place of the accident is the true basis of calculation as to her damage.

75. *How is the master affected by a valid abandonment?*—331.

He becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them.

76. *What is the doctrine, as regards the freight of an abandoned ship?*—333, 334.

It has been a controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and of Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to the disaster was to be retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris;* and that the freight subsequently earned went to the insurer on the ship.

77. *What is the rule for the adjustment of partial losses?*—335–337.

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 object of inquiry is the true value of the subject put at risk, and for which an indemnity was stipulated; and the question of total or partial loss does not turn on the estimated value, in a valued policy, but upon a view of all the circumstances attending the loss.

If goods arrive damaged at the place of destination, the way to ascertain the quantity of the damage either in open or valued policies, is to compare the market price or gross amount of the damaged goods, with the market price or gross amount at which the same goods would have sold if sound. But this mode of adjustment affords no perfect indemnity to the insured, for he has to pay freight for the goods as if they were sound, and which freight he can not recover of the insurer. The true way to avoid the inconvenience is to insure the sum to be paid for the freight and charges at the port of delivery.

78. *What is the rule as to return of premium?*—341.

If the insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and this proceeds through mistake, or misinformation, or any other innocent cause, the premium is to be returned. If the risk has not been run, whether it be owing to the fault, or pleasure, or will of the insured, or to any other cause, the premium must be returned. If the vessel never sailed on the voyage insured, or the policy became void by failure of the warranty, and without fraud, the policy never attached; but if the risk has once commenced, though the voyage be immediately thereafter abandoned, there is to be no return or apportionment of premium. And if the premium is returned, it is the usage in every country where it is not otherwise expressly stipulated in the policy, for the insurer to retain one half per cent. by way of indemnity for his trouble and concern in the transaction. And the insurer retains the premium in all cases of actual fraud on the part of the insured or his agent. So, if the trade be in any respect illegal, the premium can not be reclaimed.

LECTURE XLIX.

OF MARITIME LOANS.

1. *What are maritime loans called?*—353.

Contracts of *bottomry* and *respondentia.* They are loans of a very high and privileged nature, and are always upheld by the admiralty with a strong hand, when entered into *bona fide* and without any suspicion of fraud.

2. *What is a* bottomry bond?—353, 354.

It 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 for 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.

The object of hypothecation bonds is to procure the necessary supplies for ships which happen to be in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by such instruments, the vessels and their cargoes must be left to perish. The authority of the master to hypothecate the ship and freight, and even the cargo, in case of necessity, is indisputable.

3. *What is a* respondentia bond ?—354, 355.

It 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 upon the borrower, and is not a specific lien upon the goods, unless there be an express stipulation to that effect in the bond; and it amounts, at most, to an equitable lien on the salvage in case of loss. The condition of the loan is, the safe arrival of the subject hypothecated, and the entire principal and interest are at the risk of the lender during the voyage, as to the perils enumerated, but not as to those arising from fault of the master or owner. If the subject pledged be lost, the lender shall be repaid only to the extent of what remains; but if the subject arrives safe, or if it shall not have been injured, except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on, and for the repayment, the person of the borrower is bound, as well as the property pledged.

4. *Are wagers on* bottomry *and* respondentia bonds *illegal ?*—356, *n.* (*f.*)

By the New York revised statutes they are excepted from the prohibition of wager contracts.

5. *When can the master of a ship take up money on* respondentia *or* bottomry ?—356, 357.

The general rule is, that this power exists only after the voyage has commenced, and is to be exercised in some port where the owner does not reside. The master can not hypothecate for a preëxisting debt, and the necessity of the loan must be shown to have existed at the time it was made, and that the master had no other means of raising the money at marine interest; and when that fact is established, the misapplication of it by the master, without the knowledge and assent of the lender, will not affect its validity.

6. *What if, after money has been taken up on* respondentia, *and before the risk commenced, the voyage is broken up ?*—357.

The marine interest depends entirely upon the risk, and therefore, if the proposed voyage be abandoned before the risk has attached, the contract is turned into a simple and absolute loan at ordinary and legal interest.

7. *What if the borrower had not goods on board the ship to the value of the sum borrowed ?*—357.

The contract, in case of loss, is reduced in proportion to the diminished value, and the borrower is bound at all events to return the surplus of the sum borrowed with the ordinary interest. The maritime interest is in a ratio to the maritime risk, or value of the goods shipped.

8. *Why is it, that a bond fairly given at a foreign port, under pressure of necessity, is entitled to priority of payment over one of a former date ?*—358.

The equity of it consists in this, that the last loan furnished the means of preserving the ship, and without it, the former lenders would entirely have lost their security, and therefore it supersedes a prior mortgage as well as any other prior lien.

9. *May the lender upon* respondentia *or* bottomry *insure the money lent ?*—358.

He can insure the principal, but not his maritime interest.

10. *Will a constructive total loss discharge the borrower on* bottomry ?—359.

It will not. Nothing but an utter annihilation of the subject hypothecated will discharge him.

11. *What is the rule as to the liability of the lender on* bottomry *or* respondentia, *to contribute in case of general average?*—360.

In England, except on India risks, the lender does not contribute. This is contrary to the maritime law of France and of other parts of Europe, and in Louisiana we have a decision against it. The new French law, contrary to the ordinance of 1681, charges the lender with simple average, on partial losses, unless there be a positive stipulation to the contrary; but such a stipulation, to exempt him from gross or general average, would be void and contrary to natural equity. The reason of the thing is in favor of the right of making the lender chargeable with his equitable proportion of an average contribution.

12. *What if the ship or cargo be lost, not by perils of the sea, but by default of the borrower, or master?*—360.

The hypothecation bond is forfeited and must be paid.

13. *What if the ship be lost on the voyage, and the cargo forwarded by another ship?*—360.

The borrowers in that case must pay the debt.

14. *Is the doctrine of seaworthiness, deviation, and the necessity of diligence on the part of the borrower, applicable to* respondentia *and* bottomry *bonds?*—360.

It is equally applicable to these contracts as to that of insurance.

15. *Is a loan on* bottomry *or* respondentia *good, if the ship or goods be already at sea when it is effected?*—361.

It has been held good by the Supreme Court of the United States.

16. *When does the maritime interest cease?*—362.

After the risk has ceased, by the safe arrival of the ship, marine interest ceases, and gives place to ordinary legal interest on the aggregate amount of the debt due, consisting of the money lent with maritime premium.

17. *Are seamen's wages a legal subject for* bottomry *or* respondentia *loans?*—363.

They are not.

LECTURE L.

OF INSURANCE OF LIVES AND AGAINST FIRE.

1. *What is the nature of the contract of insurance upon lives?*—365.

These are liberal contracts, and while they create an advantageous investment of capital, they operate benevolently toward the public. Their usual purpose is to provide a fund for creditors, or for family connections, in case of death. The insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of a person whose life is insured. The insurance is either for the whole term of life, or for a limited period. Such is the nature of these contracts, that they are well calculated to relieve the more helpless members of a family from a precarious dependence, resting upon the life of a single person; and they very naturally engage the attention, and influence the judgment of those thinking men who have been accustomed to reflect deeply upon the past, and to form just anticipations of the future.

2. *When did life insurance in England commence?*—367.

With the Amicable Society, in the beginning of the last century; and in 1827, there were, in the United Kingdom, forty-four life insurance companies.

3. *Who may effect a life insurance?*—368.

A party may insure his own life for the benefit of heirs or creditors, or he may insure the life of another in which he may be interested, and assign the policy to those who have an interest in the life.

4. *What is an insurable interest in the life of another person?*—368, 369, *and notes.*

It must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent. But a child sup-

ported by his father, and dependent on some fund terminable by his death, has an insurable interest in his father's life.

By statute law in New York, Vermont, New Hampshire, Connecticut, New Jersey, Wisconsin and Rhode Island, married women may, under certain restrictions, insure for their own benefit their husbands' lives ; and in Vermont, an unmarried female can insure the life of her father or brother.

5. *What about representations while effecting a life policy of insurance?*—370.

The same good faith is as requisite in this as in all other policies ; and whether the suppression arises from fraud or accident is quite immaterial, if the fact be material to the risk, and that is a question for a jury.

6. *What is undertaken by the underwriter on an insurance against fire?*—370.

He undertakes, in consideration of the premium, 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.

7. *What is a sufficient interest in the property to support an insurance against fire?*—371, 372.

A creditor may have a policy on the house and goods of his debtor, upon which he has a lien or mortgage security. So, a trustee, or agent, or factor, who has the custody of goods for sale on commission, may insure them, and a *bona fide* equitable interest may be insured. And in New York it has been held, that a commission merchant, consignee, or factor, can insure goods, in his possession, of the consignor or principal, not merely to the extent of his commission, but to the full value of the goods, without reference to his lien. But it is usually made a condition in American policies, that goods held in trust, or on commission, must be insured *as such*, or they will not be covered by the policy.

8. *What is the insured bound, in good faith, to disclose to the insurer?*—373.

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.

9. *What is the rule as to the assignment of policies?*—375.

Fire policies usually contain a prohibition against the assignment of them, without the previous consent of the company. But without this clause, they are assignable in equity like other *choses in action*, though to render the assignment of any value to the assignee, an interest in the subject-matter of the insurance must be assigned also. This restriction upon assignments of the policy applies only to transfers before a loss happens ; and it applies only to voluntary sales, and not to sales on execution.

10. *How are settlements of losses by fire made?*—375.

They are made on the principle of particular average, and the estimated loss is paid without abandonment of what has been saved. Damages and reasonable charges on removing, at a fire, articles insured, are covered by the policy. So there may be a general average for a sacrifice made by the insured for the common good, in a case of necessity. It is analogous to the law of contribution by co-securities.

11. *How are losses certified?*—376, *n.* 2.

Upon oath ; and the certificate of a magistrate, notary, or clergyman, is made necessary to be procured in favor of the truth and fairness of the statement of the loss, and a strict and literal compliance with the terms of the conditions is held indispensable to the right of recovery. But the terms of the policy respecting notice are to have a reasonable interpretation.

The contract is confined to the parties, and, as a general rule, no equity attaches upon the proceeds of policies, in favor of third persons who, in the character of grantee, mortgagee or creditor, may sustain loss by the fire, without some contract or trust to that effect.

LECTURE LI.

OF THE FOUNDATION OF TITLE TO LANDS.

1. *Upon the introduction of the feudal tenures, what became a fundamental maxim of the English law in relation to title to land?* —378, *n.* (*b.*)

That the king was the original proprietor of all the land in the kingdom, and the only true source of title. In this country we have adopted the same principle, and applied it to our own republican governments ; and it is a settled fundamental doctrine with us, that all valid individual title to land, within the United States, is derived from the grant of our local governments, or from the United States, or from the crown or royal chartered governments established here prior to the Revolution. This doctrine was declared in New York, and several other States, and it was held to be the settled rule, that the courts could not take notice of any title not derived from our own State or colonial government, and duly verified by patent. In a recent case, however, it seems to have been looked on as settled law, that purchases made at Indian treaties, with the approbation of the government agent, carry a valid title without the necessity of a patent from the United States.* This decision is contrary to all previous ones.

2. *By what right did the European nations claim to have dominion on this continent?*—379, 380.

By right of prior discovery ; which discovery was considered to have given to the government, by whose subjects or authority it was made, a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendency was asserted, in consequence of the

* See *Coleman* v. *Doe*, 4 Smedes & Marshall, 40.

superior genius of the Europeans, founded on civilization and Christianity, and of their superiority in the art of war. 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 a 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 will, except to the government claiming the right of preëmption. The practice of Spain, France, Holland, and England, proved the very general recognition of the claim and title to American territories given by discovery. The United States have adopted the same principle ; and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.

3. *What has the Supreme Court of the United States decided regarding the Cherokee nation?*—382.

A majority of the court held,* 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 word is used in the Constitution, nor entitled as such to proceed in that court against the State of Georgia. But it was admitted that the Cherokees were a *State*, and recognized, in treaties, as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. The court considered them as domestic, dependent nations, whose relation to us resembled that of a ward to his guardian ; and it was held, that their right to the lands they occupied was unquestionable, until it should be extinguished by a voluntary cession to our government.

The court, in another case,† re-affirmed the same doctrine, and declared null and void several acts passed by the State Legislature of Georgia, depriving by force the Indians of their lands and gold mines, and prohibiting them from the exercise of any political power whatever.

* 5 Peters' R., 1. † 6 Peters' R. 515.

4. *Upon what basis did the people of the New England colonies settle their towns?*—391–399, *n.* (*a.*)

They settled all their towns upon the basis of a title procured by fair purchase from the Indians, with the consent of government, except in a few instances of lands acquired by conquest, after a war deemed to have been just and necessary. Most of the other colonies proceeded on a like principle, and prohibition of individual purchases of lands has since been made a constitutional provision in the States of New York, Virginia, and North Carolina. And the government of the United States until the year 1830, pursued a system of pacific, just and paternal policy towards the Indians, never insisting upon any other claim to their lands than the right of preëmption upon fair terms. Since then the federal government seems to have adopted a different policy, in one instance expelling Indians by military force from their lands, and, in what is now known as the *Indian Country*, introducing the criminal laws of the United States.

LECTURE LII.

OF INCORPOREAL HEREDITAMENTS.

1. *Of what do things real consist?*—401.

Of lands, tenements, and hereditaments.

2. *What is an hereditament?*—401.

Any thing capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed.

3. *What does the term "real estate" mean?*—401.

An estate in fee or for life in land, and it does not comprehend terms for years, or any interest short of a freehold.

4. *What is a tenement?*—401.

A tenement comprises every thing which may be holden so as to create a tenancy, in the feudal sense of the term, and, no doubt, it includes things incorporate, though they do not lie in tenure

5. *What are corporeal hereditaments?*—401.

They are confined to land, which, according to Lord Coke, includes not only the ground or soil, but every thing 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 every thing terrestrial under or over it.

6. *What are incorporeal hereditaments?*—402.

Certain inheritable rights which are not, strictly speaking, of a corporeal nature, or land, although they are by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or which concern them. They pass by deed, without livery, because they are not tangible rights.

7. *What are the principal incorporeal rights which subsist in our law?*—403.

1. Commons. 2. Ways, easements, and aquatic rights. 3. Offices. 4. Franchises. 5. Annuities. 6. Rents.

8. *What is a right of common?*—403, 404.

It is a right which one man has in the lands of another, the object of which is to pasture his cattle, or provide necessary fuel for his family, or for repairing his necessary implements of husbandry. Common of pasture is known as common of pasture *appendant*, and common of pasture *appurtenant*. Common *appendant* is founded on prescription, and is regularly annexed to arable land. It authorized the owner or occupier of the arable land to put commonable beasts upon the waste grounds of the manor. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription. It allowed the owner to put in other beasts than such as plow or manure the land. Common of *estovers* may be equally appendant or appurtenant.