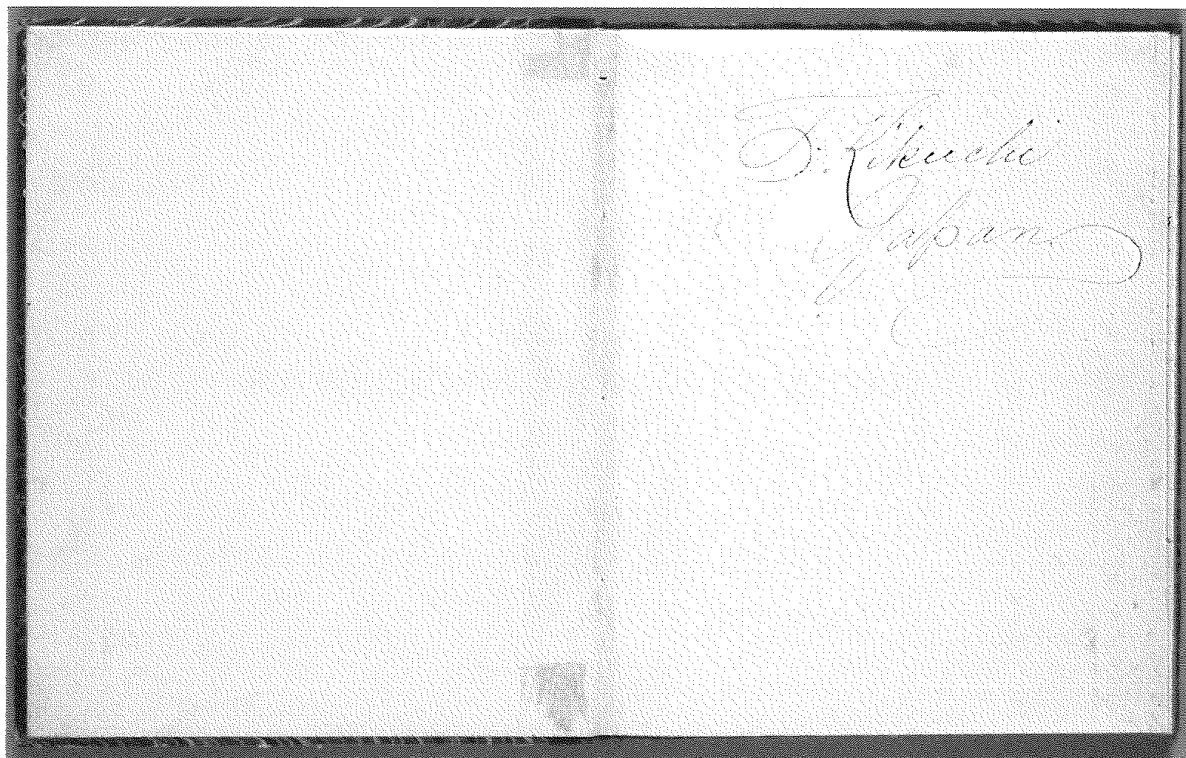
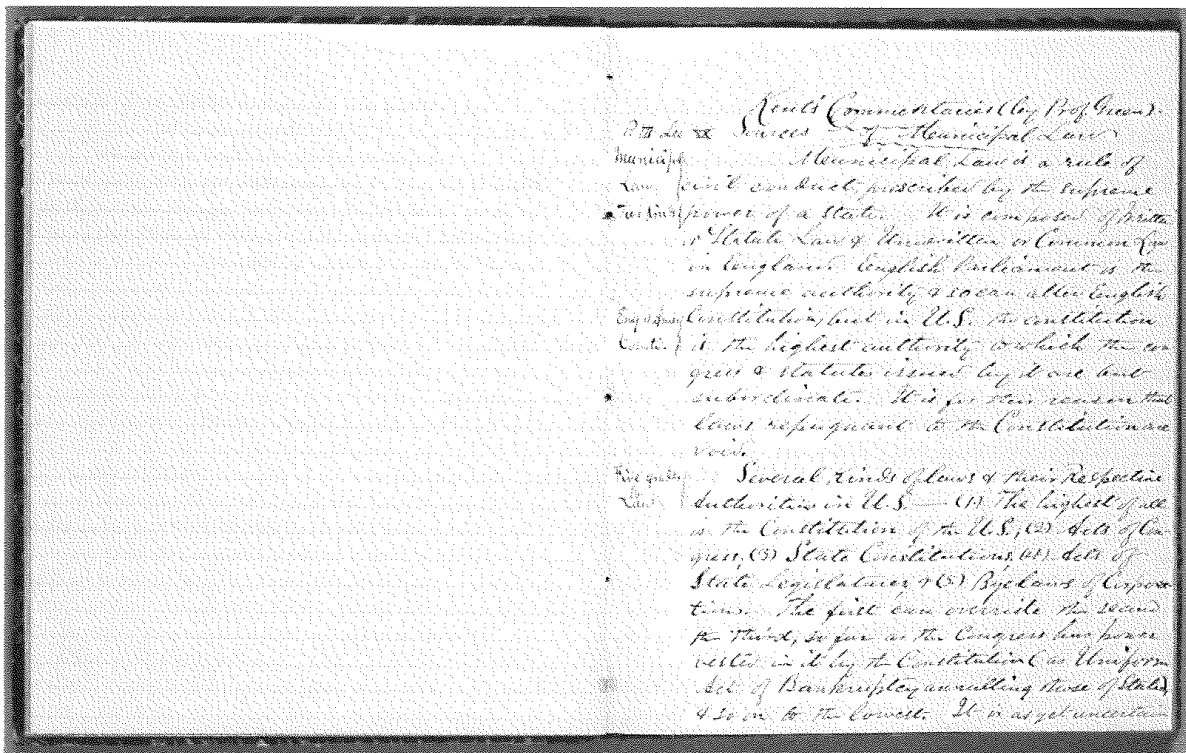


Lectures on Kent's Commentaries



[flyleaf:]



[page: 3. These pages follow eight pages on a lecture on Bills & Notes by Prof. M. M. Bigelow dated Oct. 13, 1875.]

[page 1:]

*Kent's Commentaries*ⁿ¹ (by Prof[essor]. Green).

~~~~~  
*English Law consists of Written or Statute Law & Unwritten or Common Law.*

*It is a rule<sup>^</sup> in America that wherever words of a statute are clear & definite courts must follow them as it is the supreme law.*

[page 3:]

P[art] III  
 Lec[ture] XX  
 Municipal  
 Law

*Kent's Commentaries (by Prof[essor] Green).*

*Sources of Municipal Law*

*Municipal Law is a rule of civil conduct, prescribed by the supreme power of a state. It is composed of Written or Statute Law & Unwritten or Common Law in England. English Parliament is the supreme authority & so can alter [the] English Constitution, but in the U.S. the constitution is the highest authority to which the congress & statutes issued by it are but subordinate. It is for this reason that laws repugnant to the Constitution are void.*

Two kinds

Eng[lish] &  
 Amer[ican]  
 Consti[tutions].

Five grades  
 of  
 Law

*Several Kinds of Laws & their Respective Authorities in the U.S. -- (1.) The highest of all is the Constitution of the U.S.; (2.) Acts of Congress; (3.) State Constitutions; (4.) Acts of State Legislatures; & (5.) Bye Laws of Corporations. The first can override the second [and] the third, so far as the Congress has power vested in it by the Constitution ([such] as [the federal] Uniform Act of Bankruptcy annulling those of States), & so on to the lowest. It is as yet uncertain*

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<sup>n1</sup> James Kent, Commentaries on American Law (12th ed. by O.W. Holmes, Jr., Boston 1873)

|                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                         | [page 4:]                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <i>Power of Courts to declare Laws unconstitutional</i> | <i>how questions concerning the legality or at least [the] right or wrong of the Constitution itself are to be decided &amp; by whom. Courts are bound to enforce each of these laws. But the judiciary does not pretend to declare laws unconstitutional, it only decides particular cases according to the spirit of the Constitution &amp; by such decisions it may virtually do away with laws contrary to the principles it has adopted.</i>                                                                                                                                             |
| <i>Ignorantia Legis non Excusat<sup>n4</sup></i>        | <i>Any act of Parliament has <sup>its</sup> force from the 1st day of session but it is very inequitable. The principle that everybody is presumed to know law is never verified by fact &amp; [is] unjust in one sense, but its absurdity is overlooked, inasmuch as it [is] adopted for [the] expediency of a whole community &amp; [is] important as a practical rule. Hardship resulting from this principle may be illustrated by supposing that [the] German Emperor came to Boston in those days when [the] Law of Mass[achusetts] forbade smoking in [the] streets.<sup>n4a</sup></i> |
| <i>Expediency</i>                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <i>Pub[lic] &amp; Priv[ate] Laws</i>                    | <i>Public &amp; Private Laws -- The distinction between the two is rather hard to make.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

<sup>n4</sup> Ignorantia legis non excusat [first word written over “Ignoratio”]: Latin legal maxim: Ignorance of the law is no excuse

<sup>n4a</sup> Emperor Frederick III of Prussia, the German Kaiser (1831-1888) was a pipe smoker for at least 30 years before he died of cancer of the larynx at the age of 57 years. In 1632, Massachusetts banned smoking in public and in 1683 banned outdoor smoking. In 1840 Boston banned smoking.

[page 5:]

*2 distinctions*

*One way of distinguishing them is this, that Public Law applies to everybody in a state, while Private Law affects particular individuals. Another is that public law is that part of the law of [the] land which courts are bound to know & need not be proved by the party bringing [an] action. Private laws, on the other hand, have no force unless [the court is] notified [of them,] & their existence should be proved to courts.*

*Rules of Interpretation.*

*Interpretation -- To interpret a statute is to find out the intention of [the] persons who passed it, the meaning they intended to convey by their words. In order to accomplish this task, not [the] preamble alone nor the title only but the whole law must be considered. No rule of Interpretation is absolute, but a general rule is to take a statute as a whole, to give words [their] common significations when they are meant, & [to give words] technical senses when they were intended. It is a rule that where words of a statute are clear & definite Courts must follow it.*

[page 6:]

*Where there are revised statutes we must trace back to originals & see differences between the two.*

*Remedial  
&  
Penal*

*In remedial statutes it is sufficient if an act comes within the intent of the legislature who made them. In criminal or penal statutes an act must come not only within the intent of [the statutes] but also clearly within the meaning of the words used by the legislature. If a penal statute is repealed before a sentence is pronounced against a criminal offending it, he shall not be punished, for there [is] no law operating to*

*Old & New  
Penal  
Stat[utes].*

*the contrary. If, again, a new<sup>^</sup> or former statute is substituted for it & is severer than the old, this new legislative act cannot take him [the criminal] under its control & it is always necessary, therefore, to have a saving clause in any penal statute that it shall prosecute the pending crimes or cases. But if such substituted statute is milder than the repealed, it shall have no effect. Any act, however, is illegal & cannot be entitled to [i.e. ignored by] the court, from the*

[page 7:]

*time when a statute puts it under penalty.*

*Judicial  
Reports*

*Reports of Decisions -- Decisions of foreign courts have not binding effects but only [are accorded] a weight with the domestic courts[,] whose decisions alone have any binding authority. Inferior courts generally have to follow the decisions of the supreme court, but the latter is not bound to keep up its former decisions and frequently overrules them. Courts are usually reluctant to alter [past decisions], & [it] is expedient to follow, their old decisions in civil cases, but in criminal matters they must overrule these decisions whenever they see a slightest element of wrong or mistake in the decisions, for [i.e. because the] extent of damages, as an example, in criminal cases cannot be often certain.*

*Vol[ume] II., Part IV., Lecture XXIV.*

*Rights of  
Persons.  
Absolute*

*Rights of Persons -- Absolute Rights does [i.e. do] not mean anything, since in [the] single or unconnected state of human being[s] there can be no rights[,] which are [only] to be acquired over another in society.*

[page 8:]

[in top margin:] *These various kinds of Rights are derived from English statutes, [such] as Magna Carta,<sup>n8</sup> Petition of Rights,<sup>n8a</sup> [and from the] Bill of Rights, in America.<sup>n8b</sup>*

*Personal Security* Rights are relative & legal.  
*Personal Security* -- Persons, except those serving in military & naval departments, have a right to [trial by jury], & cannot be punished in any capital offense without, trial by [a] jury or [i.e. of] twelve men[,] with the single exception of impeachment. Those in military & naval service are tried by a court marshal [i.e., martial]. Any person is entitled to a bail until he is found guilty, & bail is excessive whenever it is taken for<sup>with</sup> this purpose of imprisoning the accused. Excessive fines should not be taken. Cruel & unusual punishments mean probably mutilation & the like. Ex post facto is one which punishes an act innocent- & done, before its existence; & concerns with criminal matters only.

*The Law of the land.* Unlawful imprisonment, or deprivation of life, liberty, & or property against by the law of the land, means such an act done without trial by jury, the law of the land signifying trial by jury. Any enactment making the police court final is unconstitutional, & also any statute giving unreasonable ob-[sentence is nowhere completed]

<sup>n8</sup> Magna Carta (Eng. 1215, reissued 1225, in statute form 1297)

<sup>n8a</sup> Petition of Right (Eng. 1628)

<sup>n8b</sup> U.S. Constitution, Amendments I - X, Bill of Rights (1791)



[page 9:]

*Personal  
Liberty.*

*Personal Liberty -- In [a] case of false imprisonment or unlawful detention, any man, no matter [whether] he is a relative or not, may appear [i.e. sue] for a writ of Habeas Corpus*

*Habeas  
Corpus.*

*on behalf of the restrained person who cannot, of course, petition <sup>by</sup> himself.*

*Part IV. Lecture XXV.*

*Aliens &  
Natives.*

*Aliens & Natives -- The relation between natives & aliens, even <sup>if</sup> there is any, is not the same as domestic relations which are founded upon nature. Reciprocal duties existing between parent & child, husband & wife, guardian & ward, master & servant, has [i.e. have] no place between natives & aliens; in short there is no relation between them [native & alien] at all. It does not follow that one is a native of a country, because he is born on its soil. A native citizen is one who is born within the allegiance which his parent owes to the country[,] or [who] has been naturalized there. Laws disabling aliens from holding real property have been superseded in almost ~~every~~ <sup>all</sup> civilized*

*Disability  
of  
Aliens.*

[page 10:]

*countries especially by treaties.*

*Part IV. Lecture XXVI.*

*Domestic Relations.*

*Marriage  
with  
lunatic.*

*Marriage -- Marriage with an insane person is absolutely void, even without a formal proceeding, though [the] peace & happiness of the community or more strictly of [the] family demands a decree of a competent court. If [such] insanity was not known at the time of marriage, the contract is good until it is discovered. In such [a] case [the] marriage is void as to the parties but good as to the third party [i.e. third parties].*

*Polygamy.*

*It is an indictable offense in the U.S. to marry again while the former husband or wife of the party is living. [An] Exception to a criminal punishment is made when a party, husband or wife, remarries, provided the other party though living has been out of the state continually for seven years.*

*7 years'  
absence.*

*Marriage  
with near  
relations.*

*Marriages between near relatives, as those in ascending or descending line[s] or collateral relations are forbidden. A marriage with [a] <sup>deceased</sup> wife's sister is allowed in America but not*

|                                                                 |                                                                                                                                                                                                                                                                                                                                                                           |
|-----------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Consent of parents.</i>                                      | [page 11:]<br><i>in England. If the parties under [the] age of 21 in males &amp; 18 in females marry without the consent of their parents, the statute inflicts [a] fine in [the] U.S. (generally) but does not ge thereby invalidate the marriage.</i>                                                                                                                   |
| <i>Marriage = Status.</i>                                       | <i>The agreement to marry is a contract [while] marriage itself is a status, <sup>^</sup>since whence the marriage is performed the law confers [on] the parties rights &amp; duties[,] &amp; [the] law of contracts has no effects. Thus marriage cannot be dissolved by the mere will of the parties as in contracts.</i>                                               |
| <i>No particular forms requisite.</i>                           | <i>Marriages are regulated by statutes in almost all civilized countries, but no special forms requisite to legalize them are provided by those of [the] U.S. By common law the parties can marry themselves. Thus if they say † “We do marry, [“ or “We shall marry” followed by fulfilment as cohabitation, their marriage is valid without any further ceremonies.</i> |
| <i>Abolition of the distinction between 2 Kinds of divorce.</i> | <i>The distinction between [divorces] a vinculo &amp; a mensa et thoro<sup>n11</sup> has been abolished.</i>                                                                                                                                                                                                                                                              |

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<sup>n11</sup> *Divorce a vinculo matrimonii*, a divorce from the bonds of marriage, released both parties from their matrimonial obligations. *Divorce a mensa et thoro*, a divorce “from table and bed,” was a legal separation releasing the parties from an obligation to live together but entitling neither party to remarry.

[page 12:]

*Divorce is looked upon as affecting [the] public interest & [a] great deal of care is taken of it. To grant dissolution of a marriage, [a] judge must be satisfied beyond reasonable doubt, being allowed to set aside [a] verdict. In this case as in most others, a mere confession or admission is not to be taken.*

*Mere condonation does not affect the right of the condonee.*

*If one condols [i.e., condones] the adultery of the other party it is presumed that he or she does it on the condition that the latter should not repeat the act. When the adulterer commits the same offense again or treats the copartner harshly or cruelly the injured party may set up the former offense as [an] allegation, for the condollation[i.e. condonation] is taken away in this case.*

*Marriage is good till the proof of contrary.*

*All marriages are good until they are set aside, & hence the children born before the decree of nullity are legitimate.*

*Lecture XXVIII (common law)*

*Husband & Wife.*

*Husband & Wife -- The common law doctrine that husband & wife are one person was derived from the civil law which is founded upon the Roman cus-*

[page 13:]

*tom of regarding the head of the family alone & placing the wife on the same footing as his children.*

*No contract between the parties.*

*In pursuance of this doctrine there can be no contract made between the husband & wife, & all contracts existing previously to their marriage are dissolved at the ceremony. Generally*

*Exception.*

*she cannot make a contract with a third party also. The only contract of her[s that is] binding is one made in reference to the release of her dower to the grantee*

*Trustees necessary.*

*of her husband. In order to make contracts & conveyances binding between him [i.e. a husband] & his wife, they must be made through a third party or trustee who can sue or claim on her behalf.*

*Conveyance by Will.*

*[A] Husband can convey property to her [i.e. his wife] by his will, for it takes effect only after their relation has been extinguished.*

*Her Real Property in fee*

*Her Real Estate -- Her [i.e. A wife] enjoys the rents & profits of the estate which belongs to her in fee, during their joint life, but*

[page 14:]

*he [the husband] can continue his enjoyment after her death & during his life if he becomes a tenant by courtesy [i.e., curtesy] by having a child born alive. Her [i.e. A wife] alone can sue [third parties] for the waste committed to the rents & profits, but as to the title itself she & he must join as in all other cases where she is the principal party. She cannot sue her husband. Such land can be taken in execution, but in any case he can dispose of it so as to destroy her right of reversion. If a land is conveyed to husband & wife & others, he & she take but a share of one, so that if the parties are four in number the interest is divided into three parts.*

*Common tenancy of husband & wife.*

*Chose in action only in recovery.*

*As to [a] Chose in Action -- Over this kind of property he [the husband] enjoys exclusive benefit & control, only when he has reduced it into his possession by suit or shows an attempt to do so. If she dies before he has reduced to possession, he can still recover the property as her administrator.*

[page 15:]

*Absolute as to personal property.*

*As to her [a wife's] personal property in possession he [her husband] has absolute control & property without any process.*

*His duties  
Payment of her debts & her maintenance.*

*His duties toward her -- (1.) He is bound to pay her debts. (2.) He must maintain her or must support her with reasonable, necessary, & suitable supply. What is necessary & suitable must be determined in each particular case according to circumstances, & therefore [this] falls within the province of the jury.*

*Liability for necessities supplied her.*

*As to a third party, where nothing is said, [the] presumption in law is that she [a wife] acts with his [her husband's] consent & the third party can recover from her husband. Where it is clearly seen or to be perceived, however, that he does not allow her to contract or act in certain cases the third party must run [the] risk [of non-recovery]. At all events [a] husband is held liable in case of necessities supplied her [his wife], except in a few cases, & this liability of his arises not*

*Liability arises*

|                                                                              |                                                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                              | [page 16:]                                                                                                                                                                                                                                                                                                                                                     |
| <i>from quasi-contract.</i>                                                  | <i>from an implied but from a quasi-contract.</i>                                                                                                                                                                                                                                                                                                              |
| <i>His liability.</i>                                                        | <i>By common law during marriage, husband &amp; wife are charged together [criminally(?)] if she alone is guilty, but if they commit an offense or illegal act, he alone is held responsible. In case she is liable for damages, he has to pay them.</i>                                                                                                       |
| <i>Testimony of either party against the other.</i>                          | <i>They cannot be a witness for or against each other by common law, in both civil &amp; criminal cases, but at present they are enabled by statute to testify in almost all cases either for or against each other. Testimony, however, as to private conversation cannot [be] admitted, although she could not sue alone except for adultery in old law.</i> |
| <i>Parent &amp; Child.</i>                                                   | <i>Parent &amp; Child -- The law of England &amp; of most of [the] American states does not impose upon [a] father the duty of maintaining</i>                                                                                                                                                                                                                 |
| <i>No Comm[on] Law obligation of maintenance by father or [i.e., of] son</i> | <i>his children, though he would be liable<sup>^</sup> under statute if they are in [a] starving condition or obliged to go to work houses. His duties enumerated by [James]</i>                                                                                                                                                                               |



[page 17:]

*Kent*<sup>n17</sup> are moral duties not legal obligations,  
viz. of protection, education, & maintenance.

*Their debts.*

Where [a] compulsory education system is adopted he will be responsible [i.e. held liable] for neglecting their education. In regard to debts, they [children] are put in [i.e., on] the same footing as married women, & he is liable for necessaries supplied them. Custody over them devolves upon their mother after his [their father's] death.

*Exception to habeas corpus.*

The general doctrine of habeas corpus does not allow to put the person rescued from illegal custody under it, into the power of the party who sued out the writ for him or any other persons, for it is taking him out of one restraint & putting [him] under another. But an exception is made as to parent & child, & [a] father may sue out the writ & after delivering [his children] back, they may be placed under his control.

*Action by "next friend" for a minor*

When a minor brings an action the court appoints a guardian called his "next friend," or anybody may sue for the minor.

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<sup>n17</sup> James Kent, Commentaries on American Law (12th ed. by O.W. Holmes, Jr., Boston 1873), lecture 19, vol. 2, pp. 190-217

[page 18:]

*Proof of a  
loss of service  
of child.*

*The doctrine of common law that necessitates the proof on the part of [a] father, that he has lost the service of his children by [an] injury done to them, is contrary to the very origin of the rule, & no reason can be found why an action shall not lie in case injury is inflicted to a baby or infant incapable of any service. If rape is committed upon a female under age, very heavy damages are assessed, for she cannot sue by herself, or [i.e. so the] position <sup>^</sup> of the parties is very different from <sup>^</sup> that of between males or adult women committing an offense against one another in which [the] facility of suing is open to the injured [party].*

*Bastard.*

*Bastard -- No subsequent marriage can legitimize a bastard, but by statute if a child is born after lawful marriage or in other words if the parents marry before he is born, he is legitimate, though born of illi-*

*Subsequent  
marriage.*

*Disability  
to inherit is  
removed.*

*cit communication <sup>^</sup> existing between them originally. [The] Disability of bastard children [forbidding them] to inherit is does not now exist at present, but by statute they can inherit from their mother.*

[page 19:]

*Mother's  
right of  
complaint.*

*She can complain before justices of peace  
for non-support by the alleged father & com-  
pell [i.e. compel] him to make necessary supplies or take  
charge of the child.*

*Lecture XXIV.*

*Father not  
liable for  
torts of his  
children.*

*Parent & Child.*

*By English law [a] father is not liable for  
torts committed by his minor children, & in  
this respect English & American laws differ  
widely from those of Continental Europe. A*

*Law & Equity.*

*difference between law & equity practice is that  
in the former all that [i.e. who] are interested are ex-  
cluded, while in the latter they are made  
parties either to the plaintiff or the defen-  
dant, especially in [the] case of infants.*

*Lecture XXV.*

*Guardian & Ward*

*Guardian  
over a married  
woman.*

*The necessity of appointing a guardian  
in the case of a married woman arises from  
the adverse interests which her husband  
often has or may have.*

[page 20:]

*Various guardians.*

*Guardianship over minors devolves generally upon their father or after his death to their mother. If they acquire property, however, not through their father, a guardian should be & is generally appointed other than their father. In case they acquire property by inheritance also, a guardian is appointed during [the] father's lifetime just as if he were dead.*

*Appointment by court & election of minor.*

*When a child is under 14 years of age [the] Probate court appoints a guardian for it [the child], but above that age, it [the child] may elect his own guardian & in the latter case the court has the power to reject the appointment if the person elected is an improper ~~one~~<sup>man</sup>. If there are the father & a guardian, the former has control over the person, & the latter has to take care of the property, of the minor. It is better to appoint some person of the child's relations who would proceed upon [i.e. upon] from affection than to give guardianship to an entirely disinterested but at the same time strange man held under legal obliga-*

[page 21:]

*tion. (Law & Practise of Probate Court, by Smith.<sup>n21</sup>)*

*Lecture XXVII. (Infancy omitted [Lecture] XXVI.)*

*Master & Servant.*

[A] *Contract between master & servant is that of hiring. According to the statute of frauds, hiring for more than one year must be in writing. Although in contract generally illness is not sufficient to excuse a party from performance, yet in case of personal service sickness is a good excuse for suspension of work. Obligations arising from this class of contracts much depends [i.e. depend] upon local customs.*

*Sickness in personal service.*

*When is the master justified in dismissing.*

*To justify discharge on the part of the master, its cause must be something connected with the duties of his servants. Justification much depends upon the character of service or [the] nature of employment.*

*3 Causes of justifiable discharge.*

[There are] *Three causes which may justify dismissal, viz.: Willful disobedience of the master's orders; Gross moral misconduct; &*

<sup>n21</sup> William L. Smith, *The Practice in Proceedings in the Probate Courts*, 2nd ed. (Boston 1868), pp. 81-84

[page 22:]

*habitual negligence to the injury of master's business. Servants may be justly dismissed if they wilfully disobey their master's orders which is [i.e. are] lawful. Hardship often arises from strict observance of this rule. -- 14 Meeson & Welsby 112<sup>n22</sup> where a servant went off without [his] master's leave to see his sick mother. Also in their gross misconduct as to robbery &c., & habitual negligence, too, which injures his business justify discharge. The same rule applies where they [servants] are impotent to perform the work they promised to do.*

*Injury to Servants.*

*In case servants are injured, they can sue & recover damages for their personal injury, & the master, too, is entitled to a damage for the loss of service occasioned by the act. He cannot recover any, however, if the party who injured them did not know that they are servants of somebody.*

*In case of a man's hiring [of a] carriage[, as to] his liability for acts done by his servants['] driving] see 6 M. & W. 499<sup>n22a</sup> -- 5 Bar. & Cres. 5<sup>n22b</sup>.*

*Hilliard v. Richardson 3 Cush.<sup>n22c</sup>*

<sup>n22</sup> Turner v Mason, 14 Meeson & Welsby 112, 14 Law J. Exch. 311, 153 Eng. Rep. 411 (Eng. Exchequer 1845). In the case, the servant was a female housemaid.

<sup>n22a</sup> Quarman v. Burnett, 6 Meeson & Welsby 499, 151 Eng. Rep. 509 (Eng. King's Bench 1840)

<sup>n22b</sup> Laughler v. Pointer, 5 Barnewall & Cresswell 547, 108 Eng. Rep. 204 (Eng. King's Bench 1826)

<sup>n22c</sup> Hilliard v. Richardson, 69 Mass. (3 Gray) 349, 350 (1855)

[page 23:]

*Torts of servants.*

*Master's Liability for Torts of Servants --*

*[The] Law as to whether a master is liable for the tort of his servants, is very unsatisfactory. It is often very difficult to determine who is the master, who is his servant, & who is an independent contractor.*

*Obligatory taking servant by law.*

*When he is obliged actually to take a particular person as his servant by law, he is not liable for the torts of this servant. But however limited his choice may be, if he can exercise his choice or option at all, he is liable.*

*Optional.*

*Negligence of fellow-servants.*

*A general rule is that the master is not liable to his servant for ordinary risks. He is not responsible, too, for the negligence of co-servants. But who are fellow-servants, the law does not define to certainty at all.<sup>n23</sup> Those who are paid from a common source may be regarded as fellow servants, though their works may differ. [A] Railway corporation presents a most complicated system of co-servants.*

*Who are they?*

*In some of [the] western states, it is held*

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<sup>n23</sup> The much-criticized Fellow Servant Rule, rooted in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 55 (1842), was replaced in the twentieth century by workers' compensation statutes.

[page 24:]

*that all must be in the same position, neither superior nor inferior; but this [broader rule] is so in Mass[achusetts] and England, in the former of which, however, the rule is too much extended. It holds, for example, that one of co-servants cannot recover damages against another who has ~~caused~~ <sup>inflicted</sup> injury upon him.*

*2 Cases.  
Master is liable  
for torts of his  
servants.*

*There are two cases where the master is liable for the injury done by his servants [to fellow servants]. (1) Where he gives them bad instruments. (2) Where he employs incompetent employees.*

*Liability  
of city  
corporation.*

*A city corporation would not be held liable for any torts committed by its employees, unless the action is strictly within the statutes. It would not be responsible, therefore, for the negligent acts of the driver of a fire engine, &c.*

*For criminal  
acts, servants  
themselves  
[liable].*

*For criminal acts servants shall be always liable. In civil cases, too, they are sometimes liable themselves, though in general the master is sued ~~upon~~ <sup>against</sup>, for there is, then, a better chance [to recover damages].*



[page 25:]

*In England there are many statutes concerning this topic but only few in the U.S. & individual states. There are, however, statutes as to embezzlement.*

*Part V.*

*Lecture XXXIV.*

*Law of Personal Property.*

*What is essential to a complete title?*

*Property, whether real or personal, must be in possession to establish a complete title over it. Thus if an innocent person bona fide purchases property stolen by a thief, he has a good title against [anyone except(?)] the original owner.*

*The universal principle nowadays is that no man can be deprived of his property without his consent or can have it without a good title.*

*Purchase in a market overt*

*The rule, that purchase in a market overt gives a title good against everybody else, was true in*

[page 26:]

*olden times when communities were generally small, & it would be very hard to [be] the loser of property in a large modern city like London that is still considered as a market overt. The application of this rule is very much limited in the U.S.*

*Property ceases [i.e. ceased] at the death of a tenant in the feudal times.*

*Meanings of the term "Real"*

*The word "real" has two meanings; one is derived from the Latin word "res" that means anything real or personal; & the other is land or ground in distinction from personal property that can be carried about.*

*Equality of taxation practically impossible.*

*Everyone should be protected in his enjoyment of his property & so [a] tax should be fair[,] equal or proportional. But in [a] practical point of view it is impossible, & no system has yet been devised, to make taxation absolutely fair &*

[page 27:]

*proportionate, the only way being by approximation.*

*Rule as to putting things on one's land.*

*The general rule is that if a man builds or puts on anything on my land, that [thing] belongs to me, but the man is entitled to the benefits he conferred, unless he is a wrongdoer. It is very hard, however, if the jury, in estimating the amount of benefits which is generally measured by the increase of the value of property, should look to the increase of value alone, because it does not follow that spending much money increases the value so much. -- 19 109 Mass. Metallic Casting Co. v. Fitchburg RR. Co.<sup>n27</sup>*

*Kinds of Property.*

*Several Kinds of property -- It is divided into "real" & personal; real is land & things fixed to it, & personal includes all the rest.*

*Real & Personal.*

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<sup>n27</sup> *Metallic Compression Casting Co. v. Fitchburg Railroad Co.*, 109 Mass. 277, 280, 12 Am. Rep. 689 (1872)

[page 28:]

- Chattels.*           *Chattels -- They are also either real or personal.*
- Chattels Real*    *(1) Chattels Real or Fixtures --*  
                       *A Chattel Real or fixture is a thing that has something to do with land. All movables are personal.*
- Deeds.*           *But deeds & (bonds) & boxes that contain them are considered as chattels real.*
- Law of*  
*Fixtures.*        *The law of fixtures is very complicated. Fixture originally means a thing that is fixed to land & cannot be removed. But now nearly many things that are fixed to a house can be removed, the relation being made in favor of trade, provided that [removal] causes no damages to the house & they were put for temporary purposes, with intent to take them away. This relation is now extended beyond trade.*  
                       *The law of fixtures is a derogation of common law.*

[page 29:]

*Whether the removal of a fixture would cause damage or whether it was put on with [a] purpose to remove [it] or for [a] temporary purpose, is a question for the jury.*

*Fixtures must be removed before the end of lease.*

*Whatever fixtures a tenant can remove, he must take them away before the termination of the lease, or else he could not have them.*

*Favor of Trade.*

*As to articles of trade or fixtures put up for the purpose of trade, the law is more liberal than [(transposed): in regard to] those concerning agricultural purpose[s]. [The] Tendency is, however, toward extending the same favor toward the latter.*

*Between whom questions arise?*

*Questions as to fixtures mostly arise between executors & heirs, & landlords & tenants, [the] law always looking with favor to heirs & tenants.*

*Absolute*

*The definition of absolute*

[page 30:]

*Property*                    *property -- to "a full & complete title & dominion over it", is very imperfect, because every property is more or less qualified or restricted by law.*

*Qualified Property.*        *It can hardly be said that a person has a qualified property over air & light, because they are not subject to private property, though an indictment would lie against corrupting air as by a slaughter-house. The English doctrine that every person has [a] right to light has never been applied in the U.S. A man might, however, have qualified property over a running water, being a tangible property, which he may use in any way he likes, provided he does not destroy its purity.*

*Law as to property over tamed animals comes from that*

[page 31:]  
of larceny.

*Wild beasts.*

*The general rule as to wild beasts is that a mere pursuit does not give the pursuer any property over them. But an exception has been made in case*

*Whale fisheries.*

*of whale fisheries, where if a boat thrusts a spear to a whale & [a] string from it reaches, or within a certain distance from, the boat, the boat has property over the whale. If the fish disappears & goes beyond the limit, it becomes common property again.*

*Choses in action --*

*Personal prop[erty] subject to remainder.*

*Choses in action are right[s] in action. Personal property like land can be made subject to remainder. If the property given is of such nature that it is necessarily consumed[,] as bread [is], the gift is construed to be absolute. But if it is of fluctu-*

[page 32:]

*ating value, the general usage is to  
sell it and invest the proceeds, the  
grantee enjoying interests [i.e. income] thereon  
accrue<sup>due</sup>, while the principal goes  
to the remainderman unrepaired [i.e. unimpaired(?)].*

*Lecture XXXVH XXXVI*

*Title over Personal Property.*

*Right of a  
finder*

*A finder of a lost property  
has no title over it nor is he  
entitled to any reward or to  
recover his expenses for taking it  
up, because he is under no  
obligation to pick it up. If  
the owner of the property offers  
a reward, however, he [the finder] can claim  
it, or recover the cost of adver-  
tisement. He [The finder] is apt to be  
charged with larceny if he keeps  
it or picks it up with intent  
to keep it for himself.*

*Salvage*

*But those who save a  
ship in distress or floating [adrift] on [the]  
sea or any goods therein, are*



[page 33:]

*entitled to a reward for their service by law, & this is called salvage.*

*Treasure trove*

*The doctrine of [the] king's [right to treasure] trove is founded on customs of ruder ages, when, as is usual under a tyrannical government, people [were] disposed to conceal any treasure or property which they found buried in the ground.*

*Accession of land by water:*

*Title by Accession -- Accession of land by alleviation [i.e., accretion], takes place only where land is added by a gradual change of the course of a river or sea, not by any sudden alteration as flood [or avulsion].*

*Identity is the basis of recovery of property.*

*It is a general rule of law that whenever a man can trace his property he has title over it & can recover it, no matter w how many hand[s] [it has] been transferred through, provided always [that] its identity can be*

|                                                                             |                                                                                                                                                                                                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                             | [page 34:]                                                                                                                                                                                                                                                                                                                                                                              |
| <i>Money ex-<br/>cepted.</i>                                                | <i>be [i.e. be] established This does not, however,<br/>apply to money.</i>                                                                                                                                                                                                                                                                                                             |
| <i>Identity des-<br/>troyed by acci-<br/>den[t] or inten-<br/>tionally.</i> | <i>The same rule does not<br/>apply where mixture is done or<br/>identity is destroyed intentionally,<br/>as where it is done accidentally.<br/>In the latter case the owner<br/>cannot recover the specific pro-<br/>perty but he can in the former.<br/>If identity is destroyed by another<br/>by negligence, the effect will be<br/>the same as in case of wrongful<br/>intent.</i> |
| <i>Transfer of<br/>title by act<br/>of law.<br/>6 heads.</i>                | <i>Lecture XXXVII.<br/>Transfer of Title by Act<br/>of Law. -- (Personal Property.) --<br/>Goods &amp; chattels may<br/>change owners by act of law<br/>in the cases of (1) forfeiture, (2) suc-<br/>cession, (3) marriage, (4) judgment, (5)<br/>insolvency, &amp; (6) intestacy.<br/>In all these cases title<br/>passes without or often against the</i>                             |

[page 35:]

*consent of the owner, contrary to a general rule.*

*Forfeiture.*      *Forfeiture takes place only in treason[,] & its effect is limited to the life of the wrongdoer.*

*Judgment.*      *Judgment of execution does not transfer title to property but only declares the original owner to be the true & legitimate one. In case of trover, e.g.[,] title passes not by judgment, but by the payment of damages which are [the] value of the property.*

*Bankruptcy & insolvency.*      *Bankruptcy & Insolvency -- By the constitution, U.S. has the power to pass a uniform rule or law of bankruptcy.<sup>n35</sup> The difference between bankruptcy & insolvency in regard to U.S., the latter is used in relation to states.*

*No imprisonment for debt alone.*      *No man is to be imprisoned merely for debt, unless*

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<sup>n35</sup> U.S. Constitution, article 1, section 8, clause 4

[page 36:]

accompanied by [a] charge of fraud.

*Intestacy.*

*Intestacy --*

*Originally the goods of an intestate went to the king as the general trustee, but this right is now vested upon those who are more disposed to a faithful execution of the trust.*

*Various kinds of administrators.*

*There are various kinds of administrators. An administrator de bonis non is one who is appointed in the place of an administrator who died before disposing of the deceased's personal property, or ~~with~~ jointly with the another administrator living. An administrator next to will [i.e., with will annexed] is <sup>one</sup> appointed in [the] absence of [an] executor tho[ugh] named, though there is a will, & exercises the same powers as the latter. An administrator by special appointment is one designated when no wife or husband, nor next of kin or creditor offers to administer, int<sup>in</sup>*

[page 37:]

*order to collect & keep safe the effects of the intestate[,] but has no power to sell. Also there is ~~an~~ one appointed when land is situated in another state & ~~an~~ the intestate made a will there.*

*Order in granting administrators.*

[The] Usual order in appointing [an] administrator is (1) Wife or husband [of the intestate]; (2) Next of kin [i.e.] father, son, & like, (3) Creditors. But the court of probate has large power[s] of discretion of selecting one or more in equal degree.

*Duties of administrators.*

Administrators are obliged to give bonds attested by sureties to pledge the faithful execution of his [their] office, & to distribute equally among the next of kin surplus of the deceased's property except where [a] husband is an administrator [of his wife's estate]. Third persons cannot sue upon those bonds without a permission of the probate court. [A] Judge of this

[page 38:]

*court can renew bonds on application.*

*No power  
over land.*

*Administrators have no concern  
with real estate & can only me[d]dle  
with it on application to & per-  
mission of the probate [court], in case of  
insufficiency of personal assets. But  
Executors have certain powers over  
land, so far as directed in will[s].  
They must make [an] inventory of goods,  
& give account for their disposition  
after a certain time.*

*Actions of  
tort do not  
generally sur-  
vive.*

*Causes of action arising ex  
delicto, for wrongs for personal in-  
juries[,] die with the person &  
do not survive against his  
representatives. Damages in action[s]  
of tort cannot be recovered by  
or from administrators, by common  
law. But replevin, assault,  
& battery are made to survive  
by statutes.*

*Statutory Modi-  
fications.*

*Person  
instantly killed.*

*If a person is instantly  
killed no action ~~br~~ can be brought*

[page 39:]

*by his representatives or even [by his] widow;*

*[although] the other party may be indicted.*

*If, however, the damage is below*

*\$5,000, the next of kin may sue*

*the wrongdoer.*

*Distribution  
of personals.*

*Personal property is distributed according to the law of the state where the owner lives or resides, but real estate by *lex loci rei sitae*.<sup>n39</sup>*

*When [both] father & daughter die at the same instant, or by the same accident, neither is supposed [i.e., presumed] to survive the other & property goes to the relatives of [the] one having the stronger claim.*

*Lecture XXVIII.*

*Gift  
2 Kinds*

*Title to personal property passes by gift & contract.*

*Delivery.*

*Gift is either *inter vivos* or *causa mortis*. In <sup>both</sup> cases[,] ~~of~~ delivery is essential to make a valid & complete gift. But there*

<sup>n39</sup> i.e., "law of the place where the property is situated"

[page 40:]  
*need not be actual handing [over] but  
 it is sufficient if delivery is such  
 as is regarded to be sufficient  
 by law. Whether [a] gift is valid or  
 not, though delivery is made, depends  
 much upon the right of creditors.*

*How far is [a]  
 gift void as  
 against  
 creditors.*

*A gift is void as against creditors  
 so far as the amount of their  
 claims go & no more.*

*Lecture XLI.*

*Agency --*

*Agency.*

*A large proportion of busi-  
 ness in all civilized countries is  
 carried [on] by agency.*

*Old maxim,  
 how far true.*

*Though the maxim that  
 whatever persons of sui juris<sup>n40</sup> can  
 do themselves, may be done through  
 their agents, is true, yet it is also  
 true that whatever minors, mar-  
 ried women, idiots, & lunatics  
 can do, can be done through  
 another.*

*General rule.*

*A general rule is that*

---

<sup>n40</sup> i.e., having full legal rights of capacity, not under any disability, guardianship or power of another



[page 41:]

*whatever he has [a] right to do for himself or as his own business, he ~~has right~~<sup>can</sup> have it done through another.*

*Exception.  
No subagent.*

*But one important exception to this rule is that an agent cannot appoint another his agent[,] or delegated power cannot be delegated again. This maxim was, however, adopted in olden times & often [is] inapplicable to the modern state of society, commerce, & civilization.*

*Best rule as to subdelegation of power.*

*It seems to be a rule, probably without an exception, that wherever delegated power involves the exercise of discretion, that power cannot be delegated again.*

*What is meant by authority?*

*Whoever is competent to act for the benefit of his own can employ another in his place to do the same, & those*

[page 42:]

*who are thus employed are called agents, attorneys, & the like. The power given to them to act in such manner as he allows or wishes them to, is their authority.*

*Who can be the pr[incipal]?*

*Who are capable of becoming Principals? --*

*A general rule is that whoever is of sui juris & has power to act for himself may become a principal, unless forbidden by law. Infants, however[,] may become principals whenever their contracts are for their benefits, & married women in most cases.*

*Who can be Agent?*

*Who are capable of becoming Agents[?] --*

*All persons almost without exception can be agents. Minors may become agents of their parents & married women of their husbands. Even outlaws may.*

*Naked authority.*

*[A] Naked authority is one*

[page 43:]

*unaccompanied with any interest in the transaction which a person makes for another; & thus he is indifferent whether the business yields profits or not. And all those who are delegated with a naked authority, [such] as minors & married women, incur no liability upon themselves, for acting in the place of another.*

*Adverse interest operates how?*

*Although any person may become an agent, yet he cannot take up a delegated authority, when he has an adverse or incompatible interest. Thus one cannot buy the goods belonging to himself or cannot be a buyer & seller at the same time, nor can one in a fiduciary relation with another make any dealing or bargain with the latter or the principal, as guardians.*

*When can [an] agent*

*Though an agent cannot*

[page 44:]

*appoint a  
subagent.*

*generally appoint his agent, yet he  
may where an express authority is  
given by his principal for that  
purpose.*

*Kinds of  
agency.*

*Different Kinds of Agency --*

*Special.*

*1. Special Agency -- It is  
strictly where there is a delegation  
of authority to do a single  
transaction.*

*General.*

*2. General Agency -- It is  
where [a] delegation of authority is to  
~~do~~ carry on a particular branch of busi-  
ness with the power to do every-  
thing that is necessary <sup>for</sup>, & falls  
within the scope of[,] the transaction.*

*Broker.*

*Broker --*

*Who is he  
strictly.*

*Strictly speaking he is an  
agent contracting between other  
parties or [is a] go-between of [i.e. for] two parties  
other than himself. But like  
other agents he can bind himself  
& often does so, & it is therefore  
important to discriminate whether*

[page 45:]

*he acted as a broker or contracted for himself. A broker ought<sup>to</sup> contract in the name of his principal & whenever he uses his own name, he is no longer a broker.*

*Bought & sold notes*

*Story's statement<sup>n45</sup> of notes given by a broker ought to be reversed, i.e., it ought to be a bought note to the buyer & a sold note to the purchaser [should be: seller?].*

*Factor.*

*Factor --*

*His liability*

*He is a usual commission merchant & when he sells on credit, he is said to contract [on a] del credere commission<sup>n45a</sup> or [i.e. whereby he] guarantees the principal of [i.e. as to] the ability of the purchaser to pay. He is not liable on the first instance usually, but only when the ~~set~~ buyer fails.*

*His authority.*

*He has a right over the*

<sup>n45</sup> Joseph Story, Commentaries on the Law of Agency (8th ed., rev. with additions by N. St. John Green, Boston 1874) §28, p. 34

<sup>n45a</sup> A del credere commission is an additional commission undertaken by an agent for the seller of goods, promising to sell only to buyers who are absolutely solvent.

[page 46:]  
*goods[,] more than a lien[,] called [an]  
 authority coupled with an interest;  
 & the pr[incipal] cannot sell them  
 without satisfying him.*

*Partners.*

*Partner --*

*He acts not only as an  
 agent for another, but also for  
 himself & so he has a double  
 interest.*

*Joint & Several  
 Agents.*

*Joint or Several Agent --*

*Originally by common law  
 whenever two or three persons are  
 constituted as joint & several  
 agents for a certain purpose they  
 cannot bind the pr[incipal] except by  
 their joint execution. But this  
 has been broken by commercial  
 necessity & one can now bind  
 the pr[incipal] as well as all together.*

*Two persons  
 having distinct  
 interests.*

*One of  
 ^ two persons having each  
 a distinct interest, however, can-  
 not appoint an agent for the  
 other.*

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                  |
|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                        | [page 47:]                                                                                                                                                                                                                                                                                                                                                                       |
| <i>How appointed?</i>                                  | <i>Appointment of agent. --<br/>Generally an appointment<br/>of an agent need not be in<br/>writing.</i>                                                                                                                                                                                                                                                                         |
| <i>Agent's saying<br/>affects the<br/>pr[incipal].</i> | <i>What an agent says<br/>is an evidence against his<br/>pr[incipal], provided it relates to<br/>the matter of [the] agency, &amp; [it is said]<br/>while he is acting in<br/>this capacity. The rule<br/>applies in case of fraudu-<br/>lent &amp; negligent sayings.</i>                                                                                                       |
| <i>Note given by<br/>agent.</i>                        | [A] <i>Note given by [a] director of<br/>a company was held to be<br/>that of the corporation. --<br/>3 Hun. &amp; Norm. 176<sup>n47</sup>; Contrary -- L.R.<br/>6 Q.B. 659<sup>(1)n47a</sup><br/>[A] Recent tendency is<br/>towards the personal liabi-<br/>lity of the agent. -- 106<br/>Mass. 562; <sup>n47b</sup> 32 Me 327; <sup>n47c</sup> 59 Me. 172. <sup>n47d</sup></i> |
| <i>When authority<br/>coupled with<br/>interest.</i>   | <i>When [an] authority is<br/>coupled with [an] interest, he</i>                                                                                                                                                                                                                                                                                                                 |

<sup>n47</sup> *Lindus v. Melrose*, 3 Hurl. & Nor. 177, 178, 157 Eng. Rep. 434 (Exch. Ch. 1856 or 1858)

<sup>n47a</sup> *Dutton v. Marsh*, L.R. 6 Q.B. 361 (1871)

<sup>n47b</sup> *Carpenter v. Farnsworth*, 106 Mass. 561, 563 (1871)

<sup>n47c</sup> *Plummer v. Sturtevant*, 32 Me. 325, 327 (1850)

<sup>n47d</sup> *Sturdivant v. Hull*, 59 Me. 172, 178, 8 Am. Rep. 409 (1871)

[page 48:]  
*may use his own name  
 in a note without vitiating  
 it. 6 Cush.<sup>n48</sup> may be cor<sup>doubted</sup>.  
 When [an] agent has  
 done more or less than  
 he is authorized, [the] rule  
 is not certain whether  
 such transactions are void  
 or not, i.e., no absolute  
 rule can be laid down  
 but [the] decision must be  
 made according to each  
 particular circumstance.*

*Degree of  
 negligence &  
 diligence.*      *[The] Degree of negligence  
 or diligence existing in  
 law may be doubted, for  
 this is purely a question  
 for the jury.*

*Agent cannot*      *[An] Agent is liable for  
 his act done in violation  
 of his duty & [for the] consequences  
 of his negligence.*

*He cannot set up*

<sup>n48</sup> Wood v. Goodridge, 60 Mass. (6 Cush.) 117, 122 (1850)



[page 49:]

*set up benefit  
he conferred  
against the  
pr[incipal], as a  
defense.*

*as a defense against an  
action by the pr[incipal] that  
the latter has received  
more benefit than the  
damage done in this  
particular transaction; i.e., he  
cannot balance the  
benefit he conferred upon  
the pr[incipal] with the damage  
he has done.*

*The pr[incipal]  
can follow his  
property so  
long as he can  
trace.*

*The pr[incipal] can follow  
his property into whoso-  
ever hands it may  
have passed after a  
wrongful transfer made  
by his agent, so long  
as he can trace &  
identify it. This may  
be the case with money.*

*The pr[incipal]  
& agent may  
limit their  
liabilities by  
agreement.*

*The pr[incipal] & agent  
may limit their respec-  
tive liabilities as among  
themselves by special contract*

[page 50:]

*but in the absence of any such contracts between them they are subjected to the common law liabilities. -- telegraph companies & common carriers [have special rules in this regard].*

*They cannot sue on immoral contracts.*

*They cannot sue each other if the contracts are of [an] immoral character or [are] against public policy.*

*Ratification of illegal acts.*

*Doctrine of Ratification. A man cannot ratify the illegal act of his agent as[, for example, a] forgery. -- L. R. 6 Exch. 98.<sup>n50</sup> The contrary is maintained, however, in -- 46 Me. 176,<sup>n50a</sup> 4 Allen 447.<sup>n50b</sup>*

*Ratification may be implied.*

*Ratification? -- Except in case where the act of agent requires authority under seal & ratification also ought to be*

<sup>n50</sup> Brook v. Hook, L.R. 6 Exch. 89, 98 (1871)

<sup>n50a</sup> Forsyth v. Day, 46 Me. 176, 194 (1858)

<sup>n50b</sup> Greenfield Bank v. Crafts, 86 Mass. (4 Allen) 447, 456 (1862)

[page 51:]

*under seal, ratification may  
be & is generally inferred  
from the act of the pr[incipal].*

*Agent's liability  
to a 3rd person.*

*Agents' liabilities to a  
3<sup>rd</sup> person. --*

*Disclosure or  
non-disclosure  
of agency.*

*If a man professes  
to act as an agent of  
another & is really so  
he is not liable. But  
it must be remembered  
that he can make him-  
self liable if he wants  
to, just as the pr[incipal] is liable.*

*If he does not  
disclose his agency, however,  
he [the agent] himself is liable[,] &  
in general the pr[incipal], too,  
is liable, if the 3rd per-  
son chooses to sue the  
pr[incipal].*

*To whom credit is was  
given, if given at all,  
is a question for the jury.*