passengers, and to use all precautions, as far as human care and foresight will go, for their safety on the road. He is answerable for the smallest negligence in himself and his servants. The modern doctrine, and tendency of modern cases, seem to be, to place coach proprietors, in respect to baggage, upon the ordinary footing of common carriers. But their responsibility is now usually so limited, by means of a special notice, as probably to render this point quite unimportant.

24. *Have carriers by water been relieved of any of their common law liabilities?*—606, *n.* (2.)

Yes; in England statutes, passed in the reigns of George II. and George III., have exempted them from responsibility for losses by fire, and provided that the owners of vessels should not be liable for the loss of gold, silver, precious stones, etc., by robbery or embezzlement, unless the nature and value of the articles were specially declared, in writing, by the shipper to the master or owner of the vessel. Similar provisions are to be found in an act of Congress, passed March 3d, 1851.

25. *May carriers limit their responsibility by special notice of what they mean to assume?*—606, 607.

It seems that they can; and the goods in that case are understood to be delivered on the footing of a special contract, superseding the strict rule of the common law; and it is necessary, in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailor, and be clear, explicit and consistent. But it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence, or misfeasance in him or his servants; and the question of responsibility has generally turned upon the fact of gross negligence.

LECTURE XLI.

OF PRINCIPAL AND AGENT.

1 *On what is agency founded?*—612.

Upon a contract, either 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.

2. *How may the authority of an agent be created?*—612.

By deed or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient.

3. *May agency be inferred without proof of any express appointment?*—613.

It may, from the relation of the parties, and the nature of the employment. It is sufficient, that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust.

4. *Can an agent convey real estate under an implied contract?*—614.

He can not; to convey lands he must have an appointment in writing; and where the conveyance is required to be by deed, the authority to the attorney to execute it must be commensurate, in point of solemnity, and be by deed also.

5. *When is the agency to be created?*—614.

It may be antecedently given, or be subsequently adopted; and in the latter case, there must be some act of recognition.

6. *Is an acquiescence in the assumed agency of another, equivalent to an express authority?*—614–616.

It is, when the acts of the agent are brought home to the

knowledge of the principal. 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 in the capacity of his agent. When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed.

7. *What are the rights of an assumed agent against his principal?*—616, 617.

The Roman law would oblige a person to indemnify an assumed agent, acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement. But the English law has never gone to that extent; and therefore if A owes a debt to B, and C chooses to pay it without authority, the law will not raise a promise in A to indemnify C; for if it were so, it would be in the power of C to make A his debtor *nolens volens*.

8. *What is the English rule where there is an existing business relation between the parties?*—617.

That if payment be made under the pressure of a situation, in which one party was involved by the other's breach of faith, it will be binding on the person for whose use it was made. A surety, from his relation to the principal debtor, has an interest and a right to see that the debt be paid; and if he pays to relieve himself, it is his money paid to and for the use of the other.

9. *What is the rule as to the duty of an agent in the pursuance of his authority?*—617, 618.

That if an agent be intrusted with general powers, he must act with sound discretion, and he has all the implied powers within the scope of the employment. A power to settle an account, implies the right to allow payments already made. If he be an empowered agent for a particular transaction, he is not bound to go on and do all other things connected with, or arising out of the case. If his powers are special and limited, he must strictly follow them.

10. *What if an agent do all he is authorized to do, and something more?*—618, 619.

It will be good so far as he had a right to go, and the excess only will be void. As if A authorizes B to buy an estate for him, at fifty dollars per acre, and he gives fifty-one dollars per acre, A is not bound to pay that price; but 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. This case is stated in the civil law, and the most equitable conclusion among the civilians is, that A is bound to take the estate at the price he prescribed. *Majori summæ minor inest.* But a distinction is to be made according to the nature of the subject. If a power be given to buy a house, with an adjoining wharf and store, and the agent buy the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. So, if he be instructed to purchase the fee of a certain farm, and he purchase an interest for life or years only, or he purchases only the undivided right of a tenant in common in the farm, in these cases the principal ought not to be bound to take such a limited interest, because his object was defeated. Whether the principal would or would not be bound by an act, executed in part only, depends in a measure upon the nature and object of the purchase.

11. *What if an agent has power to lease for twenty-one years, and he leases for twenty-six years?*—619, 620.

The lease, in equity, would be void only for the excess; because the line of distinction between the good execution of the power, and the excess, can be easily made. But, at law, even such a lease would not be good *pro tanto*, or for twenty-one years. If, however, the agent does a different business from that he was authorized to do, the principal is not bound, even though it might be more advantageous to him, because the agent departed from the subject-matter of the instruction.

12. *What is the distinction between the powers of a general agent, and those of one appointed for a special purpose?*—620, 621.

The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, or at a

particular place, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary in order to prevent fraud, and encourage confidence in dealing. But an agent, constituted for a particular purpose, and under a limited power, can not bind his principal if he exceeds that power. The special authority must be strictly pursued. Whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power; though, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power

13. *What if the servant of a horse dealer, who sells for his master, but with express instructions not to warrant as to soundness, does warrant, is the master bound by the warranty?*—621.

He is; because the servant, having a general power to sell, acted within the general scope of his authority; and the public can not be supposed to be acquainted with the private conversations between the master and servant. So, if a broker, whose business it is to buy and sell goods in his own name, be intrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale.

14. *If a person intrusts his watch to a watchmaker to be repaired, and he sells it, would the owner be bound by the sale?*—622.

He would not. The watchmaker is not exhibited to the world as owner, and credit is not given to him as such, merely because he has possession of the watch.

15. *What is the rule as to the right of brokers and factors to sell on credit, without a special authority for that purpose?*—622, 623.

That a factor or merchant who buys or sells upon commission, or as an agent for others for a certain allowance, may sell on credit, without any special authority for that purpose. It is the well-settled usage, that an agent may sell in the usual way, and, consequently, he may sell upon credit without incurring

risk, provided it be the usage of the trade at the place, and he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser. But the factor can not sell on credit in a case in which it is not the usage, as in the sale of stock, for instance, unless he be expressly authorized, because this would be to sell in an unusual manner. Nor can he bind his principal to other modes of payment than a payment in money at the time of sale, or on the usual credit.

16. *What if the factor, at the expiration of the credit given on a sale, takes a note payable to himself at a future day?*—623.

He makes the debt his own. He can not bind his principal to allow a set-off on the part of a purchaser. If the factor, in a case duly authorized, sells on credit, and takes a negotiable note payable to himself, the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, would not render him personally responsible to his principal. Even if the factor should guaranty the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might waive the guaranty and claim possession of the note, or give notice to the purchaser not to pay it to the factor. In such a case, if the factor should fail, the note would not pass to his assignees to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due them, but to the principal, and did not pass under the assignment.

17. *What is the general doctrine on this subject?*—623, 624.

That where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article or its proceeds into the possession of the factor, or his legal representatives or assignees, unless they should have paid away the same, in their representative character, before notice of the claim of the principal. The same rule applies to the case of a banker who fails possessed of his customer's property. If it be

distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the liens of the banker upon it.

18. *Is a factor, selling under a* del credere *commission, for an additional premium, liable to his principal in the first instance, or only as a surety?*—625, *n.* (*g.*)

It is now finally settled in England, and the doctrine has been adopted here by Mr. Justice Story, that the character of a broker, acting under a *del credere* commission, is that of a surety for the solvency of the party with whom his principal deals through his agency. He becomes a guarantor of the price of the things sold, and has an additional percentage for his responsibility. It has been decided in New York, that the contract of a factor to account for the sales under a *del credere* commission, is not within the statute of frauds, and need not be in writing.

19. *What is the rule as to the factor's right to pledge the goods of his principal?*—625.

That he can not pledge them as security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor, is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and can not be transferred by his tortious act. Though the factor should barter the goods of his principal, yet no property passes by the act, any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover.

20. *What exception is there to this rule?*—626.

The case of negotiable paper, for there possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as security for his own debt, and it will bind the principal, unless he can charge the party with notice of the fraud, or want of title in the agent.

21. *What is the rule as to the factor's right to deliver the goods of his principal to a third person?*—626, 627.

That he may deliver them to a third person for his own security, with notice of his lien, and as his agent, to keep possession for him. Such a change of the lien does not affect the factor's right, for it is, in effect, a continuance of the factor's possession. So, if a factor, having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods, for purposes connected with the sale, as part payment in advance, or in anticipation of the sale, according to the ordinary uses in such cases. But if the goods be put into the hands of an auctioneer to sell, and, instead of advancing money upon them, in immediate reference to the sale, according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnor instead of seller, he has no lien on the goods.

22. *What alteration in the common law regarding factor and principal, has been made by statute in New York?*—628, *n.* (*b.*)

It was enacted, in 1830, that every factor intrusted with the possession of any bill of lading, custom house permit, or warehouse-keeper's receipt for the delivery of goods, or with the possession of goods for sale, or as security for advances, shall be deemed the owner, so far, as to render valid any contract by him for the sale or disposition thereof, in whole or in part, for money advanced, or any responsibility in writing assumed upon the faith thereof. The true owner will be entitled to the goods on repayment of the advances, or restoration of the security given on the deposit of the goods, and on satisfying any lien that the agent may have thereon.

23. *What is the rule as to the liability of an agent upon his contract as agent?*—630 631.

The general rule is, that where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or when

there is no responsible principal, or when as agent he becomes liable by an undertaking in his own name, or when he exceeds his power. If he makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable, even though he should take a note for the goods sold, payable to himself. And if an agent buys in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods came to his use, or the agent acted in the business intrusted to him and according to his power.

24. *What are the rules by which attorneys must execute powers?* —631, 632.

That an attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal. But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible, though he should, in the covenant, give himself the description or character of agent. And though the attorney, who acts without authority, but in the name of the principal, be not personally bound by the instrument he executes, if it contain no covenant or promise on his part, yet there is a remedy against him by special action on the case, for assuming to act when he had no power.

25. *What is the rule as to the owner's right to collect the proceeds of goods sold by his factor?*—632.

That he may command such proceeds, and 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 a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. If, however, the factor should sell in his own name as owner, and not disclose his principal, a purchaser who dealt *bona fide* with the factor as owner, will be entitled to set off any claim he may

have against the factor, in answer to a demand of the principal.

26. *What is the distinction made, in the books, in regard to personal responsibility between public and private agents?*—632, 633.

That if an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. But the agent, in behalf of the public, *may* bind himself by an express engagement. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given.

27. *Can an agent employ a sub-agent?*—633.

An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which can not be delegated.

28. *What is meant by an agent's right of lien?*—634.

The right of an agent to retain possession of property belonging to another, until some demand of his be satisfied. It is created either by common law, or by the usage of trade, or by the express agreement or particular usage of the parties.

29. *Into what classes are liens distinguished?*—634–637.

Into general and special. A general lien is the right to retain property of another, for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labor employed, or expenses bestowed, upon the identical property detained. General liens are looked upon with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors; and the usage of any trade, sufficient to establish a general lien, must have been so uniform and notorious as to warrant the inference, that the party against whom the right is claimed had

knowledge of it. A general lien may be created by express agreement.

Particular liens are favored in law; and, as a general rule, every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This is equally so, whether there be or be not an agreement for the price, unless there be a future time of payment fixed.

30. *What is necessary to create a lien?*—638.

Possession of the goods, actual or constructive; and the right does not extend to debts which accrued before the character of factor commenced; nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight.

31. *What persons have a general lien on goods in their possession?*—640–642.

A factor has a general lien for the balance of his general account, arising in the course of dealings between him and his principal; and this lien extends to all the goods of the principal in his hands in the character of factor. The factor has a lien, also, on the price of the goods which he has sold as factor, though he has parted with the possession of the goods; and he may enforce payment from the buyer to himself, in opposition to his principal. This rule applies when he becomes surety for his principal, or sells under a *del credere* commission, or is in advance for the goods by actual payment. Attorneys and solicitors, as well as factors, have a general lien upon the papers of their clients in their possession, for the balance of their professional accounts. Dyers have likewise a general lien on the goods sent to them to dye, for the balance of a general account. A banker has also a general lien on all the paper securities which come to his hand. So has an insurance broker. A wharfinger has also a general lien.

32. *By what acts may an agency cease?*—643–646.

It may terminate by the death of the agent; by the limitation of the power to a particular period of time; by the execution of the business which the agent was constituted to perform; by a change in the condition of the principal; by his express revocation of the power; and by his death. The agent's trust is not transferable, either by the act of the party, or by operation of law. According to the civil law, if the agent had entered upon the execution of the trust in his lifetime, and left it partially executed, but incomplete, at his death, his legal representatives would be bound to complete it. An authority given for private purposes to two persons can not be executed by the survivor, unless it be so expressly provided, or it be an authority coupled with interest.

A power of attorney, or any naked authority, is, in general, from the nature of it, revocable at the pleasure of the party who gave it, unless it constitutes part of a security for money, or is given for a valuable consideration, in which cases it is not revocable by the party himself, though it is necessarily revoked by his death. The agent's power is determined, likewise, by the bankruptcy of his principal. If the principal or his agent was a *feme sole* when the power was given, it is determined by her marriage. The authority of an agent may be revoked by the lunacy of the principal; but the better opinion would seem to be, that the lunacy must have been previously established by inquisition before it could control the operation of the power. The authority of an agent determines by the death of his principal, and a joint authority to two persons terminates by the death of one of them.

LECTURE XLII.

ON THE HISTORY OF MARITIME LAW.

1 *Is the marine law a municipal, or international law?*—1.

It is a part of the general law of nations, and not the law of a particular country. The marine law of the United States is the same as the marine law of Europe; and Lord Mansfield