THE

AMERICAN LAW REGISTER.

AUGUST, 1859.

RIGHT OF STOPPAGE IN TRANSITU.

The right of stoppage in transitu is a necessary and equitable concomitant of a credit system.

It may be defined to be the right which the unpaid vendor has to repossess himself of his goods before they come into the actual or constructive possession of his insolvent transferree.

As there has been much controversy as to the origin of this right, it may be as well to discover, if possible, the source whence it is derived, and to notice its gradual development.

In the early history of man all tranfers of property, being by way of barter, were cash transactions; but the advancement of the arts and sciences, as well as the progress of commerce, soon rendered a credit system necessary; and to the credit system we are indebted for our laws of exchange, usury, bankruptcy, lien, and among others, of stoppage in transitu.

When a vendor sells a parcel of goods upon credit, and before they come into possession of his vendee, learns that he is likely to lose nearly their whole value, he will naturally use his utmost endeavors to regain the possession of them; and it would be strange if the law did not assist him.

By the civil law we find it declared: "Quod vendidi non aliter

fit accipientis, quam si aut pretium nobis solutum sit, aut satis es nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione."[1] And the civil law allowed the vendor even after delivery, and even in the hands of a bonâ fide sub-purchaser, to seize his goods if unpaid for, unless express or implied credit had been given.

Upon the authority of this rule, some of the governments of Europe have allowed the unpaid vendor to take his goods from the possession of the insolvent vendee when sufficiently identifyable. Thus in Domat: "The seller who has sold anything and still lies out of the money which he was to have for it, if he finds the thing he sold in the hands of the buyer, may seize on it, and he is not obliged to share it with the other creditors of the buyer."[2] And from the same author we learn,[3] that in some of the provinces of France, if a thing had been sold on terms of prompt payment, the seller could have claimed it even from the hands of a third person, who had purchased it bonâ fide from the buyer, the property not being considered to have passed from the hands of the original vendor.

The framers of the Code Napoleon, after an investigation into the merits of the civil law system, and that of England, gave the preference to the latter. The reasons for this change are thus explained in the "Discours des Orateurs du Gouvernement:" "The framers of the plan of a Code of Commerce had demanded the abolition of the law of revendication, as contrary to the interests of commerce; the chambers and tribunals of commerce applauded this proposition, but others had voted to maintain the law of revendication, relying principally upon this reason—that one should not without reason change an usage anciently established in France and followed in some foreign countries."

"One may see that the usage of revendication was a source of litigation, and a means of fraud; that its greatest inconvenience was, that by the aid of this privilege, the fate of the creditors was left to the mercy of the bankrupt, at his will to favor the one and

[1] Dig. 18: 1, 19. Domat 3: 1, 5; 4.
[2] Bk. 4, tit. 5, § 2, art. 3.
[3] Bk. 3, tit. 1, § 5, art. 4.

sacrifice the other in preserving or changing the marks which might constitute the identity, or in retarding or accelerating the sale of the goods which had been left with him."

"It was on account of these considerations that it has been decided to permit revendication, only as it is spoken of in our article 577, and the following."

"They have hoped by these means to render an essential service to commerce, to exhaust the source of a crowd of litigations, and to fulfil the wishes of a majority of the chambers and tribunals of commerce, whose opinion they have consulted."

In the Code Napoleon,[1] we find the following ordinance: "The price of movable effects unpaid, if they are yet in the possession of the debtor, whether he has bought them on time or without time, (à terme ou sans terme,) are privileged[2] to the vendor."

"Where the sale has been made without time, the vendor may claim such effects as long as they are in the possession of the buyer and prevent their resale, provided the reclaim be made within eight days of the delivery, and the effects be found in the same state in which such delivery was made."

Thus the right of revendication has been taken away, and the right of reclaim is limited to eight days.

By the ancient law of Scotland, all goods not paid for, which had been received within three days of the period of insolvency, could be retaken, unless the buyer or his creditors, who succeeded to his rights, could rebut the general presumption of fraud by showing that they were obtained with a bonâ fide intention of paying for them.[3] But the modern law, as it exists in England, was introduced into Scotland by Lord Thurlow, in 1799.[4]

The right of stoppage in transitu will be found to have existed in the Italian States,[5] in Holland,[6] and in Russia;[7] and it is known

[1] Bk. 2, tit. 18, ch. 2, § 2.

[2] "The privilege of a creditor is the distinguishing right which the nature of his credit gives him to be preferred before other creditors." Domat 3: 1, 5; 1.

[3] 1 Bell's Commentaries, 143. [4] Ibid, Stewart *vs.* Stein, Dec. 23, 1799.

[5] Wiseman *vs.* Vanderput, 2 Vernon, 203. [6] 1 Hy. Bl. 364.

[7] Inglis *vs.* Usherwood, 1 East, 515; Bohtlink *vs.* Inglis, 3 East, 381; Ordinance of June 25, 1781, § 138.

that the old law of France had the same object of protecting the vendor, although differing widely from the present law of England.

The question of the origin of the law of stoppage in transitu in England is involved in obscurity. There is no part of the law more obscure than that connected with the common maxim that the "lex mercatoria pars est legis requi."[1]

In the earlier ages the law merchant does not seem to have been part of the common law, as it is now; but a concurrent and co-existent law, enforced by the power of the realm, and administered by its own courts in the staple or in the star chamber. Thus in 1474,[2] the Chancellor is represented to have stated his view of the law thus: "This suit is brought by an alien merchant, who has come by safe conduct here, and he is not bound to sue by the law of the land, to abide the trial by twelve men, and other forms of the law of the land; but he ought to sue him in the star chamber, and it shall be determined by the *law of nature* in chancery;" and he said further, "that a merchant was not bound by the statutes where the statutes were *introductiva novae legis;* but if they are *declarativa antiqui juris*, (that is to say of nature,) and since they have come into the kingdom the king shall have jurisdiction over them, to administer justice; but that shall be *secundem legem naturae, which is called by some the law merchant*, which is the law *universal of the world.*"

We may safely presume, that at that time the law merchant was distinct from the common law; and this will account for the fact, that there is no mention whatever of bills of exchange or other mercantile forms in the early common law books. We are not thence to suppose that they did not exist; but, that being adjudged in the courts staple, they were not mentioned in the books of common law, as at the present day; matters over which the admiralty or ecclesiastical courts have exclusive jurisdiction are never treated as part of the common law.

But when the courts of the staple were disused, and the matters

[1] And perhaps the reader will admit the doctrine of Heineccius, that "Tu re obscurâ, conjecturas ecqui non iniquum videtur." Elem. Jur. Germ. lib. 1, § 164.

[2] 13 Edw. 4, 9.

litigated before them, came into the common law courts, the principles which governed them were adopted as part of the law merchant, and began to be mentioned in the books of common law.

Thus, although the first mention of bills of exchange is in 1603,[1] it is well known that they were in common use in the thirteenth century; and although the right of stoppage in transitu is first mentioned in 1690, yet it is likely that it was exercised at a much earlier period.

On the question, whether this right had a legal or equitable origin, much has been said *pro* and *con;* and we shall see that this was a question of no small importance. Lords Mansfield, Hardewicke, and Loughborough; Justices Heath, Rooke and Grose have considered it a strictly legal right. But these great names and opinions to the contrary, notwithstanding, we are convinced that it is an equitable right, adopted and enforced for the furtherance of justice by the courts of law, and why? Because the right is inconsistent with the common law principles of the absolute transfer of property by sale and delivery. Because, were it a strictly legal right, in no case could a third party be in a better condition than the first vendee. Because, if it were, according to Lord Mansfield, "a part of the general proprietary lien of the seller," it would follow that he might exercise it at any time while unpaid, at his mere caprice; thus re-sell upon a rise of the market.

But if it is a merely equitable right adopted by the courts of law, and on this side we find Lords Kenyon and Stowell; Justices Buller, Parke, Shaw, and all the American judges who have given decisions upon the subject,) its application will be confined to the case of the probability of loss by the insolvency of the vendee; and again it will only prevail against those who have an inferior equity, and a bona fide endorsee of a bill of lading will take the property free from the vendor's right of stoppage.

The diversity of opinion which existed upon this subject may be considered to have been removed by the case of *Lickbarrow* vs. *Mason*, which bears the same relation to the law of stoppage in

[1] In the case of Martin *vs.* Bourne, Cro. Jac. 6.

transitu, that *Coggs* vs. *Barnard* does to the law of common carriers.

The first case that occurs in the English reports is that of *Wiseman* vs. *Vandepert*,[1] in 1690. In that case the Lord Chancellor directed an action of trover to be brought by the plaintiffs, in which they recovered a verdict. But the Lord Chancellor, notwithstanding, gave a decree against them. By this case it is evident that as Buller J. says, "so late as 1690 this right or privilege, or whatever it may be called was unknown at law."

The next case is that of *Snee* vs. *Prescott*,[2] in 1743. Here Lord Hardwicke applied the rule to a certain extent in equity, and received evidence of what was the custom of merchants; upon which equity and evidence he expressly founds his decree.

The next case appears to be that of ex-parte Wilkinson, in 1755, referred to in *D'Aguila* vs. *Lambert*,[3] in 1761, in which the Lord Chancellor again founded his decree upon the usage of merchants.

The case of *Lickbarrow* vs. *Mason* came before the King's Bench, in November 1787,[4] on a demurrer to evidence the court having decided that by the endorsement and delivery of a bill of lading for a valuable consideration to a third person, the vendor's right of stoppage was divested. This judgment was reversed upon a writ of error in the Exchequer, February, 1790,[5] where it was held that a bill of lading was not a negotiable instrument. This latter judgment was in turn reversed in the House of Lords, Trinity term, 33 Geo. 3, 1793; and a venire facias de novo directed to be awarded. To this trial before the house we are indebted for the elaborate opinion of Buller J. A venire having been awarded, a special verdict was found in which the doctrine of the transfer of the property by the endorsement of a bill of lading was confirmed,[6] July 1794.

We propose first to state some of the general principles which

[1] 2 Vernon, 203.

[2] 1 Atk. 245. In 1719, in the case of Atkins *vs.* Barwick, it was decided that a factor could not pledge the goods of his consignor, and that a vendee might decline to receive the goods out of regard to the interests of his vendor. 1 Str. 165.

[3] Amb. 399; 2 Eden, 75.

[4] 2 T. R. 63.

[5] 1 H. B. 357.

[6] 5 T. R. 683.

govern the right of stoppage in transitu, before entering upon a classification of the cases which have arisen under this branch of the law.[1]

The right of stoppage can of course only exist in relation to personal property, and is founded upon the supposition that the property has passed to the vendee, and that the possession is in a third person.[2] The contract of sale is not rescinded by the exercise of this right, and it only enables the vendor to resume his lien for the security of the price;[3] so that should the vendee tender the price agreed upon, the vendor must re-deliver,[4] and the vendor even after having stopped the goods, may maintain an action for the price being ready to re-deliver; or should he re-sell he may bring an action for any loss he may sustain.[5] The right of stoppage is paramount to any claim which a third person may have upon the goods,[6] and a carrier cannot retain them against the vendor for a claim due from the vendee;[7] but the vendor upon exercising his

[1] It must be kept in mind that by the general law of sale, when the vendor has given possession, his lien and all his rights in the goods are completely gone, and the vendee has the absolute, indefeasible and unqualified right of property, even though he be insolvent and the price unpaid.

[2] Lickbarrow *vs.* Mason, 6 East, 27; Abb. on Sh. 618; St. Jose Indiano, 1 Wheat. 212; Jordon *vs.* James, 5 Ham. 98.

[3] In the case of Clay *vs.* Harrison, 10 B. & C. 99, in 1829, Lord Tenterden remarked, that it had never been expressly decided whether the stoppage did, or did not rescind the contract. But in this country in the following cases it has been held that it did not, but that the parties were placed as nearly as could be in the same situation, as if the vendor had never parted with his possession. Rowlby *vs.* Bigelow, 12 Pick. 313; Stanton *vs.* Eager, 16 Pick. 475; Newhall *vs.* Vargas, 15 Me. 314; Gwynne Exp. 12 Sumner's Ves. 379; 2 Kent, 540; Story on Contracts, § 517; Chitty on Contracts, 432; Abb. on Sh. 619; Vide et etiam Hodgson *vs.* Loy, 7 T. R. 445; Tucker *vs.* Humphrey, 4 Bing. 516; Bloxam *vs.* Sanders, 4 B. & C. 948.

So in Domat "Venditor quasi pignus retinere potest eam rem quam vendidit." Bk. 3 tit 1, § 5, art 4.

[4] Abb. on Sh. 619; Jordon *vs.* James, 5 Ham. 98; 2 Kt. 540; vid post, 47.

[5] Kymer *vs.* Suevereropp, 1 Camp. 109; Abb. on Sh. 620; 2 Kent, 541; Newhall *vs.* Vargas, 13 Maine, 93; Brown on Sale, 441.

[6] Oppenheim *vs.* Russell, 3 B. & P., 42; Richardson *vs* Goss, 3 B. & P., 119; Morley vs Hay, 3 M. & Ry., 396.

[7] Oppenheimer *vs.* Russell, 3 B. & P., 42; 2 Kent, 541; Morley *vs.* Hay, 3 M. Ry., 396

Nor can the carrier retain the goods from the vendee for a debt due from the vendor. Butler *vs.* Woolcott, 2 B. & P., 64.

right must pay any expenses which have rightfully accrued since they left his possession.[1] Should the carrier, after notice from the vendor not to deliver the goods to the vendee, either intentionally or by mistake deliver them, he is liable in an action brought by the vendor, and the vendor may yet recover the goods from the vendee.[2]

"The act of stoppage" says Lord Ellenborough, "should be done *eo intuitu*, and adversely to the vendee,"[3] and the doctrine on this subject does not apply where the vendor and vendee agree that the property shall be reclaimed, for then it becomes a question of reconveyance and rescision.[4]

An attachment made by the creditors of the consignee does not divest the consignor's right of stoppage, that being the prior claim.[5]

The right of stoppage in transitu is peculiar to one who stands in the situation and sustains the character of vendor.

In 1790, Ld. Ch. B. Eyre said, "the right of stopping is out of the question, that never occurring but as between *vendor* and *vendee*."[6] In *Sweet* vs. *Pym*,[7] it was held that a fuller, having had a lien upon some cloths, could not stop them in transitu upon the insolvency of his customer, his lien being lost by delivery. In the case of *Ferze* vs. *Wray*,[8] where Fritzing bought goods in his own name in Hamburgh for Browne of London, charging B. the original cost with a commission for buying: held, that Browne having

[1] 3 B. & P., 53, Newhall *vs.* Vargas, 13 Maine, 314; Jordon *vs.* James, 5 Ham. 98.

[2] Litt *vs.* Cowley, 7 Taunt. 169; Howatt *vs.* Davis, 5 Mumford, 34; Abb. on Sh. 629.

[3] Siffkin *vs.* Wray, 6 East, 371.

[4] Lawes on Charter Parties, 544; Ash *vs.* Putnam, 1 Hill, 302; Naylor *vs.* Dennie, 8 Pick, 198; Long on Sales, 325.

[5] Smith *vs.* Goff, 1 Camp, 272; Naylor *vs.* Dennie, 8 Pick., 198; Lane *vs.* Jackson, 5 Mass, 162; Buckley *vs.* Furniss, 15 Wend., 144; Satte *vs.* Field, 5 T. R. 211; Conrad *vs.* Atlantic Ins. Co., 1 Peters, 386.

[6] Kinloch *vs.* Craig, 3 T. R. 783; Wright *vs.* Campbell, 4 Burr. 2050; 2 Kent, 540; Ludlow *vs.* Browne, 1 Jo. 18.

It is stated by some of the text writers, that the law of stoppage has been applied in cases of exchange, but we have not succeeded in finding any reported decision.

[7] 1 East, 4. But if the goods are put into the bailee's hands, subject to the bailor's control, there he never parts with the possession, and his lien continues. Freeman *vs.* Birch, 1 N. & M. 420.

[8] 3 East, 93; vid et etiam Illsley *vs.* Stubbs, 9 Mass. 65; Newhall *vs.* Vargas, 1 Shep. 93.

become bankrupt, Fritzing might stop the goods, being in fact the vendor. In the subsequent case, of *Siffkin* vs. *Wray*,[1] Fritzing being merely surety for the price, was held to have no right to stop them. Lord Ellenborough said, "Fritzing's situation in this transaction was very different from what it was in *Ferze* vs. *Wray;* there he was liable in the first instance for the price of the goods, and therefore the court considered him as a vendor *quoad* the bankrupt."

A consignor, having shipped goods on joint account of consignor and consignee, may stop the goods upon the insolvency of the consignee.[2] So an alien enemy, trading under a license, was held entitled to exercise this right, the license giving legality to all the consequences of the sale.[3]

Where goods are shipped to meet liabilities on the part of the consignee, or in payment of a precedent debt, the consignor cannot stop them;[4] nor after the bill of lading is signed can the property be divested from the consignee by any change of papers;[5] for the goods are of the nature of a pledge, and the consignor a pledgor, and not a vendor. But, although the consignee be a creditor, if the goods are shipped for and on account of the consignor, he can stop them.[6]

The right of stoppage can only be exercised when the vendor is wholly or partially unpaid.

As the paid vendor has no need, so he has no right to stop the goods. But in 1797, a doubt existed as to the vendor's right to stop the goods when he was partially paid. This doubt was dispelled by the case of *Hodgson* vs. *Loy*,[7] the judges being "clearly of opinion, that the vendee's, having partially paid for the goods, does not defeat the vendor's right to stop them in transitu."

[1] 6 East, 371.

[2] Newsour *vs.* Thornton, 6 East, 17.

[3] Fenton *vs.* Pearson, 15 East, 419.

[4] Vertue *vs.* Jewell, 4 Camp. 31; Wood *vs.* Roach, 2 Dall. 180; Walters *vs.* Ross, 2 Wash. Cir. R. 283; Smith *vs.* Rowles, 2 Esp. 578; Patten *vs.* Thompson, 5 M. & S. 356; Tookes *vs.* Hollingsworth, 5 T. R. 215; Haille *vs.* Smith, 1 B. & P. 563.

[5] Summerell *vs.* Elder, 1 Binn. 106; Ryberg *vs.* Snell, 2 Wash. C. C. R. 294.

[6] Walters *vs.* Ross, 2 Wash. Cir. R. 283; Ryberg *vs.* Snell, 2 Wash. Cir. R. 294–403.

[7] 7 T. R. 440; Edwards *vs.* Brewer, 2 M. & S. 375; Newhall *vs.* Vargas, 13 Maine, 93; 2 Kent, 541; 15 Maine, 314; Wood *vs.* Roach, 2 Dall. 180; Jordon *vs.* James, 5 Ham. 88.

Neither bills of exchange, nor notes, nor securities, nor acceptances are payment, unless expressly so considered.[1] "There is great difference," says Ashurst, J., "between payment and the liability to pay. Unpaid liabilities do not take away the right of stoppage."[2] Neither does the fact, that the goods were sold on time, not yet expired, compel the vendor to await the expiration of the time; for that, in most cases, would be the same as depriving him of his right.[3] Where the vendor has negotiated the bills received in payment, and is no longer liable on them, he is of course paid;[4] so where the debtor consignor ships goods to his creditor consignee, there can be no doubt as to payment.[5]

In *Bell* vs. *Moss*,[6] the consignors were held not to have lost their right by a general right given by the consignees to draw on a third party, such third party having given notice, that they should not meet the demand. But if the vendor takes the acceptance of a third party, it would seem that he has no right to stop the goods until he is likely to lose by the insolvency of such third party.

The right of stoppage must be exercised before the property comes into the actual or constructive possession of the vendee or of those who represent him.

Much of the difficulty, we apprehend, which has arisen in deciding whether the right of stoppage was lost or still remained in the vendor, has been caused by the equivocal meaning of the words possession[7] and delivery.

In common parlance, he is said to be possessed who has the property in his actual possession, whether he has the ownership or not.

In general legal language a person is said to be possessed when

[1] Owenson *vs.* Morse, 7 T. R. 64; Puckford *vs.* Maxwell, 6 T. R. 54; Patten *vs.* Thompson, 5 M. & S. 350; Edwards *vs.* Brewer, 2 M. & W. 375; Newhall *vs.* Vargas, 13 Maine, 93.

[2] Kinloch *vs.* Craig, 3 T. R. 122; Whitaker on Lien, p. 163.

[3] Ferge *vs.* Wray, 3 East, 93; Bohtlink *vs.* Inglis, 3 East, 381; Inglis *vs.* Usherwood, 1 East, 515; Illsley *vs.* Stubbs, 9 Mass. 65; Stubbs *vs.* Lund, 7 Mass. 453.

[4] Walter *vs.* Ross, 2 Wash. C. C. R. 283.

[5] Bunney *vs.* Poynty, 4 B. & Ad. 568. [6] 5 Wharton, 169.

[7] "Possessio appellata est, ut et Labeo ait, a pedibus quasi possessio; quia naturaliter tenetur ab eo, qui ei insistit: quam Graci κατοχην dicunt."—Mackeldey's Comp. of Civil Law, 1, 1, 1.

he owns the property, in whosoever hands it may be. In the language of the law of stoppage in transitu, a transferree is said to be possessed, when the transferror has changed his character of vendor, for that of bailee; or the property having passed from the possession of the vendor, the transferree has exercised some act of ownership or control over it, or it has come into his actual possession.

Delivery is of two kinds,[1] actual and constructive, and the distinction between these two kinds has been supposed by some writers to furnish the true criterion required to regulate the exercise of the law of stoppage in transitu.

Actual delivery we consider to consist in giving real possession of the thing sold to the vendee, or to those who are identified with him in law, his servants, special agents, or assignees.

Constructive delivery is a general term comprehending all those acts, which, though not conferring real possession, yet have been held *constructione juris* equivalent to acts of real delivery. In this are included all those *traditiones fictae* which have been considered sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage in transitu, such as marking, charging with rent, setting apart, giving delivery order, &c.

Previous to the sale, the property is in the vendor, and the possession actually his, or in the hands of some one holding in his behalf; by the completion of the bargain, the property is transferred to the vendee;[2] then some act must follow to constitute the delivery; should the vendor give the vendee the key of the warehouse in which the goods are stored,[3] or consent to keep them at rent,[4] or gratuitously[5] for the vendee, or give him a delivery order[6] for them, or transfer to him any documents indicative of the owner-

[1] By the Roman law, also, delivery was of two kinds, *traditio vera*, de manu in manum, which gave actual possession; and *traditio ficta*, constructive delivery, which was held *constructione juris*, equivalent to real delivery.

[2] So in the French law, vide Code Napoleon, No. 1583.

[3] Wilkes *vs.* Ferris, 5 John, 335; Ellis *vs.* Hunt, 3 T. R. 464: Dictum of Lord Kenyon; Copland *vs.* Stein, 8 T. R. 199.

[4] Hurry *vs.* Mangles, 1 Camp. 452.

[5] Barrett *vs.* Goddard, 3 Mason's C. C. R. 107.

[6] Wilkes *vs.* Ferris, 5 Johns. 335; Hollingsworth *vs.* Napier, 3 Caines 182.

ship,[1] these acts would constitute a constructive delivery; but should the vendee carry away the goods, or should the vendor put them into the vendee's warehouse, or on board his vessel, then they are actually delivered; but in either case the vendor's lien and right to stop them are gone.

By the completion of the bargain, although the property rests in the vendee, yet if it is actually in the hands of the vendor's agent, it is not delivered until that agent holds it in behalf of the vendee, for the privity of contract between the vendor and agent does not also pass with the property. Thus the important question, where the property is not moved, is, in what character does the bailee hold the goods? Only while the goods are in transitu may they be stopped; and hence another question arises: When are the goods in transitu, or, when has that transitus ceased?

It was formerly held by Lord Mansfield, in *Hunter* vs. *Beale*,[2] that the goods must come to the "corporal touch" of the vendee; but in *Wright* vs. *Lawes*,[3] he said, "I wish that expression had never been used, as it says too much; all that is necessary, is that the consignee should exercise some act of ownership over the property." And in *Dixon* vs. *Baldwin*,[4] Lord Ellenborough, alluding to *Hunter* vs. *Beale*, said, "that is a figurative expression, and rarely, if ever strictly true."

Let us first notice that class of cases in which the vendor's possession ends and the vendee's begins, where there is no transitus. The principles by which they are governed are precisely the same as in cases of stoppage in transitu, so that they are sometimes inaccurately classed with them.

In all these cases it must be clearly proved that the vendor has consented to give up his claim as vendor and become bailee for the vendee.

Thus in *Stoveld* vs. *Huges*,[5] H. sold D. & Co. timber lying on H.'s wharf, upon which D. & Co.'s mark was put and payment made by a bill for three months. D. & Co. sold the timber before the maturity of the bill to S. H. was informed of the resale and said "very well;" showed S. the timber, and assisted in changing

[1] Hollingsworth *vs.* Napier, 3 Caines, 182.
[2] 3 T. R. 466.
[3] 4 Esp. 82.
[4] 5 East, 184.
[5] 14 East, 316.

the marks. S. paid D. & Co., but D. & Co. failed, and H. claimed to retain the timber from S. Held by the court, that H. had consented to become the bailee of D. & Co., and that the timber had been delivered.

In the case of *Hurry* vs. *Mangles*,[1] Lord Ellenborough said: "The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for part of a warehouse, so much of it is mine. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse and there deposited under lock and key." The subsequent case, of *Miles* vs. *Gorton*,[2] is founded upon a false statement of the facts in *Hurry* vs. *Mangles*, and is opposed to it.

In the case of *Elmore* vs. *Stone*,[3] the vendor having sold a pair of horses, removed them from his sale stable, and kept them at livery for the vendee. Held, that this was sufficient delivery.

In the case of *Harman* vs. *Anderson*,[4] the vendee received a delivery order which he gave to the wharfingers holding the goods, who thereupon transferred them to his name in their books and debited him with the rent; and although one parcel was transferred, Lord Ellenborough held "that after the delivery order was given to the wharfingers, they were bound to hold the goods on account of the purchasers." From thenceforward they became the agents of the vendee, and between the vendor and the vendee the delivery was complete and the right of stoppage gone."

But it is necessary in all cases, that the bailee should consent to hold the goods for the vendee; as in the case *Lackington* vs. *Atherton*,[5] the bailee having refused so to do, and the vendee subsequently failing, it was held, that the vendor's right was not divested.[6]

As a general rule of law, an authority may be revoked at any time before its execution; but where the authority is bought for a

[1] 1 Camp. 452; vide et etiam, Anderson *vs.* Scott, 1 Camp. 235; Hodgson *vs.* Le Bet, 1 Camp. 233.

[2] In 1834, 2 C. & M. 504.

[3] 1 Taunt. 458.

[4] 2 Camp. 243; 1 N. R. 69, vide Lucas v. Donien, 7 Taunt. 278.

[5] 1 Scott N. S. 38.

[6] In Allen *vs.* Mercier, 1 Ashmead, 103, the carrier refused to deliver to the vendee until he paid the balance due; the goods having been demanded by the vendee, but remaining in the carrier's hands, it was held that the vendor's right was not divested.

consideration, and coupled with an interest, it is both transferable and irrevocable. Should the consideration fail, the giver may revoke the authority, provided it is not executed. Thus, after the vendor has given an authority to the vendee to receive the goods from the bailee, and before that authority has been communicated to the bailee, it would seem that the vendor would have a right to revoke it upon the failure of the consideration upon which it is founded. But if the authority has been communicated to the bailee, and he has changed from vendor's to vendee's bailee, the property and possession have both completely passed.

There is another class of cases, although they do not come strictly within the scope of our subject, yet as they have been classed under the head of stoppage in transitu, we shall notice them here.[1] They are those in which some act of weighing, measuring, or counting remains to be performed before or after the sale. The general rule is, that where any such act remains to be performed in order to ascertain the price, quantity, or individuality of the article to be delivered, or to put it in a deliverable state, the contract is not complete until such operation is performed.[2]

Thus in the case of *Rugg* vs. *Minott*,[3] some casks of turpentine were sold which were to be filled up before delivery; a part were

[1] These cases have probably been classed with those of stoppage in transitu, because the goods being in the hands of some third person, the vendor has endeavored to resume his lien upon them for the price. For even after giving a delivery order, or actual possession, the contract may yet be incomplete from the existence of a suspensive condition. Lucy *vs.* Burdy, 9 N. H. 298; Mitchel *vs.* Ede, 3 P. & D. 513.

[2] Vide Brown on Sale, 45. This rule was recognized by Wilde, J., in Macomber *vs.* Parker, 13 Pick. 175; by Denny, J., in Riddle *vs.* Varnum, 20 Pick 280. "In his quae pondere, numero, mensurave constant, (veluti frumento, vino, oleo, argento,) modo ea servantur, quae in caeteris, ut simul atque de pretio convenerit, non tamen aliter videatur perfecta venditis, quam si admensa, adpensa adnumeratare sint. Nam si omne vinum, vel oleum, vel frumentum, vel argentum, quantum cunque esset, uno pretio venderit, idem juris est, quod in caeteris rebus."—Domat on Sale, 1, 2, 5, 7.

Code Napoleon, No. 1585; Simmond *vs.* Swift, 5 B. & C. 857; Rapelye *vs.* Mackie, 6 Cow. 250; Outwater *vs.* Dodge, 7 Cow. 35; Logan *vs.* LeMesurier, Lond. Jurist for 1847, p. 1091. Lord Brougham says: "Now, to constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be ascertained, and that there should be a price ascertained or ascertainable."

[3] 11 East, 210; vide et etiam Ward *vs.* Shaw, 7 Mud. 404.