govern other tribunals. They have been regarded as a kind of secondary common law framed or promulgated by the Court of Chancery within the last two centuries. Vernon's Reports are the best of the old reports in chancery.

Precedents in Chancery is a collection of cases from 1689 to 1722.[1] Peere Williams' Reports extend from the beginning of the last century to the year 1735. Lord Talbot presided in chancery but a very few years: the cases during his time, under the title of Cases tempore Talbot, are well reported and have a reputation for accuracy. The decisions of Lord Hardwicke are reported in the elder Vesey and Atkyns, and partly in Ambler and Dickens.

Eden's Reports of the decisions of Lord Northington, the successor to Lord Hardwicke, are very authentic and highly esteemed. Cox's Cases in Chancery give us the decisions of Lord Kenyon. The reports of the younger Vesey extend over a large space of time, and contain the researches of Sir Richard Pepper Arden, and the whole of the decisions of Lord Loughborough, and carry us far into the time of Lord Eldon.

The old cases prior to the year 1688 need only be occasionally consulted and the leading decisions in them examined. Some of them, however, are to be deeply explored. The reports of cases since the middle of the last century ought in most instances to be read in course. They give us the skilful debates at the bar and the elaborate opinions on the bench delivered with the authority of oracular wisdom.

[1] 1 Vesey Jr. 547; 3 Vesey, 285; 5 Vesey, 664.

LECTURE XXII.

OF THE PRINCIPAL PUBLICATIONS ON THE COMMON LAW.

ONE of the oldest of these treatises is Glanville's Tractatus de Legibus Angliæ, composed in the reign of Henry II. It is a plain, dry, perspicuous essay on the ancient actions and the forms of writs then in use. Bracton wrote his treatise De Legibus et Consuetudinibus Angliæ in the reign of Henry III. He is a classical writer, and has been called the father of the English law. Britton and Fleta, two treatises in the reign of Edward I., were nothing more than appendages to Bracton, from which they drew largely. Sir John Fortescue's treatise, De Laudibus Legum Angliæ, was written in the reign of Henry VI., under whom he was chief justice, and afterwards chancellor. Littleton's Book of Tenures was composed in the reign of Edward IV., and it is confined entirely to the doctrines of the old English law concerning the tenure of real estates and the incidents and services relating thereto.

Perkins' treatise of the Laws of England, written in the reign of Henry VIII., has always been deemed a valuable book. The Dialogue between a Doctor of Divinity and a Student in Law was written by St. Germain in the reign of Henry VIII., and discusses in a popular manner many principles and points of common law. But the legal productions of the preceding

ages were all surpassed in value and extent in the reigns of Elizabeth and James by the results of the splendid talents and immense erudition of Bacon and Coke. The writings of Lord Bacon are distinguished for the perspicuity and simplicity with which every subject is treated. Lord Coke's Institutes have had a most extensive and permanent influence on the common law of England.

Before we quit the period of the old law, we must not omit to notice the grand abridgments of Statham, Fitzherbert, and Brooke. Even those exceedingly laborious abridgments were to be superseded by the abridgments of Rolle and his successors. Dr. Cowell published in Latin an Institute of the Laws of England. Reeves' History of the English Law contains the best account that we have of the progress of the law from the time of the Saxons to the reign of Elizabeth.

The treatise of Sir Henry Finch was first published in French in 1613. Sheppard's Touchstone is a work of great value and authority touching the common law modes of conveyance and those derived from the statute of uses. Since the period of the English Revolution the new digests have superseded the use of the former ones; and Bacon, Viner, Comyns, and Cruise contain such a vast accession of modern law learning that their predecessors have fallen into oblivion.

The various treatises of Baron Gilbert are of high value and character. The treatises on the Pleas of the Crown, by Sir Matthew Hale and Sergeant Hawkins, appeared early in the last century, and they contribute to give precision and certainty to that most deeply interesting part of jurisprudence. Sir Martin Wright's Introduction to the Law of Tenures is an excellent work. Dr. Wood published in 1722 his Institutes of

the Laws of England. But Wood's Institutes were superseded by the commentaries of Sir William Blackstone, who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects, which were harsh and forbidding in the pages of Coke, the attractions of a liberal science and the embellishments of polite literature. The second and third volumes of the commentaries are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use, and the greater part of the matter in those volumes is law at this day and on this side of the Atlantic.

LECTURE XXIII.

OF THE CIVIL LAW.

THE great body of the Roman or civil law was collected and digested by order of the Emperor Justinian in the former part of the sixth century. The institutions of every part of Europe have felt its influence. With most of the European nations and in the new states of Spanish America, in the province of Lower Canada, and in one of these United States,[1] it constitutes the principal basis of their unwritten or common law. As the royal laws collected by Papirius had ceased to operate except indirectly by the force of usage, and as the Romans for twenty years after the expulsion of Tarquin had been governed without any known public rules, they began to suffer the evils of uncertain and unsteady laws. A commission of three persons was instituted to form a system of law. This commission gave birth to the Twelve Tables, which constitute the commencement of what has been called the middle period of the Roman jurisprudence. They contain a great deal of wisdom and good sense, intermixed with folly, injustice, and cruelty. They were engrossed on tables of wood, or brass, or ivory,[2] and were exposed to destruction, though unquestionably preserved, when the city was burnt by the Gauls.[3] They did not survive the sixth century of the Christian era.

[1] Civil Code Louisiana, 1824.

[2] Heinec. Hist. Jur. Civ. lib. 1, sec. 26.

[3] Livy, b. 6, c. 1.

The edicts of the prætor became another very important means of the increase and improvement of the Roman law. The prætor was at first a patrician, though the office in time became accessible to plebeians. Every prætor, on entering into office, established and published certain rules and forms as the principle and method by which he proposed to administer justice for the year. He had no power to alter these rules, and this *jus prætorium vel honorarium* tempered the ancient law by the spirit of equity.[1] The opinions of lawyers, called the *responsa*, composed another very efficient source of the ancient Roman law.

In the Augustan age the body of the Roman law had grown to immense magnitude.[2] Publius and Quintus Mucius, Brutus, and Manilius, all left volumes upon law, and the three books of the latter existed in the time of Pomponius as monuments of his fame.[3] Servius Sulpicius left behind him nearly 180 volumes upon the civil law.

The noble design of reducing the civil law into a convenient digest was conceived by such great men as Cicero, Pompey, and Julius Cæsar. Before the time of Augustus the *responsa prudentum* had not the force of any authority in the forum. The judgments of the prince were called imperial constitutions, and they were usually enacted and promulgated in three ways: 1st. By rescript or letter, in answer to petitions or a distant magistrate;[4] 2d. By decrees passed by the emperor on a public hearing in a court of justice; 3d. By edict or voluntary ordinances. The first authoritative digest of the Roman law which appeared was the Perpetual Edict, compiled by Salvius Julianus. Papirius

[1] Dig. 1. 1. 7. 8. [2] Livy, 3, 34. [3] Dig. 1. 2. 36. 39.
[4] Code 1. 14. 3; Gravina, De Ortu et Prog. sec. 123, 124.

Justus collected some of the imperial constitutions into twenty books, and Julius Paulus compiled six books of decrees or imperial decisions. Gregorius digested into order the chief of the imperial rescripts from Hadrian to Diocletian, which was called the Gregorian Code. Hermogenes continued this collection under the name of the Hermogenian Code.[1]

The Theodosian Code became a standard work throughout the empire. The compilations made under Justinian, and which constitute the existing body of the civil law, consist of the following works, which I shall mention in the order published: (1.) The Code, in twelve books, is a collection of all the imperial statutes deemed worth preserving from Hadrian to Justinian. The work was accomplished by Tribonian and nine learned assistants. (2.) The Institutes, or Elements of the Roman law, in four books, were collected by Tribonian and two associates. (3.) The Digest, or Pandects, is a vast abridgment in fifty books of the decisions of prætors, and of the writings and opinions of the ancient sages of the law. (4.) The Novels of Justinian are a collection of new imperial statutes. When the body of the civil law thus made up was ratified and confirmed by Justinian it became exclusively the law of the land.

The civil law followed the progress of the Roman power into ancient Britain. After the Roman law had been expelled by the Northern barbarians, and supplanted by the crude institutions of the Anglo-Saxons, it was again introduced into the island upon the recovery of the Pandects, and taught in the first instance with the same zeal as on the continent. In everything which concerns civil and political liberty it cannot be

[1] Heinec. Hist. Jur. Civ. lib. 1, sec. 368–372.

compared with the free spirit of the English and American common law. But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice.

PART IV.

OF THE LAW CONCERNING THE RIGHTS OF PERSONS.

LECTURE XXIV.

OF THE ABSOLUTE RIGHTS OF PERSONS.

THE rights of persons in private life are either absolute, being such as belong to individuals in a single unconnected state; or relative, being those which arise from the civil and domestic relations.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.

I. *Of the Right of Personal Security.* The right of personal security is guarded by provisions which have been transcribed into the constitutions in this country from *Magna Charta*, and other fundamental acts of the English parliament, and it is enforced by additional and more precise injunctions. The substance of the provisions is that no person, except on impeachment, and in cases arising in the military and naval service, shall be held to answer for a capital or otherwise infamous crime, or for any offence above the common law degree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a grand jury;[1] that no person

[1] 1 Battle, N. C. Rep. 42; 9 N. H. Rep. 468; 5 Greenleaf, 254; 5 Mass. Rep. 259.

shall be subject for the same offence to be twice put in jeopardy of life or limb;[1] nor shall he be compelled in any criminal case to be a witness against himself; and in all criminal prosecutions the accused is entitled to a speedy and public trial by an impartial jury; and upon the trial he is entitled to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. And as a further guard against abuse and oppression in criminal proceedings, it is declared that excessive bail cannot be required, nor excessive fines imposed, or cruel and unusual punishments inflicted; nor can any bill of attainder or *ex post facto* law be passed. The Constitution of the United States, and the constitutions of almost every state in the Union, contain the same declarations in substance, and nearly in the same language.

II. *Of Slander and Libels.* As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.

III. *Of Personal Liberty and Security.* (1.) Writ of *habeas corpus.* The right of personal liberty is another absolute right of individuals which has long been a favorite object of the English law.

It is not only a constitutional principle, as we have already seen, that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint or imprisonment by the security of the privilege of the writ of *habeas corpus.* Every restraint

[1] 2 Sumner, 19.

upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected. All persons restrained of their liberty, under any pretence whatsoever, are entitled to prosecute the writ unless they be persons detained: 1st. By process from any court or judge of the United States having exclusive jurisdiction in the case. 2d. Or by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction other than in the case of a commitment for any alleged contempt.

The application for the writ must be to a competent court, or a judge of the court, or other officer having the powers of a judge at chambers; and it must be by petition in writing, signed by or on behalf of the party; and it must state the grounds of the application, and the facts must be sworn to. Generally, a person discharged upon *habeas corpus* is not to be reimprisoned for the same cause; but it is not to be deemed the same cause if he be afterwards committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted or convicted; or if the discharge was for defect of proof, or defect in the commitment, in a criminal case, and he be again arrested on sufficient proof and legal process; or if in a civil case, or discharge on mesne process, he be arrested on execution, or on mesne process in another suit, after the first suit is discontinued. The *habeas corpus* act has always been considered in England as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt, and efficient

remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right.

(2.) The writ of *homine replegiando*, or writ of personal replevin, is disused in most of our states. Its application was mainly in the case of fugitives from service.

(3.) Writ of *ne exeat*. In England the king, by the prerogative writ of *ne exeat*, may prohibit a subject from going abroad without license. But this prerogative is said to have been unknown to the common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure.

IV. *The Free Exercise and Enjoyment of Religious Profession and Worship* may be considered as one of the absolute rights of individuals, recognized in our American constitutions, and secured to them by law. Civil and religious liberty generally go hand in hand, and the suppression of either of them for any length of time will terminate the existence of the other. It is ordained by the Constitution of the United States [1] that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, and the same principle appears in all the state constitutions.

[1] Const. U. S. Amendments, art. 1.

LECTURE XXV.

OF ALIENS AND NATIVES.

We are next to consider the rights and duties of citizens in their domestic relations as distinguished from the absolute rights of individuals, of which we have already treated. Most of these relations are derived from the law of nature, and they are familiar to the institutions of every country, and consist of husband and wife, parent and child, guardian and ward, and master and servant. To these may be added an examination of certain artificial persons created by law, under the well-known name of corporations. There is a still more general division of the inhabitants of every country, under the comprehensive title of aliens and natives, and to the consideration of them our attention will be directed in the present lecture.

(1.) Natives are all persons born within the jurisdiction of the United States. (2.) An alien is a person born out of the jurisdiction of the United States. By the ancient English law children of public ministers abroad, provided their wives be English women, are an exception.

An alien cannot acquire property by descent or other mere operation of law. Nor can an alien take as tenant by the curtesy or in dower. An alien has no inheritable blood. If an alien purchase land, or if land be devised to him, in these cases he may take and

hold until an inquest of office has been had, but upon his death the land would escheat and vest in the state because he is incompetent to transmit by descent.[1] In like manner aliens cannot be seized to uses and trusts arising out of real estates as against the state. Aliens are capable of acquiring, holding, and transmitting movable property like our own citizens. They may even be mortgagees of real estate. The Supreme Court have held an alien creditor entitled to a foreclosure and sale of land. Even alien enemies, resident, may sue and be sued as in time of peace; for protection is due and implied from the permission for them to remain, without being ordered to leave the country by the President. Resident aliens owe a local allegiance, and are equally bound with natives to obey the law. An alien can be naturalized, and then has the rights of a native citizen for most purposes. If an alien dies before he has taken any steps to be naturalized, his personal estate goes according to his will or the laws of distribution of the place of his domicil at the time of his death.[2]

[1] Page's case, 5 Co. 52; 1 Sid. Rep. 193; 1 Lev. Rep. 59, S. C.; Co. Litt. 2 b; Plowd. Rep. 229 b, 230 a; 5 Bro. P. C. 91; 12 Mass. Rep. 143; 8 Mass. Rep. 445; 7 Cranch, 603, 619, 620; 4 Wheaton, 453; 11 Wheaton, 332; 1 McCord's S. C. Ch. Rep. 352, 374; 2 Dana's Kentucky R. 40; 3 Iredell's N. C. Rep. 196; 2 Haywood's N. C. Rep. 37, 104, 108; Gould's Rep. 29, pl. 4; Co. Litt. 180 b; 16 Pick. 179; 20 Pick. 124; 2 Hill's N. Y. R. 67.

[2] 1 Binney's Rep. 336; 3 Johns. Ch. Rep. 210; 1 Mason's Rep. 408.

LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

THE most important of the domestic relations is that of husband and wife.

(1.) All persons who are incapable of dealing with discretion in the common affairs of life, as idiots and lunatics (save in their lucid intervals), cannot agree to any contract, including that of marriage. A marriage procured by force or fraud is also void, a free assent by both parties being essential. (2.) No persons can make a binding contract of marriage until they have reached the age of consent, which, by the common law, is fourteen in males and twelve in females. Marriage before that age is voidable at the election of either party on arriving at age of consent. But the rule in regard to actual marriage does not apply to a contract for marriage or any other contract between a competent party and an infant. The person of full age is absolutely bound and the contract voidable at election of the infant.[1] (3.) No person can marry while former husband or wife is living unless they have been legally divorced. (4.) In most countries of Europe, marriages are prohibited between near relations by blood or marriage. (5.) The consent of parents or guardians to the marriage of minors is not requisite to the validity of the marriage. (6.) No peculiar ceremonies are requisite by the common law

[1] 2 Str. 937.

to the valid celebration of the marriage. The consent of the parties is all that is required. (7.) It has been questioned whether a marriage in Scotland between English parties resident in England and intending to evade the English marriage act could be regarded in England as valid. The law of marriage is part of the law of nations, and a marriage valid by the law of the place where celebrated is valid everywhere.[1]

[1] 2 Hagg. Cons. Rep. 407, 419, 423–436; 3 Starkie's N. P. Cases, 178; 2 Hagg. Cons. Rep. 390, 391; Shelford on Marriage and Divorce, p. 143.

LECTURE XXVII.

OF THE LAW CONCERNING DIVORCE.

WHEN a marriage is duly made it continues until dissolved by the death of one of the parties or by divorce.

I. *Of Divorce a Vinculo.* By the ecclesiastical law a marriage may be declared void from the beginning for causes existing prior to marriage, such as precontract, fear, impotence, affinity or consanguinity.[1] (1.) Neither party can obtain a divorce for adultery, if the other party proves a like infidelity. (2.) So if the injured party afterwards lives with the other after knowledge of fact, it is in law a forgiveness of the offence and a bar to the divorce. (3.) By active procurement or connivance of the other's guilty conduct.[2]

II. *Of Foreign Divorces.* The first inquiry is how far the legislature of a state under the Constitution of the United States can interfere with the marriage contract in its own jurisdiction.

A law punishing a breach of contract by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is not a law impairing the obligation of contracts. It has been question how far a divorce in one state is valid in another.[3]

[1] Co. Litt. 235 a.
[2] 3 Hagg. Eccl. Rep. 57, 74, 76, 85, 87, 129, 131, 133, 137, 150.
[3] 8 Conn. 541.

The difficulty is when parties leave the state of their marriage and domicile for the purpose of obtaining a divorce under the more favorable law of another state. It seems that a divorce in one state, judicially conducted and declared and procured under circumstances which gave the court full jurisdiction of the cause and of the parties, would be good and binding in every other state.

III. *Effect of Foreign Judgments and Suits.* (1.) *Foreign Judgments.* It has been maintained that a foreign decree of divorce in the case of a foreign marriage was conclusive.[1] A distinction has since been made between a suit brought to enforce a foreign judgment and a plea of a foreign judgment in bar of a fresh suit for the same cause.

(2.) *A pending suit* has, in case of proceedings *in rem*, been held to be a good plea in abatement of a suit.

IV. *Of Divorces a Mensa et Thoro* (from bed and board). These qualified divorces are allowed by the laws of almost all countries, and generally for the cause of extreme cruelty or adultery.

[1] 2 Swanst. 242, Lord Nottingham's MSS.

LECTURE XXVIII.

OF HUSBAND AND WIFE.

By the common law a husband and wife are regarded as one person, and her legal existence is in a degree lost or suspended during the continuance of the matrimonial union.[1] No contracts can be made between husband and wife without the intervention of trustees, for she is considered as under his power and incapable of contracting with him. A husband may devise lands to his wife, for the instrument only takes effect after his death. It is a general rule that the husband acquires upon the marriage all the goods and chattels of the wife, and the right to receive rents and profits of her lands, and he becomes liable to pay her debts and perform her contracts.

I. *The Right which the Husband acquires by Marriage in the Property of the Wife.* (1.) *To her Lands in Fee.* If the wife at the time of marriage be seized of an estate of inheritance in land, the husband becomes seized of the freehold in right of his wife, and he takes the rents and profits during their joint lives.[2] It is a freehold estate, since it must continue during their joint lives and may last during his life. He will hold it during her life only unless he

[1] Co. Litt. 112 a, 187 b; Litt. sec. 168, 291; 1 Black. Comm. 441; Erskine's Inst. b. 1, tit. 6, sec. 19, 22; Stair's Inst. b. 1, tit. 4, sec. 13, 16.

[2] Co. Litt. 351 a.

be a tenant by curtesy, which occurs when, having had issue born alive, he survives her. If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not strictly joint tenants nor tenants in common. They are both seized of the entirety, and neither can sell without the consent of the other; and the survivor takes the whole.[1]

(2.) *To her Life Estate.* If the wife at the time of the marriage hath an estate for life, the husband becomes seized of such estate. If it be an estate for her own life, his interest is gone at her death; if for the life of another and the husband survive her, he becomes a special occupant of the land during such person's life.

(3.) *To her Chattels Real.* The husband, upon marriage, becomes possessed of the chattels real of the wife (as leases for years), and he may dispose of the same as he pleases by any act during his life. If he survives his wife, the law gives him her chattels real by survivorship, for he was possessed of them by a kind of joint tenancy with his wife.[2]

(4.) *To her Choses in Action.* Debts, or *choses in action*, due to the wife, the husband may sue for and recover, and when reduced to his possession become his own.

(5.) As to personal property in possession of the wife, such as money and goods, they vest in the husband.[3]

II. *The Duties which the Husband assumes.* (1.) *To pay her Debts.* The husband is answerable for his

[1] Preston on Estates, 131.

[2] Co. Litt. 351 b; Butler's note 304 to Co. Litt. lib. 3, 351 a; 1 Rol. Abr. 345, pl. 40.

[3] Co. Litt. 351 b.

wife's debts before coverture, but if they are not recovered during the coverture he is discharged.

(2.) *To maintain her.* The husband is bound to provide his wife with necessaries suitable to her situation and his condition in life; and if she contracts debts due for them during cohabitation he is obliged to pay those debts, but is not chargeable for anything beyond necessaries.

(3.) *The Husband is liable for the Torts* and *Frauds* of the wife committed during coverture. If committed in his company, or by his order, he alone is liable; if not they are jointly liable.

III. *Wife's Capacity at Law to act as a Feme Sole.* (1.) *To purchase and sell Land.* The disability of the wife to contract so as to bind herself is a rule subject to certain exceptions. A wife may purchase an estate in fee without her husband's consent, and the conveyance will be good if the husband does not avoid it, and the wife after her husband's death may disagree to the purchase.[1]

(2.) *To sue and be sued.* If the husband lives abroad, the wife becomes capable of contracting and of suing and being sued.

IV. *Wife's Capacity in Equity.* (1.) *Of Property in Trust for Wife.* In equity a wife is allowed, through the medium of a trustee, to enjoy property as freely as a *feme sole;* and it is not unusual to convey or bequeath property to a trustee in trust to pay the interest or income thereof to the wife, free from the debts, control, or interference of her husband. The husband himself may be the trustee.

(2.) *Her Power under Settlements.* If, by marriage settlement, the estate of the wife be secured to

[1] Litt. sec. 677; Co. Litt. 3 a, 356 b; 2 Black. Comm. 292.

her separate use, the husband is accountable for that part which he receives. These settlements are intended to secure to the wife a certain support, and to guard her against the misfortunes or vices of her husband.

(3.) *Protection against her Covenants.* A wife cannot be held bound by her covenants of warranty made during coverture.

(4.) *Power to appoint by Will.* A wife cannot devise her lands by will, for she is excepted out of the statute of wills; she may dispose of her separate personal estate settled upon her or held in trust for her.

(5.) *Marriage Settlements.* Equity will enforce a specific performance of fair and valid antenuptial agreements. Settlements after marriage may be good if for a valuable consideration.

V. *Other Rights and Disabilities incident to the Marriage Union.* Husband and wife cannot be witnesses for or against each other in a civil suit. But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge the husband.[1] The husband is the guardian of the wife and bound to protect and maintain her; and the law has given him a reasonable control over her person. The husband is the best judge of the wants of the family and the means of supplying them; and if he changes his domicile the wife is bound to follow him.[2]

The respective common law rights of husband and wife have been greatly modified by the statutes of the different states.

[1] 1 Str. Rep. 527; 1 Esp. N. P. Rep. 142; 2 Esp. N. P. Rep. 511, note; 8 Moore's Rep. 16; 1 Bing. Rep. 199, S. C.; 2 Hall's N. Y. Rep. 550; 3 Neville & Manning, 422.

[2] 17 Martin's Louisiana Rep. 60.

LECTURE XXIX.

OF PARENT AND CHILD.

I. *Of the Duties of Parents.* (1.) *Of maintaining Children.* It is the duty of the parent to maintain the child until the latter is capable of providing for himself,[1] but a father is not bound by the contract of his son even for articles suitable and necessary, unless an actual authority be proved or the circumstances imply one.[2]

(2.) *Of educating Children.* It is the duty of the parent to educate the child in a manner suitable to his station and calling. Early education is made the subject of much attention and legislation in the several states.

II. *Of the Rights of Parents.* As parents are bound to maintain and educate their children the law has given them the requisite authority to properly fulfil their duty.

III. *Of the Duties of Children.* Children owe to their parents the duties of obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives.

IV. *Of Illegitimate Children.* Illegitimate children, or bastards, are persons begotten and born out of wedlock.

[1] Paley's Moral Phil. 223; Taylor's Elements Civil Law, 383; Puff. Droit de la Nature, b. 4, ch. 11, sec. 4 and 5.

[2] 2 Starkie, 501.

A bastard, being in the eye of the law the child of no one (*nullius filius*),[1] has no inheritable blood, and is incapable of inheriting as heir; nor can he have heirs but of his own body,[2] but the statutes of many of the states provide that the mother and bastard may inherit from each other. The mother or reputed father is generally, in this country, chargeable by law with the maintenance of the bastard child. The father is liable upon his implied contract for the necessary maintenance of a bastard child, without any compulsory order, provided he has adopted the child as his own.[3]

[1] Co. Litt. 123 a. [2] 1 Black. Comm. 459.
[3] 5 Esp. N. P. Rep. 131; 3 Carr. & Payne, 36; 7 Dowl. & Ryl. 612; 19 Wendell, 405.

LECTURE XXX.

OF GUARDIAN AND WARD.

THE relation of guardian and ward applies to children during their minority, and may exist in the lifetime of the parents if the infant becomes vested with property, but it usually takes place on the death of the father, and the guardian is intended to supply his place. There are two kinds of guardianship, one by the common law and the other by statute; and there were three kinds of guardians at common law, namely, guardian by nature, by nurture, and in socage.[1]

(1.) Guardian by *nature* is the father, and on his death the mother, and this guardianship extends to the age of twenty-one years and to the custody of the person of infant. (2.) Guardian by *nurture* occurs only when the infant is without any other guardian, and it belongs exclusively to the parents, — first to the father and then to the mother; it extends only to the person, and terminates when the infant arrives at the age of fourteen. (3.) Guardian *in socage* has the custody of infant's lands as well as of his person,[2] this guardianship ceasing when the infant attains fourteen years, provided the infant elects another guardian, which he may do. This guardianship is a personal trust, and is not transmissible by succession, nor devisable or assignable. (4.) *Testamentary guardians* are founded on the deed or last will of the father; they supersede

[1] Co. Litt. 88 b; 3 Co. 37 b. [2] Com. Dig. tit. Guardian, B.

the claims of any other guardian, and extend to the person and estate of the child and continue during minority. (5.) The different kinds of guardians mentioned have been very generally superseded by the chancery or statutory guardians.

The guardian of the estate has no further control over the ward's real estate than what relates to the leasing of it and the reception of the rents and profits. Besides these general guardians, every court has the incidental power to appoint a guardian *ad litem* (for the purposes of a suit).[1]

The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money, nor act for his own benefit in any contract or purchase or sale as to the subject of the trust.

[1] Harg. note 70, and note 220 to lib. 2, Co. Litt.; Carth. 255; 1 Atk. 489; 1 Harris & Gill, 220.

LECTURE XXXI.

OF INFANTS.

(1.) *When of Age.* The necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years.

(2.) *Acts void or voidable.* Most of the acts of infants are voidable only, and not absolutely void; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done and contracts made in infancy.

(3.) *Acts avoided or confirmed.* If the deed or contract of an infant be voidable only, it is nevertheless binding on the adult with whom he dealt, so long as it remains executory, and is not rescinded by the infant.[1] If any act of confirmation be requisite after he comes of age, to give binding force to a voidable act of his infancy, slight acts and circumstances will be a ground from which to infer the assent.

(4.) *Acts binding on an Infant.* Infants are capable, for their own benefit and the safety of the public, of doing many binding acts. Contracts for necessaries are binding upon an infant, and he may

[1] 1 Mod. Rep. 25; Str. Rep. 937; 2 Maule & Selw. 205; 10 Serg. & Rawle, 114.

be sued and charged in execution on such a contract, provided the articles were necessary for him under the circumstances and condition in which he was placed.[1] The question of necessaries is governed by the real circumstances of the infant, and not by his ostensible situation; and therefore the tradesman who trusts him is bound to make due inquiry, and if the infant has been properly supplied by his friends the tradesman cannot recover.[2]

Infancy is not permitted to protect fraudulent acts. An infant has a capacity to do many other acts valid in law. He may bind himself as an apprentice, or make a contract for service and wages, it being an act manifestly for his benefit.

(5.) *Their Marriage Settlements.* In consequence of the capacity of infants at the age of consent to contract marriage, their marriage settlements, when reasonable, have been held valid in chancery; but it has long been an unsettled question whether a female infant could bind her real estate by a settlement upon marriage.

(6.) *Suits in Equity against them.* The answers of guardians *ad litem* of infants to the suits of creditors are not binding upon the infants;[3] such an answer in chancery, *pro forma*, leaves the plaintiff to prove his case, and throws the infant upon the protection of the court.

[1] Cro. J. 560; 5 Esp. N. P. 28, 152; 1 Holt's Rep. N. P. 77; 6 Yerger's (Tenn.) Rep. 1.

[2] Peake's N. P. 239; 4 Carr. & Payne, 526; 4 Meeson & Welsby, 727.

[3] Carthew's Rep. 79.

LECTURE XXXII.

OF MASTER AND SERVANT.

THERE are three kinds of servants: (1.) slaves; (2.) hired servants; and (3.) apprentices.

(1.) Slavery having been abolished in this country, its discussion here is unnecessary.

(2.) *Of Hired Servants.* The relation of master and hired servant is one founded wholly upon contract. One agrees to do the work, the other to pay the agreed price. If a servant hired for a definite period leaves the service before its end without good cause, or is rightly dismissed, he loses the right to wages for the period he has served.[1] The master is bound by the act of his servant either in respect to contracts or injuries, when the act is done by authority of the master. But the master is not liable where the servant wilfully commits an injury.

(3.) *Apprentices* are servants bound to service for a term of years to learn some art or trade. The term of apprenticeship generally extends through the minority of the person bound, who, unless he is chargeable as a pauper, must be a party to the indenture. Upon the death of the master the apprenticeship is dissolved, but the assets in the hands of his representative are chargeable with the maintenance of the infant apprentice.[2]

[1] 2 Carr. & Payne's N. P. Rep. 510; 6 Ibid. 15; 1 Watts & Serg. 265; 12 Louisiana Rep. 67; 1 Blackford's Ind. Rep. 122.

[2] 1 Salk. Rep. 66; Str. Rep. 1266; 5 Miller's Louisiana Rep. 266.

LECTURE XXXIII.

OF CORPORATIONS.

A CORPORATION is a franchise (or special privilege granted by government to individuals) possessed by one or more persons who subsist as a body politic under a special name, and are vested by law with the capacity of perpetual succession, and of acting in several respects as a single individual. The object of its institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body undisturbed by the change of members. All the individuals composing a corporation and their successors are considered in law but as one person, capable of taking and conveying property and contracting debts.

One of the peculiar features of a corporation is its power of perpetual succession. The rights of the corporation do not end or vary upon the death or change of any of the individual members; they last as long as the corporation endures. The immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. Many corporations are limited in duration to a few years.

I. *Of the History of Corporations.* Corporations, private as well as public or municipal, were well known to the Roman law, and they existed from the earliest periods of the Roman republic. It would

appear, from a passage in the Pandects,[1] that they were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law. The powers, capacities, and incapacities of corporations under the English law very much resemble those under the civil law; and it is evident that the principles of law applicable to corporations under the former were borrowed chiefly from the Roman law, and from the policy of municipal corporations established in Britain and the other Roman colonies after the countries had been conquered by Roman arms. Under the latter system corporations were divided into ecclesiastical and lay, civil and eleemosynary. The propensity, in modern times, has been to multiply civil corporations, especially in these United States, where they have increased in a rapid manner, and to a most astonishing extent. The demand for charters of incorporation is not merely for municipal purposes, but usually for the more private and special object of assisting individuals in their joint stock operations and enterprising efforts directed to the business of commerce, manufactures, and the various details of internal improvement. This branch of jurisprudence becomes an object of curious as well as of deeply interesting research.

The multiplication of corporations, and the avidity with which they are sought have arisen in consequence of the power which a large and consolidated capital gives them over business of every kind, and the facility which the incorporation gives to the management of that capital, and the security which it affords to

[1] Dig. 47. 22. 4; 3 St. John, Manners Ancient Greece, 76, 77.

the persons of the members, and to their property not vested in the corporate stock.

II. *Of the Various Kinds of Corporations and how created.* Corporations are divided into *aggregate* and *sole*.[1] The former consists of two or more persons. A corporation sole consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he could not have. A bishop, dean, parson, and vicar are given in the English books as instances of sole corporations; and they and their successors in perpetuity take the corporate property and privileges; and the word "successors" is generally as necessary for the succession of property in a corporation sole, as the word "heirs" is to create an estate of inheritance in a private individual.[2] A fee will pass to a corporation aggregate, without the word successors in the grant, because it is a body which in its nature is perpetual; but, as a general rule, a fee will not pass to a corporation sole without the word successors, and it will continue for the life only of the individual clothed with the corporate character.[3] Another division of corporations by the English law is into *ecclesiastical* and *lay*. The former are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us they are called religious corporations. Lay (or secular) corporations are again divided into *eleemosynary* and *civil*. An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and

[1] Co. Litt. 8 b, 250 a. [2] Co. Litt. 8 b, 9 a.
[3] Co. Litt. 94 b, and notes 46 and 47 to Co. Litt. lib. 1; Viner, tit. Estate, L.

bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons; and colleges and academies established for the promotion of learning and piety, and endowed with property by private and public donations.[1] Civil corporations are established for a variety of purposes, and they are either *public* or *private.*

Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state.[2]

They may also be empowered to take or hold private property for municipal purposes, and such property is invested with the security of other private rights.

III. *Of the Powers and Capacities of Corporations.* (1.) *Their ordinary powers* are: (*a.*) to have perpetual succession, which includes election of members; (*b.*) To sue and be sued and to grant and receive; (*c.*) To purchase and hold lands and chattels; (*d.*) To have a common seal; (*e.*) To make by-laws for corporate government; (*f.*) The power of removal of members.

(2.) *Of Quasi Corporations.* There are some persons and associations who have a corporate capacity for certain ends only, but can in that capacity sue and be sued as an artificial person.[3] Every county and town is a body politic for certain purposes.[4]

[1] 1 Black. Comm. 471; 1 Kyd on Corp. 25–27; 1 Lord Raym. 6, 8; 1 Ves. 537; 9 Ves. Jr. 405; 1 Burr. Rep. 200; 2 Term R. 353.

[2] 13 Wendell, 325.

[3] 4 Wharton's Rep. 531.

[4] N. Y. R. L. vol. 1, p. 337, 364; Statutes Ohio, 1831; Rev. Stats. Mass. 1835; Rev. Stats. Indiana, 1838.

(3.) *Of Corporations as Trustees.* A corporation has no other powers than those which are necessary to carry into effect the purposes for which it was established. It is incapable of a personal act in its collective capacity.[1] Corporations are competent to perform the duties of trustees, and we find them authorized to receive and take by deed or devise, in their corporate capacity, real and personal property in trust, and to execute any trust so created and declared.[2]

(4.) *Of their Capacity to hold Lands and to sue and be sued.* (*a.*) *To hold Lands.* Corporations at common law had the capacity to purchase and alien lands and chattels unless restrained by their charters or by statute.[3] In England, corporations are rendered incapable of purchasing lands without the king's license, and this restriction extends equally to ecclesiastical and lay corporations, and is founded upon a succession of statutes from *Magna Charta*, 9 Henry III. to 9 George II., which took away entirely the capacity which was vested in corporations by the common law. These statutes are known by the name of the statutes of mortmain (dead hands), and they applied only to real property, and were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges.[4] The earlier statutes of mortmain were originally levelled at the religious

[1] 1 Kyd on Corp. 225.

[2] Laws N. Y. April 17, 1822, ch. 240.

[3] Co. Litt. 44 a, 300 b; 1 Sid. 161, note; 10 Co. 30 b; 1 Kyd on Corp. 76, 78, 108, 115; Com. Dig. tit. Franchise, 11, 15–18; 3 Pick. R. 239.

[4] 3 Mylne & Keen, 517.

houses; but the statute of 15 Rich. II. c. 5, declared that civil or lay corporations were equally within the mischief and within the prohibition; and this statute made lands conveyed to any third person, for the use of a corporation, liable to forfeiture, in like manner as if conveyed directly in mortmain.[1]

(*b.*) *To sue and be sued.* Corporations have a capacity to sue and be sued by their corporate name. Private moneyed corporations are not only liable to be sued like private individuals for breaches of contract, but they may be sued by a special action on the case for neglect and breaches of duty, and in actions of trespass and trover for damages resulting from trespasses and torts committed by their agents under their authority, and such authority need not be under seal.[2]

(5.) *Of their Right to hold to Charitable Uses.* It has been a question of grave import and difficult solution, whether a corporation instituted as a charity could be permitted to become the *cestui que trust* of lands devised for charitable uses. Corporations are excepted out of the statute of wills in England, and in New York, and most of the other states; and it has been decided that they cannot be directly devisees at law.[3]

(6.) *Their Powers to make Contracts.* It was an ancient and technical rule of the common law, that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and

[1] Co. Litt. 2 b; 2 Black. Comm. 268–274; 1 Black. Comm. 497.

[2] 16 East's Rep. 6; 1 Adolph. & Ellis, 526; 1 Carr. & Marshman, 330, Phil. ed.; 6 Johns. Rep. 90; 6 Mass. Rep. 364; 4 Serg. & Rawle, 6; 3 Peters' U. S. Rep. 398; 5 Miller's Louisiana Rep. 461; 19 Pick. Rep. 516; 3 Hill, 193.

[3] 2 Caines' Cases in Error, 337.

acted only by its common seal.[1] Afterwards the rule was relaxed, and for the sake of convenience corporations were permitted to act, in ordinary matters, without deed, as to retain a servant, &c. That corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts to be deduced by inference from corporate acts, without either a vote or deed or writing, is a doctrine generally established in the courts of the several states, with great clearness and solidity of argument.[2]

(7.) *Of the Corporate Name.* It is general rule that corporations must take and grant by their corporate name. Without a name they could not perform their corporate functions; and a name is so indispensable a part of the constitution of a corporation, that if none be expressly given, one may be assumed by implication.[3]

(8.) *Of the Power to elect Members and make By-Laws.* The same principle prevails in these incorporated societies as in the community at large, and the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act, to be done by a select and definite body, as by a board of directors, and one to be per-

[1] Davies' Rep. 121.

[2] 1 N. H. Rep. 26; 14 Maine Rep. 444; 16 Ibid. 439; 10 Mass. R. 397; 1 Pick. Rep. 297; 2 Conn. Rep. 252; 12 Johns. Rep. 227; 14 Ibid. 118; 1 Cowen's Rep. 513; 3 Halsted's Rep. 182; 4 Serg. & Rawle, 16; 12 Ibid. 312; 5 Munf. Rep. 324; 1 Nott & McCord, 231; 12 Wheaton, 64; 14 Peters, 19; 1 Harr. & Gill, 324; 1 Aiken's Rep. 180; 1 B. Monroe's K. Rep. 14; 2 Ala. Rep. N. S. 451; Angell & Ames on Corp. 218, 219, 222, 2d ed.

[3] 1 Leon. Rep. 163; 1 Salk. Rep. 191; 1 Black. Comm. 474, 475; 1 Kyd on Corp. 234, 237, 250, 253; 10 Co. 28 b, 29 b.

formed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.

(9.) *Of the Power of Removal.* The power of amotion, or disfranchisement of a member for a reasonable cause, is a power necessarily incident to every corporation.

(10.) *Corporate Powers strictly construed.* The modern doctrine is, to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine,[1] and it has been repeated in the decisions of the state courts.[2]

IV. *Of the Visitation of Corporations.* I proceed next to consider the power and discipline of visitation to which corporations are subject. It is a power applicable only to ecclesiastical and eleemosynary corporations;[3] and it is understood that no other corporations go under the name of eleemosynary but colleges, schools, and hospitals.[4] The visitation of civil corporations is by the government itself, through the medium of the courts of justice.

V. *Of the Dissolution of Corporations.* A corpo-

[1] 2 Cranch, 167; 4 Wheaton, 686; 4 Peters' U. S. Rep. 168; 13 Peters, 587; 14 Peters, 122; 12 Wheaton, 68.

[2] 15 Johns. Rep. 358, 383; 5 Conn. Rep. 560; 2 Cowen's Rep. 664, 675; 3 Wendell, 482; 2 Cowen's Rep. 709; 7 Wendell, 31; 3 Pick. Rep. 232; 1 Stewart's Ala. Rep. 299; 9 Conn. Rep. 180; Angell & Ames on Corp. 239.

[3] 1 Black. Comm. 480; 2 Kyd on Corp. 174.

[4] 1 Wood, Lec. 474.

ration may be dissolved, it is said, by statute; by the natural death or loss of all its members, or of an integral part; by surrender of its franchises; and by forfeiture of its charter, through negligence, or abuse of its franchises.[1]

1 Black. Comm. 485; Angell & Ames on Corp. 648, 2d ed.

PART V.

OF THE LAW CONCERNING PERSONAL PROPERTY.

LECTURE XXXIV.

OF THE HISTORY, PROGRESS, AND ABSOLUTE RIGHTS OF PROPERTY.

HAVING considered the various rights of *persons*, I proceed next to the examination of the law of *property*, and first of the law of *personal* property. Occupancy, doubtless, gave the first title to property in lands and movables. It is the natural and original method of acquiring it, and upon the principles of universal law, that title continues so long as occupancy continues.[1] The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.[2]

The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.[3] By the ancient

[1] Grotius, Jure B. & P. b. 2, ch. 3, sec. 4; Mare Liberum, ch. 5.
[2] Toullier, Droit Civil Français, tome iii. 40.
[3] Grotius, b. 2. ch. 6, sec. 1.

law of all the nations of Europe, the *bonâ fide* possessor of goods had a good title as against the real owner, in whatever way, whether by force, fraud, or accident, the owner may have been divested of the possession. By the Roman law in its early state, property stolen and sold was lost to the real owner, and the only remedy was by an action against the thief. The law of the Twelve Tables, by which the possession of one year was a good title by prescription to movables, shows that a feeble and precarious right was attached to personal property out of possession. The title to it was gradually strengthened, and acquired great solidity and energy, when it became understood that no man could be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title. The exceptions to this rule grew out of the necessities and policy of commerce; and it was established as a general rule, that sales of personal property in market overt would bind the property even against the real owner. It is understood that the English custom of markets overt does not apply to this country; and the general principle applicable to the law of personal property throughout civilized Europe is, that "no one can transfer a greater right in a thing than he himself has." Title to property resting originally in occupancy ceased of course upon the death of the occupant. Sir William Blackstone considers the descent, devise, and transfer of property, political institutions and creatures of the municipal law, and not natural rights, and that the law of nature suggests that on the death of the possessor the estate should become common, and be open to the next occupant.

It is the general doctrine that property in land was

originally vested in the state or sovereign, and was derived by grant to individuals.[1] The power of its alienation is a necessary incident to the right of property. Delivery of possession was anciently necessary to the valid transfer of land; when actual delivery became inconvenient, symbolical delivery supplied its place, and with the introduction of writing came alienation of land by deed.

Every person is entitled to be protected in the enjoyment of his property alike from the invasions of individuals and the unequal taxation by the state. The duty of protecting every man's property by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest obligations on the part of the government. Government is bound to assist the rightful owner of property in the recovery of its possession.[2] It is questioned whether the rightful owner is bound to pay to an innocent possessor the value of improvements made by the latter. By the common law the owner is not bound to do so.

There are many cases in which the rights of property must be made subservient to the public welfare. The maxim of law is that a private mischief is to be endured rather than a public inconvenience. If a common highway be out of repair, a passenger may lawfully go through an adjoining private inclosure.[3] The right of eminent domain gives to the legislature the control of private property for public uses, and for public uses only.[4] The Constitution of the United

[1] Grotius, b. 2, ch. 2, sec. 4; Ibid. ch. 3, sec. 4.

[2] 8 Wheaton, 1.

[3] 2 Show. Rep. 28; 1 Lord Raym. 725; Doug. Rep. 745.

[4] Grotius, b. 1, ch. 1, sec. 6; Ibid. b. 2, ch. 14, sec. 7; Ibid. b. 3, ch. 19, sec. 7; Ibid. ch. 20, sec. 7; Puff. b. 8, ch. 5, sec. 7; Bynk. Quæst. Pub. Jur. b. 2, ch. 15; Vattel, b. 1, ch. 20, sec. 244; Esprit

States and of most of the States of the Union have imposed a great and valuable check upon the exercise of legislative power by declaring that private property should not be taken for public use without just compensation.

des Loix, tome iii. p. 203; 2 Johns. Ch. Rep. 162; 1 Rice's S. C. Rep. 383.

LECTURE XXXV.

OF THE NATURE AND VARIOUS KINDS OF PERSONAL PROPERTY.

PERSONAL property usually consists of things temporary and movable, but includes all subjects of property not of a freehold nature, nor descendible to the heirs at law.[1] The division of property into real and personal, or movable and immovable, is too obvious not to have existed in every system of municipal law.

I. Chattel is a very comprehensive term in our law, and includes every species of property which is not real estate or a freehold. The most leading division of personal property is into chattels real and chattels personal. Chattels real are interests annexed to or concerning the realty, as a lease for years of land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion, or remainder in fee in some other person.[2] It is only personal estate if it be for a thousand years.[3] Falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner. It does not attend the inheritance, for in that case it would partake of the quality of an estate in fee.

[1] Com. Dig. tit. Biens, H. 3; 2 Dana's Ken. Rep. 206, 207; Hilliard's Abr. vol. 1, 18; 2 Conn. Rep. 567; 2 P. Wms. 127; 2 Vesey Jr. 653.

[2] Co. Litt. 118 b; 2 Black. Comm. 386.

[3] Co. Litt. 46 a; 5 Mass. Rep. 419; 1 N. H. Rep. 350.

There are also many chattels which, though they be even of a movable nature, yet being necessarily attached to the freehold, and contributing to its value and enjoyment, go along with it in the same path of descent or alienation. This is the case with the deeds and other papers which constitute the muniments of title to the inheritance;[1] and also with shelves and family pictures in a house, and the posts and rails of inclosures.[2] So also it is understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond, go with the inheritance as *heirlooms* to the heir.[3] But *heirlooms* are a class of property distinct from fixtures, and in modern times, for the encouragement of trade and manufactures, and as between landlord and tenant, many things are now treated as personal property which seem, in a very considerable degree, to be attached to the freehold. The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold. Questions respecting the right to what are ordinarily called fixtures, or articles of a personal nature affixed to the freehold, principally arise between three classes of persons: (1.) Between heir and executor; and there the rule obtains with the most rigor in favor of the inheritance and against the right to consider as a personal chattel anything which has been affixed to the freehold. (2.) Between the executor of the tenant for life and the remainder-man, or reversioner; and here the right to fixtures is considered more favorably for the execu-

[1] Co. Litt. 20 a; 2 Bell's Com. 2; 2 Ibid. 3; 12 Price's Exch. Rep. 163.

[2] Herlakenden's Case, 4 Co. 61; Moore's Rep. 177, pl. 315; 11 Co. 50 b.

[3] Co. Litt. 8 a.

tors. (3.) Between landlord and tenant; and here the claim to have articles considered as personal property is received with the greatest latitude and indulgence. (4.) There is an exception of a broader extent in respect to fixtures erected for the purposes of trade, and the origin of it may be traced back to the dawnings of modern art and science.[1]

II. Property in chattels personal is either absolute or qualified. Absolute property denotes a full and complete title over it; but qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally divested on the happening of some particular event. A qualified property in chattels may subsist by reason of the nature of the thing or chattel possessed. The elements of air, light, and water are the subjects of qualified property by occupancy. Animals of a wild nature, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues it is as much under the protection of the law as any other property, and every invasion of it is redressed in the same manner.[2]

III. Personal property may be held by two or more persons in joint tenancy or in common, and in the former case the same principle of survivorship applies which exists in the case of a joint tenancy in lands.[3]

IV. Personal property is divided into things in pos-

[1] 20 Henry VII. 13 a and b, pl. 24; 21 Henry VII. 27.
[2] 7 Co. 16–18; Finch's Law, 176. [3] Co. Litt. 182 a.

session and things in action, which latter are personal rights not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages due for breach of covenant, for the detention of chattels, or for torts, are things in action.

V. Chattels may be limited over by way of remainder after a life interest in them is created, though not after a gift of the absolute property. Chattels real or personal may be given by will[1] or limited by deed[2] to A. for life with remainder over to B., and the limitation over after the life interest in the chattel has expired is good. In the case of specific things in which the use consists in the consumption (as corn, hay, and fruits, etc.) such limitation cannot be made.[3]

[1] 8 Co. 95; 10 Co. 46.

[2] 2 Black. Comm. 398; 13 Conn. Rep. 42, S. C. Law Journal, No. 3, 442; 1 Bailey's S. C. Rep. 100; 1 Dana's Ken. Rep. 237; 3 Dev. N. C. 263; 3 Paige's Rep. 1.

[3] 3 Merivale's Rep. 194; 6 Gill & Johns. 171; 10 Yerger, 30; 1 Domat, b. 1, tit. 11, sec. 5, 6; 2 Hill's S. C. Ch. Rep. 520; 4 Russell's Rep. 200.

LECTURE XXXVI.

OF TITLE TO PERSONAL PROPERTY BY ORIGINAL ACQUISITION.

TITLE to personal property may accrue in three ways: (1.) By original acquisition; (2.) By transfer by act of law; (3.) By transfer by act of the parties.

The right of original acquisition may be comprehended under the heads of occupancy, accession, and intellectual labor.

I. *Of Original Acquisition by Occupancy.* Title by occupancy is become almost extinct under civilized governments, and it exists in few cases.

(1.) Goods taken by capture in war were by the common law adjudged to belong to the captor.[1] Now such goods vest primarily in the sovereign, and belong to the individual captors only to the extent prescribed by positive law. (2.) Goods lost by the owner, and unreclaimed or intentionally abandoned, belong to the finder.[2] This rule does not extend to goods found derelict at sea, nor to goods found hidden in the earth.[3] Goods *waived* or scattered by a thief in his flight belong at common law to the king, but this rule has never been adopted here. *Estrays* (cattle whose owner is

[1] Finch's Law, 28, 178; Bro. tit. Prop. pl. 18, 38; 1 Wils. Rep. 211.

[2] 1 Black. Comm. 296; 2 Ibid. 402; Mass. Act 1788, ch. 55; Mass. Rev. Stats. 1835.

[3] 1 Rob. Adm. Rep. 32; 1 Hagg. Adm. Rep. 383; Amer. Jurist, No. 3, 119; 1 Sumner, 207.

unknown) and *wrecks* are not within the rule, but the latter are chargeable with salvage.

II. *Of Original Acquisition by Accession.* Under this head we will also consider admixture or confusion of goods. The right of accession is the right to the productions of one's own property. The hirer of animals is entitled to their offspring born during the term.

If the materials of one person are united to those belonging to another by the labor of the latter, who furnishes the principal materials, the property is in the latter by right of accession.[1]

If A. builds a house on B.'s land, A. furnishing materials, B., the owner of the land, acquires by right of accession the property in the buildings.

Where there has been an intermixture of goods by consent of the owners each has an equal interest as tenant in common. If the mixture was intentionally made by one owner without the other's consent, the latter acquires the property in the goods by the common law.[2]

III. *Of Original Acquisition by Intellectual Labor.* Under this head may be included literary property, as maps, charts, writings, and books, and mechanical inventions, consisting of useful machines or discoveries produced by the joint result of intellectual and manual labor. As long as the author keeps possession of them he has the right to their exclusive enjoyment. But when they are circulated abroad and published with the author's consent, they become common property.

For the promotion of the useful arts and the encouragement of learning we have secured by law to inventors and authors, for a limited time, the right to

[1] 7 Johns. Rep. 473. [2] Popham's Rep. 38, pl. 2.

the exclusive use and profit of their productions and discoveries.

(1.) *As to Patent Rights for Inventions.* A patent is a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend an invention.

Congress has passed various acts authorizing the grant of letters patent to inventors for new and useful inventions and discoveries, and prescribing regulations and conditions. Patents are assignable, and may be granted in whole or in part by writing, to be recorded in the patent office.

(2.) *Copyrights of Authors.* The authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens or residents of the United States, are entitled to the exclusive right of printing, reprinting, publishing, and vending them for the term of twenty-eight years from the time of recording the title thereof; and for the further term of fourteen years the author or his widow or children can have a like right on complying with the terms prescribed by the act of Congress. The violation of the copyright thus duly secured is guarded against by adequate penalties and forfeitures. A copyright may exist in a translation as much as in an original composition.[1]

[1] 3 Ves. & Bea. 77.

LECTURE XXXVII.

OF TITLE TO PERSONAL PROPERTY BY TRANSFER BY ACT OF LAW.

I. *By Forfeiture.* The title of the government to goods by forfeiture as a punishment for crimes depends probably upon local statute law. Government succeeds to the personal and real estate of the intestate when he has no heirs or next of kin to claim it.

II. *By Judgment.* On a recovery by law in an action of trespass or trover, of the value of a specific chattel of which the possession has been acquired by tort, the title of the goods is altered by the recovery and is transferred to the defendant, and the damages recovered are the price of the chattel so transferred by operation of law.

III. *By Insolvency.* Bankrupt and insolvent laws are intended to secure the application of the effects of the debtor to the payment of his debts, and then to relieve him from them.[1] Bankruptcy in the English law is applied only to traders. The principle is that of equality among creditors who have not previously procured some legal lien upon the estate of the bankrupt, and to that end the bankrupt's estate, as soon as an act of bankruptcy is committed, becomes a common fund for the payment of his debts, and he loses his

[1] 12 Price's Exch. Rep. 183; 4 Paige's Rep. 305; 13 Vesey, 581; 15 Ibid. 52; 4 East's Rep. 372; 9 N. H. Rep. 478; Petersdorf's Abr. vol. 6. tit. Comp. with Creditors.

power as its proprietor.[1] The power given to the United States to pass bankrupt laws is not exclusive. The assignment of the insolvent passes all his interest, legal and equitable, existing at the time of executing the assignment in any estate. It is the general policy of all insolvent laws to distribute the property assigned ratably among all creditors subject to existing liens and priorities.

IV. *By Intestacy.* When a person dies leaving personal property undisposed of by will, the personal estate, after the debts are paid, is distributed to the widow and among the next of kin.

(1.) *Of granting Administration.* When a person died intestate in the early periods of English history his goods went to the king; this right was afterwards transferred to the clergy. In this country it is given to the courts to grant letters of administration, and they may be granted to the widow, husband, next of kin, creditor of the intestate, or public administrator, according to the circumstances of the case.

(2.) *Of the Power and Duty of the Administrator.* The administrator must give bond to the judge of probate with sureties, for the faithful execution of his trust: (*a.*) He is to make an inventory of the goods and chattels of the intestate, generally with the aid of sworn appraisers. (*b.*) He is to collect debts and convert the property into money, and pay the debts due from the intestate. He must sell the personal property, so far as it may be necessary for the payment of debts and legacies,[2] beginning with articles not required for immediate family use nor specifically bequeathed. The common law order of payment is

[1] 4 Wheaton, 195.

[2] 2 Paige, 122; 6 Gill & Johnson, 171.

first funeral charges [1] and probate expense; debts due the state; debts of record, as judgments, recognizances,[2] and final decrees; debts for rent; debts by specialty, as bonds and sealed notes; and lastly, debts by simple contract.

(3.) *Of the Distribution of the Personal Estate.* The administrator is bound to distribute the personal estate according to law, which is generally to the husband or widow and next of kin. The next of kin is determined by the rule of the civil law: the father stands in the first degree, the grandfather and grandson in the second, and in the collateral line the computation is from the intestate up to the common ancestor of the intestate and the person whose relationship is sought, and then down to that person. The half blood are admitted equally with the whole blood. In a majority of the states the descent of real and personal property follows the regulations of the English statute of distributions, with the exception of the widow as to the real estate, who takes one third for life only as dower.

It is a settled principle that the disposition and distribution of personal property is governed by the law of the country of the owner's or intestate's domicile at the time of his death. It is equally settled that real property as to its tenure, mode of enjoyment, transfer, and descent is to be regulated by the *lex loci rei sitæ* (the law of the place where the property is located).[3]

[1] 1 B. & Adol. 260; R. M. Charlton's Geo. Rep. 56.

[2] 4 Leigh's Rep. 35.

[3] Hub. tome i. lib. 3, tit. 13, De Success. s. p. 278; Story's Comm. Conflict of Laws, p. 359–390.

LECTURE XXXVIII.

OF TITLE TO PERSONAL PROPERTY BY GIFT.

TITLE to personal property arising from transfer by act of the party may be acquired by gift and by contract. There are two kinds of gifts: (1.) Gifts simply so called, or gifts *inter vivos* (between living persons): (2.) Gifts *causa mortis*, or those made in apprehension of death.

I. Gifts *inter vivos* have no reference to the future, and go into immediate effect. Delivery, actual or constructive, is essential to the validity of a parol gift. When the gift is perfect by delivery and acceptance, it is then irrevocable unless it be prejudicial to creditors, or the donor was under a legal incapacity, or was circumvented by fraud.

II. Gifts *causa mortis* are conditional, like legacies, and it is essential to them that the donor make them in his last illness or in expectation of death, and with reference to their effect after his death; and if he recovers they become void.[1] The English law upon this subject is derived wholly from the civil law. A gift *inter vivos* is irrevocable; a gift *causa mortis* conditional, and made in apprehension of death.[2]

[1] Swinb. 18; 1 P. Wms. 404; 1 Vesey Jr. 546; 7 Simons, 325; S. C. Mylne & Craig, 226; 3 Binney's Rep. 366; 2 Wharton, 17.

[2] Dig. 39. 6. 2. & 27; Inst. 2. 7. 1; Vide Dig. lib. 39, tit. 5, De Donationibus & tit. 6.

LECTURE XXXIX.

OF CONTRACTS.

I. *Of the Parties thereto.* An executory contract is an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing.[1] It is either under seal or not under seal; if under seal it is denominated a specialty, and if not under seal an agreement by parol. Contracts of record (as agreements entered into before a court of record and recognizances) form a third class.[2] The agreement conveys an interest either in *possession* or in *action;* the former if the agreement has been performed, the latter if it is executory. Contracts are also divided into *express* and *implied;* the former when the parties contract in express words or by writing, and the latter are those contracts which the law presumes by reason of some value or service rendered. Every valid contract is made between parties having sufficient understanding and age and freedom of will, and its exercise for the given case. The general rule is that sanity is to be presumed until the contrary be proved, and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies upon him who alleges it. Complete intoxication renders the contract voidable. If the contract be induced by violence or restraint, it is void.

[1] 2 Black. Comm 442; Plowd. Rep. 17 a; Com. Dig. tit. Agreement 1 A; 4 Wheaton, 197.

[2] Smith on Contracts, p. 3.

II. *Of the Lex Loci.* A contract, valid where made, is valid everywhere. The law of the place of contract controls its nature, construction, and validity. (1.) It is a general truth that the laws of a country have no binding force beyond its limits, and that their authority is admitted in other states, not by its own force, but by the comity or courtesy of nations. It is a rule that personal contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they were made. When a contract is made in one country and put in suit in another, the interpretation of the contract is to be governed by the law of the country where it was made, but the mode and time of suing by the law of the country where the action is brought;[1] but no people are bound to enforce any contract which is injurious to their public rights, offends their morals, contravenes their policy, or violates their law.[2] But if a contract be made under one government and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, its construction and force is governed by the law of the state in which it is to be executed.[3] (2.) Remedies upon

[1] Hub. De Conflictu Legum, sec. 7; 1 B. & Adolph. 284; 1 Bing. N. C. Rep. 151; 2 Metcalf's Rep. 8.

[2] Hub. Prælec. Jur. Civ. tome ii. b. 1, tit. 3, De Conflictu Legum; Voet ad Pand. lib. 5, tit. 1, sec. 51; Emerigon des. Ass. ch. 4, sec. 8, vol. 1. p. 122; Kames' Equity, b. 3, ch. 8, sec. 4; 1 Gall. Rep. 371; 1 Mason's Rep. 381; 2 Ibid. 151; 6 Mass. Rep. 358; 13 Martin's Louis. Rep. 202; 13 Mass. Rep. 1; Ibid. 26; 1 Johns. Cas. 139; 17 Martin's Louis. Rep. 569; Story's Com. Conflict Laws, 203–215; Green's Rep. 326; 13 Mass. Rep. 6; Story's Con. 29.

[3] Hub. De Con. Legum, sec. 10; Voet ad Pand. 4. 1. 29; 2 Burr. Rep. 1077; Dig. 42. 5; Ibid. 44. 7. 21; Story's Con. Laws, 233, 234; 12 Peters, 436, 437; 13 Peters, 65; 1 Howard's U. S. Rep. 182; 8 Paige, 261; 13 Mass. Rep. 23; 8 Johns. 189; 6 Peters, 172; 17 Johns. 511; Casaregis, Dig. 179; 8 Martin's Louis. Rep. 93.

contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted. In respect to remedies, there are three places of jurisdiction: (*a.*) The place of domicile of defendant; (*b.*) The place where the thing in controversy is situate; (*c.*) The place where the contract is made or the act done.

III. *Of the Consideration.* A valid contract must have a sufficient consideration. There must be something given in exchange, or something which is the inducement to the contract, and it must be lawful and of competent value. A contract without a consideration is a *nudum pactum*, a naked contract, and not binding in law. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.[1] Any damage or suspension or forbearance of a right will be sufficient to sustain a promise.[2] A mutual promise amounts to a sufficient consideration provided the mutual promises be concurrent in point of time; and in that case the one promise is a good consideration for the other. But if two concurrent acts are stipulated, as delivery by the one party and payment by the other, no action can be maintained by either without showing a performance, or what is equivalent to a performance, of his part of the agreement.[3] If the consideration be wholly past and executed before the promise be made, it is not sufficient unless the consideration arose at the instance or request of the party promising; and that request must

[1] 4 East's Rep. 455; 10 Mass. 236.

[2] 12 Wendell's Rep. 381; 2 Neville & Perry, 297.

[3] 1 Salk. 171; 1 Lord Raym. 665, S. C; 1 Salk. 113; 1 Saund. 319; 8 Dana's Ken. Rep. 356, 357.

have been expressly made, or be necessarily implied, from the moral obligation under which the party was placed; and the consideration must have been beneficial to the one party or onerous to the other.[1] A subsisting legal obligation to do a thing is a sufficient consideration for a promise to do it.

The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals. If the contract grows immediately out of or is connected with an illegal or immoral act, a court of justice will not enforce it. But if a party who may be entitled to resist a claim on account of its illegality waives that privilege and fulfils the contract, he cannot be permitted to recover the money back; and the rule that *potior est conditio defendentis* will apply.[2]

IV. *Of the Contract of Sale.* A sale is a contract for the transfer of property from one person to another, for a valuable consideration;[3] and three things are requisite to its validity, namely, the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.[4] (1.) If the subject matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent, or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future delivery.[5] But if the article

[1] 1 H. Black. Rep. 90; 1 Caines' Rep. 584; 7 Johns. Rep. 87; 10 Johns. Rep. 243; 1 McCord's Rep. S. C. 514; 1 Barn. & Ald. 104.

[2] 8 Term Rep. 575; 6 Cowen's Rep. 431.

[3] 2 Black. Com. 446.

[4] Pothier, Traité du Contrat de Vente, n. 3; Bell's Prin. L. S. sec. 85, 90, 92.

[5] 2 Camp. 326; 4 Ibid. 237; Heinec. Elem. Jur. Secund. Ord. Inst. lib. 3, tit. 24, sec. 906; Pothier, Con. de Vente, n. 7; 1 Ryan & Moody, 386; 1 P. Wms. 570; 3 Scott, 141.

intended to be sold has no existence, there can be no contract of sale. Thus if A. sells his horse to B., and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void.

(2.) On the subject of the claim to a completion of the purchase, or to the payment or return of the consideration money, in a case where the title or the essential qualities of part of the subject fail and there is no charge of fraud, it would seem to be sound doctrine that a substantial error between the parties concerning the subject matter of the contract, either as to the nature of the article or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity.[1] In the case of a purchase of land where the title in part fails, the Court of Chancery will decree a return of the purchase money even after the purchase has been carried completely into execution by the delivery of the deed and the payment of the money, provided there had been a fraudulent misrepresentation as to the title.[2] With us a partial as well as a total failure of the consideration may be given in evidence by the maker of a note to defeat or mitigate, as the case may be, a recovery.[3] The good sense and equity of the law on this subject is, that if the defect of title be so great as to render the thing sold unfit for the use intended the purchaser ought not to be held to the contract but be allowed to rescind it.

(3.) The price is an essential ingredient in the con-

[1] 5 Taunt. Rep. 786; 1 Bell's Com. 242, 295; Civ. Code Louis. art. 2496-2519.

[2] Cooper's Eq. 308; 14 Ves. 144.

[3] 8 Cowen's Rep. 31; 15 Johns. 230; 13 Wendell, 605; 11 Conn. 432; Rev. Stats. Ill. 1833, p. 484; 2 Hill's Rep. 606; 2 McLean's C. C. Rep. 464.

tract of sale, and it must be real, and not merely nominal, and fixed.

(4.) Mutual consent is requisite to the creation of the contract, and it becomes binding when a proposition is made on one side and accepted on the other; but if the parties err as to subject matter or essential facts it is no contract.[1]

V. *Of Implied Warranty of the Articles sold.* In every sale of a chattel, if the possession be at the time in another and there be no covenant or warranty of title, the rule of *caveat emptor* (let the buyer beware) applies, and the party buys at his peril.[2] But if the seller has possession and sells the article as his own, and not as agent for another, and for a fair price, he is understood to warrant the title. When goods are not as ordered the purchaser ought at once to return them to the vendor, or notify him to take them back, and thereby rescind the contract, or he will be presumed to acquiesce in the quality of the goods.[3]

VI. *Of the Duty of Mutual Disclosure.* If there be an intentional concealment of material facts in the making of a contract, in cases in which both parties have not an equal access to the means of information, it will be such an unfairness as will vitiate and avoid the contract. As a general rule each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not equally within the range of his observation.

One party must not practice any artifice to conceal

[1] 5 Taunton, 786; 2 Sumner, 395, 399.

[2] Tanfield, Ch. Baron, Cro. Jac. 197; 1 Salk. Rep. 210; 3 Term Rep. 57, 58.

[3] 1 Camp. N. P. Rep. 190.

defects or adopt any device to throw the buyer off his guard. If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee. An action will lie against a disinterested person for making a false and fraudulent representation to the seller, whereby he sustained damage by trusting the purchaser on credit of such misrepresentation.[1]

VII. *Of passing the Title by Delivery.* (1.) When the terms of sale are agreed on, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer.[2] But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him, though the right of possession is not absolute but is liable to be defeated if he becomes insolvent before he obtains possession.[3] If the seller has even dispatched the goods to the buyer and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu;* for though the property is vested in the buyer so as to subject him to the risk of any accident, he has not an indefeasible

[1] 6 Johns. Rep. 181; 3 Fairfield, 262; 6 Cowen's Rep. 346; 2 Wendell's Rep. 385; 7 Wendell's Rep. 1 S. C. 11; Ibid. 374; Mass. Rev. Stats. (Frauds and Perjuries).

[2] 2 Black. Com. 448; 7 East's Rep. 571; Noy's Maxims, ch. 42; Code Napoleon, 1583; Civ. Code Louis. art. 2431; 6 Barn. & Cress. 360; 2 Aiken's Ver. Rep. 115; 1 Meig's Tenn. Rep. 22; 2 Sumner's Rep. 211.

[3] 6 East's Rep. 614; 4 Barn. & Cress. 941; 5 Ibid. 857.

right to the possession; and his insolvency, without payment of the price, defeats that right equally after the *transitus* has begun as before the seller has parted with the actual possession of the goods. (2.) To make the contract of sale valid in the first instance according to statute law, there must be a delivery or tender of it, or payment, or tender of payment, or earnest given, or a memorandum in writing signed by the party to be charged; and if nothing of this kind takes place it is no contract, and the owner may dispose of his goods as he pleases.[1] The English statute of frauds of 29 Car. II. ch. 3, sec. 17 (the provisions of which prevail in the United States, with the exception of Louisiana), declares that no contract for the sale of goods, for the price of £10 or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless some note or memorandum in writing of the bargain be made, and signed by the parties to be charged, or their agents thereunto lawfully authorized. If, therefore, earnest money be given, though of the smallest value, or there be a delivery or payment in whole or in part, or a note or memorandum of the contract duly signed, the contract is binding, and the property passes to the vendee, with the risk, and under the qualifications already stated.[2] The vendee cannot take the goods, notwithstanding earnest be given without payment. Earnest is only one mode of binding the bargain, and giving to the buyer a right to the goods upon payment;[3] and if he does not come in a reasonable time

[1] Noy's Maxims, ch. 42; 3 Barn. & Ald. 680.

[2] Shep. Touch. 224; 5 Term Rep. 409; 8 Gill & Johnson, 398.

[3] Glanville, 1. 10. c. 14; Inst. 3. 24; Bracton, 1. 2. c. 27.

after request, and pay for and take the goods, the contract is dissolved, and the vendor is at liberty to sell the goods to another person.[1] If anything remains to be done, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is a well established principle in the doctrine of sales.[2] But when everything is done by the seller, even as to parcel off the quantity sold, to put the goods in a deliverable state, the property, and consequently the risk of that parcel, passes to the buyer, and as to so much of the entire quantity as requires further acts to be done on the part of the seller, the property and risk remain with the seller.[3] The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass.[4] It is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if the goods of different value be sold in bulk and not separately, and for a single price, or *per aversionem* in the language of the civilians, the sale is perfect and the risk with the buyer; but if they be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified.[5] (3.) Where no time is agreed on for payment, the payment and de-

[1] 1 Salk. Rep. 113; 2 H. Black. Rep. 316; 3 Camp. Rep. 426; 1 Bailey's S. C. Rep. 537.

[2] 6 East's Rep. 614; 4 Camp. Rep. 237; 13 East's Rep. 522; 2 Maule & Sel. 397; 5 Taunt. Rep. 617; 5 Barn. & Cress. 857; 15 Johns. Rep. 349; 3 Mason's Rep. 112; 2 Iredell's N. C. Rep. 12.

[3] 11 East's Rep. 210; Newfoundland Rep. 90.

[4] 4 Taunt. Rep. 644; 5 Ibid. 176; 7 Cowen's Rep. 85; 7 Ohio Rep. 128.

[5] Vinnius, Com. in Inst. 3. 24. 3, sec. 4; Dig. 18. 1. 35. 3.

livery are concurrent acts, and the vendor may refuse to deliver without payment. (4.) By the civil law the risk of the goods was the buyer's before delivery if the contract of sale was completed, even though the title was still in the vendor.[1] (5.) Delivery of goods to a servant or agent of the purchaser, or to a carrier or master of a vessel, is equivalent to delivery to the purchaser, and the property and its risk vest in the purchaser, subject to the vendor's right of stoppage *in transitu*.[2] (6.) Symbolical delivery will in many cases be equivalent to actual delivery. The delivery of warehouse key, or a transfer on the warehouse books, is a sufficient delivery to transfer the property.[3] (7.) If no place be designated the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale.

VIII. *Of the Memorandum required by the Statute of Frauds.* The statute of frauds of 29 Charles II. ch. 3, sec. 4, declared that no action should be brought to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person, upon any agreement made upon consideration of marriage, or upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement signed by the party to be charged, or his agent. The statute, in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandise in cases where there

[1] Inst. 3. 24. 3.
[2] 1 Lord Raym. 271; 3 Bos. & Pull. 582; 8 Term Rep. 330.
[3] 1 Atk. Rep. 171; 7 Term Rep. 71.

was no delivery and acceptance of part, or payment in part, or something in earnest given. This statute is assumed to be the basis of the statute laws of the several states on this subject.

IX. *Of Fraudulent Sales.* If the purchaser, knowing of a judgment against the vendor, buys with the intent to defeat the creditor's execution, it is fraudulent. The question of fraud depends on the motive. If the vendee finds that he is insolvent and cannot pay for the goods, he may return them with the seller's assent, if done in good faith, before the contract is consummated by delivery and acceptance.

X. *Of Sales at Auction.* An auctioneer has an interest, coupled with possession of the goods he sells: he has a special property in the goods, and a lien upon them for the charges of the sale and his commission. If the auctioneer has notice that the goods do not belong to his principal he sells at his own risk.[1] If he does not disclose the name of his principal at the time of sale, he becomes responsible to the purchaser for any default concerning the goods.[2] A bidding at an auction may be retracted before the hammer is down: a bid is merely an offer, not binding until accepted.[3]

XI. *Of the Vendor's Right of Stoppage in Transitu.* This is the right which the vendor, when he sells on credit, has of resuming the possession of the goods while they are in the hands of a carrier in their transit to the vendee, and before he has actual possession or they arrive at the destination he has appointed upon the vendee's becoming insolvent. (1.) This right extends to every case in which the consignor is substantially the vendor. (2.) The right of stoppage

[1] 5 Esp. N. P. Rep. 103.
[2] Peake's Rep. 120.
[3] 3 Term Rep. 148.

ends with actual or constructive delivery. (3.) If the vendor has given to the vendee documents sufficient to transfer the property, and the vendee sells the goods to a *bonâ fide* purchaser without notice, the vendor would be divested of his right.

XII. *Of the Interpretation of Contracts.* The rules of construction of contracts are the same in courts of law and of equity.[1] The mutual intention of the parties to the instrument is the great and sometimes difficult object of inquiry. Words are to be taken in their popular and ordinary meaning. If the intention be doubtful, it is to be sought by reference to the context and to the nature of the contract and usage of the place. Parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a written contract. Parol evidence is received, however, to defeat the contract by showing fraud or illegality. Parol evidence is admissible to explain a latent ambiguity, or one which does not appear on the face of the contract.[2]

[1] 3 Vesey, 692; 13 East's Rep. 74.
[2] 8 Johns. Rep. 90; 1 Johns. Ch. Rep. 234; 4 Dow's P. C. 65, 96.

LECTURE XL.

OF BAILMENT.

BAILMENT is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered.[1] There are five species of bailment, according to Sir William Jones: (1.) *Depositum*, or a naked deposit without a reward; (2.) *Mandatum*, or commission, which is gratuitous, and by which the mandatary undertakes to do some act about the thing bailed; (3.) *Commodatum*, or loan for use without pay, and when the thing is to be restored *in specie;* (4.) *A pledge*, as when a thing is bailed to a creditor as a security for a debt; (5.) *Locatio*, or hiring for a reward.[2]

(1.) *Depositum* is a bailment of goods to be kept for the bailor (person delivering them) and returned upon demand without a recompense. The bailee is to exercise a reasonable care, and is responsible only for gross neglect or bad faith.

(2.) *Mandatum.* Mandate is when one undertakes without recompense to do some act for another in respect to the thing bailed. If the mandatary undertakes to perform gratuitously some work relating to it, he is bound to use a suitable degree of diligence and attention; but where he acts in a case in which neither his situation nor employment necessarily im-

[1] 2 Black. Com. 452. [2] Jones on Bailments.

plied any particular knowledge or professional skill, he is held responsible only for bad faith or gross negligence.[1]

(3.) *Commodatum* is a bailment or loan of an article for a certain time, to be used by the borrower without paying for the use. This should be distinguished from a loan for consumption, or the *mutuum* of the Roman law, where other property was to be returned. This was a sort of barter or exchange. In the case of *commodatum*, the identical article is to be returned.

(4.) *A pledging* is a bailment or delivery of goods by a debtor to his creditor to be kept until the debt is discharged. The pawnee is answerable for ordinary neglect.

(5.) *Locatio, or hiring for a reward*, is a contract by which the use of a thing, or labor or services about it, is agreed to be given for a reasonable compensation. *Locatio* is of three kinds: (*a.*) *Locatio rei*, by which the hirer has the temporary use of a thing; (*b.*) *Locatio operis faciendi*, or letting out of work and labor to be done by bailee on goods bailed; (*c.*) *Locatio operis mercium vehendarum*, or the bailment of goods to a carrier.

(*a.*) In the cases of *locatio rei*, or letting to hire, the hirer has a special property in the thing hired, the letter an absolute property in the price, and a general property as owner of the chattel. The hirer is answerable only for ordinary neglect.

(*b.*) In the case of *locatio operis faciendi*, the workman for hire must answer for ordinary neglect, and apply an adequate degree of skill. Mr. Justice

[1] 2 Adolph. & Ellis, 256; 11 Wendell, 25; Story on Bailment, 121–123.

Story[1] subdivides this head of *locatio* into *locatio operis faciendi*, or hire of labor and services, and *locatio custodiæ*, or deposit for hire. Bailees under this head are responsible for ordinary neglect.

Innkeepers, like common carriers, are an exception, and are responsible for slight neglect at common law, subject generally in this country to statute modifications.

(c.) *Locatio operis mercium vehendarum* is a contract relating to the carriage of goods for hire. A private carrier is only answerable for ordinary neglect, unless he expressly assumes a greater obligation. A common carrier is a sort of insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses except those occasioned by the acts of God or public enemies. Common carriers undertake generally, and for all people, to convey goods or persons and deliver them at a place appointed, for hire.[2]

[1] Story's Com. 276.

[2] 1 Salk. Rep. 249; 8 Carr. & Payne, 207; Story on Bailments, 323, N. 3, 2d edit.

LECTURE XLI.

OF PRINCIPAL AND AGENT.

I. *Agency, how constituted.* Agency is founded upon a contract, express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and render an account of it. The agent's authority may be created with or without writing.[1] The agency must be antecedently given or subsequently adopted, and in the latter case there must be some act of recognition. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other as agent.

II. *Of the Power and Duty of Agents.* A general agent has all the implied powers which are within the scope of his employment. If his powers are special and limited he must strictly follow them. If A. authorizes B. to buy an estate for him at $50 per acre and he gives $51, A. is not bound to pay that price; the better opinion is that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate.

A factor or commission merchant may under certain

[1] Chitty's Commercial Law, vol. 3, p. 104; 11 Mass. Rep. 27; Ibid. 97; Ibid. 288; 8 Pick. 9.

circumstances sell on credit. If he be not restrained by his instructions and he follow the usage of trade at the place, he may sell on credit without incurring personal risk. Where a factor acts under a *del credere* commission, guaranteeing payment to his principal for an additional premium, he becomes liable to his principal. While a factor may sell and bind his principal, he cannot pledge the goods as security for his own debt, but he may place them in the hands of his agent. Where a contract is made by the agent, the principal and not the agent is bound to the party. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or when the agent exceeds his power.[1] Where the agent buys in his own name for the benefit of an undisclosed principal, both are bound if the principal gets the benefit of the goods or the agent acted as he was authorized.[2] If the authority of an agent be coupled with an interest in the property, he may contract and sell in his own name. When goods have been sold by the factor, the owner is entitled to call upon the buyer for payment before the money is paid over to the factor; and a payment to the factor, after notice from the owner not to pay, would be at the buyer's risk.[3] A public agent is not personally bound as a private agent might be.[4] It is not presumed that

[1] 2 Str. Rep. 955; 5 Maule & Selw. 345; 3 Johns. Cas. 70; 11 Mass. Rep. 29; 2 Pick. Rep. 221; 9 Serg. & Rawle, 212; 2 Ala. Rep. N. S. 718; 9 N. H. Rep. 55; 1 Brockenborough's Rep. 103; 4 Rawle's Rep. 223; 6 Wharton, 1; 2 Hill, 451, 461.

[2] 3 Doug. Rep. 410; 2 Greenleaf's Rep. 373; 9 Barnw. & Cress. 78; 10 Ibid. 671; 12 Wendell, 413; Dig. 14. 3. 3. 17; Pothier, Traités des Oblig. No. 82; 4 Miller's Rep. 64; Ibid. 234; 2 Fairfield's R. 267; 22 Wendell's R. 324, S. P.

[3] 2 Atk. Rep. 394.

[4] 1 Term Rep. 172; Ibid. 674; 3 Brod. & Bing. 572; 1 Mass.

a public agent meant to bind himself individually. An agent ordinarily cannot delegate his authority.

III. *Of the Agent's Right of Lien.* A lien is the right of an agent to retain possession of property belonging to another until some demand of his be satisfied. A *general lien* is the right to retain another's property for a general balance of accounts, but a *particular lien* is for expense incurred or labor bestowed upon the identical property detained. Bailees for hire have a particular lien for labor bestowed. The finder of goods, except those lost at sea, has no lien.[1] Rightful possession of the goods is necessary to create the lien. The agent may waive his right of lien. When the party voluntarily parts with the possession of the property upon which the lien attached, he is divested of his lien. A factor has a general as well as a particular lien upon the goods of his principal in his possession. Attorneys and solicitors likewise have a general lien upon the papers of their clients in their possession for the balance of their professional accounts. The attorney has a special lien on the funds recovered in a suit.[2]

IV. *Termination of Agency.* The agent's authority may terminate in various ways: By the death of agent; by limitation of the power to a particular period of time; by the execution of the business; by a change in the state of the principal; by express revocation of the power; and by his death. (1.) An

Rep. 208; 9 Mass. 490; 1 Cranch, 345; 12 Johns. Rep. 444; 15 Ibid. 1; 3 Conn. 560; 1 Greenleaf's Rep. 231; 1 Humphrey's Tenn. Rep. 303.

[1] 2 Salk. Rep. 654; 1 Lord Raym. 393, S. C.; 5 Burr. 2732; 8 East, 57.

[2] 2 Jac. & Walk. 218; 1 Mo. & Mal. 538; 9 Bing. Rep. 402; 3 B. & Adolph. 350.

agent's trust is not transferable, either by act of the party or operation of law. It terminates by his death.[1] (2.) While a power of attorney is generally revocable, where it constitutes *partly* or *wholly* a security for a debt it is not revocable.[2] (3.) Bankruptcy of the principal terminates the agent's power so far as the agent's acts affect the estate of his principal.[3] If either party were a *feme sole* when the power was given, marriage ended it. (4.) Lunacy of principal revokes power of agent. (5.) The agent's authority terminates by his principal's death, and a joint authority to two persons terminates by the death of one.[4]

[1] Dig. 17. 1. 27. 3; Pothier, Traité du Contrat de Mandat, No. 101.

[2] 2 Esp. Rep. 565; 7 Ves. 28; 8 Wheaton, 174; 10 Barnw. & Cress. 731; Story on Agency, 2d edition, sec. 496; Story on Bailments, 151, 2d edition.

[3] 4 Taunt. Rep. 541; 16 East, 382; Pothier, Contrat de Mandat, n. 120; Civil Code Louis. art. 2996.

[4] Litt. sec. 66; Co. Litt. Ibid; Moore's Rep. 61, pl. 172; Prec. in Chan. 125; 8 Wheaton, 201; 3 Watts & Serg. 79; Paley on Agency, 177; Com. Dig. tit. Attorney, C. 10, 11; 7 Taunt. 453.

LECTURE XLII.

OF THE HISTORY OF MARITIME LAW.

THE marine law of the United States is the same as that of Europe. It is not the law of a particular country, but the general law of nations.

(1.) *Of the Maritime Legislation of the Ancients.* While marine law was founded on the law of the ancients, we have no evidence that either the Phœnicians, Carthaginians, or states of Greece had formed any authoritative code of naval law. The Rhodians were the earliest people to promulgate a system of marine law. They were the chief naval power about nine hundred years before the Christian era. Their laws concerning navigation were received at Athens and throughout the coasts of the Mediterranean as part of the law of nations. The emperor Augustus first gave a sanction to the laws of the Rhodians, as rules for decision in maritime cases at Rome; and the emperor Antoninus referred one of his subjects aggrieved by the plunder of his shipwrecked property to the maritime laws of Rhodes. The Rhodian laws, by their authoritative recognition, became rules of decision in all maritime cases in which they were not contrary to some express provision of the Roman law. We are therefore to look to the collections of Justinian for all that remains to us of the commercial law of the ancients. The navigation which the Romans cultivated was for the purposes of war, and not of commerce,

except so far as was requisite for the supply of the Roman market with provisions.[1]

(2.) *Of the Maritime Legislation of the Middle Ages.* Upon the revival of commerce, after the destruction of the western empire of the Romans, maritime rules became necessary. The earliest code of modern sea laws was called the Amalphitan Table, and was compiled for the trading republic of Amalphi, in Italy, about the time of the first crusade, towards the end of the eleventh century. It was authority throughout Italy and superseded the ancient laws.[2] The next code of note was that of the laws of the Mediterranean powers, entitled the "Consolato del Mare." Its origin is unknown, but it is the most authentic and venerable monument extant of the commercial usages of Southern Europe during the Middle Ages.

The laws of Oleron come next in order:[3] they were promulgated in the French island of Oleron in the time of Richard I. Their precise origin is in dispute, but they were evidently borrowed from the Rhodian laws and the Consolato, with adaptions to the trade of Western Europe. They have been admitted as authority on admiralty questions in the courts of this country.[4] The laws of Wisbuy were compiled by the merchants of the city of Wisbuy, in the island of Gothland, in the Baltic Sea, about the year 1288. The Hanseatic League was begun in the middle of the thirteenth century, and it originated with the cities of Lu-

[1] Huet, Hist. du Com. et de la Navig. des Anciens, 278, 279; Polybius, General History, b. 3, c. 3.

[2] Azuni's Maritime Law, vol. i. 376.

[3] Traité des Assurances, Pref.

[4] 1 Peters' Adm. Dec. 142, 157; 2 Hall's L. J. 359.

beck, Bremen, and Hamburg. Their object was mutual defence against piracy and pillage. This association became so beneficial that many other cities joined, and to further commerce and avoid controversies with each other they formed a code of maritime law which was afterward enlarged. It was evidently founded on the codes of Wisbuy and Oleron.[1]

(3.) *Of the Maritime Legislation of the Moderns.* The French Ordinance upon Commerce in 1673 and the French Marine Ordinance of 1681 superseded in a great degree all former ordinances and compilations. To the able ministry of Louis XIV. the world is indebted for this model of a perfect code of maritime jurisprudence. The whole law of navigation, shipping, insurance, and bottomry was systematically collected and arranged. Every commercial nation has rendered homage to the wisdom and integrity of the French Ordinance of the Marine, and it has been justly regarded as a digest of the maritime law of civilized Europe. Besides these general codes there have been a number of local ordinances of note upon maritime matters, such as those of Barcelona, Florence, Amsterdam, Antwerp, Copenhagen, and Königsberg. Several learned treatises have also been written.[2] The English nation never had any general code of maritime law. This deficiency has been supplied partly by private compilations,[3] but principally by a series of judicial decisions beginning about the middle of the last century, which show on the part of the judges a complete knowledge of the principles and

[1] Les Us. et Coutumes de la Mer, p. 157–165.

[2] Magens' Essay on Insurance, vol. ii.

[3] Malynes, Molloy, Beawes, Postlethwaite, Magens, Wesket, Millar, Park, Marshall, Abbott, Chitty, Holt, Lawes, and Benecke.

spirit of commercial policy and jurisprudence. The decisions in this country may fairly be placed upon the same high level for their deep and accurate learning as well as their high ability and wisdom.

LECTURE XLIII.

OF THE LAW OF PARTNERSHIP.

PARTNERSHIP contracts have been found by experience to be convenient to persons engaged in trade, and useful to the community. Merchants are thereby enabled to consolidate their credit and extend their business. I shall consider: (1.) The nature, creation, and extent of partnerships; (2.) The rights and duties of partners, in their relation to each other and to the public; (3.) The dissolution of the contract.

I. *Of the Nature, Creation, and Extent of Partnerships.* (1.) Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.[1] The two leading principles of the contract are a common interest in the stock of the company and a personal responsibility for the partnership engagements. The common interest of the partners applies to all the partnership property, whether vested in the first instance by their several contributions to the common stock, or acquired afterwards in the course of the partnership business; and that property is first liable for the debts of the company, and, after they are paid and the partnership

[1] Puff. Droit de la Nature, liv. 5, c. 8, s. 1; Pothier, Traité du Contrat de Société, No. 1; Répertoire de Jurisprudence, art. Société; Story on Partnership, p. 8, 10–19.

dissolved, then it is subject to a division among the members, or their representatives, according to agreement. If one person advances funds, and another furnishes his personal services or skill, in carrying on the trade, and is to share in the profits, it amounts to a partnership.[1] It would be a valid partnership, notwithstanding the whole capital was in the first instance advanced by one party, if the other contributed his time and skill to the business, and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent.[2] A joint possession renders persons tenants in common, but it does not, of itself, constitute them partners, and the representatives of a deceased partner are not partners, notwithstanding they have a community of interest in the joint stock.[3] There must be a community of profit to constitute a partnership as between the parties, though it is not necessary that there should be a community of interest in the property itself. They must be not only jointly concerned in the purchase, but jointly concerned in the future sale. A joint purchase with a view to separate and distinct sales by each person on his own account, is not sufficient. If several persons, who had never met and contracted together as partners, agree to purchase goods in the name of one of them only, and to take aliquot shares of the purchase, and employ a common agent for the purpose, they do not, by that act, become partners, or answerable to the seller in that character, provided they are

[1] 16 Johns. Rep. 34; Story on Partnership, 19, 39.
[2] 4 Barnw. & Cress. 867. [3] 2 Vesey, 33.

not to be jointly concerned in the resale of their shares, and have not permitted the agent to hold them out as jointly answerable with himself.[1] If the purchase be on separate and not on joint account, yet if the interests of the purchasers are afterwards mingled with a view to a joint sale, a partnership exists from the time that the shares are brought into a common mass.[2] A participation in the loss or profit, or holding himself out to the world as a partner, so as to induce others to give credit on that assurance, renders a person responsible as a partner.[3] A partnership necessarily implies a union of two or more persons; and if a single individual, for the purpose of a fictitious credit, was to assume a copartnership name or firm, the only real partnership principle that could be applicable to his case would be the preference to be given to creditors dealing with him under that description in the distribution of his effects.

A contract of partnership need not be in writing. Though there be no express articles of copartnership, the obligation of a partnership engagement may equally be implied in the acts of the parties; and if persons have a mutual interest in the profits and loss of any business carried on by them, or if they hold themselves out to the world as joint traders, they will be held responsible to third persons, whatever may be the real nature of their connection, or of the agreement under which they act. Actual intention is requisite to constitute a partnership among themselves.[4] If a person partakes of the profits, he is answerable as a partner

[1] Doug. 371; 1 H. Black. 37; 9 Bingham, 297.
[2] 8 Serg. & Rawle, 103.
[3] 16 East, 173; 2 Arkansas, 346.
[4] 1 Story's R. 371.

for losses, on the principle that by taking a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts.[1] It is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage-coaches, artisans, or farmers, as well as between merchants and bankers.[2] The essence of the association is, that they may be jointly concerned in profit and loss, or in profit only, in some honest and lawful business. The contract must be for the common benefit of all the parties to the association; and though the shares need not be equal, yet, as a general rule, all must partake of the profit in some ratable proportion; and that proportion, as well as the mode of conducting the business, may be modified and regulated by private agreement, at the pleasure of the parties.[3] If there be no such agreement on the subject, and no evidence to the contrary, the general conclusion of the law is that the partnership losses are to be equally borne, and the partnership profits equally divided;[4] and this would be the rule, even though the contribution between the parties consisted entirely of money by one, and entirely of labor by the other. There may be a general partnership at large, or it may be limited to a particular branch of business or to one particular subject.[5] There may be a partnership in the goods in a particular adventure, or it may be confined to the profits thereof.[6]

[1] Voet, Com. ad Pand. 17. 2. 1; 2 Black. Rep. 998; 2 H. Black. 247; 4 Barnw. & Ald. 663; 16 Vesey, 49; 16 Johns. Rep. 40.

[2] Cowp. 814; 1 H. Black. 43; 2 Bing. 170.

[3] Collyer on Part. 11; Gow on Part. 9; Story, Part. 29, 30.

[4] Story on Part. 25–37. [5] Cowp. 816; Code Napoleon, 1841.

[6] 2 Term, 675; 1 Rose, 297; 1 Barnw. & Cress. 72; 5 Taunton 74.

(2.) *Of Dormant Partners.* *Dormant* partners, or those who participate in the profits of the trade and conceal their names, are equally liable when discovered as if their names had appeared in the firm, and although they are unknown to be partners at the time of the creation of the debt.[1] The question arises also in the case of a *nominal* or implied partner who has no actual interest in the trade or its profits, and he becomes responsible as a partner by voluntarily suffering his name to appear to the world as a partner, by which means he lends to the partnership the sanction of his credit.[2] There is a just and marked distinction between partnership as respects the public, and partnership as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. Though the law allows parties to regulate their concerns as they please in regard to each other, they cannot, by arrangement among themselves, control their responsibility to others; and it is not competent for a person who partakes of the profits of a trade, however small his share of those profits may be, to withdraw himself from the obligations of a partner.[3] Each individual member is answerable *in solido* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. Even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute either money or labor, or to receive any

[1] 3 Price's Exch. Rep. 538; 1 H. Black. 48; 4 Mass. Rep. 424; 8 Serg. & Rawle, 55; 5 Miller's Louis. Rep. 406, 408; 7 East, 210; 5 Peters, 529, 561.

[2] 2 Camp. 802; 2 H. Black. 242; 5 Miller's Louis. 408, 409; 6 Bing. 776.

[3] 2 H. Black. 235; 4 East, 144.

part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it would not receive nor perhaps deserve.

(3.) *Of Sharers in Profits.* A person may be allowed in special cases to receive part of the profits of a business without becoming a legal or responsible partner. Thus a party may by agreement receive, by way of rent, a portion of the profits of a farm or tavern without becoming a partner.[1] So to allow a clerk or agent a portion of the profits of sales as a compensation for labor, or a factor such a percentage on the amount of sales, does not render the agent or factor a partner when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in the profits in the character of profits, and there is no mutuality between the parties.

(4.) *Of Limited Partners.* In many parts of Europe limited partnerships are admitted, provided they be entered upon a register.[2] It is supposed to be well calculated to bring dormant capital into active and useful employment; and this species of partnership has accordingly been authorized by statute in most of our states.

It is well established that when a person joins a partnership as a member he does not assume the previous debts of the firm nor become bound by them.

II. *Of the Rights and Duties of Partners in their Relation to each other and to the Public.* (1.) *Of the Interest of Partners in their Stock in Trade.*

[1] 6 Halst. 181. [2] 1 H. Black. 48.

Partners are joint tenants of their stock in trade, but without the right of survivorship. On the death of one partner his representatives become tenants in common with the survivor in regard to *choses in action:* the remedy to reduce them to possession vests exclusively in the survivor. But no partner has an exclusive right to any part of the joint stock until a balance of accounts be struck between him and his copartners and the amount of his interest accurately ascertained.

(2.) *Of Stock in Land.* If partnership capital be invested in land for the benefit of the company, though it may be a joint tenancy in law, yet equity will hold it to be a tenancy in common and as forming part of the partnership fund, and, if the legal estate be vested in one person, will consider that person as trustee for the whole concern, and the property will be entitled to be distributed as personal estate.[1] Real estate held by partners in common may be conveyed or charged by one partner on his private account, provided the purchaser or mortgagee dealt with him in good faith and with no notice of partnership rights.

(3.) *As Ship-Owners.* It has been held that shipowners were tenants in common and not to be considered as partners; still there may be a special partnership in ships.

(4.) *Acts by which One Partner may bind the Firm.* The act of each partner in transactions relating to the partnership is considered the act of all and binds all. When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one ex-

[1] 3 Bro. Ch. Cas. 199; 5 Vesey, 189; 7 Vesey, 424; 17 Vesey, 298; Gow on Part. 54; 2 Dow P. C. 242; 1 Swanston, 521; 7 Conn. 11; 1 Sumner, 182–186; Newfoundland Rep. 396.

hibited, one of the partners cannot make a valid partnership engagement except on partnership account. But if the negotiable paper of a firm given by one partner on his private account passes into the hands of a *bonâ fide* holder without notice, or if one partner should purchase on his private account an article in which the firm dealt or which was connected with its business, knowledge that it was a private and not a partnership transaction must be brought home to the claimant to defeat his claim upon the firm. A partner may pledge as well as sell the partnership effects.

(5.) *Of Guaranty.* A partner cannot bind the firm by guaranty of the debt of a third person without a special authority for that purpose.

(6.) *By Deed.* One partner cannot charge the firm by deed with a debt, but one partner, by the special authority of his copartners under seal, and, if in their presence, by parol authority, may execute a deed for them in a transaction concerning all parties. One partner may by deed execute a firm release of a debt. So also in bankruptcy proceedings a partner may execute a deed binding upon the firm.

(7.) *The admissions of debt* by single partner during the partnership will bind the firm.

(8.) *Separate Account.* The business and contracts of a partner distinct from the partnership are on his own account, but a partner cannot so deal to the prejudice of the firm.

III. *Of the Dissolution of Partnership.* A partnership ceases with the completion of its business or at the expiration of the term for which it was limited. It may be dissolved by the voluntary act of the parties or of one of them, and by the death, insanity, or bankruptcy of either, and by judicial decree or disability of one of the parties.

(1.) *Dissolution by the Voluntary Act of either Partner.* Any partner may withdraw if no period is prescribed for continuance of partnership.[1] Marriage of a *feme sole* partner operates as a dissolution of firm.

(2.) The *death* of either party dissolves the partnership. A surviving and the representatives of a deceased partner have a common interest, and the latter have a right to insist on the application of the joint property to the payment of the joint debts and a due distribution of the surplus.

(3.) *Insanity of a Partner* does not, *ipso facto*, dissolve a partnership, but affords a ground for its dissolution.

(4.) *Insolvency of the Partnership*, or of its members, dissolves it, and the assignees become tenants in common with the solvent partners.

(5.) *Judicial Decree.* A partnership may be dissolved by judicial decree for various causes at the instance of a member.

(6.) The *inability* of either of the parties to act for any considerable time in the business would dissolve the partnership. If the partners were subjects of different governments, a war between them would dissolve the partnership.

(7.) *A dissolution* suspends all the operations of the firm save to wind up its affairs. To render a dissolution safe and effectual there must be a due notice of it.

[1] 16 Ves. 49; 17 Ves. 298; 1 Swanst. 508.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

(1.) *Of the History of Bills and Notes.* It is the general opinion that the commerce of the ancients was carried on without the use of bills of exchange. Promissory notes are governed by the rules that apply to bills. The statute of 3 & 4 Anne made promissory notes payable to a person and to his order or bearer negotiable like inland bills, and by subsequent statutes the latter are put on the same footing as foreign bills, except that no protest is requisite.

(2.) *Of the Essentials of Negotiable Paper.* A bill of exchange is a written order or request, and a promissory note a written promise, by one person to another, for the payment of money absolutely and at all events.[1] If A., living in New York, wishes to receive one thousand dollars which await his orders in the hands of B., in London, he applies to C., going from New York to London, to pay him one thousand dollars and take his draft on B. for that sum, payable at sight. A. receives his debt by transferring it to C., who carries his money across the Atlantic in the shape of a bill of exchange, without risk, and on his arrival at London he presents the bill to B., and is paid. A., who draws the bill, is called the *drawer*. B., to whom it is addressed, is called the *drawee*, and on acceptance he becomes the *acceptor*. C., to whom the bill is made

[1] Bayley on Bills, 1.

payable, is called the *payee*.[1] As the bill is payable to C. or his order, he may by indorsement direct the bill to be paid to D., and in that case C. becomes the *indorser*, and D., to whom the bill is indorsed, is called the *indorsee* or *holder*. A check upon a bank is more nearly like a bill of exchange than a promissory note. It is transferable like a bill of exchange. It is not a direct promise by the drawer to pay, but an engagement that the drawee shall accept and pay, and the drawer is answerable only on the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange.[2] A bill or note is not confined to any set form of words. A promise to deliver, or to be accountable or to be responsible for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money.[3] The instrument must be made payable to the payee, and to his *order* or *assigns*, or to *bearer*, in order to render it negotiable. It must have negotiable words on its face, showing it to be the intention to give it a transferable quality. Without them it is a valid instrument between the parties, and is entitled to the allowance of three days of grace, and may be declared on as a promissory note within the statute.[4] But if it wants negotiable words, it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own

[1] 9 Barnw. & Cress. 356; 9 Porter's (Ala.) Rep. 76; 2 Metcalf's Rep. 58.

[2] 3 Johns. Cas. 5; Ibid. 259; 7 Term, 430; 4 Wharton, 252; 4 Harr. & Johns. 276.

[3] 2 Lord Raym. 1396; 8 Mod. Rep. 362; Str. 629, 1271; 7 Johns. 461.

[4] Story on Bills, 75; 10 Gill & Johns. 299.

name.[1] If the name of the payee or indorsee be left blank, any *bonâ fide* holder may insert his own name as payee.[2] It is usual to insert the words "*value received*," in a bill or note, but they are unnecessary, and value is implied in every bill, note, acceptance, and indorsement. The burden of proof rests upon the other party to rebut the presumption of validity and value, which the law raises for the protection and support of negotiable paper.[3] Nor is it necessary that the maker should subscribe his name at the bottom of the note; and it is sufficient if the maker's name be in any part of the note, as if it should run, "I, A. B., promise to pay C. D., or order, one hundred dollars."[4] If the note be payable to B., or *bearer*, it need not be indorsed; and it is the same, in effect, as if the name of B. had been omitted. The bearer may sue in his own name; and if his right and title, or the consideration, be called in question, he must then show that he came by the note *bonâ fide*, and for a valuable consideration.[5] So a bill or note payable to a fictitious person may be sued by an innocent indorsee as a note payable to bearer; and such a bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payee was fictitious was known to the acceptor.[6]

[1] 1 Salk. 132; 2 Lord Raym. 1545; 6 Term Rep. 123; 6 Taunt. 325; 9 Barnw. & Cress. 409; 1 Deacon & Chitty, 275; 1 Dallas, 194; 3 Caines, 137; 1 Vermont, 136.

[2] 2 Maule & Selw. 90.

[3] 11 Adolph. & Ellis, 702; Story on Bills, 78, 199; 3 Maule & Selw. 352; 1 Mood. & Rob. 366; 4 Watts & Serg. 445; 3 Watts, 27; 2 M'Lean, 213.

[4] 1 Str. 399; 2 Lord Raym. 1576.

[5] 3 Burr. 1516; 18 Martin's Louis. 565; 1 Vermont, 316.

[6] 1 H. Black. 313, 569; 3 Term Rep. 174, 481; 2 Yeates, 480; 2 N. H. Rep. 446.

(3.) *Rights of the Holder.* The *bonâ fide* holder can recover upon the paper, though it came to him from a person who had stolen it from the true owner, provided he took it innocently in the course of trade for a valuable consideration and not overdue, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised.[1] This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. As between the original parties to negotiable paper the consideration of a bill, note, or check may be inquired into.

(4.) *Of Acceptance of the Bill.* Bills drawn payable at or after sight must be presented to the drawee for acceptance without unreasonable delay in order to hold the drawer and indorser. The acceptance may be by parol or in writing and general or special.[2] If a bill be accepted payable at a certain place, demand must be made at that place.[3] Every act giving credit to the bill amounts to an acceptance.[4] The acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or a release, even though he accepted without consideration, and for the accommodation of the drawer.[5] A third person, after protest for non-acceptance by the drawee, may become a party to the bill by accepting and paying the bill for the honor of the drawer or of a particular indorser. His acceptance

[1] 1 Burr. 452; Doug. Rep. 633; 2 Camp. N. P. 5; 13 East, 135; 4 Taunt. 114; 7 Bing. 246; 3 Johns. Cas. 5; Ibid. 259; 6 Mass. 428; 20 Pick. 545; 16 Maine, 465; 17 Louis. 152.

[2] Str. 1000; 1 Atk. 612.

[3] 2 Brod. & Bing. 165.

[4] 1 Atk. 611; 5 East, 514; 3 Bing. 625.

[5] 1 Bing. N. C. 267.

is termed an acceptance *supra protest*. The bill must be duly presented to the drawee at maturity, and if not paid it must be duly protested for non-payment, and due notice given to the acceptor, *supra protest*, to bind him as an absolute acceptor. Two persons may accept each for the honor of a different party to the bill.[1]

(5.) *Indorsement.* A valid transfer may be made by the payee or his agent, and the indorsement is an implied contract that the antecedent names are genuine, that the bill or note shall be duly honored or paid, and if not, that he will on due protest and notice take it up. Blank indorsements are common, and they may be filled up at any time by the holder; when a note is so indorsed it passes by delivery. In the case of blank indorsements possession is evidence of title. The holder of paper fairly negotiated is entitled to recover only where such paper has been taken *bonâ fide* in the course of business before it falls due. Demand notes must be presented within a reasonable time by the holder to charge an indorser. If a bill or note be negotiated after it is due, and be thereby subject to every equitable defence, yet a demand must be made upon the drawee or maker within a reasonable time, and notice given to the indorser in order to charge him equally, as if it had been a paper payable at sight or negotiated before it was due.[2] A negotiable instrument may be indorsed conditionally, and in a way to exempt the indorser from liability, as by adding to the indorsement the words *without recourse.*

(6.) *Of the Demand and Protest.* The demand of

[1] Beawes, tit. Bills of Exchange, pl. 42; 2 Camp. 447.

[2] 8 Serg. & Rawle, 351; 9 Johns. 121; 2 Conn. 419; 2 N. H. Rep. 159; 3 S. C. Const. Rep. 33; 3 Bailey's S. C. Rep. 457.

acceptance of a foreign bill is usually made by a notary, and in case of non-acceptance he protests it, which protest receives credit in all courts and places by the law and usage of merchants without any auxiliary evidence. Prompt protest of a foreign bill is necessary upon refusal. If the bill has been accepted, demand of payment must be made on the day when the bill falls due by the holder or his agent, at the place appointed for payment, or at the residence or place of business of the acceptor, or upon him. In default of payment protest must be forthwith made by a notary at the place of payment, according to the law of that place, and it must be made on the last day of grace.[1] Three days of grace apply equally to foreign and inland bills and notes, and the acceptor or maker has within a reasonable time of the end of business on the third day of grace to pay.

(7.) *Of the Steps Requisite to fix the Drawer and Indorsers.* The holder must not only show a demand or due diligence to get the money of the drawee of the bill or check and of the maker of the note, but he must give reasonable notice of their default to the drawer and indorsers to entitle himself to sue them.[2] The indorser to whom notice is duly given is liable, the object of notice being to afford an opportunity to the drawer and indorsers to obtain security from those persons to whom they are entitled to resort for indemnity.

The general rule is that notice of dishonor may be sent the same day, but must be sent the day after dishonor. Each party successively, into whose hands a

[1] 6 Wheaton, 572; 2 Hill, 297; 1 Bell's Com. 415; Story on Bills, 447, 448.

[2] 2 Burr. 669; Doug. 679; 2 Peters, 96.

dishonored bill may pass, shall have one day to give notice. If the demand be made on Saturday it is sufficient to give notice to the drawer or indorser on Monday;[1] and putting the notice by letter into the post office is sufficient, though the letter should happen to miscarry.

There are many cases in which notice is not requisite or the want of it is waived. If the party be absent, or absconded, and his place of residence not known, and due inquiry be made, or giving notice be impossible, or if the party draw a fraudulent bill, notice is not necessary.[2]

Giving time by the holder to the acceptor of a bill or maker of a note will discharge the other parties, but the agreement for delay must be one which was binding in law upon the parties.[3]

The acceptor is first liable, and the indorsers in the order in which they stand on the bill; and taking new security, or giving time, or discharging or compounding with a subsequent indorser, cannot prejudice a prior indorser, because he has no rights against a subsequent indorsee.[4] The acceptor is not discharged by time given to or security taken from other parties to the bill.[5] A subsequent promise to pay by the party entitled to notice will amount to a waiver of the want of demand or notice. So if the indorser has

[1] 2 Caines, 343; 3 Bos. & Pull. 601.

[2] Chitty on Bills, c. 8, 360; c. 9, 389, 422; c. 10, 486–488; 1 Term Rep. 405; 4 Cranch, 153, 164; 10 Peters, 572.

[3] 12 Wheaton, 554; 2 Gill & Johns. 230; 1 Bailey's S. C. 412; 2 Metcalf, 178; 3 Younge & Collyer, 187; Story on Bills, 503.

[4] 3 Esp. N. P. 49; S. C. 2 Bos. & Pull. 61; 3 Esp. N. P. 46; 6 Mass. 85.

[5] Story on Bills, 295; Chitty on Bills, c. 7, 9; 13 Peters, 186.

taken sufficient collateral security, he waives his right to demand and notice.[1]

If an indorser comes again into possession of the bill he may sue and recover as against prior parties. To maintain suit against the indorser the holder must show due demand of the maker or acceptor or a presentment for acceptance and due notice to him of the default. But in a suit against the acceptor the holder need not show notice to any other person: nothing short of the statute of limitations or payment, or a release or an express declaration of the holder, will discharge the acceptor. He is bound, like the maker of a note, as a principal debtor.

(8.) *Of the Measure of Damages.* The engagement of the drawer and indorser of every bill is that it shall be paid at the proper time and place, and if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. By the law-merchant of Europe, the holder of a protested bill may immediately redraw, from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, its contingent expenses, and the new exchange.

In this country it is the practice to allow an additional per cent. for damages instead of redrawing; this per cent. varies in the different states.

(9.) *Of Mercantile Guaranties.* A guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who, in the first instance, is liable.

[1] 2 Greenleaf, 207; 5 Mass. 170; 5 Conn. 175; 9 Gill & Johnson, 47; 1 Esp. R. 302; 4 Harrison's N. J. Rep. 61; Story on Bills of Exchange, 443; 7 Wendell, 165.

This agreement must be in writing according to the statute of frauds. But if the promise to pay the debt of another arises out of some new and original consideration between the newly contracted parties, it is then not a case within the statute.[1] The indorser of negotiable paper is entitled to strict notice, but the guarantor is only entitled to notice when he may be prejudiced by the want of it.[2]

(10.) *Of Treatises on Bills and Notes.* The earliest English work on bills is in Malynes' "Lex Mercatoria." The next English treatise on the subject was that by Marius, published in 1651. This was a more complete and accurate work than that of Malynes. The next work was that of Molloy: in his "De Jure Maritimo," published in 1676, he touched upon the subject of bills of exchange. Beawes' "Lex Mercatoria Rediviva" is much superior to the work of Malynes, for which it was intended as a substitute. Cunningham wrote and published a work on bills and notes about 1750. It was superseded by Kyd's treatise on bills and notes published in 1790. Mr. Chitty's treatise appeared in 1799. He refers to Pothier, who, in his work on bills, which was a commentary upon the French Ordinance of 1673, draws upon the works of MM. Jousse and Dupuy de La Serra and Savary. The Commercial Ordinance of France in 1673 digested the law of bills of exchange, and it was substantially incorporated into the Commercial Code of 1807. M.

[1] 8 Johns. 29; 11 Ibid. 221; 5 Mass. 358; 3 Burr. 1886; 2 Chitty, 403; 6 Yerger, 418.

[2] 8 Pick. 423; 18 Pick. 534; 9 Serg. & Rawle, 202; 2 Taunt. 206; 8 East, 242; 3 Dev. N. C. 65; 1 Story's Rep. 26; 2 M'Lean, 21; 5 Peters, 624; 7 Peters, 113; 12 Peters, 207; 13 Conn. 28; 22 Pick. 223; 2 Ala. N. S. 373; 13 Vermont, 106; 1 Bailey's S. C. Rep. 620.

Merlin also treats of the French law of bills and notes, and Mr. Thompson's work upon the same subject in Scotland is highly spoken of by competent persons.

LECTURE XLV.

OF THE TITLE TO MERCHANT VESSELS.

(1.) *Requisites to a Valid Title.* The title to a ship acquired by purchase passes by writing. Possession of a ship and acts of ownership will be presumptive evidence of title without the aid of written proof. Upon the sale of a ship in port, delivery of possession is requisite to make the title perfect. If the seller should remain in possession and act as owner and should become bankrupt, the property would be liable to his creditors. If the buyer takes possession of a ship sold while at sea within a reasonable time after her arrival in port, his title will prevail against that of a subsequent purchaser or attaching creditor,[1] but his title is subject to prior incumbrances.

(2.) *Who is liable as Owner.* The owner is personally liable for necessaries furnished and repairs made to a ship by order of the master.[2] In determining liability for repairs the question is, "Upon whose credit was the work done?"[3] The weight of American decisions favors the position that a mortgagee of a ship out of possession is not liable for repairs or necessaries procured on the order of the master and

[1] 2 Vesey, 272; Cooke's B. L. 231; 4 Maule & Selw. 240; 9 Pick. 4.

[2] 4 Barnw. and Ald. 352; 5 Carr. & Payne, 358; 1 Ibid. 602; 5 Miller's Louis. 335; 4 Watts & Serg. 240.

[3] Ryan & Moody, 43; 1 Adolph. & Ellis, 312.

not upon the particular credit of the mortgagee, who was not in receipt of the freight.

(3.) *Of the Custom House Documents.* The United States have imitated the policy of England and other commercial nations,[1] in conferring peculiar privileges on American built ships owned by our own citizens. The object of the registry acts is to encourage our own trade, navigation, and ship building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries. The registry of all vessels at the custom house and the memorandums of the transfers add great security to title, and bring the existing state of our navigation and marine under the view of the general government. By these regulations the title can be effectually traced back to its origin.[2] The acts of Congress of December 31, 1792, and February 18, 1793, constitute the basis of the regulations in this country for the foreign and coasting trade and for the fisheries of the United States; and they correspond very closely with the provisions of the British statutes in the reign of George III. No vessel is to be deemed a vessel of the United States, or entitled to the privileges of one, unless registered and wholly owned and commanded by a citizen of the United States. Further statute regulations are extended and minute.

(4.) *Of Part Owners.* The part owners of a ship are not partners, but tenants in common.[3] Each has

[1] Prescott's Ferdinand and Isabella, vol. iii. 453.

[2] Reeves' Hist. of Shipping.

[3] 2 Ves. & Bea. 242; 2 Rose, 78, note; 2 Rose's Cases in Bankruptcy, 76; 1 Montagu on Partnership, 102, note; 4 Johns. Ch. Rep. 526.

his distinct though undivided interest, and when one of them is manager of the ship he is termed the ship's husband. If the part owners be equally divided in opinion in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her.[1] If a part owner sells, he can sell only his undivided right.

Part owners are liable for necessary stores and repairs ordered by one of their number. Their liability is more restricted than that of a partner. The duty of the ship's husband is to look after the equipment, provisions, crew, and documents. He cannot insure or borrow money for the owners.[2] The rights of tenancy in common among part owners apply to the cargo as well as the ship, and one part owner cannot dispose of the whole interest.

[1] Abbott on Shipping, Part I. c. iii. sec. 6.
[2] 5 Burr. 2727; Collyer on Partnership, 810.

LECTURE XLVI.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

(1.) *Of the Authority and Duty of the Master.* The captain of a ship has confided to him great power. He must be experienced and skilful. His authority at sea is summary, and often absolute. As the master is the confidential agent of the owners, he has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of the ship.[1] The master is appointed by the owner, and the appointment holds him forth to the public as a person worthy of trust and confidence; and the appointment may be revoked at discretion.

The master is always personally bound by his contracts, and the person who deals with the captain in a matter relative to the usual employment of the ship, or for repairs or supplies furnished her, has a double remedy. He may sue the master on his own personal contract, and he may sue the owner on the contract made in his behalf by his agent, the master. The latter may, however, exempt himself from personal responsibility by expressly confining the credit to the owner, and stipulating against his personal liability.[2]

The master is bound to conduct himself, in all re-

[1] Carth. 58; Cowp. 636; 8 Term, 531; 15 Mass. 370; 4 B. & Ald. 352.

[2] Cases temp. Hard. 360; 1 Term, 108; 9 East, 482.

spects, with good faith, diligence, and competent skill, and he is responsible to the owners, as their agent, for his conduct.[1] The master may, by a charter-party, bind the ship and freight. This he may do in a foreign port in the usual course of the ship's employment; and this he may also do at home if the owner's assent can be presumed. The ship and freight are, by the marine law, bound to the performance of the contract.[2] The master can bind the owners, not only in respect to the usual employment of the ship, but in respect to the means of employing her. His powers relate to the carriage of the goods and the supplies requisite for the ship, and he can bind the owner personally as to repairs necessary for the ship; and this was equally the rule in the Roman law. The case of the ship Grand Turk[3] is a decision in the Circuit Court of the United States for New York, on the point that the master's wages and perquisites were no lien on the ship; and it was so ruled also in Fisher *v.* Willing.[4] In the Circuit Court of the United States for Massachusetts[5] the rule was laid down that the master had a lien upon the freight for all his advances and responsibilities abroad upon account of the ship, and it seemed to be the strong inclination of the court to acknowledge the master's lien on the ship for the same object. It is very clearly settled that the master, when abroad and in the absence of the owner, may hypothecate the ship, freight, and cargo, to raise money requisite for the completion of the voyage.[6]

[1] Pardessus, tome iii. 67; 3 Mason, 161.

[2] Ord. de la Mar. liv. iii. tit. 1, art. 11; Valin, Ibid. tome i. 629; 6 Greenleaf, 160.

[3] 1 Paine, 72. [4] 8 Serg. & Rawle, 118. [5] 3 Mason, 255.

[6] 3 Doug. 101; 3 Rob. Adm. 240; 2 P. Wms. 367; 3 Sumner, 228.

This authority is, however, limited to objects connected with the voyage. The power of the master to charge the owners relative to the repair and freight of the ship does not exist when the owners are present, or when at their residence.[1] But if only a minority of the owners are present, or reside at the place, then the captain's power remains good.[2] The master, in the course of the voyage, and when it becomes necessary, may also sell part of the cargo to enable him to carry on the residue; and he may hypothecate the whole of it, as well as the ship and freight, for the attainment of the same object. It is the duty of the master engaged in a foreign trade to put his ship under the charge of a pilot, both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment.[3] The pilot, while on board, has the exclusive control of the ship.

The mate is the next officer to the master on board, and upon his death or absence the mate succeeds, by virtue of his office, to the care of the ship and the government and management of the crew.

(2.) *Of the Rights and Duties of Seamen.* We come next to the laws applicable to seamen; and it will appear, for obvious reasons, that in the codes of all commercial nations they are objects of great solicitude and paternal care. They are usually a heedless, ignorant, audacious, but most useful class of men, exposed to constant hardships, perils, and oppression. The seamen employed in the merchant service are made subject to special regulations, prescribed

[1] Code de Commerce, art. 232; Ord. de la Mar. liv. ii. tit. 1; Gilpin, 456; 1 Wash. Cir. 49.

[2] Boulay-Paty, Cours du Droit Com. tome ii. 271.

[3] 7 Term, 160; 6 Rob. Adm. 316.

by acts of Congress for their government and protection. Shipping articles are contracts in writing or in print, declaring the voyage and the term of time for which the seamen are shipped, and the rate of wages, and when they are to render themselves on board; and the articles are to be signed by every seaman or mariner, on all voyages from the United States to a foreign port, and in certain cases to a port in another state, other than an adjoining one.[1] Further statutory provisions are made for the relief of disabled seamen.

The master is personally responsible in damages for any injury or loss to ship or cargo, the result of his neglect, and he is intrusted with a corresponding authority. Every seaman is bound to do his duty in the service to the utmost of his ability. A seaman incurring sickness or bodily injury in the service is entitled to his whole wages for the voyage. The general principle of the marine law is that freight is the mother of wages; and if no freight be earned no wages are due, unless the freight be lost by the fraud or neglect of the master. If a ship delivers her outward cargo and perishes on the return voyage, the seamen's wages on the outward voyage are due. Mariners are bound to contribute out of their wages for embezzlements of the cargo, or injuries produced by the misconduct of any of the crew. In case of shipwreck, if materials be saved, a compensation is allowed to the seamen as salvors.

[1] 1 Story's Rep. 1.

LECTURE XLVII.

OF THE CONTRACT OF AFFREIGHTMENT.

(1.) *A Charter-Party* is a contract of affreightment in writing by which the owner of a ship lets the whole or a part of her to a merchant, to carry goods for the payment of freight. All contracts under seal were anciently called charters, and used to be divided into two parts and each party thereto took one, whence its meaning, *charta partita*, — a deed or writing divided. This mercantile lease of a ship describes the parties, the ship, the voyage, and the agreement. When the goods of several distinct persons are laden on board, the vessel is termed a general ship; but when one or more contract for the ship exclusively, it is said to be a chartered ship.

The extra days beyond the lay days (days for loading and unloading) are called days of demurrage, and that term is likewise applied to the payment for such delay. If either party be not ready by the time appointed, the other may abandon the contract. By the contract the owner is bound to see that the ship be seaworthy and well equipped.

(2.) *The Bill of Lading.* The master of the ship signs a bill of lading, which is an acknowledgment of the receipt of the goods on board. There are commonly three bills of lading: one for the freighter; another for the consignee, factor, or agent abroad; a third is kept by the master for his own use. It is the

document and title of the goods sent, and as such, if it be to order or assigns, is transferable in the market.

(3.) *Of the Carriage of the Goods.* The master is bound to sail promptly and to proceed to the port of delivery without delay. If the ship be disabled from completing the voyage, the owner may recover freight by promptly forwarding the goods to their destination. Every care must be taken of the cargo.

(4.) *Of the Delivery of the Goods.* The cargo is to be delivered to the consignee or to the order of the shipper on production of the bill of lading and payment of the freight.

(5.) *The Responsibility of the Ship-Owner.* The only causes which will excuse the ship-owner for non-delivery of goods are events falling under the description of the act of God and public enemies, unless there be special stipulations to the contrary.

(6.) *Of the Shippers' Duties.* The shippers' duties are to use the ship in a lawful manner and for the purposes for which it was let.

(7.) *Of the Payment of Freight.* The term freight is applied to all rewards or compensation paid for the use of ships, including passenger transportation.[1]

The general right of the master and owner to retain the goods for the freight is equally perfect, whether the merchant takes the whole vessel by a charter-party or sends his goods in a general ship.

(8.) *Of Loss from Collision of Ships.* When it is clear that a fault was committed by one party and disaster was the result, the party in fault must pay the damages. But if fault be on both sides or neither side, neither party can sue the other.[2]

[1] 1 Peters' Adm. 206.

[2] 1 Moody & Malkin, 169; 1 Cromp. & Meeson, 21; 6 Wharton, 311.

(9.) *Of General Average.* General, gross, or extraordinary average means a contribution made by all parties concerned toward a loss sustained by some of the parties in interest for the benefit of all. By the Rhodian law, as cited in the Pandects,[1] if goods were thrown overboard in case of extreme peril to lighten and save the ship, the loss, being incurred for the common benefit, was to be made good by the contribution of all. The captain must first begin the jettison with things the least necessary, the most weighty, and of least value.

Before contribution takes place it must appear that the goods sacrificed were the price of safety to the rest. Contribution is equally requisite whether the goods were cast into the sea or delivered to a pirate.

(10.) *Of Salvage.* Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved wholly or in part.

Though the contract of seamen be not dissolved by shipwreck, and it be their duty to remain and labor to preserve the wreck, yet they may be entitled to recompense for their peculiar services.

(11.) *Of the Dissolution of the Contract of Affreightment.* If the voyage becomes unlawful or impossible to be performed, or if it be broken up by war or interdiction of commerce, the contract is dissolved.[2]

[1] Dig. 14. 2. 1.

[2] 10 East, 526.

LECTURE XLVIII.

OF THE LAW OF MARINE INSURANCE.

MARINE insurance is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain sea risks to which his ship, freight, and cargo, or some of them, may be exposed during a certain voyage or fixed period.

I. *Of the Formation and Subject Matter of the Contract.* (1.) *Of the Parties.* All persons, whether aliens or natives, may be insured, with the exception of alien enemies, for it is a contract authorized by the general law and usage of nations. With respect to persons who may be insurers, the rule of the common law prevails with us, and any individuals, or companies, or partnerships may lawfully become insurers.

(2.) *Of the Terms and Subject of the Policy.* If the ship be specified in the policy it becomes part of the contract, and no other ship can be substituted without necessity; but the cargo may be shifted from one ship to another, if it be done from necessity, and the insurer of it will still be liable.[1] An insurance on the body of the ship sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship. The form of the policy in England and the United States contains the words "lost or not lost;" and if the subject insured be lost, or has arrived in safety when the contract is made, it is still valid, if

[1] 12 Johns. 138.

made in ignorance of the event, and the insurer must pay the loss or not pay it as the case may be. A policy on a voyage from abroad may be good, though it omits to name the ship, or master, or port of discharge, or consignee, or to specify and designate the nature or species of the cargo, for all these may be unknown to the insured when he applies for the insurance.[1] The policy, in such case, will be good to the amount insured, if effects be laden in any ship, or any port, and to any consignee. And a policy may be on bills of exchange if they truly exist.[2]

If bottomry or respondentia interest be insured by the lender, it has been required to be insured by name and not under the general description of goods.[3] But this rule was originally adopted on the ground of mercantile usage; and where the usage was shown to be different, such an interest was allowed to be covered by a policy on goods.[4] If part of the policy should be written and part printed, and there should arise a reasonable doubt upon the meaning of the contract, the greater effect is to be attributed to the written words, for they are the immediate language selected by the parties, and the printed words contain the formula adapted to that and all other cases upon similar subjects.[5] Policies are generally effected through the agency of brokers; and the insurance broker keeps running accounts with both parties, and becomes the mutual agent of both the underwriter and the in-

[1] Le Guidon, c. 12, art. 2; Ord. de la Mar, tit. Des Assurances, art. 4; Code de Commerce, art. 337; Boulay-Paty, Cours de Droit Com. tome iii. 411, 412.

[2] 2 Bing. 185; 2 Metcalf's Rep. 1.

[3] 3 Burr. 1394; 2 Johns. Cas. 250; 1 Johns. Rep. 385.

[4] 1 Condy's Marshall on Insurance, 118.

[5] 4 East, 136.

sured. His receipt of the premium places him in the relation of debtor to one and creditor to the other party.

The general rule is that the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for the loss. The receipt of the premium in the policy is conclusive evidence of payment, and binds the insurer unless there be fraud on the part of the insured.[1] If the agent effects an insurance for his principal without his knowledge or authority, and the principal afterwards adopts the act, the insurer is bound, and cannot object to the want of authority.[2] If the subject matter of the policy be assigned before loss, the policy may also be assigned so as to give a right of action to the assignee.

(3.) *Of Insurable Interests.* The assured must have a lawful interest subsisting at the time of the loss in the subject insured to entitle him to recover upon his policy. That interest may be absolute or contingent, legal or equitable. It may exist in him not only as absolute owner, but also in the character of mortgagor or mortgagee, borrower or lender, consignee, factor, or agent, and may arise from profits, freight, or commissions, or other lawful business.

(*a.*) *Of Illicit Trade.* The proper subject of insurance is lawful property engaged in a lawful trade; and if the voyage as originally insured be lawful, a subsequent illegality does not affect it, if the loss be not tainted with such illegality. We have seen that the property of enemies, and a trade carried on with enemies, do not come within this definition. So an insurance on a voyage, undertaken in violation of a blockade or of an embargo, or of the provisions of a

[1] 1 Campb. 532; 3 Taunt. 493. [2] 1 Hall's N. Y. Rep. 247.

treaty, is illegal, whether the policy be on the ship, freight, or goods, embarked in the illegal traffic.[1] It is a settled principle, that an insurance on property intended to be imported or exported contrary to the law of the place where the policy is made, or sought to be enforced, is void.

(*b.*) *Of Contraband of War.* The insurance by a neutral of goods usually denominated contraband of war is a valid contract, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. But, on the other hand, all articles contraband of war are subject to seizure *in transitu* by the belligerent cruisers, and so far it is a case of imperfect right.

(*c.*) *Of Seamen's Wages.* The commercial ordinances have generally prohibited the insurance of seamen's wages, and the expediency of the provision arises from the consideration that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and disaster.

(*d.*) *Of Freight, Profits, and Commissions.* In England and the United States, future or expected and contingent, and even dead freight, is held to be an insurable interest. Profits are equally with freight a proper subject of insurance.

(*e.*) *Of Open and Valued Policies.* An open policy is one in which the amount of interest is not fixed by the policy, but is left to be ascertained by the insured in case a loss should happen. A valued policy is where a value has been set on the ship or goods insured, and inserted in the policy in the nature of liquidated damages.

[1] 3 Rob. Adm. 324; K.B. 25 George III.; Park on Insurance, 311; 2 Rob. Adm. Rep. 6; Hughes, Insurance, 70.

(*f.*) *Of Wager Policies.* A mere hope or expectation, without some interest in the subject matter, is a wager policy, and all such marine policies are by statute in England declared void.[1]

(4.) *Of Reassurance and Double Insurance.* After an insurance has been made, the insurer may have the entire sum he had insured reassured to him by some other insurer. The object of this is indemnity against his own act; and if he gives a less premium for the reassurance, all his gain is the difference between what he receives as a premium for the original insurance, and what he gives for the indemnity against his own policy.

A double insurance is where the insured makes two insurances on the same risk and the same interest. The insurers are bound to contribute ratably towards the loss.[2]

(5.) *Of Representation and Warranty.* (*a.*) *Of Representation.* Good faith on the part of the insured is peculiarly enjoined, and he is bound to truly state the facts concerning the subject of the contract of insurance. A representation relates to facts or information extrinsic to the policy, and may be made by parol or in writing.

(*b.*) *Of Warranty.* There is in every policy an implied warranty that the ship is seaworthy when the policy attaches.

Every warranty is part of the contract, and is either express or implied. Any statement or averment of a fact, or any undertaking or description on the part of the insured on the face of the policy relating to the risk, is a warranty.

[1] 19 George II. c. 37.

[2] Park on Insurance, 374, 375, 6th edit.; 6 Cowen, 635.

(6.) *Of the Perils within the Policy.* The general rule is that the insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage.

(*a.*) *Of the Acts of the Government of the Parties.* An insurance against loss by reason of the acts of one's own government, as an arrest or embargo, is valid.

(*b.*) *Of Interdiction of Commerce.* An interdiction of commerce with the port of destination, or denial of entry or blockade, has been held not to be a loss within the policy.

(*c.*) *Of Risks excluded.* It has been customary to stipulate that upon certain enumerated articles the insurer should not be liable for any partial loss whatever, and upon others for none under a given rate per cent. If there be a total loss of the voyage by reason of shipwreck or any other casualty, and there is no other means to forward the cargo, there is no distinction between the memorandum articles and the rest of the cargo.

(*d.*) *Of the Usual Perils covered by the Policy.* The insurer undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. The enumerated perils of the sea — *pirates, rovers, thieves* — include the wrongful and violent acts of individuals, whether as felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore.[1]

II. *Of the Voyage in Relation to the Policy.* (1.) *When the Policy attaches and terminates.* The commencement and end of the risk depend upon the words of the policy.

[1] 4 Term, 783 ; 1 Dow, 349 ; 1 Holt's N. P. Rep. 149.

(2.) *Of Deviation.* The policy relates only to the voyage described in it, and to the route proper for the voyage insured, and if the vessel departs voluntarily and without necessity from the usual course of the voyage, the insurer is discharged.

III. *Of the Rights and Duties of the Insured in Cases of Loss.* (1.) *Of Abandonment.* A total loss within the meaning of the policy may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little or no value. It is only in particular cases that the loss of the voyage will be a ground of abandonment of the cargo. Upon a valid abandonment the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them.

(2.) *Of the Adjustment of Partial Losses.* In an open policy the general rule is that the actual or market value of the subject insured is to be estimated at the time of the commencement of the risk. The insurer is liable for all the labor and expense attendant upon an accident which forces the vessel into port to be repaired.[1]

(3.) *Of the Return of Premium.* The premium paid by the insured is in consideration of the risk which the insurer assumes, and if the contract be void *ab initio* (from the beginning), or the risk has not been commenced, the insured is entitled to a return of the premium. The insurer retains the premium in all cases of fraud on the part of the insured or his agent.[2]

IV. *Of the Writers on Insurance Law.* The first

[1] 1 Miller's Louis. Rep. 304.

[2] Park on Insurance, 285; Marshall on Insurance, 652.

allusion to the subject of insurance we find in the laws of Wisbuy, in the early periods of modern history. The European ordinances relating to insurance have been collected in Magens' "Essay on Insurance," published in 1755. The earliest work extant on insurance is the celebrated French treatise entitled "Le Guidon," published in 1671; it was written several centuries before that time. The treatise on insurance of Roccus, an eminent civilian and judge at Naples, has been regarded as a text-book of great authority; it was published in 1655. Valin's Commentary on the Ordinance of Louis XIV. treats learnedly of this subject, and Pothier's "Essay on Insurance" is a concise digest of the principles of insurance. Emerigon's treatise surpassed all previous works. Among the French authors are Baron Locré, Pardessus, Laporte, Delvincourt, Toullier, and, last and best, Boulay-Paty. In 1786 Mr. Park published his system of the law of marine insurance. Mr. Marshall, in 1802, published his "Treatise on the Law of Insurance."

Mr. Phillips' treatise is a valuable work, covering both English and American cases. Benecke's "Principles of Indemnity in Marine Insurance" is a work of great research and practical utility. Later publications upon this subject have multiplied.

LECTURE XLIX.

OF MARITIME LOANS.

A *bottomry bond* is a loan of money upon the ship, or ship and accruing freight, at an extraordinary interest, upon maritime risks, to be borne by the lender for a specific voyage or a definite period. It is in the nature of a mortgage by which the ship owner, or the master on his behalf, pledges the ship as a security for the money borrowed, and it covers the freight of the voyage, or during the limited time.

A *respondentia bond* is a loan upon the pledge of the cargo, though an hypothecation of both ship and cargo may be made in one instrument; and generally it is only a personal obligation on the borrower. The condition of the loan is the safe arrival of the subject hypothecated, and the entire principal as well as interest is at the risk of the lender during the voyage. The money is loaned to the borrower upon condition that if the subject pledged be lost by a peril of the sea, the lender shall not be repaid except to the extent of what remains; and if the subject arrives safe, or if uninjured save by its own defect or the fault of the master or seamen, the borrower must return the sum borrowed, together with interest agreed on; and for the repayment the person of the borrower is bound as well as the property pledged. Money may also be loaned upon the hazard of a voyage without any security at any rate of interest.

The power of the master to take up money upon bottomry or respondentia exists *only* after the voyage has commenced. The principle of necessity which upholds a bottomry bond entitles a bond of a *later* date, fairly given at a foreign port under a pressure of necessity, to priority of payment over one of a *former* date, notwithstanding this is contrary to the usual rule in other cases of security.[1]

If the ship or cargo be lost not by the perils of the sea, but by the default of the borrower or master, the hypothecation bond is forfeited, and must be paid. After the safe arrival of a ship, marine interest ceases, and gives place to the ordinary legal interest on the aggregate amount of the debt due, being money lent and maritime interest added.

[1] 1 Dodson, 204; Ibid. 239; 2 Gallison, 350; Code de Commerce, art. 323.

LECTURE L.

OF INSURANCE OF LIVES AND AGAINST FIRE.

I. *Of Insurance of Lives.* The usual purpose of life insurance is to provide a fund for creditors or for family connections in case of death. The insurer, for a consideration, undertakes to pay a certain sum, or an annuity depending upon the death of the person whose life is insured. (1.) The party insuring must have an interest in the life insured. A *bonâ fide* creditor has an insurable interest in his debtor's life to the extent of his debt, for there is a probability more or less remote that the debtor would pay the debt if he lived.[1] So has a child in the life of a parent upon whom it was dependent. (2.) The insured must be in a reasonably good state of health. (3.) The insurance may be for the term of natural life, or for a definite period of years.

II. *Of Insurance against Fire.* By this insurance the underwriter, in consideration of the premium, undertakes to indemnify the insured against all losses in his houses, buildings, furniture, ships in port, or merchandise, by means of accidental fire happening within a prescribed period.

(1.) *Of the Interest in the Policy.* The insured must have an interest in the property covered by the policy, else the contract is void. His interest may be in the nature of a lien or mortgage, or that of a factor.

[1] Park on Insurance, 6th ed. 575.

(2.) *Of the Terms and Construction of the Policy.* A policy against fire is strictly a policy on time, and the commencement and termination of the risk are to be stated with precision. The insured is bound in good faith to disclose to the insurer every fact material to the risk and within his knowledge, and which, if stated, would influence the mind of the insurer in making or declining the contract.[1] Fire policies usually contain a prohibition against their assignment without the previous consent of the company. They also contain numerous other restrictions and conditions.

(3.) *Of the Adjustment of the Loss.* Settlements of losses by fire are made on the principle of a particular average, and the estimated loss is paid without abandonment of what has been saved.[2]

[1] 2 Peters' S. C. Rep. 25; 10 Pick. 535.
[2] 4 Miller's Louis. 289; 1 Hall's N. Y. 41; 6 J. B. Moore, 199.

PART VI.

OF THE LAW CONCERNING REAL PROPERTY.

LECTURE LI.

OF THE FOUNDATION OF TITLE TO LAND.

In passing from the subject of personal to that of real property, the student will immediately perceive that the latter is governed by rules of a distinct and peculiar character. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law, abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and many of the technical rules and fictions of that system, are still retained.

(1.) It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor or lord paramount of all the land in the kingdom, and the true and only source of title.[1] In this country we have

[1] 2 Black. Com. 51, 53, 59, 86, 105; Rise and Progress of the

adopted the same principle, and applied it to our republican governments; and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the Revolution.

(2.) The European nations which respectively established colonies in America assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of preëmption. The rights of the British government, within the limits of the British colonies, passed to the United States by the force and effect of the Act of Independence; and the uniform assertion of those rights by the crown, by the colonial governments, by the individual states, and by the Union, is, no doubt, incompatible with an absolute title in the Indians.

(3.) This assumed but qualified dominion over the Indian tribes, regarding them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory by right of discovery, arose, in a great degree, from the necessity of

English Commonwealth, vol. i. 584; Bell's Prin. Law of Scotland, sec. 676.

the case. In the case of Cherokee Nation *v.* State of Georgia,[1] it was held by a majority of the court, that the Cherokee Nation of Indians, dwelling within the jurisdictional limits of the United States, was not a foreign state in the sense in which the term is used in the Constitution, nor entitled as such to proceed in that court against the State of Georgia. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned.

(4.) The original English emigrants came to this country with no slight confidence in their right to possess, subdue, and cultivate the American wilderness, as being by the law of nature and the gift of Providence open and common to the first occupants, in the character of cultivators of the earth. The great patent of New England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men, tended to confirm that confidence. The colony of Massachusetts, in 1633, prohibited the purchase of lands from the natives, without license from the government; and the colony of Plymouth, in 1643, passed a similar law. Very strong and authentic evidence of the distinguished moderation and equity of the New England governments towards the Indians is to be found in the letter of Governor Winslow of the Plymouth Colony, of the first of May, 1676, in which he states, that before King Philip's War the English did not possess one foot of land in that colony but what was fairly obtained by honest purchase from the In-

[1] 5 Peters, 1.

dian proprietors, and with the knowledge and allowance of the general court.[1]

The government of the colony of New York has a claim equally fair with that of any part of America, to a policy uniformly just, temperate, and pacific towards the Indians within the limits of its jurisdiction.

In New Jersey, the proprietaries very early secured all their titles by Indian purchases; and all purchases to be made, without the consent of the government, were, by a law, in 1682, declared to be void.

The justice and equity of the original Indian purchases by William Penn, the founder of Pennsylvania, particularly at his memorable treaty of 1682, were known and celebrated throughout Europe.[2] So Governor Calvert, in 1633, planted Maryland, after fair purchases from the Indians.

The historical facts and documents to which we have referred relative to the acquisition of the Indian lands in this country are sufficient to vindicate the justice and moderation of our colonial ancestors.

The government of the United States, since the period of our independence, has pursued a steady system of pacific, just, and paternal policy toward the Indians, within their widespread territories. It has never insisted on any other claim to the Indian lands than the right of preëmption upon fair terms.

[1] Hazard's Collection State Papers, vol. ii. 531–534; Holmes' American Annals, vol. i. 383; Hubbard's Narrative.

[2] Proud's Hist. Pennsylvania, vol. i. 212.

LECTURE LII.

OF INCORPOREAL HEREDITAMENTS.

THINGS real consist of lands, tenements, and hereditaments. The latter is a word almost as comprehensive as property, for it means anything that may be inherited, be it corporeal, incorporeal, real, personal, or mixed.[1] The term real estate means an estate in fee or for life in land, and does not comprehend terms for years, or any interest short of a freehold.[2] A tenement comprises everything which may be holden so as to create a tenancy in the feudal sense of the word, and no doubt it includes things incorporeal, though they do not lie in tenure.[3] Corporeal hereditaments are confined to land, which, according to Lord Coke,[4] includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include everything terrestrial, under or over it.[5] Incorporeal tenements and hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they

[1] Co. Litt. 6 a.

[2] Co. Litt. 19, 20; 2 Cowen, 497.

[3] Preston on Estates, vol. 1, 8; Co. Litt. 19 b, 20 a; 1 Moore & Payne, 330.

[4] Co. Litt. 4 a.

[5] 2 Black. Com. 18; Co. Litt. 48 b.

are, by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or concern them. They pass by deed without livery, because they are not tangible rights.[1] The incorporeal hereditaments which subsist by our law are fewer than those known and recognized by the English law.

The incorporeal rights, which I shall now consider, are: I. Commons; II. Ways, Easements, and Aquatic Rights; III. Offices; IV. Franchises; V. Annuities; and VI. Rents.

I. The right of common is a right which one man has of taking some part of the product of the lands of another. The object is to pasture his cattle, or provide necessary fuel for his family, or for repairing his implements of husbandry.[2] This right was intended, in early ages, for the encouragement of agriculture, and existed principally between the owner of a manor and his feudal tenants.

(1.) *Of Common of Pasture and of Estovers.* Common of pasture was known at common law as common of pasture appendant and common of pasture appurtenant. The first, or common *appendant*, is founded on prescription, and is regularly annexed to arable land. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription.[3] It allowed the owner to put in other beasts than such as plough or manure the land; and not being founded on necessity, like the other right, as to commonable beasts, was not favored in the law. Common of estovers may be equally appendant or appurtenant. This right of common may be controlled by custom. It may be held subservient to a

[1] Bracton, lib. 2, c. 18; Co. Litt. 20 a, 49 a.
[2] Finch's Law, 157. [3] 2 Black. Com. 33.

distinct right in the lord of the manor, founded on immemorial usage, to dig in the soil, without leaving sufficient herbage for the commoners.[1]

(2.) *Of Common of Piscary.* This is said to be a liberty or right of fishery in the water covering the soil of another person, or in a river running through another man's land.[2] A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons, and which is distinguished from a common fishery, which may be for all mankind. Riparian owners had at common law an exclusive right of fishing in navigable streams, subject only to their public use as water ways. This private right of fishing is confined to fresh water unless a special grant or prescription be shown.

(3.) *Of the Remedy for the Disturbance of these Rights.* The disturbance of a right of common of pasture arises when a person usurps the right, or if he has a right to use the land for commonable cattle, by putting in those which are not commonable, or by surcharging the common by putting in more cattle than the pasture will sustain. In these cases the owner of the soil has his action of trespass, and the commoner his special action upon the case.

II. *Of Ways, Easements, and Aquatic Rights.* An easement is a privilege which the public, or the owner of neighboring lands, has in the lands, of another, and by which the servient owner is obliged to suffer or not to do something on his own land.

(1.) *Of Ways.* This incorporeal hereditament is a right of private passage over another man's ground. It may arise either by grant of the owner of the soil,

[1] 5 Term, 411.

[2] 2 Black. Com. 34, 39; Cruise's Dig. tit. Common, sec. 34.

or by prescription which supposes a grant, or from necessity.[1]

If it be a right of way in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. A right of way may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, the purchaser is entitled to a right of way over the other's ground to arrive at his own land. There is a temporary right of way over the adjoining land if the highway be out of repair, or impassable. But this right of going upon adjoining land applies to public and not to private ways.

(2.) *Of Riparian Rights.* It is a settled principle that the right of soil of owners of land bounded by the sea, or on navigable rivers where the tide ebbs and flows, extends to high-water mark, and the shore below the ordinary high-water mark belongs to the public, though it may by grant or prescription become private property. "*Prima facie*," said the vice-chancellor of England,[2] "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream. If he owns both banks he owns the whole river to their extent." If a fresh water river running between the lands of separate owners insensibly gains on one side or the other, the title of each continues to go to the middle line of the stream; but if the alteration be sudden the bounds are unchanged. If soil be formed by islands, or relicted land out of the sea, or a river by slow and imperceptible accretion, it belongs in the case of the sea or navigable rivers to the sovereign, and in the case of rivers not navigable in the

[1] 1 Rol. Abr. 391, tit. Chemin Private, 10.
[2] 1 Simons & Stewart, 190; 17 Pick. 41.

common law sense of the term, or above where the sea ebbs and flows, it belongs to the owners of the adjoining land.[1] Islands in the middle of such rivers belong in severalty to the opposite owners.

(3.) *Of Highways.* Every thoroughfare common to all the king's subjects is a highway, whether it be a carriage-way, horse-way, footway, or a navigable river. The law with respect to public highways and to fresh water rivers is the same, and the analogy perfect as concerns the right of soil. The presumption is that the owners of land on each side go to the centre of the road, and they have the exclusive right to the soil subject to the right of passage in the public.

(4.) *Of Servitudes and Vicinage.* The term servitude is derived from the civil law, and is synonymous with the common law term easement. The term servitude, however, applied more particularly to certain rights in adjoining premises, as that of support for a building. The servitude of drip occurs where one man engages to permit the water's flowing from his neighbor's house to fall on his estate. There were other servitudes, as that of drain and way.

(5.) *Of Party Walls.* If there be a party wall between two houses and one of the owners repair it, it must be done in a reasonable time, and if the repairs are necessary the other is bound to contribute.

(6.) *Of Division Fences.* At common law an owner of land is not bound to fence it unless by force of prescription.

(7.) *Of Running Waters.* Every proprietor of lands on the banks of a river has the right to use the water. No proprietor has the right to use the water to the prejudice of other proprietors above or below

[1] Just. Inst. 2. 1. 28.

him, unless he has a prior right to divert it or a title to some exclusive enjoyment.

(8.) *Easements acquired and lost by Prescription.* The right to the use of *waters* may be abridged or enlarged or modified, by grant or prescription,[1] which is a title acquired by twenty years' undisturbed and continued enjoyment of an easement, and which raises the presumption of some former grant. The right to the enjoyment of *ancient lights* is an easement acquired by long and uninterrupted use. The right is not recognized, or has been abrogated by statute, in this country as unsuited to the genius of its institutions.

(9.) *Easements lost by Abandonment.* A right acquired by use may be lost by non-user, and an absolute discontinuance of the use for twenty years affords a presumption of the extinguishment of the right in favor of some adverse right.[2] The presumption is not a strong one.

(10.) *Easements may be lost by Dedication to the Public.*

(11.) *Of Rights by License.* A license is an authority to do a particular act or series of acts upon another's land without possessing any estate therein.

III. *Offices* are another kind of incorporeal hereditaments, and they consist in a right and corresponding duty to execute a public or private trust and to take its emoluments.[3] In this country no public office can be termed properly an hereditament.

IV. *Franchises* are certain privileges conferred by grant from government and vested in individuals. They are innumerable:[4] the privilege of making a

[1] Co. Litt. 113 b.
[2] 2 Evans' Pothier, 136; 3 Camp. 514.
[3] Finch's Law, 162.
[4] 2 Black. Com. 37.

road or establishing a ferry, and taking tolls for the use of the same, are examples of franchises.

V. *Annuities.* An annuity is a yearly sum stipulated to be paid to another in fee for life or for years, and chargeable only to the person of the grantor.[1]

VI. *Of Rents.* (1.) *The Various Kinds.* A rent is a certain yearly profit issuing out of lands of another. At common law there were three kinds of rent: rent service, rent charge and rent seck. *Rent service* was where the tenant held his land by fealty or other service and a certain rent. A right of distress was incident to this rent.[2] *Rent charge*, or fee-farm rent, is where the rent is created by deed and the fee granted. There was no right of distress annexed to this rent unless expressly granted.[3] *Rent seck*, or barren rent, was reserved by deed without any clause of distress, and where the owner of the rent had no future interest or reversion in the land.

(2.) *When and how far not payable.* (*a.*) *Of Eviction.* Rent must always be reserved to him from whom the land proceeded. If the tenant be evicted from the lands demised to him by a title paramount before the rent falls due, he will be discharged from the payment of the rent.[4]

(*b.*) *Destruction of the Premises.* Where there is an express agreement to pay rent the tenant must pay it though the premises be destroyed.

(*c.*) *Of Apportionment of Rent.* There are two modes of apportioning rent. The one is by granting

[1] Co. Litt. 144 b.

[2] Litt. s. 215; Co. Litt. 142 a; 9 Watts, 258.

[3] Litt. s. 217; Co. Litt. 143 b; Gilbert on Rents, 155; 1 Wharton, 337.

[4] 2 Roll. Abr. tit. Rent, O; 1 Saund. 205, n.

the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another.[1] If the owner of a rent service purchase part of the land out of which the rent issues, the rent is to be justly apportioned. But if a man has a rent charge and purchase or release part of the land out of which the rent issues, the whole rent is held to be extinguished.[2] An apportionment of rent is an exception to the doctrine of the common law that an entire contract could not be apportioned.

(3.) *Of the Remedy.* The remedy for the recovery of rent depends upon the nature of the instrument or contract by which payment is secured. The suit may be an action of covenant, debt, or assumpsit, for the use and occupation of the land. The landlord may also reënter or recover possession of the land by the action of ejectment for non-payment of rent, provided half a year's rent or more be in arrear and no sufficient distress can be found. But the more usual way is by distress, which was a seizure of tenant's goods by the landlord or his agent. Certain goods, as the tools and implements of a man's trade and his beasts of the plough, were not to be taken, provided other sufficient distress was to be had. There are other things not distrainable at common law: (*a.*) Things annexed to the freehold; (*b.*) Things delivered to a person exercising a public trade to be wrought or manufactured; (*c.*) Sheaves of corn.[3]

[1] 5 Barnw. & Ald. 876.

[2] Litt. sec. 222; Co. Litt. 147 b, 148 a; 8 Co. 104, 106; Gilbert on Rents, 152, 163, 164.

[3] 3 Blackf. Ind. Rep. 64.

LECTURE LIII.

OF THE HISTORY OF THE LAW OF TENURE.

ALL the land in England is held mediately or immediately of the king. There are no lands to which the term tenure does not strictly apply, nor any proprietors of land, except the king, who are not legally tenants. To express the highest possible interest that a subject can have in land, the English law uses the terms fee simple or a tenancy in fee, and supposes that some other person retains the absolute right.

I. *Origin of Feudal Tenures on the Continent of Europe.* The origin of the feudal system is attributed to the northern Gothic conquerors of the Roman Empire. It was devised by them as the most effectual means to secure their conquests. The chieftain, as head or representative of his nation, allotted portions of the conquered lands in parcels to his principal followers, and they in their turn gave smaller parcels to the sub-tenants, or vassals, and all were granted under the same condition of fealty and military service.[1]

These grants, which were first called benefices, were originally for life, or perhaps for a term of years.[2] The vassal had a right to use the land and take the profits, and he was bound to render in return such feudal duties and services as belonged to a military

[1] Craig's Jus Feudale, lib. i.; Dieg. 4, sec. 4, Of the Origin and Progress of Feuds; Wright on Tenures, 7.

[2] Hallam's Middle Ages, vol. i. 89.

tenure. The property of the soil remained in the lord from whom the grant was received. Prior to the introduction of the feudal system lands were allodial and held in free and absolute ownership. Allodial land was very gradually supplanted by the law of tenures, and some centuries elapsed between the first rise of these feudal grants and their general establishment.[1]

Allodial estates were never entirely abolished. Considerable land in continental Europe remained allodial. The precise time when benefices became hereditary is uncertain: it was probably in the age of Charlemagne, who favored the feudal tenure.[2] The perpetuity of fiefs was established by a general law, which allowed fiefs, like allodial estates, to descend to the children of the possessor.[3]

The feudal tenure supplanted allodial estates because of the mutual support and protection afforded by the former.

II. *Of the History of Feudal Tenures in England.* All the lands in England are held by some feudal tenure. These tenures were established in the reign of William the Conqueror, and were principally of two kinds, according to the service annexed. They were either tenures by knight service, in which the services, though occasionally uncertain, were altogether of a military nature and esteemed highly honorable; or they were tenures by socage, in which the services were both defined and certain and generally of a peaceful nature.[4] Tenure by knight service, besides the

[1] Hallam, vol. i. 97, 112.
[2] Craig's Jus Feudale, lib. i.; Dieg. 4, sec. 10.
[3] Esprit de Loix, b. 31, c. 25.
[4] Wright on Tenures, 139–142.

obligation of fealty and the military service of forty days in the year, was subject to certain hard conditions. These were: —

(1.) Aid, or the payment of money to the lord on certain calls, as when he married his daughter, when he made his son a knight, or when he was taken prisoner; (2.) Relief, an amount paid by the heir for succeeding to the inheritance; (3.) Wardship of the minor heir; (4.) Marriage, or the right of disposing of the infant ward in marriage; (5.) A fine paid by tenant for the privilege of selling land; (6.) Escheat, or reversion of the land to the lord, if the tenant dies without heir competent to perform feudal service or was convicted of treason or felony.[1] A feoffment in fee did not originally pass an estate in the sense we now use it. It was only an estate to be enjoyed as a benefice without the power of alienation in prejudice of the heir or the lord; the heir taking a mere right of use, and on failure of heirs the tenure became extinct and the land reverted to the lord. The heir took by purchase independent of his ancestor, neither could the ancestor or lord alien his right without the other's consent. The first step taken to mitigate the restrictions upon alienation of the feudal estate was the allowance of the power of alienation by the tenant with leave of the lord.

Gradually the power of alienation became enlarged, until the statute of 12 Charles II. essentially abrogated the feudal system in England.

III. *Of the Doctrine of Tenure in these United States.* Socage tenure denotes tenure by a fixed and determinate service which is not military, nor variable

[1] Litt. Tenures, b. ii.; Wright on Tenures; 2 Black. Com. c. 5; Hallam, vol. i. 101–106; vol. ii. 23.

at the will of the lord. The only feudal fictions and services which can be presumed to be retained in any part of the United States consist of the feudal principle that the lands are held of some superior or lord to whom the obligation of fealty and to pay a determinate rent are due.

Lands held by socage tenure (and all lands, granted or patented, before the Revolution are so held)[1] would seem in theory to be chargeable with the oath of fealty, and every tenant, whether in fee for life or years, was by the English law obliged to render it when required, as being an indispensable service due to his lord. Fealty was at common law deemed inseparable from all tenure except that in frankalmoigne. An estate in fee simple means an estate of inheritance and nothing more, and it has lost its original meaning as a beneficiary or usufructuary estate as distinguished from that which is allodial, so that the distinction is merely nominal.

[1] Story's Com. Constitution U. S. vol. 1.

LECTURE LIV.

OF ESTATES IN FEE.

A FEE, as understood here, is an estate of inheritance in law belonging to the owner and transmissible to his heirs.[1] No estate is deemed a fee unless it may continue forever.

The most simple division of estates of inheritance is that of Sir William Blackstone[2] into inheritances *absolute* or in fee simple, and inheritances *limited*, and these limited fees he subdivides into *qualified* and *conditional* fees.

(1.) *A fee simple* is a pure inheritance clear of any qualification or condition, and it gives a right of succession to all the heirs generally under the restriction that they must be of the blood of the first purchaser and of the blood of the person last seized.[3] It is an estate of perpetuity and confers an unlimited power of alienation, and no person can have a greater estate in land. The word "heirs" is, at common law, necessary to be used if the estate is to be created by deed. The rule is of feudal origin; a feudal grant was, *stricti juris*, made in consideration of the personal abilities of the feudatory, and was consequently confined to the life of the donee unless there was an express provision that it should go to his heirs.[4]

[1] Litt. sec. 1.
[2] 2 Black. Com. 104, 109.
[3] Litt. sec. 1, 11; Co. Litt. 1 b; Fleta, lib. iii. c. 8; Plowd. 557 a.
[4] 2 Black. Com. 107, 108.

But the rule has for a long time been controlled by a more liberal policy. The word heirs is not necessary in conveying an estate in fee simple in the case of a fine when the fine is in the nature of an action, as the fine *sur conuzance de droit.* Nor is it necessary in a common recovery, nor to a release by way of extinguishment, nor to a partition, nor to releases by joint tenants or coparceners, nor in grants to corporations, nor in wills.[1] A court of equity will supply the omission of words of inheritance, and in contracts to convey it will enforce a conveyance in fee where such seems to have been the intentions of the parties.[2]

(2.) A *qualified*, *base*, or *determinable fee* is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance by some act or event which cuts off its continuance. Such estates are deemed fees because they have a possibility of enduring forever. A limitation to a man and his heirs so long as A. shall have heirs of his body or till the marriage of B., or so long as a tree shall stand, are examples of estates which descend to the heirs, but continue no longer than the period limited.[3] If the event marked out as the limitation of the estate becomes impossible, as by the death of B. before his marriage, the estate ceases to be determinable, and enlarges into a fee simple absolute.

(3.) A *conditional fee* is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his

[1] Co. Litt. 9 b; 1 Term, 411; 2 Term, 656; 2 Caines, 345; Dane's Abr. vol. 4, c. 128.

[2] Com. Dig. tit. Chancery, 2 T. 1.

[3] Plowd. 557 a; 10 Co. 97 b; 11 Co. 49 a; 1 Ld. Raym. 326; 2 Ld. Raym. 1148; 2 Black. Com. 109; Preston on Estates, vol. 1, 431–433, 481–483.

body.[1] This was, at the common law, construed to be a fee simple on condition that the grantee had the heirs prescribed; if the grantee died without such issue, the lands reverted to the grantor, but if he had such issue, it was a performance of the condition, and his estate became absolute, so that the grantee might alien the land, and bar not only his own issue but the possibility of a reverter.

(4.) *Of Fees Tail.* The statute *De Donis* (13 Edward I. c. 1) took away the power of alienation on the birth of issue, and the courts considered that the estate was divided into a particular estate in the donee and a reversion in the donor. Where the donee had a fee simple before, he had, by the statute, what was denominated an estate tail; and where the donor had but a bare possibility before, he had, by construction of the statute, a reversion or fee simple expectant upon the estate tail. Hence the donee could not bar or charge his issue, nor, for default of issue, the donor or his heirs, and a perpetuity was created. The tenant in tail was not chargeable with waste, and the wife had her dower and the husband his curtesy in the estate tail.

These fettered inheritances were very inconvenient. Attempts were frequently made to get rid of them, but the bills introduced into Parliament for that purpose were uniformly rejected by the feudal aristocracy, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation.

[1] Fleta, lib. iii. c. 3, sec. 5; 2 Black. Com. 110.

It was not until *Taltarum's case* (12 Edward IV.) that relief was obtained, and it was given by a bold and unexampled stretch of the power of judicial legislation. The judges, upon consultation, resolved that an estate tail might be cut off and barred by a common recovery. These recoveries are now considered simply in the light of a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate as if he were a tenant in fee simple. It is the only mode of conveyance in England by which the tenant in tail can effectually dock the entail. Estates tail existed to some extent in this country before the Revolution, but they are now obsolete in most parts of the United States.

Executory limitations not perpetuities, and estates in fee upon condition other than those technical conditional fees, are familiar to American law. Entails under certain modifications have been retained in certain parts of the United States, with increased power over the property and greater facilities of alienation. The desire to preserve and perpetuate family influence and property is very prevalent, and is attended with many good results.[1] But if it stimulates industry and economy in the ancestor, it encourages idleness in the issue in tail. Entails were known to the Roman, Scotch, and French law.

Sir Wm. Jones' Rep. 101.

LECTURE LV.

OF ESTATES FOR LIFE.

An estate of freehold is a denomination which applies equally to an estate of inheritance and an estate for life: it anciently meant an estate held by a freeman independently of the mere will and caprice of the feudal lord, and was used in contradistinction to the interests of terms for years and lands in villenage or copyhold, which estates were originally determinable at pleasure.

Estates for life are divided into conventional and legal estates. The first are created by the act of the parties, the second by operation of law.

I. Estates for life, by the agreement of the parties, were, at common law, freehold estates of a feudal nature, inasmuch as they were conferred by the same forms and solemnity as estates in fee, and were held by fealty and the conventional services agreed on between the lord and tenant.[1]

Life estates may be created by express words, as if A. conveys land to B. for the term of his natural life; or they may arise by construction of law, as if A. conveys land to B. without specifying the term of duration and without words of limitation.

The life estate may be either for a man's own life or for the life of another person, when it is called an estate *pur autre vie* (for the life of another), which is

[1] Wright on Tenures, 190.

the lowest species of freehold. A third kind of life estate is an estate for the term of the tenant's own life and the life of one or more third persons; the tenant's estate is regarded as but one freehold.

Life estates may be made to depend upon a contingency which can happen and determine the estate before the death of the grantee. Thus if an estate be given to a woman while she remains unmarried, or to a person while he dwells in a particular place, in these cases the grantee takes an estate for life, but one that is determinable upon the happening of the event on which the contingency depended.[1] If the tenant for the life of B. died during the lifetime of B., the estate was open to any general occupant during the life of B.; but if the grant was to A. and his heirs during the life of B., the heir took it as a special occupant.

II. *Tenancy by the curtesy* is an estate for life created by the act of the law. When a man marries a woman, seized, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue by her born alive and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England. This estate is to be found, with some modifications, in the ancient laws of Scotland, Ireland, Normandy, and Germany.[2]

Four things are requisite to an estate by the curtesy, namely, marriage, actual seizin of the wife, issue, and death of the wife. The law vests the estate in the husband immediately on the death of the wife, without entry. His estate is initiate on issue had, and con-

[1] Bracton, lib. iv. c. 28, sec. 1; Co. Litt. 42 a; 24 Wendell, 201.
[2] Co. Litt. 30 a; Wright on Tenures, 193; 2 Black Com. 126.

summate on the death of the wife, who, according to the English law, must have been seized in fact and in deed, and not merely of a seizin in law of an estate of inheritance, to entitle the husband to his curtesy.[1] In this country the rule is qualified, and if a wife be seized of waste lands not held adversely, she is deemed seized in fact so as to entitle her husband to his right of curtesy. To entitle the husband to curtesy, he must be a citizen, and the wife must have had such a seizin as will enable her issue to inherit. At common law the husband could not be tenant by the curtesy of a use,[2] but it is now well settled that he may be a tenant by the curtesy of an equity of redemption, and of lands of which the wife had only a seizin in equity as a *cestui que trust*.[3] The husband is likewise tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture; not so, however, if there be a clear and distinct expression that the husband is not to have a life estate or any other interest. Curtesy applies to qualified as well as absolute estates in fee. Though the wife's dower be lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy, nor will any forfeiture of her estate by the wife defeat the curtesy.[4] These discriminations, which are manifestly unfair, are founded on the statute of Westminster II.

III. The next species of life estates created by the act of the law is that of *dower*. It exists where a

[1] Co. Litt. 29 a; 1 Howard, U. S. 37.

[2] Gilbert on Uses, by Sugden, 48, 440.

[3] 1 Sumner, 128.

[4] Preston on Abstracts of Title, vol. 3, 385; 1 Stewart's (Ala.) Rep. 590; Mass. Rev. Stats. 1835.

man is seized of an estate of inheritance and dies in the lifetime of his wife. In that case she is at common law entitled to be endowed for her natural life of the third part of all the lands whereof her husband was seized, either in deed or in law, at any time during the coverture, and of which any issue which she might have had might by possibility have been heir.[1] This humane provision of the common law was intended for the sure and competent sustenance of the widow and the support and education of her children.[2]

To the consummation of the title to dower three things are requisite, namely. marriage, seizin of the husband, and his death.[3] Dower attaches upon all marriages not absolutely void, and existing at the death of the husband; it belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*. It belongs to a marriage within the age of consent, though the husband dies within that age.[4] But a *feme covert* who was an alien was not by the common law to be endowed any more than to inherit.[5]

(1.) *Of what Estate the Wife may be endowed.* The husband must have had seizin of the land in severalty at some time during the marriage to entitle the wife to dower. It is sufficient to give a title to dower that the husband had a seizin in law without being actually seized. If land descends to the husband as heir and he dies before entry, his wife will be entitled to her dower, but it is necessary that the husband should have been seized either in fact or in law; and where the husband had been in possession for years,

[1] Litt. sec. 36; Perkins, sec. 301; Park on Dower, 5.
[2] Bracton, 92 a; Fleta, lib. 5, c. 23, sec. 2; Co. Litt. 30 b.
[3] Co. Litt. 31 a.
[4] Co. Litt. 33 a; 7 Co. 42; Doct. & Stu. 22.
[5] Co. Litt. 31 b; 2 Johns. Cas. 29.

using the land as his own and conveying it in fee, the tenant deriving title under him is concluded from controverting the seizin of the husband in the action of dower.[1] If, however, upon the determination of a particular freehold estate, the tenant holds over and continues his seizin and the husband dies before entry, or if he dies before entry in a case of forfeiture for condition broken, his wife is not dowable, because he had no seizin either in fact or in law. A transitory seizin for an instant, when the same act that gives the estate to the husband conveys it out of him, is not sufficient to give the wife dower.[2] Nor is the seizin sufficient when the husband takes a conveyance in fee and at the same time mortgages the land back to the grantor or to a third person to secure the purchase money in whole or in part. Dower attaches to all real hereditaments, such as rents and commons, provided the husband was seized of an estate of inheritance in the same.[3] The common law of dower has received modifications by statute in many of our states.

The wife of a trustee is not entitled to dower in the trust estate any further than the husband had a beneficial interest therein, nor is the wife of a *cestui que trust* dowable in an estate to which her husband had only an equitable and not a legal title during coverture. But a wife is held dowable of an equity of redemption where the mortgage was made during coverture. The mortgagor, so long as the mortgagee does not exert his right of entry or foreclosure, is regarded as being legally, as well as equitably, seized in respect to all the world but the mortgagee and his assigns. As

[1] Caines, 185; 2 Johns. 119.
[2] Co. Litt. 31 b; Cro. Car. 190; 1 Atk. 442.
[3] Perkins, sec. 342, 345, 347; Co. Litt. 32 a; Park on Dower, 112. 4.

to the interest of the widow of a *mortgagee* the case and the principles applying to it are different. A mortgage before foreclosure is regarded by the courts in this country as a chattel interest,[1] and it is doubted whether the wife of the mortgagee who dies before foreclosure or entry on the part of her husband, though after the technical forfeiture of the mortgage at law by non-payment at the day, be now even at law entitled to dower in the mortgaged estate, the better opinion seems to be that she would not be entitled as against the mortgagor.

(2.) *In what Way Dower will be defeated.* Dower will be defeated upon the restoration of the seizin under the prior title in the case of defeasible estates, as in the case of reëntry for condition broken, which abolishes the intermediate seizin.[2] A recovery by actual title against the husband also defeats the wife's dower. If the husband be seized during coverture of an estate subject to dower, the title thereto will not be defeated by the determination of the estate by its natural limitation. Thus if the tenant in fee or in tail dies without heirs, yet the widow's dower is preserved.[3]

Dower will be defeated by the operation of *collateral limitations*, as in the case of an estate to a man and his heirs so long as a tree shall stand. Whether dower will be defeated by a *conditional limitation* created by way of shifting use or executory devise has been much discussed.[4] The better reason would seem

[1] 1 Caines' Cases in Error, 47; 4 Johns. 41; 4 Conn. 235; 3 Pick. 484.

[2] Perkins, sec. 311, 312, 317.

[3] Bro. tit. Tenures, pl. 33; tit. Dower, pl. 86; 8 Co. 34; Jenk. Cent. 1, Cas. 6, p. 5.

[4] Park on Dower.

to indicate that it would, and that the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity existing before the inception of the title and which would have defeated the husband's seizin.

(3.) *How Dower may be barred.* Dower is a title inchoate until the death of the husband; the seizin which gives it must be during the coverture. If the husband and wife levy a fine or suffer a common recovery the wife is barred of her dower.[1] A divorce *a vinculo matrimonii* (from the bonds of matrimony) bars the claim of dower. The wife may also be barred of her dower by having a joint estate, usually called a *jointure*, settled upon her and her husband, and in case of his death to the use of the wife during her life. If the jointure be made before marriage it bars the dower, but if made after marriage the wife may accept or reject the jointure; and if she be at any time lawfully evicted of her jointure or any part of it, she may resort to her right of dower to remedy the loss.

A conveyance to trustees for the wife's benefit after her husband's death is not a *legal* jointure, but would be an equitable bar of dower.

A collateral satisfaction, consisting of money or other chattel interests given by will and accepted by the wife after the husband's death, will constitute an equitable bar of dower.

(4.) *The Manner of Assigning Dower.* It was provided by *Magna Charta*[2] that the widow should give nothing for her dower, and that she should tarry in the chief house of her husband for forty days after his death, within which time her dower should be assigned her, and that, in the mean time, she should have reasonable estovers or maintenance out of the estate.

[1] 10 Co. 49 b; Plowd. 504. [2] C. 7.

This declaration of Magna Charta is probably the law in all the United States. The assignment of dower may be made *in pais* by parol, by the party who hath the freehold, but if the dower be not assigned within the forty days by the heir or devisee or other persons seized of the lands subject to dower, the widow has her action at law by writ of dower *unde nihil habet*, or by writ of right of dower against the tenant of the freehold. In the former the widow recovers damages for non-assignment of dower. On recovery, the sheriff, under the writ of seizin, delivers to the demandant possession of her dower by metes and bounds if the subject be properly divisible.[1] If the dower arises from rent or other incorporeal hereditament, as commons or piscary, of which the husband was seized in fee, the third part of the profits is appropriated to the widow.[2] If the husband dies seized, the heirs may assign when they please; but if they delay it and improve the land, the widow will be entitled to her dower according to the value of the land, exclusive of the emblements at the time of the assignment. In cases of alienation by the husband the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent value. Dower may be recovered by bill in equity as well as by action at law.

Incidents attendant upon Life Estates. (*a.*) Every tenant for life is entitled to take reasonable *estovers*, that is, wood from off the land for fuel or reasonable improvements. (*b.*) He is entitled through his representatives to the profits of the growing crops, where the estate determines by his death before the produce can be gathered. These profits are termed

[1] Litt. 36. [2] Co. Litt. 144 b; Popham, 87.

emblements, and the doctrine applies only to annual products raised by the yearly expense and labor of the tenant. (*c.*) Tenants for life have the power of making under-leases for any lesser term. (*d.*) In estates for life, if the estate be charged with an incumbrance, the tenant for life is bound in equity to keep down the interest out of the rents and profits. The tenant for life or years is answerable for waste to the person entitled to the immediate estate of inheritance. Estates for life were by the common law liable to forfeiture not only for waste, but by alienation in fee. This rule has been abrogated in some of our states.

LECTURE LVI.

OF ESTATES FOR YEARS, AT WILL, AND AT SUFFERANCE.

I. *Of Estates for Years.* A lease for years is a contract for the possession and profits of land for a determinate period with the recompense of rent. An estate for life is a higher and greater estate than a lease for years, notwithstanding the lease should be for a thousand years, and if the lease be made for a less time than a single year the lessee is still ranked among tenants for years.[1] In the earlier periods of English history leases for years were defeasible by the freeholder's suffering a common recovery,[2] but the statute of 21 Henry VIII. c. 15 enabled the lessee for years to falsify a recovery suffered to his prejudice. In the latter part of the reign of Elizabeth long terms, as for one hundred, or five hundred, or a thousand years, created by way of trust to secure jointures and raise portions or money on mortgage for family purposes, and made attendant upon the inheritance, came into use.

(1.) The advantage derived from *attendant terms* is the security which they afford to purchasers and mortgagees. If the *bonâ fide* purchaser or mortgagee should happen to take a defective conveyance or mortgage by which he acquires a mere equitable title, he

[1] Co. Litt. 46 a; Litt. sec. 67.
[2] Co. Litt. 46 a; 9 Mod. Rep. 102.

may, by taking an assignment of an outstanding term to a trustee for himself, cure the defect so far as to entitle himself to the legal estate during the term in preference to any creditor of whose incumbrance he had not notice at or before the time of contracting for the purchase or mortgage. A distinction has been made between attendant terms (which are the creations of a court of equity) and terms in gross, though at common law they are the same. At law every term is a term in gross, a term in active operation without having the purpose of its creation fulfilled. When the legal ownership of the inheritance and the term meet in the same person a legal coalition occurs, and at law the term which before was personal property falls into the inheritance and ceases to exist. Where the equitable ownership of the term and the inheritance meet in the same person, undivided by any intervening beneficial interest in another, an equitable union exists, and the term which before was personal property becomes annexed to the inheritance and attendant upon it as a part of the same estate. But though equity considers the trust of the term as annexed to the inheritance, yet the *legal* estate of the term is always separate from it and existing in a trustee; otherwise it would be merged. These attendant terms will not be permitted to deprive creditors of any benefit they would have of the term for payment of their debts; nor will they protect the inheritance in fee from debts due from the vendor by specialty to the crown.[1]

A proviso of *cesser* is usually annexed to long terms, raised by mortgage, marriage settlements, or annuity, whereby the term is declared to be determin-

[1] Sugden's Vendors and Purchasers, App. n. 13.

able on the happening of a certain event; and until the event provided for in the declaration of cesser has occurred, the term continues. As the owner of the fee is entitled to all the benefits which he can make of a term attendant upon the inheritance during its continuance in trust, the equitable interest in the term will devolve in the same channel and be governed by the same rules as the inheritance.

In this country we have instances of long terms of near one thousand years; but they are treated altogether as personal estate, and go in a course of administration as chattel interests, without any suggestion of their being of the character of attendant terms.[1] Our registry acts applicable to mortgages and conveyances determine the rights and title of *bonâ fide* purchasers and mortgagees by the date and priority of the record; and outstanding terms can have no operation when coming in collision with a registered deed.

(2.) Leases for years may be made to commence *in futuro;* for being chattel interests, they never were required to be created by feoffment and livery of seizin. But the statute of frauds of 29 Car. II. c. 3, sec. 1, 2, 3, which has been generally adopted in this country, rendered it necessary that these secondary interests should be created in writing. The statute declared that "all leases, estates, or terms of years, or any uncertain interests in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And

[1] 5 Mass. 419; 1 N. H. 350.

that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered, unless in writing."

(3.) If land be let upon shares for a single crop only, that does not amount to a lease; and the possession remains in the owner.[1] The occupant is, however, a tenant in common with the owner of the growing crop, and he continues so until the tenancy be severed by a division.[2] But if the contract be that the lessee possess the land with the usual privileges of exclusive enjoyment, it is the creation of a tenancy for a year, though the land be taken to be cultivated upon shares.[3] A lessee for years may assign or grant over his whole interest, unless restrained by covenant not to assign without leave of the lessor. He may underlet for any fewer or less number of years than he himself holds; and he may incumber the land with rent, and other charges.[4] If the deed passes all the estate or time of the termor, it is an assignment; but if it be for a less portion of time than the whole term, it is an underlease, and leaves a reversion in the termor. The tenant's right to create an under tenancy, by the grant of a less estate than his own, is a native principle of the feudal system, and a part of the common law. The lessee so under-leasing may distrain for the rent due him on the under-lease: though if he assign over the whole term he cannot, because he has no reversion. The under or derivative lessee is not liable for the rent reserved in the original lease, except so far as his goods and chattels, while on the premises, are liable to a distress for the rent in arrear to the original land-

[1] Cro. Eliz. 143; 8 Johns. 151; 1 Vermont, 37; 9 Cowen, 39.
[2] 24 Pick. 191.
[3] 1 Johns. 267.
[4] 1 Bell's Com. 75–77.

lord. There is no privity between him and the original lessor, and he is not liable to an action of covenant for such rent.[1] But the assignee of the lessee is liable to the assignee of the lessor, in an action of debt for the time he holds; for, though there be no privity of contract, there is a privity of estate which creates a debt for the rent.[2] So, on the other hand, the covenantor and his representatives, under a covenant to pay rent, are liable for the non-payment of rent by reason of the privity of contract, after an assignment, and though there may be a good remedy against the assignee.[3] At common law, actual entry was requisite to give the lessee the rights and privileges of a tenant in possession; for until then he was not capable of receiving a release of the reversion by way of enlargement of the estate. But when the words and the consideration inserted in the lease were deemed sufficient to raise a use, the statute of uses operated upon the lease and annexed the possession to the use, without actual entry.[4] Before entry under the lease, as a demise at common law, the lessee had only an executory interest, or *interesse termini*, and no possession.[5] An *interesse termini* is a right to the possession of a term at a future time; and upon an ordinary lease to commence *instanter*, the lessee, at common law, and independent of the statute of uses, has an *interesse termini* only until entry. Its essential qualities, as a mere interest, in contradistinction to a term in possession, seem to arise from a want of possession. It is a right or interest only, and not an estate, and it

[1] Doug. 183; Bacon, tit. Leases, 1, 3.
[2] Str. 1221; 9 Pick. 52.
[3] 4 Taunt. 642.
[4] Bacon's Abr. tit. Leases, M.
[5] Co. Litt. 270 a; Shep. Touch. by Preston, 267.

has the properties of a right. It may be extinguished by a release to the lessor, and it may be assigned or granted away.

(4.) Leases may operate by estoppel when they are not supplied from the ownership of the lessor, but are made by persons who have no vested interest at the time. If an heir apparent, or a person having a contingent remainder, or an interest under an executory devise, or who has no title whatever at the time, makes a lease, or duly conveys for years, and afterwards an estate vests in him, the lease or conveyance will operate by way of estoppel to entitle the lessee to hold the land for the term specified.[1]

(5.) A term for years may be defeated by way of merger, when it meets another term immediately expectant thereon. The elder term merges in the reversion or remainder. A merger also takes place when there is a union of the freehold or fee and the term in one person, in the same right, and at the same time. In this case the greater estate merges and drowns the less, and the term becomes extinct. Merger bears a very near resemblance in circumstances and effect to a surrender. To a surrender it is requisite that the tenant of the particular estate should *relinquish* his estate in favor of the tenant of the next vested estate, in remainder or reversion. But merger is confined to the cases in which the tenant of the estate in reversion or remainder *grants* that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to him in reversion or remainder.[2] Surrender is the act of the party, and merger

[1] Pollexfen, 54; 2 Barnw. & Ald. 242; Com. Dig. Estoppel, E. 10; 10 Conn. 422; 12 Vermont, 39.

[2] Preston on Conveyancing, vol. 3, 25.

is the act of the law. Merger is not favored in equity, and is never allowed unless for special reasons, and to promote the intention of the party.

(6.) Surrender is the yielding up of an estate for life or years to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement.[1] The underlessee cannot surrender to the original lessor, but he must surrender to his immediate lessor or his assignee.[2] The surrender may be made expressly or it may be implied in law. The latter is when an estate, incompatible with the existing estate, is accepted or the lessee takes a new lease of the same lands.[3]

(7.) A term for years may be defeated by a condition, or by a proviso of *cesser* on the happening of a specified event, or by a release to the disseizor of the reversioner.[4] Leases for years may be forfeited by any act of the lessee which disaffirms the title and determines the relation of landlord and tenant. Forfeitures are lessened by statutory provision in this country.

(8.) A lease made under a power may continue notwithstanding the determination of the estate by the death of the person by whom the power is exercised.[5]

(9.) Covenants for renewal are frequently inserted in leases for terms of years.

(10.) The tenant for years is not entitled to emblements, provided the lease be for a certain period and does not depend upon any contingency.[6]

[1] Co. Litt. 337 b.
[2] Preston on Abstracts of Title, vol. 2, 7.
[3] 16 Johns. 28; Shep. Touch. by Preston, vol. 2, 300, 301.
[4] Co. Litt. 276 a.
[5] 2 Rol. Abr. 261, pl. 10; Ram on Tenure and Tenancy, 75.
[6] Litt. sec. 68.

II. *Of Estates at Will.* An estate at will is where one man lets land to another to hold at the will of the lessor.[1] It has been determined, however, that estates at will were equally at the will of both parties.[2] The lessor could not determine the estate after the tenant had sowed and before he had reaped, nor could the tenant determine the estate so as to deprive the landlord of his rent.[3] A tenancy is generally construed to be one from year to year unless otherwise expressed, and if the tenant holds over by consent, it is held to be a tacit agreement for another year's tenancy. The reservation of an annual rent is what turns leases for uncertain terms or estates at will into leases from year to year, the latter being assignable.[4] Either party is entitled to a reasonable notice of determination of tenancy.

III. *Of Estates at Sufferance.* A tenant at sufferance is one that comes into the possession of land by lawful title but holdeth over by wrong after the determination of his interest.[5] He has only a naked possession and no transmissible estate.

[1] Litt. sec. 68.
[2] 11 Mass. 519.
[3] 1 Sid. 348; 2 Salk. 413.
[4] 2 Wm. Black. 1173.
[5] Co. Litt. 57 b.

LECTURE LVII.

OF ESTATES UPON CONDITION.

ESTATES upon condition are such as have a qualification annexed to them by which they may upon the happening of a particular event be created or enlarged or destroyed. They are divided by Littleton[1] into estates upon condition implied or in law, and estates upon condition express or in deed.

(1.) *Of Conditions in Law.* Estates upon conditions in law are such as have a condition impliedly annexed to them unspecified in deed or will,[2] as forfeiture by tenant for life for alienation of a greater estate or for waste.

(2.) *Of Conditions in Deed.* These conditions are expressly mentioned in the contract between the parties: the object of them is either to avoid or defeat an estate, as if the feoffor reserves to himself and his heirs a yearly rent, with an express condition annexed that if the rent be unpaid the feoffor and his heirs may enter and hold the lands free of the feoffment.

A condition in deed is either general or special: the former puts an end altogether to the tenancy on entry for the breach of the condition; but the latter only authorizes the reversioner to enter on the land and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled. These condi-

[1] Litt. sec 325.

[2] Litt. sec. 378, 380; Co. Litt. 215 b, 233 b, 234 b.

tions are also either precedent or subsequent. A precedent condition is one which must take place before the estate can vest or be enlarged; as if a lease be made to B. for a year to commence from the first day of May thereafter, upon condition that B. paid a certain sum of money within the time.

Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated. Of this kind are most of the estates upon condition in law, and which are liable to be defeated on breach of the condition. If the condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled or there be a breach of it, that is termed a conditional limitation.[1] Words of *limitation* mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation. The one specifies the utmost time of continuance, the other marks some event which, if it takes place in the course of that time, will defeat the estate.[2] The material distinction between a condition and a limitation is this: that a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs. A *conditional limitation* is of a mixed nature, and partakes of a condition and of a limitation: as if an estate be limited to A. for life provided that when C. returns from Rome it shall thenceforth

[1] 2 Cro. 591; 11 Mod. 61; 1 Atk. 383; 2 Black. Com. 155; 2 East, 488.

[2] Shep. Touch. by Preston, vol. 1, 117; Preston on Estates, vol. 1, 45, 49, 128, 129.

remain to the use of B. in fee; it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited; and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken.[1]

There is this further distinction to be noticed between a condition annexed to an estate for years and one annexed to an estate of freehold, that in the former case the estate *ipso facto* ceases as soon as the condition is broken; whereas, in the latter case, the breach of the condition does not cause the *cesser* of the estate without an entry or claim for that purpose. *A collateral limitation* is another refinement belonging to this abstruse subject of limited and conditional estates. It gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral event; as a limitation of an estate to a man and his heirs, tenants of the manor of Dale, or to a woman during widowhood, or to C. till the return of B. from Rome, or until B. shall have paid him twenty pounds. The event marked for the determination of the estate is collateral to the time of continuance. Conditions subsequent are not favored in law and are construed strictly, because they tend to destroy estates.

Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is far preferable to the tenant.

[1] Butler's note, 99, to Co. Litt. lib. iii.; 16 Maine, 158.

LECTURE LVIII.

OF THE LAW OF MORTGAGE.

A MORTGAGE is the conveyance of an estate by way of pledge for the security of a debt, and to become void on payment of it. The legal ownership is vested in the creditor; but in equity the mortgagor remains the actual owner, until he is debarred by his own default or by judicial decree.

I. *Of the General Nature of Mortgages.* (1.) *Different Kinds of Mortgages.* The English law of mortgages appears to have been borrowed, in a great degree, from the civil law; and the Roman *hypotheca* corresponded very closely to the description of a mortgage in our law. The land was retained by the debtor, and the creditor was entitled to his *actio hypothecaria* to obtain possession of the pledge when the debtor was in default; and the debtor had his action to regain possession when the debt was paid or satisfied out of the profits, and he might redeem at any time before a sale.[1]

The English books distinguish between *vadium vivum* and *vadium mortuum.* The first is when the creditor takes the estate to hold and enjoy it, without any limited time for redemption, and until he repays himself out of the rents and profits. In that case the land *survives* the debt; and when the debt is discharged, the land, by right of reverter, returns to the

[1] Story's Equity, vol. 2, 276, note.

original owner. In the other kind of mortgage the fee passed to the creditor, subject to the condition of being defeated, and the title of the debtor to be resumed, on his discharging the debt at the day limited for payment; and if he did not, then the land was lost, and became dead to him forever.[1] This latter kind of mortgage is the one which is generally in use in this country.

A Welsh mortgage was a conveyance of the legal ownership of property as security for a debt, to become void on repayment of the debt, which was to bear no interest save the use and profit of the property.

(2.) *Of the Pledge and Mortgage of Chattels.* There is a material distinction also to be noticed between a pledge and a mortgage. A pledge, or pawn, is a deposit of goods redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge and is essential to its validity. The general property does not pass, as in the case of a mortgage, and the pawnee has only a special property. If no time of redemption is fixed by the contract, the pawnor may redeem at any time, and though a day of payment be fixed he may redeem after the day. The wisdom of the provisions by which the interests of the debtor and creditor are equally guarded is to be traced to the Roman law, and shines with almost equal advantage and with the most attractive simplicity in the pages of Glanville. It forms a striking contrast to the common law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere

[1] Co. Litt. 205 a; 2 Black. Com. 157.

right of reëntry, upon performance of the condition by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default the condition was forfeited, and the estate became absolute in the mortgagee without the right or the hope of redemption.[1]

(3.) *The Defeasance.* The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; and if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it so as to render it a security in the nature of a mortgage. The essence of a defeasance is that it defeats the principal deed, and makes it void if the condition be performed.

(4.) *Of Conditional Sales and Covenants to pay.* The case of sale, with an agreement for a repurchase within a given time, is totally distinct, and not applicable to mortgages. Such conditional sales or defeasible purchases, though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers; and the time limited for the repurchase must be precisely observed, or the vendor's right to his property will be lost. Property of every kind, real and personal, which is capable of sale, may become the subject of a mortgage.

(5.) *Of the Power to sell.* It is usual to add to the mortgage a power of sale in case of default, which enables the mortgagee to obtain relief in a prompt and easy manner, without the expense, trouble, formality, and delay of foreclosure, by a bill in equity.

[1] Litt. sec. 332.

(6.) *Mortgage of Reversionary Terms.* If nothing appears to gainsay it, the period at which portions are to be raised is presumed to have been intended to be that which would be most beneficial to those for whom the portions were provided.

(7.) *Of Deposit of Title Deeds.* A mortgage may arise in equity, out of the transactions of the parties, without any deed or express contract for that special purpose. It is now well settled in the English law, that if a debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the statute of frauds.

(8.) *Equitable Lien of Vendor.* The vendor of real estate has a lien, under certain circumstances, on the estate sold, for the purchase money. The vendee becomes a trustee to the vendor for the purchase money, or so much as remains unpaid.

II. *Of the Rights of Mortgagor.* (1.) *His Character at Law.* Upon the execution of a mortgage, the legal estate vests in the mortgagee subject to be defeated upon performance of the condition.

Technically the mortgagor has at law only a mere tenancy, which is subject to the immediate right of the mortgagee to enter if there be no agreement to the contrary.

(2.) *The Mortgagor's Rights in Equity.* The equity doctrine is, that the mortgage is a mere security for the debt and only a chattel interest, and that until a decree of foreclosure the mortgagor continues the real owner of the fee.

The courts of law have also gradually adopted these

equitable views of the subject. Except as against the mortgagee, the mortgagor while in possession and before foreclosure is regarded as the real owner with all the rights of a freeholder, whereas the mortgagee has only a chattel interest.

(3.) *The Mortgagor's Equity of Redemption.* The right of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives and assignee, and in every other person who has an interest in, or a legal or equitable lien upon, the lands. In carrying the right of redemption into effect, a court of equity is sometimes obliged to marshal the burden according to the equity of the different claimants, in order to preserve a just proportion among those who are bound in conscience to a just contribution, and in order to prevent one creditor from exercising his election between different funds unreasonably, and to the prejudice of another.[1]

III. *Rights of the Mortgagee.* (1.) *His Right to the Possession.* The mortgagee may at any time enter and take possession of the land, by ejectment or writ of entry, though he cannot make the mortgagor account for the past or bygone rents.[2] He may, without suit, obtain possession of the rents and profits from a lessee existing prior to the mortgage, on giving him notice of his mortgage and requiring the rent to be paid him; and in default he may distrain.[3]

(2.) *Accountable for the Profits.* If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the

[1] 3 Co. 14; 1 Powell on Mortgages, 342 b; 1 Johns. Ch. 425; 4 Ibid. 530.

[2] 3 Atk. 244; 2 Atk. 107; 1 Pick. 90.

[3] Doug. Rep. 279; 1 Term, 378.

actual receipts of rents and profits, and nothing more, unless they were reduced or lost by his wilful default or gross negligence.[1]

(3.) *Of Registry.* The mortgagee's right depends very essentially upon the registry of his mortgage, and upon the priority of that registry. If not recorded, it is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration of the same estate, or any portion thereof, whose conveyance shall be first duly recorded. Registry of a deed is held to be constructive notice of it to subsequent purchasers and mortgagees.[2]

(4.) *Future Advances.* The ancient rule was that if the mortgagor contracted further debts with the mortgagee, he could not redeem without paying those debts also.[3] The rule is now limited to the right to tack the subsequent debt to the mortgage as against the heir of the mortgagor and a beneficial devisee, but not against creditors, an assignee for value, or devisee for payment of debts.[4]

(5.) *Doctrine of Tacking.* It is the established doctrine in the English law that if there be three mortgages in succession, and all duly registered, or a mortgage and then a judgment, and then a second mortgage upon the estate, the junior mortgagee may purchase in the first mortgage and tack it to his mortgage, and by that contrivance "squeeze out" the

[1] 1 Vern. 44; 1 Eq. Cas. Abr. 328, pl. 1; 2 Call, 428: 1 Bibb, 195; 5 Paige, 1.

[2] 2 Johns. 510; 1 Johns. Ch. 298; 18 Johns. 544 S. C.; 3 Conn. 146; 9 Wheat. 489; 1 M'Cord's Ch. 395; 1 Yeates, 174; 6 Pick. 86; 1 Blackford (Ind.), 150; 1 Green (N. J.), 63.

[3] 1 Vern. 244, 245; 3 Salk. 84.

[4] 1 Ves. 86; 2 Ves. 662; 3 Atk. 556, 630; 3 Bro. 162; 1 Ves. Jr. 513; 2 Ves. Jr. 376.

middle mortgage and gain preference over it. This doctrine is not the law in this country.

IV. *Of Foreclosure.* (1.) *Of Strict Foreclosure.* The equity of redemption which exists in the mortgagor after default in payment may be barred or *foreclosed*, if the mortgagor continues in default after due notice to redeem.

(2.) *Of selling on Foreclosure.* In England, and with us, the practice of selling the land by the party himself, or by an authorized trustee under a power inserted in the mortgage, has extensively prevailed.

(3.) *Parties to a Bill of Foreclosure.* When the mortgagee proceeds by bill to foreclose, he must make all incumbrancers existing at the filing of the bill parties, and incumbrancers who are not parties will not be bound by the decree.[1] The general rule is that all persons materially interested in the mortgage or mortgaged estate ought to be made parties to a bill of foreclosure. The equity of redemption may be foreclosed by the act of the mortgagor himself, for upon a bill to redeem the plaintiff is required to pay the debt by a given time, which is usually six months after the liquidation of the debt; and upon his default the bill is dismissed for non-payment, which is a bar to a new bill, and equivalent to a decree of absolute foreclosure.[2]

(4.) *Equity of Redemption barred by Time.* The right of redemption may be barred by the length of time. The analogy between the right in equity to redeem and the right of entry at law is generally preserved, so that the mortgagor who comes to re-

[1] 2 Vern. 601, 663; 2 P. Wms. 643; 2 Bro. 276; 3 Johns. Ch. 459; 5 Conn. 544; 3 Ch. Rep. 46; 3 Ves. 314; 1 Hopkins, 277.

[2] 2 Atk. 267; 11 Ves. 199; 4 Johns. Ch. 140.

deem against a mortgagee in possession, after the period of limitation of a writ of entry, must bring himself within one of the exceptions which would save the right of entry at law, or the time will be a bar to the redemption, and a release of it to the mortgagee may be presumed. The limitation at law and in equity is usually the same, with the allowance of the same time for disabilities.[1] The mortgagee may equally on his part be barred by lapse of time, and if the mortgagor has been permitted to possess and enjoy the estate without account, and without any payment of principal or interest, or claim for a given period (generally twenty years), the mortgage debt is presumed to be extinguished, and a reconveyance of the legal estate from the mortgagee may be presumed. When a mortgagee omits to give proper notice, the sale may be impeached in chancery.[2]

(5.) *Of opening Biddings.* The English practice of opening biddings on a sale of mortgaged premises under a decree does not prevail to any great extent in this country.[3]

(6.) *Of the Reconveyance.* If a mortgage be satisfied without a sale, and the estate is to be restored to the mortgagor, it will depend upon circumstances whether a reconveyance be necessary. When the condition of the mortgage is that the conveyance shall be void on payment at a given day, and payment be duly made, the land returns to the mortgagor by the operation of the condition;[4] but

[1] 3 P. Wms. 287; 3 Atk. 313; 3 Bro. 639, note; 17 Ves. 99; 1 Ves. & Beame, 536; 3 Johns. Ch. 129; 7 Ibid. 90; 1 Paige, 48; 3 Harr. & M'Henry, 328; 1 Jac. & Walk. 83; 1 Marshall, 519; 10 Wheat. 168; 2 Jac. & Walk. 191.

[2] 6 Mad. Ch. 15.

[3] 2 Edw. V. Ch. 614.

[4] Preston on Conveyancing, vol. 2, 200, 201.

if there has been a default, a reconveyance is necessary on discharging the debt.[1] This is the English rule; the law in this country is somewhat at variance with it, although the cases are not uniform.

[1] 1 Atk. 520; 1 Sch. & Lef. 176, 177; 8 Mass. 557, 561, 563, Appendix.

LECTURE LIX.

OF ESTATES IN REMAINDER.

ESTATES in expectancy are of two kinds: one created by the act of the parties, and called a *remainder;* the other by the act of law, and called a *reversion.*

I. *Of the General Nature of Remainders.* A remainder is a remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it.[1] A remainder may consist of the whole remnant of the estate, as in the case of a lease to A. for years, remainder to B. in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it left vested in the grantor, as in the case of a grant to A. for years, remainder to B. for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A. for years, remainder to B. for life, remainder to C. in tail, remainder to D. in fee. The various interests into which an estate may be thus subdivided make, for many purposes, but one estate, being different parts or portions of the same entire inheritance.[2] The subdivision of the interest of an estate, to be enjoyed partitively, and

[1] Co. Litt. 49 a, 143 a; 2 Black. Com. 163; Preston on Estates, vol. 1, 90, 91.

[2] 2 Black. Com. 164.

in succession, is a very natural and obvious contrivance, and must have had a place in early civilization.[1] If the whole fee be granted, there cannot, as a matter of course, be any remainder. So, if an estate be granted to A. and his heirs till C. returns from Rome, and then to the use of B. in fee, the limitation to B. cannot be good as a remainder, though it may enure as a shifting use or executory limitation; for the entire fee passed to A. as a base or qualified fee, in which the grantor retained only a possibility of reverter.[2] But if the estate had been granted to A., without words of inheritance, until C. returned from Rome, he would have taken only a freehold estate, and the residue of the estate, upon the return of C., if limited to the use of B., would be a remainder. There can be no remainder limited after an estate of inheritance, save only after an estate tail. There may be a future use, or executory devise, but it will not be a remainder.[3] In a devise to A. and his heirs, and if he dies without issue, remainder over,[4] the remainder is good, where the word "heirs" is, by the terms of the devise, restricted to "issue," and thus the remainder depends upon an estate tail.

Cross remainders are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A., and of another lot to B. in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C. in fee, A. and B. have cross remainders over by express terms,

[1] Cornish on Remainders, 3.
[2] 10 Co. 97 b; 1 Eq. Cas. Abr. 186, E, 1.
[3] 2 Inst. 336; Fearne on Remainders, 7, 8.
[4] 9 East, 382; 12 Ibid. 253; 4 Maule & Selw. 61.

and on the failure of either, the other or his issue takes, and the remainder to C. is postponed; but if the devise had been to A. and B. of lots to each, and remainder over on the death of both of them, the cross remainders to them would be implied.[1]

II. *Of Vested Remainders.* Remainders are of two sorts, vested and contingent. An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment. A grant of an estate to A. for life with the remainder in fee to B., or to A. for life and after his death to B. in fee, is a grant of a fixed right of immediate enjoyment in A. and a fixed right of future enjoyment in B. A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. Though it may be uncertain whether a remainder will ever take effect *in possession*, it will nevertheless be a vested remainder if the interest be fixed. The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.[2] Every remainder man may die without issue before the death of the tenant for life. It is the present *capacity* of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder.[3] A limitation after a power of appointment as to the use of A. for life, remainder to such use as A. shall appoint, and in default of appointment remainder to B., is a vested remainder, though liable to be devested by the execution of the power.[4] Vested remainders are

[1] Cro. Jac. 695; 2 Black. Com. 381; 2 Bailey's S. C. 442.
[2] 25 Wendell, 119.
[3] Willes, 337; Fearne on Rem. 277, 278.
[4] 1 Ves. 174; 4 Term, 39.

actual estates, and may be conveyed by any of the conveyances operating by force of the statute of uses. Where estates tail exist, they may be destroyed by a common recovery suffered by the tenant in tail, for that destroys everything, as well remainders and reversions and all ulterior limitations, whether by shifting use or executory devise. But if a particular tenant for life or years, on whose estate a vested remainder depends, makes a tortious conveyance which merely works a forfeiture of his particular estate and does not ransack the whole estate, the next remainderman whose estate was disturbed and displaced may take advantage of the forfeiture and enter.[1] Where a remainder is limited to the use of several persons, who do not all become capable at the same time, as a devise to A. for life, remainder to his children, the children living at the death of the testator take vested remainders subject to disturbance by after-born children. The remainder vests in the persons first becoming capable, and the estate opens and becomes devested in quantity by the birth of subsequent children who are let in to take vested proportions of the estate.[2]

III. *Of Contingent Remainders.* A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate. It is not the uncertainty of future enjoyment, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest.[3]

[1] Litt. sec. 416; Co. Litt. 252 a.

[2] Fearne, 394-396; 3 Term, 484; 1 Eden, 453; 4 Johns. 61; 5 Barnw. & Cress. 866; 3 Pick. 360.

[3] Fearne on Rem. 3; Preston on Estates, vol. 1, 71, 74.

There are four species of contingent remainders, according to Mr. Fearne: (1.) The first sort is where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in futuro* will ever vest; thus if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return remainder over in fee, the remainder depends entirely on the uncertain or contingent determination of the estate in B. by the return of C. from Rome.[1] (2.) The second sort is where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate and must precede the remainder; as if a lease be to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life. The event of B. dying before A. does not affect the determination of the preceding estate, but it is a dubious event which must precede in order to give effect to the remainder in C.[2] (3.) A third kind is where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it: thus if a grant be made to A. for life, and after the death of B. to C. in fee, here if the death of B. does not happen until after the death of A. the particular estate is determined before the remainder is vested, and it fails from the want of a particular estate to support it.[3] (4.) The fourth class of contingent remainders is where the person to whom the remainder is limited is not ascertained or not in being; as in the case of a limitation to two persons for life, remainder to the survivor of them, or in the case of a lease to A. for life, remainder to the right

[1] 3 Co. 20 a, b; 10 Co. 85 a.
[2] 3 Co. 20 a; Co. Litt. 378 a.
[3] 3 Co. 20 a.

heirs of B. then living. B. cannot have heirs while living, and if he should not die until after A. the remainder is gone, because the particular estate failed before the remainder could vest.[1]

There is an exception to the third class of remainders. Thus a limitation of a long term of years, as for instance to A. for eighty years if B. should live so long, with remainder over after the death of B. to C. in fee, gives a *vested* remainder to C. The law regards it as sufficiently certain that B. will die before the expiration of the eighty years, so that C. has a vested interest. Exceptions exist to the fourth class of contingent remainders. Thus, if the ancestor takes an estate of freehold and a remainder is limited thereon in the same instrument to his heirs in fee or in tail, the remainder is not contingent or in abeyance, but is immediately executed in possession in the ancestor, and he becomes seized in fee or in tail. Another exception to the fourth class of contingent remainders is where there is a limitation by a special designation by will to the heirs of a person *in esse*, as to the heirs of the body of A. now living. The limitation is deemed to be vested in the heirs so designated by purchase, and consequently there is no contingent remainder in the case.

IV. *Of the Rule in Shelley's Case.*[2] In Shelley's case the rule was stated, on the authority of several cases in the Year Books, to be "that when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, *the heirs*, are words of limitation of the estate and not words of purchase." The origin of

[1] Cro. C. 102; 3 Co. 20 a; Fearne, 3–6. [2] 1 Co. 104.

the rule is traceable to feudal principles, which favored the taking of estates by descent with the feudal burdens rather than by purchase, where the taker would be exempt from them. The rule in Shelley's case has been adopted in many of the United States, although changed in some by statute.

V. *Of the Particular Estate.* There must be a particular estate to precede a remainder, for it necessarily implies that a part of the estate has been already carved out of it and vested in immediate possession in some other person. The particular estate must be valid in law, and formed at the same time and by the same instrument with the remainder.[1] The latter cannot be created for a future time without an intervening estate to support it. Though a term for years may be granted to commence *in futuro*, an estate of freehold limited on such future interest would be void. When, therefore, a freehold remainder is intended to be created and vested, it is necessary to create a previous particular estate to subsist in the mean time and to deliver immediate possession of it, which is construed to be giving possession also to him in remainder, since the particular estate and the remainder constitute one and the same estate in law. The remainder-man is seized of his remainder at the same time that the tenant of the particular estate is possessed of his estate.[2] It was necessary to make livery of seizin on the particular estate, even though that particular estate was a chattel interest, as a term for years, provided a freehold vested remainder was to be created. If the particular estate be void in its creation or be defeated afterwards, the remainder created by a conveyance at common

[1] Plowd. 25 a; Doc. & Stu. Dialog. 2, c. 20; 4 Mod. 316.
[2] 2 Black. Com. 166.

law, and resting upon the same title, will be defeated also, as being, in such a case, a freehold, commencing *in futuro*. If the estate in remainder be limited in contingency and amounts to a freehold, a vested freehold must precede it and pass at the same time out of the grantor.

VI. *Of Remainders limited by Way of Use.* Remainders may be limited by way of use as well as by common law conveyances.

VII. *Of the Time within which a Contingent Remainder must vest.* The interest to be limited as a remainder must commence or pass out of the grantor in the same instrument and at the time of the creation of the particular estate, and not afterwards.[1] It must vest in the grantee during the continuance of the particular estate or at the very instant that it determines.[2] The rule was founded on feudal principles, and was intended to avoid the inconvenience of an interval when there should be no tenant of the freehold to render feudal service.

The remainder must be so limited as to await the natural determination of the particular estate, and not to take effect in possession upon an event which prematurely determines it.[3] If limitations on such conditions be made in conveyances to uses and in wills, they are good as conditional limitations, or future or shifting uses or executory devises, and upon the breach of the condition the first estate, *ipso facto*, determines without entry, and the limitation over commences in possession.[4]

[1] Plowd. 25, 28; Co. Litt. 49 a, b.
[2] Plowd. Rep. 25; 1 Co. 66, 138.
[3] Cro. Eliz. 360; Plowd. Rep. 24 b, 29 a, b.
[4] Fearne, 319.

VIII. *Of the Destruction of Contingent Remainders.* If the particular estate determines or be destroyed before the contingency happens on which the expectant estate depended, and leaves no right of entry, the remainder is annihilated.

IX. *Of Other Properties of Contingent Remainders.* If a contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens.

A vested remainder lying in grant passes by deed without livery, but a contingent remainder is a mere right and cannot be transferred before the contingency happens otherwise than by way of estoppel. All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent and devisable and assignable.[1]

[1] 1 Ves. 391, 411; 7 Paige, 76.

LECTURE LX.

OF EXECUTORY DEVISES.

AN executory devise is a limitation by will of a future contingent interest in lands contrary to the rules of limitation of contingent estates in conveyances at law.

I. *Of their History.* The reason of the institution of executory devises was to support the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then out of indulgence to wills held to be good as an executory devise. They are substantial estates, and are put under such restraints only as have been deemed requisite to prevent the mischiefs of perpetuities or the existence of estates that were unalienable.[1]

The doctrine of perpetuities was finally settled in 1736,[2] in Stephens *v.* Stephens. The addition of twenty-one years to a life or lives in being, within which time the expectant estate should vest, was held to be admissible.

II. *Of the Several Kinds and General Qualities of Executory Devises.* There are two kinds of executory devises relative to real estate, and a third sort relative to personal estate.[3]

(1.) Where the devisor parts with his whole estate

[1] Willes, 211.
[2] 2 Barnard, K. B. 375; Cases temp. Talb. 228.
[3] 1 Salk. 229.

but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. Thus if there be a devise to A. for life, remainder to B. in fee, provided that if C. should within three months after the death of A. pay one thousand dollars to B., then to C. in fee, this is an executory devise to C., and if he dies in the lifetime of A. his heir may perform the condition.[1]

(2.) Where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time, as in the case of a devise to the heirs of B. after the death of B., or a devise to B. in fee to take effect six months after the testator's death, or a devise to the daughter of B. who shall marry C. within fifteen years.[2]

(3.) At common law, if there was an executory bequest of personal property, as of a term for years, to A. for life, and after his death to B., the ulterior limitation was void, and the whole property vested in A.; but it is now settled that such limitations over of chattels real or personal in a will, or by way of trust, are good. An executory devise differs from a remainder in three points: (*a.*) It needs not any particular estate to precede and support it, as in the case of a devise in fee to A. upon his marriage; (*b.*) A fee may be limited after a fee, as in the case of a devise of land to B. in fee, and if he dies without issue or before the age of twenty-one, then to C. in fee; (*c.*) A term for years may be limited over after a life estate created in the same.

III. *Of Limitations to Executory Devises.* (1.) *When too remote.* Every future estate is void in its

[1] 10 Mod. 419. Prec. in Ch. 486.
[2] T. Raym. 82; 1 Salk. 226; 1 Lutw. 796.

creation which suspends the absolute power of alienation for a longer period than twenty-one years and a life or lives in being.

(2.) *Of Dying without Issue, as to Real Estate.* If an executory devise be limited to take effect after a dying *without heirs* or *without issue*, or *on failure of issue*, or *without leaving issue*, the limitation is held to be void, because the contingency is too remote, as it is not to take place until after an indefinite failure of issue. If the testator meant that the limitation over was to take effect on failure of issue *living at the time of his death* of the person named as the first taker, then the contingency determines at his death, and no rule of law is broken, and the executory devise is sustained.

(3.) *Of Dying without Issue, as to Chattels.* Little distinction is made between *executory* devises of real and personal estate in this regard, though in bequests of personal property the rule will more readily than in devises of land be made to yield to other expressions or slight circumstances in the will indicating an intention to confine the limitation to the event of the first taker dying without issue living at his death.

IV. *Of other Matters relating to Executory Devises.* When there is an executory devise of the real estate, and the freehold is not, in the mean time, disposed of, the inheritance descends to the testator's heir until the event happens. So, where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits between the determination of the first estate and the vesting of the limitation over will go to the heir at law, if not otherwise appropriated by the will.[1] The same rule ap-

[1] Cro. Eliz. 878; 1 Atk. 422; Cases temp. Talb. 44.

plies to an executory devise of personal estate; and the intermediate profits, as well before the estate is to vest as between the determination of the first estate and the vesting of a subsequent limitation, will fall into the residuary personal estate.[1] In the great case of Thellusson *v.* Woodford,[2] the doctrine was declared that there was no limited number of lives for the purpose of postponing the vesting of an executory interest. There might be an indefinite number of concurrent lives no way connected with the enjoyment of the estate; for, be there ever so many, there must be a survivor, and the limitation is only for the length of that life.[3] The purpose of accumulation was no objection to an executory devise, nor that the enjoyment of the subject was not given to the persons during whose lives it was to accumulate. The value of the thing was enlarged, but not the time. The accumulated profits arising prior to the happening of the contingency might all be reserved for the persons who were to take upon the contingent event; and if the limitation of the executory devise was for any number of lives in being, and a reasonable time for a posthumous child to be born, and twenty-one years thereafter, it was valid in law. The devise in that case was to trustees in fee during the lives of all the testator's sons, and of all the testator's grandsons, born in his lifetime, or living at his death, or then *in ventre sa mère*, to receive the profits during all that time in trust, and to invest them from time to time in other real estates, and thus be adding income to principal. After the death of the last survivor of all the enumer-

[1] Cases temp. Talb. 145; 2 Vesey, 122.
[2] 4 Vesey, 227; 11 Ibid. 112, S. C.
[3] 2 Bro. C. C. 30; 11 Vesey, 145.

ated descendants, the estates were to be conveyed to those branches of the respective families of the sons, who, at the end of the period, should answer the description of the heirs male of the respective bodies of the sons.

The testator's object was to protract the power of alienation, by taking in lives of persons who were mere nominees without any corresponding interest. The property was thus tied up from alienation and from enjoyment for three generations; and when the period of distribution shall arrive, the accumulated increase of the estate will be enormous. This is the most extraordinary instance upon record of calculating and unfeeling pride and vanity in a testator, disregarding the ease and comfort of his immediate descendants for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. It gave occasion to the statutes of 39 & 40 Geo. III. c. 98, prohibiting thereafter any person by deed or will from settling or devising real or personal property, for the purpose of accumulation, by means of rents or profits, for a longer period than the life of the settlor, or twenty-one years after his death, or during the minority of any person or persons living at his decease who, under the deed or will directing the accumulation, would, if then of full age, be entitled to the rents and profits.

LECTURE LXI.

OF USES AND TRUSTS.

I. *Of Uses.* A use is where the legal estate of lands is in A. in trust that B. shall take the profits, and that A. will make and execute estates according to the direction of B.[1] Before the statute of uses, a use was a mere confidence in a friend, to whom the estate was conveyed by the owner without consideration, to dispose of it upon trusts designated at the time, or to be afterwards appointed by the real owner.

(1.) They existed in the Roman law under the name of *fidei commissa*, or trusts. They were introduced by testators to evade the municipal law, which disabled certain persons, as exiles and strangers, from being heirs or legatees.

The English ecclesiastics borrowed uses from the Roman law, and introduced them into England in the reign of Edward III. or Richard II., to evade the statutes of mortmain, by granting lands to third persons to the use of religious houses, and which the clerical chancellors held to be *fidei commissa* and binding in conscience.[2] When this evasion of law was suppressed by the statute of 15 Richard II. uses were applied to save lands from the effects of attainders, and afterwards to a variety of purposes in the business of civil life. There was a strong contrast between uses and

[1] Gilbert on Uses, 1.

[2] 2 Black. Com. 328; Saunders on Uses and Trusts, 14.

estates at law. When uses were created before the statute of uses, there was a confidence that the feoffee would suffer the feoffor to take the profits, and that the feoffee upon the request of the feoffor, or notice of his will, would execute the estate to the feoffor and his heirs or according to his directions.[1] There was a continual struggle maintained for upwards of a century between the patrons of uses and the English parliament: the one constantly masking property and separating the open legal title from the secret equitable ownership; and the other, by a succession of statutes, endeavoring to fix the duties and obligations of ownership upon the *cestui que use*. At last the statute of 27 Henry VIII., commonly called the statute of uses, transferred the uses into possession by turning the interest of the *cestui que use* into a legal estate and annihilating the intermediate estate of the feoffee; so that if a feoffment was made to A. and his heirs to the use of B. and his heirs, B., the *cestui que use*, became seized of the legal estate by force of the statute. The legal estate, as soon as it passed to A., was immediately drawn out of him and transferred to B., and the use and the land became convertible terms.

Contingent, shifting, and springing uses presented a method of creating a future interest in land, and executory devises owed their origin to the doctrine of shifting or springing uses. But uses differ from executory devises in this respect: that there must be a person seized to the uses when the contingency happens or they cannot be executed by the statute. The statute having turned uses into legal estates, they were thereafter conveyed as legal estates in the same manner and by the same words.[2] The classification

[1] Bacon's Law Tracts, 307. [2] Willes, 180.

of uses into shifting or secondary, springing and future, or contingent and resulting uses, seems to be necessary to distinguish them.

(2.) *Shifting* or *secondary uses* take effect in derogation of some other estate, and are either limited by the deed creating them or authorized to be created by some person named in it. Thus if an estate be limited to A. and his heirs, with a proviso that if B. pay to A. one hundred dollars by a given time, the use of A. shall cease and the estate go to B. in fee, the estate is vested in A. subject to a shifting or secondary use in fee in B. These shifting uses, whether created by the original deed or by the exercise of a power, must be confined within proper limits so as not to lead to a perpetuity, which is such a limitation of property as renders it inalienable beyond the period allowed by law.

(3.) *Springing uses* are limited to arise on a future event where no preceding estate is limited, and they do not take effect in derogation of any preceding interest. If a grant be to A. in fee to the use of B. in fee after the first day of January next, this is an instance of a springing use, and no use arises until the limited period. The use in the mean time results to the grantor who has a determinable fee.[1]

(4.) *Future* or *contingent uses* are limited to take effect as remainders. If lands be granted to A. in fee to the use of B. on his return from Rome, it is a future contingent use, because it is uncertain whether B. will ever return.[2]

(5.) If the use limited by deed expired or could not vest but upon a contingency, the use *resulted* back to the grantor who created it.

[1] Cro. Eliz. 439; Dyer, 274 b. [2] Gilbert on Uses, 152–178.

(6.) The English doctrine of uses and trusts under the statute of 27 Henry VIII. and the conveyances founded thereon have been very generally introduced into the jurisprudence of this country.[1]

II. *Of Trusts.* The object of the statute of uses, so far as it was intended to destroy uses, was as we have seen subverted by the courts.

(1.) *Growth and Doctrine of Trusts.* It was soon held that the statute executed only the first use, and that a use upon a use was void. In a feoffment to A. to the use of B. to the use of C., the statute was held to execute only the use to B., and there the estate vested, and the use to C. did not take effect.[2] In a bargain and sale to A. in fee, to the use of B. in fee, the statute passes the estate to A. by executing the use raised by the bargain and sale, but the use to B., being a use in the second degree, is not executed by the statute, and it becomes a mere trust, and one which a court of equity will recognize and enforce.[3] Trusts have been made subject to the common law canons of descent; they are deemed capable of the same limitations as legal estates; and curtesy was allowed by analogy to legal estates, though by a strange anomaly dower has been excluded. Trusts are now what uses were before the statute, so far as they are mere fiduciary interests distinct from the legal estate and to be enforced only in equity. The *cestui que trust* is seized of the freehold in the contemplation of equity, and has a right to receive the profits and dispose of the lands.

(2.) *How created.* Though there be no particular

[1] 1 N. H. Rep. 64; 3 Ibid. 239; 6 Mass. 31; Johns. Rep. *passim;* 3 Binney, 619.

[2] Dyer, 155; 1 And. 37; Cro. C. 244; 2 P. Wms. 146; 6 Barnw. & Cress. 305.

[3] 1 Atk. 591; 16 Johns. 302.

form of words requisite to create a trust if the intention be clear, yet the English statute of frauds, 29 Car. II. c. 3, sec. 7, 8 (and which is generally the adopted law throughout this country), requires the declaration of trusts of lands to be manifested by some writing signed by the party creating the trust. In addition to the various direct modes of creating trust estates there are resulting trusts, implied by law from the manifest intention of the parties and the nature and justice of the case, and such trusts are expressly excepted from the operation of the statute of frauds.[1] Where an estate is purchased in the name of A., and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B., provided the payment of the money be clearly proved. Another case of a resulting trust is where a trust is declared only as to part and nothing is said as to the residue, that residue left undisposed of remained to the heir at law.

[1] 1 P. Wms. 111.

LECTURE LXII.

OF POWERS.

THE powers with which we are most familiar in this country are common law authorities of simple form and direct application, such as a power to sell land, to execute a deed, etc., etc. But the powers now under consideration are declarations of trust and modifications of future uses. All these powers are in fact powers of revocation and appointment. An appointment under a power operates to substitute one *cestui que use* for another.[1]

I. *Of the Nature and Division of Powers.* In creating a power the parties concerned in it are the *donor*, who confers the power; the *appointer*, or *donee*, who executes it; and the *appointee*, or person in whose favor it is executed. A power is defined to be an authority enabling a person to dispose, through the medium of the statute of uses, of an interest vested either in himself or in another person. It is a mere right to limit a use, and the appointment in pursuance of it is the event on which the use is to arise. The usual classification of powers is as follows: —

(1.) Powers *appendant* or *appurtenant;* and they enable the party to create an estate which attaches on his own interest.

(2.) *Powers collateral*, or *in gross*, do not attach on the interest of the party, but they enable him to create an estate independent of his own.

[1] Butler's note, 231, to Co. Litt. lib. iii.

(3.) Powers *simply collateral* are those which are given to a person who has no interest in the land, and to whom no estate is given. Mr. Powell divides powers into two classes, general and particular. (*a.*) General powers to be exercised in favor of any person whom the appointer chooses. (*b.*) Particular powers to be exercised in favor of specific objects.

II. *Of the Creation of Powers.* (1.) *Estate created by the Power.* No formal set of words is requisite to create or reserve a power. It may be created by deed or will, and it is sufficient that the intention be clearly declared. The creation, execution, and destruction of powers, all depend on the substantial intention of the parties,[1] and they are construed equitably and liberally in furtherance of that intention.

(2.) *Devise to Executors.* The earlier cases established the distinction that a devise of land to executors to sell passed the interest in it; but a devise that *executors shall sell*, or that *the lands shall be sold by them*, gave them but a power.

(3.) *Powers under the Statute of Uses.* Powers of appointment and revocation may be reserved, in conveyances under the statute of uses, as well as in conveyances at common law. But the deed of bargain and sale, or of covenant to stand seized, must be sustained by a sufficient consideration, according to the nature of the deed.

III. *Of the Execution of Powers.* (1.) *Who may execute.* Every person capable of disposing of an estate actually vested in himself may exercise a power, or direct a conveyance of the land. The rule goes further, and even allows an infant to execute a power simply collateral, and that only; and a *feme covert*

[1] Doug. Rep. 293; 3 East, 441; 11 Johns. 169.

may execute any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband is in no case necessary.[1]

(2.) *When Powers survive.* A naked authority, without interest, given to several persons, does not survive; and it was a rule of the common law, that if the testator, by his will, directed his executors by name to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied.[2]

(3.) *Valid Execution of them.* The appointee under the power derives his title, not from the person exercising the power, but from the instrument by which the power of appointment was created. Every instrument executing a power should mention the estate or interest disposed of; and it is best to declare it to be made in exercise of the power, and the formalities required in the execution of the power must appear on the face of the instrument.

(4.) *Execution of Powers strictly construed.* When the mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing. It is nothing more than declaring the use upon an estate already legally created to serve it. It is the plain and settled rule that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been if no such precise directions had been given.

[1] Sugden on Powers, 148–155; 2 Hill's S. C. Ch. 214, S. P.

[2] Co. Litt. 112 b, 113 a, 181 b; Shep. Touch. tit. Testament, 448, pl. 9; Bro. tit. Devise, pl. 31; Dyer, 177; 2 Johns. Ch. 19; 10 Peters, 536.

(5.) *Power need not be referred to.* The power may be executed without reciting it, or ever referring to it, provided the act shows that the donee had in view the subject of the power.[1] In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power there must be a reference to the subject of it, or to the power itself.

(6.) *Powers of Revocation.* In a deed executing a power, a power of revocation and new appointment may be reserved, though the deed creating the power does not authorize it; and such powers may be reserved *toties quoties.* A power to be executed by *will* is always revocable by a subsequent will; for it is in the nature of a will to be ambulatory until the testator's death.[2]

(7.) *Relates back to the Instrument.* An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power.

(8.) *Defective Execution aided.* The beneficial interest which a person takes under the execution of a power forms part of his estate, and is subject to his debts like the rest of his property. The appointment cannot be made so as to protect the property from the debts of the appointee.[3] A court of chancery goes further, and holds that where a person has a *general* power of appointment over property, and he actually exercises his power, whether by deed or will, the property appointed shall form part *of his assets*, and be subject to the claims of creditors in preference to the claims of the appointee.

[1] 1 Atk. 559; 1 Russ. & Mylne, 515.
[2] Sugden, 321. [3] 2 Vesey, 640.

IV. *Of the Extinguishment of Powers.* There are some subtle distinctions in the English law relative to the cases in which powers are to be deemed suspended, merged, or extinguished. The donee of the power cannot defeat his own grant,[1] nor can the donee of a power *simply collateral* suspend or extinguish it by any act of his own.[2] But a total alienation of the estate extinguishes a *power appendant or in gross;* as if a tenant for life, with a power to grant leases in possession, conveys away his life estate, the power is gone, for the exercise of it would be derogatory to his own grant, and to the prejudice of the grantee.[3]

[1] Doug. Rep. 477.

[2] 15 Hen. VII. fol. 11 b; App. No. 1 to Sugden on Powers; Co. Litt. 237 a, 265 b; 1 Co. 175 a; 1 Atk. 474; Sugden, 50, 67; 1 Russ. & Mylne, 391.

[3] Doug. Rep. 292.

LECTURE LXIII.

OF ESTATES IN REVERSION.

A REVERSION is the return of land to the grantor and his heirs after the grant is over.[1] The reversion arises by operation of law, and not by deed or will, and it is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment. It is an incorporeal hereditament, and may be conveyed either in whole or in part by grant, without livery of seizin. The reversioner, having a vested interest in the reversion, is entitled to his action for an injury done to the inheritance.[2] He is entitled to an action on the case, in the nature of waste, against a stranger, while the estate is in the possession of the tenant. The injury must be of such a permanent nature as to affect the reversionary right.[3] The usual incidents to the reversion, under the English law, are fealty and rent.

[1] Co. Litt. 142 b.
[2] 4 Burr. 2141.
[3] 1 Maule & Selw. 234; 6 Conn. 328.

LECTURE LXIV.

OF A JOINT INTEREST IN ESTATES.

A JOINT interest may be had either in the title or possession of land. Two or more persons may have an interest in connection in the title to the same land, either as joint tenants or coparceners, or in the possession of the same as tenants in common.

I. *Joint tenants* are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.[1] Joint tenants are said to be seized *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole. The doctrine of survivorship is the distinguishing incident of title by joint tenancy, and therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. A conveyance jointly to husband and wife is not strictly a joint tenancy, but they take as one person, and both are seized of the entirety and neither has a severable interest, although both may convey, and the survivor has an estate in severalty. Joint tenancy may be destroyed by destroying any of its constitutent unities, except that of time. If A. and B. be joint tenants, and A. conveys his joint interest, being his moiety of the estate, to C., the joint tenancy is severed, and turned into a tenancy in com-

[1] 2 Black. Com. 181; Litt. sec. 304.

mon as between B. and C., for they hold under different conveyances. Joint tenants may also sever the tenancy voluntarily, by deed, or they may compel a partition by writ of partition, or by bill in equity.

II. An estate in *coparcenary* always arises from descent. At common law it took place when a man died seized of an estate of inheritance, and left no male issue but two or more daughters, or other female representatives in a remoter degree. In this case they all inherited equally, as coheirs in the same degree, or in unequal proportions, as coheirs in different degrees.[1] They have distinct estates, with a right to the possession in common, and each has a power of alienation over her particular share. The doctrine of survivorship does not apply to them.

III. *Tenants in common* are persons who hold by unity of possession, and they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. Each tenant is considered to be solely or severally seized of his share. The conveyance of the undivided share of an estate in common is made in like manner as if the tenant in common was seized of the entirety.[2] Tenants in common can compel each other to a partition, and are liable to each other for waste, and are bound to each other for a due share of the profits of the estate in common. The possession of one tenant in common is the possession of the others, and one joint tenant, or tenant in common, can compel the others to join in expense of necessary repairs to a house or mill held by them.

[1] Litt. sec. 241, 242.
[2] Preston on Abstracts, vol. 2, 277.

LECTURE LXV.

OF TITLE BY DESCENT.

To constitute a perfect title there must be the union of actual possession, the right of possession, and the right of property. These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and a third the right of property. All the modes of acquiring title to land are reducible to title by descent, and by purchase or title by operation of law, and title by purchase or by act of the parties.[1] Descent, or hereditary possession, is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. The English law of descents consists of a number of rules or canons of inheritance, which have been long established, and which have regulated the transmission of the estate from ancestor to heir with absolute certainty. But in the United States the English common law of descents has been rejected, and each state has established a law of descent for itself.

The leading principles of descent in this country are as follows: I. If a person owning real estate dies seized or as owner without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone; and if more than one per-

[1] Co. Litt. 18 a, b; Harg. Ibid. n. 106.

son and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common in equal parts, however remote the common degree of consanguinity may be.

II. The second rule of descent is that if a person dying seized or as owner of land leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living.

Those who are in the nearest degree take the shares which would have descended to them had the descendants in the same degree who are dead, leaving issue, been living; and the issue of the descendants who are dead, respectively, take the shares which their parents if living would have received. When the heirs are of equal degree they are said to inherit *per capita*, when of unequal degree *per stirpes*.

III. A third canon of inheritance which prevails to a considerable extent in this country is, that if the owner of lands dies without lawful descendants leaving parents, the inheritance shall ascend to them; either first to the father and next to the mother, or jointly under certain qualifications. (1.) *Of the Father.* The estate goes to the father in such a case, unless it came to the intestate on the part of the mother, and then it passes to her or the maternal kindred.

(2.) *Of the Mother.* If the inheritance came to the intestate on the part of the mother, though his

father survive him; or if he does not survive him and the mother survives, and there be a brother or sister, or their descendants, the mother takes an estate for life only; and if there be no brother or sister or their issue, or father, she takes the inheritance in fee.

IV. If the intestate dies without issue or parents, the estate goes to his brothers and sisters and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living.

V. In default of lineal descendants and parents, and brothers and sisters and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them.

VI. In default of lineal descendants and parents, and brothers and sisters and their descendants, and grandparents, the inheritance goes to the brothers and sisters equally of both the parents of the intestate and to their descendants.

VII. If the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father and their descendants shall have preference; and in default of them the estate shall descend to the brothers and sisters of the mother and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters and their descendants have the preference, and in de-

fault of them, the brothers and sisters on the father's side and their descendants take. This rule controls rule VI. in some of the states.

VIII. On failure of heirs under the preceding rules the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states as to the half-blood, and as to ancestral estates, and as to the equality of distribution.

There are some minor rules of descent to be noticed.

(1.) Posthumous children inherit in like manner as if they were born in the lifetime of the intestate, and had survived him.

(2.) In the mode of computing the degrees of consanguinity, the civil law, which is generally followed in this country upon that point, begins with the intestate, and ascends from him to a common ancestor, and descends from that ancestor to the next heir, reckoning a degree for each person in the ascending and descending lines.

(3.) Under the English law illegitimate children cannot take by descent, for they have not inheritable blood.

(4.) There is generally in the statute laws of the several states a provision relative to real and personal estates, similar to that which exists in the English statutes of distribution concerning an advancement to a child. If any child of the intestate has been advanced by him by settlement either out of the real or personal estate, or both, equal or superior to the amount in value of the share of such child which would be due from the real and personal estate if no such advancement had been made, then such child and

his descendants are excluded from any share in the real or personal estate of the intestate. But if such advancement be not equal, then the child and his descendants are entitled to receive from the real and personal estate sufficient to make up the deficiency and no more.

(5.) An estate by descent renders the heir liable for the debts of his ancestor to the value of the property descended.

The general rule of the English and American law is, that the personal estate is the primary fund for the discharge of the debts, and is to be first applied and exhausted, even to the payment of debts with which the real estate is charged by mortgage; for the mortgage is understood to be merely a collateral security for the personal obligation.[1] The order of marshalling assets in equity towards the payment of debts is to apply: 1. The general personal estate; 2. Estates specially devised for the payment of debts; 3. Estates descended; 4. Estates devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order.[2] The rule prevails generally in these United States, that the lands descended to the heirs are liable to the debts of the ancestor equally, in all cases, with the personal estate.

[1] Harg. & Butler's Co. Litt. 208 b, note 106; 1 P. Wms. 291; 3 P. Wms. 358; 3 Johns. Ch. 257; 9 Serg. & Rawle, 73; 6 Call, 608.

[2] 1 Eden, 38; 1 Cox's Cas. 1, 245; 1 Meriv. 193; 3 Mad. 453; 9 Ves. 447; 3 Johns. Ch. 148, 312; 3 Dana (Ken.), 394; Ram on Assets, c. 30, p. 247.

LECTURE LXVI.

OF TITLE BY ESCHEAT, BY FORFEITURE, AND BY EXECUTION.

TITLE to land is usually distributed under the heads of *descent* and *purchase*, the one title being acquired by operation of law, and the other by the act or agreement of the party.[1] But titles by escheat and forfeiture are also acquired by the mere act of law; and Mr. Hargrave thinks that the proper general division of title to estates would have been by *purchase* and by *act of law*, the latter including equally descent, escheat, and forfeiture.

Our American authors[2] have added an additional title, and one unknown to the English common law, and which they treat separately. It is *title by execution;* and I shall take notice of it in regular order.

I. *Of Title by Escheat.* This title in the English law was one of the fruits and consequences of feudal tenure. When the blood of the last person seized became extinct, and the title of the tenant in fee failed from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors.

II. *Of Title by Forfeiture.* The English writers carefully distinguish between escheat to the chief lord

[1] Litt. sec. 12; Co. Litt. Ibid. n. 106.

[2] Swift's Digest Conn. Law; Dane's Abridg. Amer. Law.

of the fee and forfeiture to the crown. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy.[1] Besides the forfeiture of property to the state for the conviction of crimes, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. If a tenant for life or years by feoffment, fine, or recovery conveys a greater estate than he is by law entitled to do, he then under the English law forfeits his estate to the person next entitled in remainder or reversion; for he puts an end to his original interest.

III. *Of Title by Execution.* This species of title owes its introduction to modern statutes, and it was unknown to the common law. The remedy given to the judgment creditor by the English law was a sequestration of the profits of the land by writ of *levari facias*, or the possession of a moiety of the lands by the writ of *elegit*, and, in certain cases, of the whole of it by *extent*. In all these cases, the creditor holds the land in trust until the debt is discharged by the receipt of the rents and profits. This limited remedy against the real estate of the debtor was not deemed sufficient security to British creditors in its application to the American colonies; and the statute of 5 Geo. II. c. 7 was passed in the year 1732 for their relief. It made lands, hereditaments, and real estate within the English colonies chargeable with debts, and subject to the like process of execution as personal estate. Lands were dealt with on execution precisely as personal property. The practice of selling real estate under certain checks and modifications, created to pre-

[1] Wright on Tenures, 117, 118.

vent abuse and hardship, has been continued and become permanently established. The general regulation, and one prevalent in most of the states, is to require the creditor to resort, in the first instance, to the personal estate as the proper and primary fund; and to look only to the real estate after the personal estate shall have been exhausted and found insufficient.

LECTURE LXVII.

OF TITLE BY DEED.

A PURCHASE, in the ordinary acceptation of the term, is the transmission of property from one person to another, by their voluntary act and agreement, founded on a valuable consideration. But in judgment of law it is the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.[1]

I. *Of the History of the Law of Alienation.* The power of alienation is a necessary consequence of ownership, and it is founded on natural right.[2] In the time of the Anglo-Saxons lands were alienable, either by deed or by will; when conveyed by charter or deed, they were termed *boc* or *book-land*, and the other kind of land called *folcland* was held and conveyed without writing.[3] The feudal system introduced by the Conqueror imposed great restraints upon alienation, which were gradually removed by the long continued efforts of the English nation to break down its stern policy. The first step was the countenance given to the practice of sub-infeudations. They were calculated to elude the restraint upon alienation by

[1] Litt. sec. 12; Co. Litt. Ibid.

[2] Inst. 2. 1. 40; Grotius, De Jure Belli et Pacis, lib. ii. c. 6, n. 1.

[3] Wright on Tenures, 154, n.; Reeve's Hist. Eng. Law, vol. 1, 5, 10, 11; Spelman on Feuds, c. 5; Ibid. on Deeds and Charters, b. 7, c. 1.

carving out portions of the fief to be held of the vassal by the same tenure with which he held of the chief lord of the fee. Sub-infeudations were encouraged by the subordinate feudatories, because they contributed to their own power and independence, but they were injurious to the paramount lords. Conditional fees had been introduced by the policy of individuals to impose further restraints upon alienation, but public opinion influenced the courts of justice to give to conditional fees a construction inconsistent with their original intention. This led the feudal aristocracy to procure from parliament the statute *De Donis* of 13 Edw. I., which changed conditional fees to estates tail.

The policy of the statute was defeated by means of common recoveries. The statute of *Quia Emptores*, 18 Edw. I., established the free right of alienation by the sub-vassal, but it prohibited sub-infeudations. The power of involuntary alienation, by rendering the land answerable by attachment for debt, was created by the statute of Westminster II., 13 Edw. I. c. 18, which granted the *elegit;* and by the statutes merchant or staple of 13 Edw. I. and 27 Edw. III., which gave the *extent.*

II. *Of the Purchase of Pretended Titles.* The ancient policy, which prohibited the sale of pretended titles and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The doctrine that a conveyance by a party out of possession and with an adverse possession against him is void prevails in most of these United States.

III. *Of the Due Execution of the Deed.* A deed duly executed must be written on paper or parchment, and signed, sealed, delivered, and recorded.

(1.) *The Deed must be in Writing, and signed and sealed.* The law requires more form and solemnity in the conveyance of land than in that of chattels. In the early periods of English history, the conveyance of land was usually without writing, but it was accompanied by overt acts, equivalent in point of certainty and formality to deeds. As knowledge increased conveyance by writing became more prevalent; and finally by the statute of frauds and perjuries, 29 Charles II. ch. 3, sec. 1, 2, all estates and interests in lands (except leases not exceeding three years) created, granted, or assigned by livery and seizin only, or by parol and not in writing and signed by the party, were declared to have no greater force or effect than estates at will only. And, by the 4th section, no person could be charged upon any contract or sale of lands, or any interest in or concerning the same, unless the agreement, or some memorandum or note thereof, was in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized. This statute provision has been either expressly adopted or assumed as law throughout the United States.[1] Part performance of an agreement by parol and without writing to sell land will, in certain cases in the judgment of a court of equity, take the agreement out of the operation of the statute of frauds, and authorize the court to decree a *specific performance* of the contract. It is deemed essential in the English law to the conveyance of land that it should be by writing, *sealed* and delivered. A deed is an instrument in writing upon paper or parchment between parties able to contract, and duly sealed and delivered.[2] A seal is requisite to a deed. The com-

[1] Civil Code Louis. art. 2415.

[2] Co. Litt. 35 b; 9 Mass. 218; 13 Mass. 223.

mon law intended by a seal, an impression upon wax or wafer, or other tenacious substance, capable of being impressed. In some of the states, a mere flourish of the pen at the end of the name has been deemed a valid substitute for a seal.

(2.) *It must be delivered.* Delivery is essential to the due execution of a deed. It may be delivered to a stranger as an *escrow*, which means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the grantee.

(3.) *It must be recorded.* By the statute law of every state in the Union all deeds and conveyances of land, except certain chattel interests, are required to be recorded upon previous acknowledgment or proof. If not recorded they are good and pass the title as against the grantor and his heirs and devisees, and they are void only as to subsequent *bonâ fide* purchasers, and mortgagees whose deeds shall be first recorded.[1]

IV. *Of the Component Parts of a Deed.* A deed consists of the names of the parties; the consideration for which the land was sold; the description of the subject granted; the quantity of interest conveyed; and lastly the conditions, reservations, and covenants, if any there be.

(1.) *Of the Form of the Deed.* The Saxons in their deeds observed no set form, but used plain and brief language. The English used a more cumbersome form. In the United States, generally, the form of conveyance is very simple. It is usually by bargain and sale, and possession passes *ex vi facti* under the authority of the local statute without the necessity of livery of seizin, or reference to the statute of uses.

[1] 3 Yerger, 711; 10 Ibid. 1; 4 Dev. 418.

(2.) *Of the Parties.* The parties must be competent to contract, and truly and sufficiently described.

(3.) *Of the Consideration.* A consideration is generally held to be essential to a good and absolute deed. The consideration of a deed must be good, or valuable, and not partaking of anything immoral, illegal, or fraudulent. A *good* consideration is founded upon natural love and affection between near relations by blood,[1] but a *valuable* one is founded on value, as money, goods, services, or marriage.

(4.) *The Description of the Estate.* In the description of the land conveyed the rule is that known and fixed monuments control courses and distances. The least certain and material parts of the description must yield to those which are the most certain and material, if they cannot be reconciled. Whenever it appears by the definite boundaries or by words of qualification, as "more or less," or the like, that the statement of the quantity of land in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case.[2] A *reservation* is a clause in a deed whereby the grantor reserves some new thing to himself out of the thing granted and not in being before; but an *exception* is always of a part of the thing granted. It is repugnant to the deed and void, if the excepted part was specifically granted; as if a person grants two acres, excepting one of them.[3] The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dove-house.

[1] 4 Lit. (Ken.) 207.
[2] 4 Mason, 414.
[3] Co. Litt. 47 a; Plowd. 153 a.

(5.) *Of the Habendum.* The habendum was originally used to determine the interest granted. It has now become a mere form.

(6.) *Of the Usual Covenants in a Deed.* The ancient warranty was a covenant real, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher or by judgment in a writ of *warrantia chartæ* to yield other lands to the value of those from which there had been an eviction by a paramount title.[1] The heir of the warrantor was bound only on condition that he had as assets other lands of equal value by descent. *Lineal* warranty was where the heir derived title to the land warranted either from or through the ancestor who made the warranty; and *collateral* warranty was where the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title. Personal covenants have superseded the old warranty, and they affect only the covenantor and the assets in the hands of his representatives after his death. The usual personal covenants inserted in a conveyance of the fee are: 1. That the grantor is lawfully seized; 2. That he has good right to convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims. The first three covenants are personal; the fourth and fifth, in the nature of real covenants, being prospective, and, therefore, running with the land conveyed. They therefore descend to heirs and vest in assignees or the purchaser.

V. *Of the Several Species of Conveyances.* Sir William Blackstone[2] divides conveyances into two

[1] Co. Litt. 365 a.

[2] 2 Black. Com. 309.

kinds; namely, conveyances at common law, and conveyances which receive their efficacy from the statute of uses.

(1.) *Of Feoffment.* Feoffment was the mode of conveyance in the earliest periods of the common law. It signified the grant of a feud or fee, but it came in time to signify the grant of a free inheritance in fee. The charter of feoffment was very simple in form. The feoffment was accompanied with delivery of possession of the land, termed livery of seizin, in the presence of the neighboring freeholders. Seizin was the completion of the feudal investiture by which the tenant was admitted into the feud and performed the rites of homage and fealty. Disseizin in fact was the violent termination of this seizin by the ouster of the feudal tenant. There were two kinds of disseizin. The one was a disseizin in fact, the other a disseizin by construction of law. The latter could be created in many ways without forcible and violent ouster, as by feoffment with livery, by entry under an adverse lease, etc.

(2.) *Of Grant.* This was a common law conveyance and applied to incorporeal hereditaments, such as reversions, rents, and services, and which could not be conveyed by livery of seizin. Such rights were said to lie in grant and not in livery, and they were conveyed simply by deed.[1] It will be unnecessary to enlarge upon conveyances of a special or secondary character, as exchange, partition, confirmation, surrender, assignment, and defeasance. Let us now consider conveyances, which owe their introduction and universal practice to the statute of uses.

(3.) *Of the Covenant to stand seized to Uses.*

[1] Co. Litt. 9 b, 172 a.

By this conveyance a person seized of lands covenants that he will stand seized of them to the use of another. On executing the covenant the other party becomes seized of the use of the land according to the terms of the use, and the statute of uses immediately operates and annexes the possession to the use. This conveyance has the same force and effect as a deed of bargain and sale. The distinction between them is that the former can only be made use of among near domestic relations, for it must be founded on the consideration of blood or marriage.

(4.) *Of Lease and Release.* This is the usual mode of conveyance in England, because it does not require the trouble of enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery or attornment. The first step was to create a small estate, as a lease for a year, and vest possession of it in the grantee. In a lease at common law actual entry was requisite to vest the possession and enable the lessee to receive a release of the reversion. To avoid the necessity of actual entry, the lesser estate was created by a bargain and sale under the statute of uses, and founded on a nominal pecuniary consideration. The bargain raised the use, and the statute immediately annexed the possession to the use, and the lessee, being thus in possession by the operation of the statute, was enabled to receive a release of the reversion.

(5.) *Of Bargain and Sale.* This is the mode of conveyance most prevalent in the United States. A bargain and sale was originally a contract for the conveyance of land for a valuable consideration; and though the land itself would not pass without livery,

the contract was sufficient to raise a use which the bargainor was bound in equity to perform.[1] After the passage of the statute of uses, the use which was raised and vested in the bargainee by means of the bargain was annexed to the possession, and by that operation the bargain became at once a sale and complete transfer of the title.[2] A use may be raised by feoffment as well as by bargain and sale, or covenant to stand seized to uses. But when raised by feoffment, the feoffor having parted with the legal estate cannot stand seized to the use of the feoffee as the bargainor and covenantor, who retain in themselves the legal estate, do in the other cases.[3]

(6.) *Of Fines and Recoveries.* Alienation by matter of record, as by *fines* and *common recoveries*, makes a distinguished figure in the English code, but has been comparatively unknown and little used in this country.

[1] 1 Co. 121 b. [2] 2 Black. Com. 338. [3] 3 Pick. 532.

LECTURE LXVIII.

OF TITLE BY WILL OR DEVISE.

A WILL is a disposition of real and personal property, to take effect after the death of the testator. When the will operates upon personal property it is sometimes called a *testament*, and when upon real estate a *devise;* but the more general denomination, embracing equally real and personal estate, is that of *last will* and *testament*.[1]

I. *Of the History of Devises.* The general interests of society seem to require that every man should have the free enjoyment and disposition of his own property. In the primitive age of many nations, wills were unknown. This was the case with the ancient Germans, and with the laws of Lycurgus, and with the Athenians before the age of Solon.[2] But family convenience and a sense of the absolute right of property introduced the use of testaments in the more advanced progress of nations. It seems to be the better opinion that lands were devisable to a qualified extent with the Anglo-Saxons. The *folcland* was held in independent right and devisable by will.[3] But upon the establishment of the feudal system at the Norman Conquest lands held in tenure ceased to be devisable, in consequence of the feudal doctrine of non-alienation

[1] Dict. de Cout. de Norm. vol. 1, 197.

[2] Tacit. M. G. c. 20; Taylor's Elements of Civil Law, 522, 524; Jones Com. on Isaeus.

[3] Spelman on Feuds, c. 5; Wright on Tenures, 171.

without the consent of the lord. There were exceptions to the feudal restraint on wills existing as to burgage tenures, and gavelkind lands.[1] The restraint upon the power of devising was not removed so early as that upon alienation in the lifetime of the owner. The power was covertly conferred by means of the application of uses, for a devise of the use was not considered a devise of the land. The statute of uses, like the introduction of feuds, again destroyed the privilege of devising; but the disability was removed five years after by the statute of wills of 32 Henry VIII. That statute applied the power of devising to socage estates, and to two thirds of the lands held by knight service; and this last and lingering check was removed with the abolition of the military tenures in the beginning of the reign of Charles II., so as to render the disposition of real property by will absolute. The English law of devise was imported into this country by our ancestors, and under some modifications became a part of our colonial law.

II. *Of the Parties to a Devise.* The general rule is that all persons of sound mind are competent to devise real estate, with the exception of infants and married women. Testaments of chattels might at common law be made by infants of the age of fourteen if males, and twelve if females. Infants, *femes covert*, and persons of non-sane memory, and aliens, may be devisees; for the devise is without consideration. A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise.[2]

[1] Cro. C. 561; Co. Litt. 111 b; 6 Co. 16.
[2] 1 Wm. Black. Rep. 187.

Corporations are excepted out of the English statute of wills; the object of the law was to prevent property from being locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of merit or duty to give away their estates from their families. Witnesses to a will are rendered incapable of taking any beneficial interest under it, except it be creditors whose debts by the will are made a charge on the real estate.

III. *Of Things devisable.* It is the rule of the English law that the testator must be *seized* of the lands devised at the time of making the will. Lands purchased after the execution of the will do not pass by it.[1] The testator must likewise continue seized at the time of his death.[2] The interest under a contingent remainder or executory devise or future or springing use is devisable. All contingent possible estates are devisable, for there is an interest. But the mere possibility of an expectant heir is not devisable, for that is not within the principle. A joint tenant has not an interest which is devisable.

IV. *Of the Execution of the Will.* A will of real estate must be in writing, and subscribed by the testator, or acknowledged by him in the presence of *at least* two witnesses, who are to subscribe their names as witnesses. The regulations in the several states vary; but generally they have adopted the directions of the English statute of frauds, 29 Charles II. The general doctrine of international law is, that wills concerning land must be executed according to the prescribed formalities of the state in which the land is

[1] 3 Doug. 361.

[2] Bro. Abr. tit. Devise, pl. 15; 3 Co. 25 a; 1 Salk. 237; 1 Bro. P. C. 199, S. C.; 11 Mod. 148.

situated; but wills of chattels, executed according to the laws of the place of the testator's domicile, will pass personal property in all other countries, though not executed according to their laws. The English statute of frauds required the will to be signed by the devisor, and to be attested and subscribed by the witnesses *in his presence.* This is generally the law in this country. At common law a will of chattels was good without writing. In ignorant ages there was no other way of making a will but by words or signs. As learning became generally cultivated unwritten or nuncupative wills were confined to extreme cases, and held to be justified only upon the plea of necessity.[1]

V. *The Revocation of a Will.* A will duly made may be revoked during the testator's life, at his pleasure.[2] But to prevent the admission of loose and uncertain testimony to defeat it, it is provided that the revocation must be by another instrument, duly executed, or else by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction. This is the English and American law. A will may be revoked by implication or inference of law, founded on a reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will. It is a settled rule of the English law that marriage and the birth of a child after the execution of the will are a revocation in law of a will of real as well as of personal estate, provided the wife and child were wholly unprovided for, and there was an entire disposition of the whole estate to their exclusion. This presumption, however, may be rebutted by parol evidence. A testator may, if he pleases, devise

[1] Perkins, sec. 476; Swinb. on Wills, 32.

[2] 8 Co. 81 b.

all his estate to strangers, and disinherit his children. If, however, the testator has not given the estate to a competent devisee, the heir takes, notwithstanding the testator may have clearly declared his intention to disinherit him, as the estate must descend to the heirs if not legally vested elsewhere.[1] In some of our states children born after the making of a will inherit as if the father had died intestate, unless some provision be made for them in the will or otherwise, or they be particularly noticed in the will. The reasonable operation of this rule only disturbs and revokes the will *pro tanto*, or as far as duty requires. In many of our states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. The will of a *feme sole* is revoked by her marriage. Not only contracts to convey, but inoperative conveyances, will amount to a revocation of a devise to the extent of the property intended to be affected, if there be evidence of an intention to convey, and thereby to revoke the will.[2]

A codicil is an addition or supplement to a will, and must be executed with the same solemnity. It is no revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation.[3] An estate vests under a devise on the death of the testator before entry.[4] But a devisee may renounce the gift, by which act the estate will descend to the heir, or pass over in some other direction under the will.

VI. *Of the Construction of Wills.* The intention

[1] Cowp. Rep. 657; 7 Cowen, 187; S. C. 2 Wendell, 1.
[2] 1 Roll. Abr. 615.
[3] 8 Cowen, 56.
[4] Co. Litt. 111 a.

of the testator is the first and great object of inquiry, and to this object technical rules are, to a certain extent, made subservient. The intention of the testator, to be collected from the whole will, is to govern, provided it be not unlawful, or inconsistent with the rules of law.[1] It does not require the word "heirs" to convey a fee, but other words denoting an intention to pass the whole interest of the testator, as a devise of *all my estate*, *all my title*, *all my property*, and many other expressions of like import, will carry an estate of inheritance, unless otherwise limited. But if there be nothing in the will by which a fee by implication may be inferred, the devisee takes only an estate for life. The general doctrine with respect to the expressions used by the devisor is, that if they denote only a *description of the estate*, as a devise of the house A., or the farm B., and no words of limitation be employed, then only an estate for life passes; but if the words denote the *quantity of interest* which the testator possesses, as all his estate in his house A., then a fee passes.[2] Where the testator creates a charge upon the *devisee* personally, in respect of the estate devised, as if he devises lands to B. on condition of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser. But where the *charge is upon the estate* and there are no words of limitation, as a devise to A. of his lands after the debts and legacies are paid, the devisee takes only an estate for life.[3] A fee will pass by will by impli-

[1] 3 Peters, 346. [2] Cowp. Rep. 299.

[3] 10 Johns. 148; 18 Johns. 35; 18 Wendell, 200; 7 Paige, 421; 15 Maine, 436; 5 Harr. & Johns. 177; 6 Ibid. 208; 9 Mass. 161; 10

cation of law, as if there be a devise over *after the death of the wife;* the law in that case presumes the intention to be that the widow shall be tenant for life. There is a distinction taken in the English books between a lapsed legacy of personal estate and a lapsed devise of real estate; and while the former falls into the residuary estate, and passes by the residuary clause, if any there be, and if not, passes to the next of kin, the latter does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the heir at law.[1]

Wheat. 231; 3 Mason, 209–212; 5 Term, 558; 4 East, 496; Cruise's Dig. tit. Devise, c. 11, sec. 49–70; Preston on Estates, vol. 2, 207, 217–220, 228, 235, 243–250.

[1] 15 Ves. 709; 16 Ves. 451; 2 Meriv. 393; 1 Ves. & Beame, 388; 3 Wharton, 477; 4 Adolph. & Ellis, 582.

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