# Chapter 6

## The Legal Nature of Debt, Continued

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## CHAPTER VI.

## THE LEGAL NATURE OF DEBT. - (CONTINUED.)

SOME persons may not have been convinced, by the arguments already offered, that debt is but a bailment. The doctrine is also too important to be dismissed without offering all the arguments that go to sustain it. Some further explanations of collateral questions are also necessary. These additional arguments and explanations have been reserved for a second chapter, for the reason that, to many minds, I apprehend, they will be unnecessary, and therefore tedious; and for the further reason that the matter will be simplified by presenting them separately from those in the preceding chapter.

There remain two lines of argument, which go to prove the same point, to wit, that debt is but a bailment-and which, for the sake of distinctness, will be presented separately. It will be impossible, in presenting them, to avoid entirely a repetition of some of the ideas already expressed.

FIRST ARGUMENT.

In order to get at the true nature and obligation of debt, it is necessary to consider that a promise to pay money is of no *legal* importance, except as *evidence* of debt. It does not, of itself, create the debt. It only aids to prove it.

Neither do the true nature and obligation of debt consist in, nor even rest at all upon, the merely *moral* obligation of a promise to pay. A naked promise to pay money is of no obligation, *in law,* however sincere may have been the intention of

the maker to fulfill it. The *legal* obligation of debt never arises from the fact that a man has made a promise to pay money. It is entirely immaterial to the validity of a debt, whether the debtor have made any promise or not. The debt does not arise from the promise; the promise is only given as evidence of the debt.

The legal obligation of a debt, then, is something entirely distinct from the moral obligation of a promise, or the moral obligation to keep one's word. The promise is given merely because the debt is dime, and as evidence that the debt is due. It is no part of the legal obligation of the debt itself.

If a promise be made when no debt is due, the promise is of no importance in law. On the other hand, if a debt be due, and no promise have been given, the debt is equally valid, as if a promise had been given. These facts show that the promise is nothing material, either to the existence or to the obligation of a debt. A debt may be created without giving a promise; and a promise may be given without treating a debt.

In order, therefore, to get at the true nature of debt, it is necessary to separate it entirely from the idea of a promise. It is this false idea of the legal obligation of a promise, that interposes itself before our minds, and prevents our seeing the true nature and obligation of the debt.

But it is said by the lawyers, that when a man has "received value," as a "consideration" for his "promise," his promise is binding. But it is an entire misstatement of fact, and conveys wholly erroneous ideas of the nature of debt, to say that the debtor receives value, as a consideration for his *promise.* A man never pays a consideration for a *promise-for* a promise, as we have seen, has, of itself, no legal obligation, and is of no consequence to the validity of a debt. To say, therefore, that a man pays a consideration for a *promise,* is equivalent to saying that a man pays his money for nothing-for that which has no value of itself, and is of no legal obligation.

If, then, the creditor do not pay "value" to the debtor as a consideration for the debtor's *promise,* for what does he pay it to him? Obviously as the consideration, or price, of the *thing promised-* that is, as the price of the equivalent, which the debtor sells to him in exchange. If, for instance, A sells to B a horse for an hundred dollars, and takes B's promissory note therefor, he does not sell the horse for the note, but for the hundred dollars; and he takes the note merely as evidence that he

has bought the hundred dollars, and paid an equivalent (or value) for them, *and that they are therefore now his,* by *right of property;* also as evidence of the time when they are to be delivered to him.

This brings us to a perception of the fact, that the "value received" by the debtor from the creditor, and the sum, or value, which the debtor 'promises to pay or deliver to the creditor, are merely equivalents, which have been mutually sold or exchanged for each other.

If these equivalents have been mutually sold, or exchanged for each other, each equivalent has bought and paid for the other; and, of necessity, the right of property in each equivalent passed to *its* purchaser, at the same time that the right of property in the other equivalent passed to *its* purchaser - that is, at the time of the contract.

But that, which makes one of these parties the debtor of the other, when there has been merely an exchange, or a mutual purchase and sale of equivalents, between them, is simply this, viz., *that the value, which is sold by one of (he parties to the other, is, by agreement, to remain, for a time, in the hands of the seller, for his use.*

A debtor, therefore, is one, who, having sold value to another, *and passed the rig/a of property in it to the purchaser,* retains it for use until a time agreed upon for its delivery. At the end of this time, the creditor can claim this value, *because it is his,* he having previously bought it, and paid for it-and *not* because the debtor has *promised* to deliver it at that time. The debtor's promise to pay, or deliver, this value to the creditor, at the time agreed upon, is not of the essence of the contract, by which the creditor acquired his right of property to the value promised; and it is of no importance whatever except as evidence that the value, thus promised to be paid, or delivered to the creditor, has been already sold to him, paid for by him, and now belongs to him; and that the debtor has no right to retain it, for use, beyond the time when he has promised to deliver it. The promise, therefore, instead of being evidence that the right of property, in the value promised, has *not* passed to the creditor, is only evidence that it *had* (in point of law) passed to him before the promise to deliver it was made.

The right of property, in, the value to be paid by the debtor, *must* have passed to *its* purchaser, the creditor, at the same time that the right of property, in the

"value" paid by the creditor, passed to *its* purchaser, the debtor-that is, at the time of the contract; else the *creditor* would have parted with his "value," or property, (that which he paid to mite debtor,) without receiving any equivalent for it. He would merely have received a promise, which, as we have seen, is of no legal value, of itself, and could be used only as evidence. And it could be used as evidence only to prove that the creditor had paid value to the debtor in exchange for an equivalent; that he had thus bought the equivalent; and that lie was then, of course, the owner of the equivalent thus bought and paid for- notwithstanding it wore still remaining in the hands of the debtor.

The promise, therefore, would be of no avail, even as evidence, unless the right of property in the value promised to be paid, or delivered, had already passed to the creditor- for that is the only fact, (in case of debt,) which the promise can be used to prove.

But perhaps it will be said, (and this is all that can be said on the other side,) that the promise, and the acknowledgment of the receipt of value, by the debtor, maybe used to prove that the creditor has paid value to the debtor in exchange for an equivalent, which the debtor was to deliver, or pay, to the creditor at *a future* time. True it may; it can be used for that purpose, and no other. But that is, in reality, only asserting, instead of contradicting, what has already been stated, viz., that the promise may be used to prove that time creditor has bought value of the debtor, and paid for it; and that it, (the value thus bought and paid for,) is therefore now his, (the creditor's,) *by right of property,* and has been his ever since he bought and paid for it, to wit, ever since lie paid his value to the debtor-for (as has before been mentioned) it is absurd to say, when a man has bought and paid for a thing, that he does not own it, (has not the right of property in it,) merely because it was left for a time in the hands of the seller.

The essential error in the common theory of debt, is, that it supposes that the creditor acquires no *present* right of property-at the time the contract is made, or at the time he pays *his* value to the debtor-in the equivalent which the debtor promises to pay or deliver to him; that lie only acquires a right of property in this equivalent when it is finally delivered, or paid to him-which may be days, months, or years after he has really bought it and paid for it. It supposes that he pays *his* value to the debtor, and passes his right of property in it to the debtor, without at

the time acquiring, in return, any equivalent right of property in the value which the debtor is to pay, or to deliver to him.

This error results, in part, in this way, to wit; because the value sold by the debtor to the creditor, is, at the time of the sale, merged in the whole value of all the debtor's property, amid is to remain so merged until it is finally separated and converted into money, for the purpose of delivery, we overlook the fact, that the right of property in it has nevertheless as much passed to the purchaser, (that is, to the creditor,) as if it were already separated from the mass of the debtor's property, and delivered to the creditor.16

This error is further strengthened by our confounding, in the first place, the idea of a promise, and the obligation of the debt; and, in the second place, the right of property, and the delivery of the property itself. The promise, and the obligation of the debt, as we have already seen, are entirely distinct matters. So also the right of property, and the delivery of property, are entirely distinct matters. Neither depends at all upon the other.17 The right of property is acquired when it is bought and paid for; the delivery only gives the owner the *possession* of what was already his. A creditor, therefore, acquires a right of property in the value promised to him, at the time he pays *his* value for it- whether the actual delivery or payment of the value promised takes place at that time, or months, or years afterwards. If this were not so, the creditor, during the whole period, between the time when he pays *his* value to the debtor, and the time when the debtor finally delivers or pays to him the equivalent value, is without any right of property at all, either in the value he has parted with, or in the value that he is to receive for it. And if he has no rights of property, during all this time, to either of these values, he has, of necessity, no rights at all in reference to them; *and never can have by virtue of his contract.* He only holds a promise, which could be used as evidence of his rights of property, if lie had any such rights; but which, on the theory that he has lit) such rights, can be of no use whatever.

If it be now established, that the value paid by the creditor to the debtor, and the value promised by the debtor to the creditor, are merely- equivalents, that are mutually bought and sold for each other; and if it be also established that the right of property, in each of these equivalents, passes to *its* purchaser, at the same time that the right of property in the other equivalent passes to *its* purchaser, to wit, at

the time of the contract, instead of at the time of delivery, these facts furnish us with an explanation, or definition of the true legal obligation of a debt. They define this obligation to be the obligation of a seller to preserve for, and deliver to his purchaser at a time agreed upon, value, which he has sold him, and the right of property in which has already passed to him.

If this definition be correct, a debt (or sum due) is merely an amount of value, which has been sold by one person to another, and is to be delivered to him at a time subsequent to the sale. And a debtor is merely one, who has sold value to another, but retains the custody and use of it for a time after the sale, and is bound to deliver it to the purchaser, on demand, or at a future time agreed upon.

If these definitions of debt, debtor, and the obligation of a debt, are correct, they prove that from the time the contract (by which the debt is created) is entered into, up to the time the value due is to be delivered, the debtor is the mere bailee of the creditor; for a man, who continues to hold property, that he has sold to another, is merely the bailee of the purchaser; lie is the mere holder, user, and hirer of the value, which he himself has sold, but not delivered; and all the necessary consequences of bailment follow; and the legal principles of bailment apply. One of these principles, as has before been stated, is that if (lie property bailed he lost or injured during the bailment, without any fault or culpable neglect on the part of the bailee, the loss falls on the bailor, or owner.

SECOND ARGUMENT.

It is a principle of natural law, that a contract for the conveyance of property is void, unless there be property owned by the maker, for the contract to attach to, *at the time it is* made. If, for instance, A should give to B, a deed of a farm, which A did not own, the deed would be void. It would convey no rights to B, simply because A owned no such farm for the contract to attach to - or, what is the same thing, because it is, in the nature of things, impossible that he could convey to B any rights, which he did not himself possess. And even if A should afterwards become the owner of the farm, the deed that he had previously given of it to B, would give B no title to it. To convey the farm to B, a new deed would have to be given, simply because, at the time the first deed was given, A had no right of property in the farm, for his contract to attach to and convey. His first deed being void, at the time it was given, it could never afterwards be made a legal conveyance of rights

subsequently acquired.

Again. If A should make a contract, purporting to convey to B his (A's) right, as heir, in his father's estate, while his father was yet living, the contract would be void, simply because, while his father was living, he had no right, as heir, in his estate. And even after his father should have died, and he should have become heir to his estate, B could not hold it under any contract that had been made prior to A's becoming entitled as heir-all for the simple reason, that at the time the contract was entered into, there was no legal right or property in A, for his contract to attach to and convey. And if it attached to nothing at the time it was entered into, it never could attach to anything. No contract, that a man can enter into at one time, can, in the nature of things, be made a legal conveyance of any rights which he did not then possess, and which he should only acquire subsequently.

If A were to give to B, a bill of sale of a horse, which he (A) did not own, B would acquire no rights to the horse by it; simply because A had, at the time, no ownership, or right to the horse, that he could convey. And even if A should afterwards become the owner of the horse, B could not hold him, or claim him, under the bill of sale that had been previously given-solely for the reason that, as there was no right of property, in A, to the horse, at the time the bill of sale was given, the contract was void. It conveyed nothing, because the maker of it had no rights that his contract could convey. There was nothing for the contract to attach to. The contract being void at the time it was entered into, nothing that might happen afterwards could make it a valid conveyance of rights subsequently acquired. B could then get the horse only by a new sale, or a new contract, to be made after A had become the owner of the horse.

In all these three cases, that have been named, where the sale proved void, for Want of any right in A to the thing purported to be sold, B could recover back his consideration money, on the ground of its having been paid without any equivalent, or value received. And in an action to recover it, he could use the deed, bill of sale, or other contract, as evidence that he had paid the consideration money; but the contract itself would convey him no rights, either to the land, the inheritance, or the horse, simply because A, at the time of making the contract, had no rights that lie could convey. And B would recover his consideration money, *solely because the grant or contract had conveyed him no rights.*

These cases are put simply to illustrate the principle, that a contract, for the conveyance of property, is void, and conveys no rights whatever to the grantee, unless the grantor be the possessor, at the time the contract is entered into, of the rights his contract purports to convey. Any subsequent ownership, that lie may acquire, is not transferred to the grantee by any contract made previous to his becoming the owner. There being, in the grantor, at the time the grant is made, no such rights as the contract purports to convey, the contract is void, inoperative; and being void at that time, nothing can give it validity at a future time. It can only be used as evidence that the grantee has paid his money without consideration, and ought to recover it back. And if he wishes to acquire the specific property contracted for, whenever it may afterwards happen to come into the hands of the grantor, he must do it by a new contract-the old one being absolutely inert, lifeless, invalid, *for any purpose of a conveyance.* And it is equally invalid, so far as any conveyance of rights is concerned, whether the grantee have actually recovered his consideration money, or not. It may be useful, as evidence, to enable the grantee to recover the motley lie has paid; but it is incapable of any validity as a conveyance.

The force and justness of this principle will be more clearly seen, when it is considered what a contract really is. It is merely a consent, agreement, assent- a mere operation of the mind. The written instrument, called a contract, is only the evidence of the mental contract, or consent. IL has no validity otherwise than as such evidence. The only really material matter is the mental operation, or assent. 18 Now this mental exercise, or assent, can obviously produce no effect, except while it is in action. It must therefore pass the right of property *then,* or never. If, while it is in action, the right of property be in the person who experiences this assent, the assent passes the right of property to another. But if the right of property be not in him, while experiencing this sensation of assent, the sensation accomplishes nothing, because there is nothing on which it can operate. And if the person should ever after become the proprietor of the thing to be conveyed, he must experience the sensation again, *in* order to make the conveyance, because his former consent was of no force except while it continued.

This principle being established, that a contract for the conveyance of property, has no legal force, or validity, as a *conveyance-* that is, that it attaches to nothing,

and conveys no right to anything-unless the maker, at the time the contract is made, be the owner of the rights he purports to convey, let us apply the principle to the case of a promissory note.

A promissory note is a contract (or, more accurately speaking, the evidence of a contract) for the conveyance of property-that is, of money. It is a bill of sale of money, that has been sold and paid for, and is to be delivered at a future time. It differs, in some particulars, from the contracts just mentioned, in regard to land, a horse, &c.; but it does not differ from them, in any particular that is essential to the principle just stated, to wit, that a contract for the conveyance of property, attaches only to the property that a man has when the contract is entered into-(and, of consequence, to such other property as may become indistinguishably mixed with it prior to the delivery.) The rights, which a creditor acquires by a promissory note, (or by the contract of which the note is the evidence,) are rights which attach to the debtor's property the moment the contract is entered into, even though the money is not to be delivered for months or years afterwards. And if the debtor have no property for the contract to attach to, at the time the contract is entered into, the contract is void, and can never afterwards attach to anything. And this is on the same principle, that a deed of a farm attaches to the farm from the moment the deed is made, and that the right of property in the farm *passes,* at that moment, from the seller to the buyer, even though the possession of the farm is, by agreement, not to be delivered for months or years afterwards. So also a bill of sale of a horse, attaches to the horse, and the right of property in the horse *passes* from the seller to the buyer at the moment the contract of sale is entered into, even though the horse, by agreement, is not to be delivered until a subsequent time. On the same principle, the right conveyed by a promissory note, (which is merely a contract for the sale and delivery of money,) attaches to the debtor's property, and the lien *passes* to the creditor at the moment the contract is entered into, even though the money is not to be delivered until months or years subsequent. The right of the creditor *must* attach at the time the contract is entered into, or, for the reasons already given, it can never attach at all; and would therefore convey no rights at all to the creditor.

The principal points, in which a deed of land, or a bill of sale of a horse, (where the possession is to be delivered at a time subsequent to the contract,) differs from a

promissory note, are these:

1. A deed of land, or a bill of sale of a horse, necessarily describes or designates a particular piece of land, or a particular horse; and it necessarily applies or attaches only to the one so described, because there is, and can be no other precisely like it. But a promissory note does not describe the particular dollars, that are sold, or are to be delivered, but only time number of them. It therefore does not apply, or attach to, any particular dollars; and it is not necessary that it should, because all dollars are of equal value, and therefore it is immaterial what particular dollars shall be delivered.

2. As a promissory note does not describe or designate the identical dollars sold, it cannot apply, or attach to any particular dollars, any more than to any other dollars that the debtor may have.

3. As a promissory note does not describe, designate, or attach to any particular dollars, in preference to others, it does not imply that the identical dollars, that are finally to be delivered, now exist in the hands of the debtor. And if it does not imply that those identical (dollars now exist in the halide of the debtor, it does not oven imply that the amount of value, which the dollars contain, or (in other words,) the amount of value which the note conveys, now exists (in the hands of the debtor) *in the shape of dollars,* any more than that it exists in any other particular shape, from which it can, by the time agreed on for the delivery, be converted into the particular dollars that shall finally be delivered, or into any dollars that the debtor may have a right to deliver in fulfillment of his contract. As the note does not describe or designate the identical dollars, that are sold by the contract, it does not imply or describe the particular shape, in which the amount of value sold, now exists; for if it do not imply that it exists in the shape of the identical dollars than are to be delivered, it does not imply that it exists in the shape of any other dollars, any more than that it exists In the shape of cost, wool, or iron. It only implies, therefore, that it exists, (that is, that the *amount* or *value* conveyed by the note exists,) in the hands of the debtor, in *some* or *other,* from which It Is susceptible of being converted into dollars by the time agreed on for the delivery.

4. *As* the note does not describe the particular shape in which the value conveyed by it now exists, and does not even imply that it now exists in the shape of dollars, the note is, in effect, an lien upon all a; man's property for the number of dollars

mentioned in the note; or it is a sale of so much value, existing in some shape or other, as will procure, or exchange for the number of dollars mentioned in the note, rather than a sale of any particular dollars themselves. That such is the fact, is evident from two considerations, to wit; *first,* that the identical dollars sold are not described, and therefore cannot be known; and, secondly, that the debtor is to have the use of them until the time agreed upon for the delivery. As the dollars, while remaining in the specific shape of dollars, can be of no use to the debtor, and can, be used by him only by converting them into other commodities, and as they are to be left in his hands, for a certain time, *solely that he* may use *(liens,* it follows that It must have been the intention of the parties that the debtor should have the right of converting them into other commodities that might he productive, or susceptible of use In the mean time- that is, until the tune of delivery; and, therefore, that the creditor should have his lien upon them, or upon an amount of value equivalent to them, Into whatever shape they might be converted, or through whatever changes they might pass, previous to delivery; and that, in time for the *delivery,* this amount or value was to be converted again into dollars for that purpose.19

5. As the contract, to be of any validity, (that is, to convey any rights,) must, from the moment It is entered into, attach to something or oilier in the hands of the debtor; and as It dots not designate, or therefore purport to attach to the identical dollars that are to be delivered, It can only attach to the general property of the debtor, as a lien for the number of dollars to be delivered. Unless it thus attach to the general property of the debtor as a lien, it would, of necessity, be a nullity, having no legal operation whatever, simply because there is nothing else for it to attach to.

A promissory note, therefore, for an hundred dollars to he delivered at a future time, is, in reality, a contract of sale of so *much value,* existing, in some shape or other, in the hands of the debtor, as will produce an hundred dollars. Such a con tract is, in effect, a lien, for that amount, upon a man's whole property, even though his whole property should be equal to all hundred times that amount- and why? Because, as the particular amount of value, or property, to which the contract, attaches, Is not described, or set off distinctly from the rest of his property, the debtor can never show, as long as any portion of his property remains

in his hands, and the debt Is unpaid, that the portion remaining in his hands is *not* the portion that was sold, and promised to be delivered. Besides, if, by the time of delivery, it shall appear that all his property has disappeared except a single hundred dollars, it is more reasonable to suppose that he has disposed of his own property, than that he has disposed of that to which his creditor had an equitable right.

*A* promissory note, then, for an hundred dollars, Is a mere bill of sale of an hundred dollars, that are to be delivered at a future time; or rather a bill of sale of *so much value,* (now existing, or presumed to exist, in some other shape than that of the identical dollars which, are to be delivered,) as will purchase an hundred dollars at the time agreed upon for the delivery. Although, then, a promissory note differs from a bill of sale of a horse, or a deed of land, in not describing or designating the identical dollars sold, and therefore in not attaching to any particular dollars which the debtor may have on lined at the time the contract is entered Into, it Is nevertheless precisely like a bill of sale of a horse, or a deed of land, in this respect, to wit, that the rights of the creditor attach, from the moment the contract is made, to an *amount* of *value,* (existing in the hands of the debtor, in *some shape or other,)* sufficient to produce, or be converted into, the number of dollars mentioned in the note.

But perhaps some may be disposed to deny that there is any such analogy, as I have supposed, between a promissory note and a deed of land, or a bill of sale of a horse; or any analogy that makes it necessary that there should be any property, In actual existence, for the contract expressed in the note, to attach to. And perhaps they will say that the different form of a promissory note from that of a deed, or bill of sale - the former being a "promise to pay" at a future time, and the two latter being express grants in thin present tense - implies that the note conveys no such *present* right of property to the payee, as a deed does to the grantee, or a bill of sale to the vendee.

To see the fallacy of this objection, it is necessary to get rid of words, and get at Ideas; or rather to get rid of that confusion of ideas, which results from the habit of arbitrarily using different words to convey the same essential ideas. For instance. We "pay" money for a horse, and we "sell" a horse for money- such is the common use of words. Yet, in reality, we as much "*pay*" the horse for the money, as the

money for the horse. And we as much *sell* the money for the horse, as the horse for the money. The horse *buys* the money, as much as the money buys the horse. The horse and the money are equivalents, which are mutually exchanged for each other; which mutually *buy* each other; which are mutually *sold* for each other; which mutually *pay* for each other. In every exchange of equivalents of this kind, there are two purchases, and two sales. One of the parties sells his horse for money, the other his money for a horse. One of the parties buys a horse with money, the other buys money with a horse. And this is the whole matter.

When, therefore, a man sells a horse for money, and promises to deliver the horse at a future time, the contract is of precisely the same essential nature as where a man sells money for a horse, and promises to deliver, or "pay" the money at a future time. The horse and the money are the equivalents, that are exchanged for each other; that is, *the* right *of property* in each Is exchanged for *the right of property* in the other. And the right of property In each equivalent *passes* at the same instant that the right of property in the other equivalent passes-else the contract is not reciprocal, mutual, or equal, and one of the parties receives no equivalent, or consideration, for the property he sells. And it is of no consequence when the *delivery,* either of the horse, or of the money, actually takes place-whether in a month or a year alter the contract-or whether the delivery of both equivalents takes place at one and the same lime, or not. The right of property in both equivalents passes at the time of the contract, whether the delivery of either or both takes place then or not. The delivery is a mere incident to the contract, and is of no Importance in itself, as affecting the rights of property, which each of the parties has acquired by the contract. Alter the contract is made, the horse belongs to *its* purchaser, as much before it is delivered to him as afterwards; and, by the same rule, the money belongs to *its* purchaser as much before it is delivered, or "paid" to him, as afterwards. The same is true in regard to the sale of land. The right of property in the land passes at the time the contract is made, or the deed given, though the possession of the land itself be not delivered until a subsequent time. And, of consequence, the right of property in the equivalent, the consideration, the money, for which the land is sold, or exchanged, passes also at the time of the contract, though this equivalent, or money Itself, be not delivered, or paid, until a subsequent time-else the contract would not be mutual, reciprocal,

or equal, and the seller of the land would have parted with his right of property In the land, without receiving any consideration therefor - that is, without receiving any equivalent right of property in exchange. The delivery of money, then, on a note or contract made previously to the delivery, corresponds with a delivery of the possession of land, on a deed that has been previously given. The delivery has nothing to do with the right of property in either case - for that (the right of property) has previously passed, to wit, at the time the contract was entered into.

What we call "paying" money on a note, is the mere delivery of money that line been previously sold and paid for, and the right of property in which has previously passed to the purchaser. And it is solely because the money has been previously sold and paid for, and the right of property in it has passed to the purchaser, that the money itself is paid, or delivered. It is because the money has been previously bought by another, and therefore belongs to him, *is* owned by him, is, in fact, his property, that it is paid, or delivered to him. If it he not paid to him for this reason, or if it be not his property before It is delivered, the delivery is a gratuity; it is what he cannot claim as a right - for plainly a man cannot claim, on a contract, that property be delivered, or paid to him, as his, unless he has, by the contract, first acquired the ownership of it.

Contract rights to things, then, are actual *bona fide rights of property* in and to the things contracted for. No other intelligible meaning can be given of contract rights to things. A right to a mere profuse, or a merely moral claim to the fulfillment of a promise, is nothing in law. The law, that governs men's title to property, cannot take notice of any such uncertain, intangible, and speculative rights, as that of a merely moral claim to the fulfillment of a promise, if such a claim, (depending, as it may, upon a thousand contingencies not in their nature susceptible of proof,) can be called a right. The law, in regard to property, can take notice of nothing less definite, certain, or tangible, than actual, proprietary rights, in actual, existing things. And unless a man acquire a *right of property* in a thing, by his contract, he requires, *legally speaking,,* no right but all by his contract. There is no other legal right to or in things, that he can acquire by contract. And this proprietary right is acquired- In all cases when it is acquired at all - the moment the contract is made/ whether it be agreed that the delivery shall take place at that or a future time. And this principle applies as well to money that is sold for a horse, or for land, and is

agreed to be delivered, or paid, at a future time, as it does to land, or a horse, that is sold for money, and is agreed to be delivered at a future time.20

But perhaps it will be said that the words, "I promise," which are contained in the note are not contained in the bill of sale of a horse, or deed of land; and that these words indicate some essential difference in the nature of these different contracts.

But the words, I "promise," are no essential part of the contract. Nor is a formal promise in any case essential to the validity of a debt-that is, to the obligation to deliver money that has been sold and paid for. A man may make as many naked promises to pay money, as he pleases, and they are of no obligation in low. On the other hand, if a man have received value from another, with the understanding that it is not a gift, or that am, equivalent is to be paid for it, the debt is obligatory - that is, the obligation to deliver the equivalent is binding-whether there he any formal promise to pay or not. This we see in the ease of goods sold, and charged on account. And time obligation to deliver the equivalent consists in this - that it, (the equivalent or money,) has been bought amid paid for, and now actually belongs to the creditor, or purchaser, as a matter of property. The promise, then, is a matter of mere form in any case, and of no importance to the validity of an obligation to deliver an equivalent, that line, by contract, (consent,) been exchanged for value that has been received. It may lie important us evidence of the contract; but it is no part of the contract itself; that is, it, of itself, conveys no rights of property to the promisee, and no rights of any kind, to the equivalent promised, which lie would not have without any formal promise.

But it may be said, (and this is the language of the lawyers,) that where a man has paid a *consideration* for a promise, there the promise is binding. But the truth is, (as has before liven stated,) that a man never pays a consideration for a *promise.* He simply pays an equivalent, a price, or consideration, for the *thing promised.* And his right of properly to the thing promised, of course, attaches at the time of the contract - at the time he pays the equivalent for it - or it can never attach at all. fluid *then* limo promise to deliver, or pay it, (the thing promised,) is made solely as evidence that it (the thing promised) has been sold, and now belongs to the promisee as a matter of property.

A promissory note, then, that Is given for money, is, in its essence, precisely like a biii of sale, that is given of a horse, and that contains an agreement to deliver the

horse at a future limo; or it is precisely like a deed that Is given of land, and that embraces an agreement, or memorandum, that the *possession* of the land Is to be given at a future time. Time language of these three contracts are, in their legal purport, essentially time same. For instance. The promissory note runs thus.

"Thirty (lays from date I promise to pay A. B. one hundred dollars, for *value received.*" Signed C. D.

The bill of sale runs thus.

A. B. bought of C. D. one horse, lobe delivered in thirty (lays from date. Received payment." Signed C. D.

Time deed of land runs thus.

"In consideration of one hundred dollars, paid by A 13, the receipt of which is hereby acknowledged, I hereby grant, cell, and convey to A B, one acre of land, *possession* to lie delivered In thirty days from the date hereof." Signed C. D.

What difference is there in these three contracts, so far as a conveyance of proprietary rights to the thing promised to he paid, or delivered, is concerned? Obviously none whatever. The bill of sale says, in substance, that the horse has been sold, not just this "payment," the value, or the equivalent, has then "received;" and that time horse - which, having been thus sold and paid for, now of course belongs to the puchaser- is to be delivered to him in thirty days. The deed says that the laud is sold, and its equivalent, or "consideration," has been "paid" not "received and that the possession of the land- (which, having been thus sold and paid for, now of course belongs to the purchaser) - Is to be given in thirty days. The note says that the "value" - that is, the equivalent, the "payment," the" consideration," for the money promised, has been "received," (which Implies that the money promised has been sold, and now belongs to the purchaser,) and that the money Is to be delivered, or paid, in thirty days.

What possible ground is there for saying that the right of property in the land, or in the horse, is conveyed by the contract expressed in the foregoing deed, or bill of sole, and that the right of property in the money, (or in an amount of value sufficient to purchase the money,) is *not* conveyed by the contract expressed in the note? None, none whatever.

Suppose A amid 14 should make a contract with each other for the exchange - or, whet is the same thing, for the mutual purchase and sale - of one hundred dollars in

money, and a horse; that Is, A should sell to B a horse for an hundred dollars in money, and 13 should sell to A an hundred dollars in money for a horse; amid that both the money and the horse are to be delivered in twenty days from the time of the contract. The promise of one would be to "pay" the money in thirty days, and of these then to "deliver" the horse in thirty days. Yet do not these mutual promises, or undertakings, mean precisely the same timing? And is not the contract, on, the part of each, precisely the same throughout, that it is on the part of the other? Tim also is the equivalent of the money, and time money of the horse. The money is *sold* for the horse, as much as the horse is sold for the money. Amid the horse *buys* the money, as much as the money buys the horse. Time again is reciprocal and equal in every respect. The mutual purchase and sale have beets a mere exchange of the rights of property in certain values, or equivalents. Why, then, attach a different meaning to the word "pay," when applied to the money, from which we attach to the word "deliver," when applied to the horse? Why say that time right of property in the horse *passes* to the purchaser of the horse at the time of the contract, limit then the right of property in the money, (or in an amount of value sufficient to purchase the money,) does not pass to the purchaser of the money until the delivery, thirty days afterwards? Clearly there is ho reason for it. Evidently, the right of property in one equivalent passes at this same time that the right of property in the other equivalent passes, to wit, at the time of the contract, without any regard to the time of the delivery.

The real, equitable, *bona fide* right of property in each of these articles, (time horse and hue money,) is exchanged *by time contract,* and therefore necessarily *passes* at the time of the contract. The *possession* merely of each remains with the seller for thirty days. All will agree that the right of property *in the horse* passes at the time of time contract, and that the possession merely remains with the seller during the thirty days. Why does not the right of property, *in the hundred dollars,* (or in an amount of value equivalent to the hundred dollars,) *pass* equally at the time of the contract, mind the possession merely remain with the seller of the money for thirty days? The mutual purchase and sale of the horse and the money is a mere exchange of equivalents- a reciprocal cud equal contract; and precisely the same rights of property, which pass to time purchaser of the horse, pass also to the purchaser of the money. Certainly, if the right of property in

the horse, passes to the purchaser of time horse, *by force of the* contract, *and at the time of thee contract,* time same right of property in the money passes also to the purchaser of the money, *by force of contract, and at* the *time of the contract.* No proposition, in law, it seems to me, can lie more sell-evident than this.

Well, them, supposing this point to he established, that the right of property, in money that is promised-or rather in an amount of value existing, in some shape or other, in the hands of the debtor, sufficient to purchase the amount of money promised - passes to its purchaser at the time the contract is entered into, instead of the time of delivery - what follows?

From the time that property is sold, until it is delivered, the seller is the mere bailee of the purchaser; and the property itself Is at the risk of the purchaser, unless the seller be guilty of some fault, or culpable neglect, in regard. to the custody or use of it.

For instance. In the case before supposed, where A sells to B a horse, for an hundred dollars, giving him a bill of sale thereof; and B sells to A an hundred dollars for time horse, giving him a promissory note therefor - the horse and money to be each delivered to their respective purchasers in thirty days from the time of the contract-A holds the custody oh the horse, for those thirty days, as the house of B. And if the horse, during those thirty days, die, be stolen, or otherwise lost or injured, by any of the casualties to which horses are liable, without any fault, or culpable negligence, on time part of A, the loss falls upon B, the purchaser. All lawyers will agree that this is time law In regard to the *horse.* On the same principle, them, that A is time mere bailee of the horse for those thirty days, B is the mere bailee of the money, (or of an amount of value equivalent to the money,) during the same time; that is, this money or value remains in the hands of B, for his use, the real ownership being in A; and if the money, during the thirty days that It is to remain in time hands of B, for his use, be lost by fire, or theft, or any of the accidents, or any of the casualties of *trade,* to which money is liable, without any fault, or culpable negligence on the part of B, the loss fells upon A, the purchaser and real owner of the money. Clearly the same principles apply to both the articles, horse and money. The right of property in each has been exchanged for the right of properly in time other; and the custody and use of each are to remain with its seller

for thirty days. Each purchaser, of course, takes the same risk as the other, of the commodity he has purchased, while it remains in the hands of its seller.

If A, the seller of the horse, while the horse remains in his possession, after the sale, should use it in any mode different from what it was understood that he should use it; or should neglect to take such reasonable care, in the use and treatment of the horse, as good faith towards the owner of the horse required of him; and should thereby the time cause of injury or death to the horse, he (the seller) would be still liable for the value of the horse; not, however, on his contract, nor in an action of trover for the horse itself, but in an action on the case for damages, for the loss occasioned by his intent, as has before been explained. By the same rule, if B, the seller of the money, while it remained in his possession, would intentionally or negligently expose it to any other than the usual risks, to which it was understood that it was to be exposed, and thereby the money should be lost, then he (the seller of the money) would be shill liable to the owner of it for the amount ; *not, however, on his contract, nor in an action of tromer for the money itself, bud In an action on the case for damages, for the loss occasioned by his fault.* 21

But if A, the seller of the horse, used the horse with such reasonable care, while it remained in his possession after the sale, as the law of bailments and good faith towards B; the owner of the horse, required of him, and the horse, nevertheless, canoe to injury or death, B, the purchaser and owner of the horse, must bear the loss. By the same rule, if B, the seller of this money, some such care in the preservation and management of it, while it remains in his possession after the sale, as the law of bailments and good faith towards A, the purchaser of the money, require of him, and it (the money) should, nevertheless, be diminished or lost, A, the purchaser and real owner of the money, must bear the loss.

Now the only objection which the lawyers will raise to this doctrine, or to the application of the principles of bailee and bailor to the cases of debtor amid creditor, Is simply this m They will say that the specific property, to which time contract of debt (at the time It is entered into) attaches, may, before the time agreed on for the delivery, be exchanged, by the debtor, for other property ; and that the same contract, which attached to the original property, cannot attach to the new property for which that is exchanged.

They get this false idea from looking solely at the *general* rule it, regard to bailments, and keeping the exceptions and qualifications to the rule not of sight; which, in fact, these exceptions and qualifications cover nearly or quite as many cases, in actual life, as the rule Itself. For instance the *general* rule, in bailments, is, that the specific thing loaned or entrusted to the bailee, is to be restored to the bailor. The exceptions or qualifications ore, where there is either an express, or implied authority given to the bailee to exchange the property hailed for something rise. Wherever there is either an express or implied authority given to the bailee to make such exchange, the same right of property which the bailor has in the original commodity hailed, attaches to the new commodity, or equivalent, for such that has been exchanged. In time cases of the various kinds of commercial agencies, where the agent is entrusted with commodities of one kind, to be exchanged by him for money, or other commodities, the right of property in the money or other commodities, received by the bailee as the equivalent of time commodities bailee, vests in the bailor on the instant of time exchange, amid never becomes vested in time hither. Many, perhaps in time larger numbers of cases of commercial agencies, the bailee receives *express* authority for making time exchange; but not all, nor nearly all. In mammy cases the authority is implied from collateral facts. And an, implied authority is as good, in low, its any case whatever, as an express authority. All that is necessary, Is, that there be valid grounds for the implication.

Considering, then, the relations of debtor and creditor to be those of bailee or bailor, are there any valid grounds for the implication of an authority, from time creditor to time debtor, to exchange, and traffic with, the property bailed, or loaned to the creditor.

There are several.

Inasmuch as the contract makes no designation of the particular form in which the value, to which the contract attaches, exists at the time the contract is entered into, it, of course, describes no particular form it in which it must *exist at any time* , except at the time of delivery, when it must be in money. Since, then, there is, in the contract, no express or implied requirement that the debtor shall retain the value in any particular form, it inherently allows him to use all reasonable discretion as to the form in which it will be expedient to keep it. And such a discretion allows him to convert it, by exchanges, into such different forms as a prudent and careful

man might reasonably deem beneficial. Unless he were allowed this discretion, he would not be allowed to convert it from a perishable commodity into a durable one ; nor from an unproductive into a productive one.

2. The capital loaned, is loaned to be *used*. This must always be presumed, because no other reasonable motive for the loan can be supposed. And if it be loaned to be used, and the form in which it is to be used is neither expressed nor implied by the contract, (as is the case in the instance of a promissory note,) it must be presumed that it was intended, by the creditor, that the debtor should use it in such manner as prudent men use their own capital. And as the habit of prudent men is to convert their own capital, by exchanges, or traffic, from one form into another; and as, in many kinds of business, they are obliged to do so, to derive any profit from their capital, It must always be presumed, (in the absence of any express or implied prohibition,) that the debtor was to he allowed the same discretion in the management of the loan, arid in converting it from one form into another, by traffic, as prudent men exercise in the management of their own capital.

3. The contract of debt never describes the particular form, in which the amount of value, to which the contract attaches exists at the time the contract of bailment or debt is entered into; but only the form in which it is finally to be delivered, to wit, that of money. The contract, therefore, only implies that the amount of value exists, *in some shape or other,* in the bands of the debtor. If, therefore, the debtor have not money for the contract to attach to, at the time it is entered into, it must attach to value existing in some other form, else It would attach to nothing, and therefore be void. When, then, the contract does attach to value existing in some other form than money, it certainly implies an authority to exchange the commodities, (in which the value is invested,) for money, at least, if for nothing else ; because the contract expressly prescribes that the value to which the contract attaches shall only be deliverable to the creditor in the shape of money, and the debtor, therefore, cannot fulfill his contract, unless lie could convert this value into money. And if the debtor is authorized to convert into money, the value to which the contract attaches, there is no reason, that I know of, why he has not all fair and reasonable discretion as to the mode of converting it into money; nor why he may not do it by means of a dozen intermediate exchanges, if he thinks he can thus do

it more advantageously.

4. If the value, to which the contract attaches, do exist in the shape of money at the time the contract is entered into, (as in the case whore money itself is loaned, and the debtor has no other property, than the loan, for the contract to attach to,) then the contract certainly implies an authority to exchange that money for other commodities, and those commodities back into money; because the money is obviously loaned to be used; as is proved by the facts, that no other reasonable motive for the loan can lie supposed, arid that, in most cases the debtor agrees to pay uttered for its use, which he could not afford to do unless the money were to be made productive to him. Now money itself can neither be used, nor made productive, in any other way than by being exchanged for other commodities, or by being wrought into some other shape than coin. These facts, then, are enough to prove it must have been the intention of the lender, or bailor, that the borrower, or bailee, should be at liberty to exchange the money loaned, for other commodities. And then the fact that the amount of value promised to be paid to the creditor, is finally to he delivered to him in, the shape of money, proves that the debtor has the consent of the creditor to convert these other commodities back into money again.

Whether, therefore, the contract of debt attach, at the time it is entered into, either to value existing in the shape of money, or to value existing in any other shape, (not designated in the contract,) the contract and the collateral facts imply an authority to the debtor to traffic with the property or value to which the contract attached. And, if this be the fact, then the rights of the creditor, or bailer, follow the value, and cling to it, in every form that it may pass through in the hands of the debtor, from the time the contract is made, until it is finally delivered, or repaid to him, (the creditor,) in the shape of money.

If it has now been shown that the true relation subsisting between debtor and creditor is merely the relation of bailee and bailor; that a debtor is merely one who has sold value to another, and retains the possession and title of it for a time after the sale; and that the legal obligation of the debtor to pay money, end the legal purport of his promise to pay money, for value that hue has received, are merely an obligation and promise to deliver money, which he has sold and received his pay for, and the right of property in which has already passed to the creditor, it follows that the creditor's right, acquired by his contract, attaches to nothing except to

such property as actually existed in the hands of the debtor for the contract to attach to, at the time the contract was made, and no such other value as may have become Indistinguishably mixed with it, between that the and the time nmgree4 upon for Its delivery or payment. And from *these* several propositions it also follows, that at the time a debt becomes due, a creditor has no claims, by virtue of his contract, upon anything except what remains of the property that he purchased by his contract, end upon such other value or property as may have become indistinguishably mixed with it, (unless the debtor have been guilty of some fault or culpable neglect in the use *or* custody of it, whereby it has been diminished or lost.)

The *utmost* extent, therefore, of the creditor's claim, (when the debtor has been guilty of no fault, neglect, or bad faith, In the custody or use of the property loaned to him,) is to the property actually existing in the hands of the debtor at the time the debt becomes due. He hums a *prima facie* claim to the whole of this,22 if it be necessary for the satisfaction of his debt. But if it be insufficient for the satisfaction of his debt - that is, if his purchase have been diminished In value or amount, while In the custody of the debtor, (without any fault or culpable neglect on the part of the debtor,) - he, the creditor, must bear the loss. The contract is extinct, fulfilled, on the delivery of whatever remains of the property originally bailed to the debtor. And If the whole of the value bailed have beams lost, without the fault of the debtor, the loss falls on the creditor.

There is no escape from this conclusion but by denying that the contract attached to anything at the time it was made. And such a denial, instead of proving that the debt was obligatory *beyond* the debtor's means of payment, would only be equivalent to a denial that it ever had any legal validity at all. In order to maintain the validity of the contract, we must maintain that it attached to something-that is, that it conveyed to the creditor a proprietary right to some value existing in the hands of the debtor at the time the contract was entered into. And if the contract had any validity-that is, if it attached to anything - at the time it was entered into, its validity lived only in the life of time value, or property to which It attached; and when that value expired, or became extinct, the contract, or, in other words, all the rights which the creditor acquired by virtue of his contract, necessarily expired with it.

Taking it for granted that it has now been shown that a debtor is, in law, the mere bailee of his creditor, it may be important to repeat the statement of the principle, by which this bailment operates as a lien upon the whole property of the debtor, even though his property he many times greater than the debt. The principle is this. Suppose the debt to be one hundred dollars ; and the whole amount of property, in the hands of the debtor, to be one thousand dollars. The contract attaches to amid binds so much value, or property, in the hands of the debtor, as will bring one hundred dollars. But the contract does Cot designate the particular form, in which the value, or property, to which it attaches, exists. It, therefore, attaches to it in every form it exists in the hands of the debtor; simply because it cannot be shown that it attaches to that which exists in one form, any more than to that which exists in another form. Any portion, therefore, of the debtor's property, or the whole of it, if it should be necessary, is liable to be taken for the satisfaction of the debt; and this liability of the whole makes the debt a lien upon the whole. It is on this principle that a mortgage on land, for but a tenth part of the actual value of the land, is a lien upon the whole.

A promissory note, or other personal debt, where there is no designation of the particular articles of property, to which the contract attaches is, in fact, a *sale* of all the property the debtor has in his hands, subject to his right of canceling the sale by paying the amount of the debt in money, just as a mortgage is a sale of the unmortgaged subject to the right of the debtor to cancel the sale by paying in money the amount for which the mortgage is given.

In other words, a contract of debt, without any designation of the specific property to which the contract attaches, is a contract by which the debtor *pledges* his whole property for the delivery, or payment of the amount sold out of it to the creditor, viz., the amount of the debt. Such a pledge gives the creditor a special, or conditional ownership of' the whole property pledged ; and the debtor thenceforth holds the whole property as the bailee of that portion of its value, which actually belongs to the creditor, and is merged in the value of his, (the debtor's) whole property.

If the point be now established, that a debt is a lien upon the whole property of the debtor; amid if the debtor is the mere bailee of the amount of value sold and belonging to the creditor, it becomes necessary to show on what grounds it is, that

the debtor has the right to appropriate for his subsistence, any portion of the property on which his creditor holds a lien. Where a debtor has mortgaged *land* to his creditor, he (the debtor,) has no right to sell any portion of that land, not even to provide himself with food. Why is it different in the case of the liens created by a personal debt, upon the whole property of the debtor? The reason is, that there is an implied permission given by the creditor to the debtor, to appropriate enough of the property ins his hands for his subsistence - subject to the condition that the debtor shall apply his care and labor to the increase and preservation of that property. This permission is to be implied from the following facts:

1. It is a self-evident fact that the debtor amid his family must live; and being a self-evident fact, it must have been taken for granted by the creditor as a part of the contract-because all self-evident facts having any bearing on the contracts, are taken for granted in all lawful contracts.

2. If the debtor and his family must live, it is self evident that they must derive their subsistence, either by selling their labor for wages, (independently of any property in their hands;) or by bestowing their care and labor upon the property in their hands, and taking their subsistence out of it, and its proceeds.

Now it is evident that the contract does not contemplate that the debtor is to sell his labor for wages to the neglect or disuse of the property loaned to him; for the only reasonable motive that can be supposed for the loan, is, that the debtor may use the capital loaned, that is, that he may bestow his labor upon it. And if he bestow his labor upon it, it follows that he must meanwhile take his subsistence out of it- because, while bestowing his labor upon It, he cannot be selling his labor for wages, and of conse9uenca cannot derive his subsistence in any other way than from the property in his hands. Amid as the creditor's lien extends to *all* the property in his hands, it follows that the debtor must take his subsistence out of that to which the lien attaches - simply because there is no other property in his hands for him to take it out of.

In all this there is a strong analogy to the case of a lien on land-for there the debtor takes the produce of the land for his subsistence, which is hardly distinguishable in fact, and is not distinguishable in principle, from taking the land itself - inasmuch as the crops exhaust the fertility, and consume the value of the land.

3. The contract evidently supposes that the debtor, while laboring, is to have

enough of the fruit of his labor for his subsistence, (because a man cannot labor without a subsistence;) that his labor is to he bestowed upon the capital on which the creditor has a lien; and, of course, that the value of his labor is to become incorporated indistinguishably with that of the capital. It follows that it must have been understood, both by debtor amid creditor as a self-evident matter, that the debtor, while laboring, should appropriate enough of the property in his hands for his subsistence, because without his subsistence, he could not bestow his labor upon the capital.

4. The nature of the contract proves that the creditor is interested in the labor of the debtor, became, at a given time, he (the creditor) is to receive the capital loaned, *with increase.* This, of course, the debtor could not afford, nor the creditor expect, unless the debtor were to bestow his labor upon the capital. And if he bestow his labor upon the capital, he must, of necessity, have his subsistence meanwhile. And if his contract is a lien upon everything in his hands, it must of necessity have been understood that he should appropriate his subsistence out of the property that is subject to the lien.

In short, the contract proceeds throughout upon the supposition that the subsistence of the laborer, while laboring on capital, roust be provided for out of the capitol on which he labors. Arid this supposition is not normally reasonable, but it is a necessary one - for it is obvious that his subsistence must he thus provided for, whether he bold the relation of debtor to the capitalist, or that of a laborer for wages. In either case, his subsistence, while laboring, must be a tax upon the capital on which he labors.

In all this there is nothing that authorizes waste or prodigality on the part of the debtor ; or that authorizes anything except what is consistent with such economy and frugality as good faith towards the creditor requires. But this point has been sufficiently explained in the preceding chapter.

Halting at this point, and looking lack upon the ground we have gone over, does riot that ground present a more rational view of the nature of debt, than any time has ever been practiced upon by courts of law? Is it not the only view that can make the contract of debt consistent, either with morality, or with the idea that creditors acquire any tangible, legal rights, to actual things, by virtue of that contract?

This view of the contract of debt places the debtor and creditor, to a certain extent, in the relation of partners. The creditor furnishes capital, the debtor labor. The separate values of this capital and labor become indistinguishably mixed - that is, the labor bestowed upon the capital adds to its value, by converting it into new forms - as for instance, by converting leather into shoes. The debtor, while thus bestowing his labor upon the capital, receives his subsistence out of the mass ; in other word's, his subsistence, while laboring, is the first charge (as in all cases it necessarily must be) upon the combined capital and labor. The creditor holds the next lien upun this combined capital amid labor, for the amount of his investment, and his stipulated profits. The debtor is entitled to the residue, if any there be, as the reward of his labor. During the partnership, the creditor holds tine debtor to the observance of economy and good faith. Under these circumstances, both parties take the natural risks of the business. The creditor risks his capitol, the debtor his labor.23

All this is obviously a Joint operation, a *bona fide* partnership. The creditor, as well as the debtor, is to derive a profit from it. The prospect of profit is the creditor's only motive for entering into the contract. The debtor, therefore, heroines a bailee, not merely for the benefit of himself, but also for the benefit of the creditor. What is there in morality, or in the legal rights of the parties to the capital and labor thus combined, that requires the debtor to take the risk, both of his own labor and of the creditor's capital, beyond the due exercise of his skill, industry, care, and good faith in the preservation and management of the latter?

The creditor adopts this mode of employing his capital, as being the most advantageous to himself. He has more capital than his own labor can advantageously employ. He must, therefore, in order to make his capital. productive, either loan it to others, or employ the labor of others upon it by hiring them, and paying them wages. He considers that, by loaning it, and offering the debtor an inducement to the exercise of his best skill, by a contract that gives to the debtor all the proceeds of the joint labor and capital, except a stipulated amount, (called interest,) he will better stimulate the laborers industry, skill, and care, and thus reap a better profit to himself than he will if he hire the man as a laborer for wages. And this the reason why he loans his capital, instead of hiring the labor necessary to employ it. But there is nothing in all this, that morally or legally

entitles his capital - while it is in the hands to which he has thus, with a view of his own profit, chosen temporarily to entrust it - to, in insurance against the necessary risks to which capital is always liable. Nor is there anything in all this, that morally or legally entitles him to make this bailee, and partner, his slave for life, in case of any misfortune to the partnership business, by which both his capital and the debtor's labor should be lost. Nor is there in all this, anything that gives him any tangible, legal, proprietary rights, to property that his partner and bailee may earn alter the partnership, or bailment, shall have terminated.

16. Suppose A sells to B, *and receives his pay for,* an hundred bushels of grain, out of a certain mass consisting of a thousand bushels; and A promises that he will separate the hundred bushels from the mass in which they are merged, and deliver them to B In one month from the time of the contract. In this case the right of property in the hundred bushels, passes to B, the purchaser, at the time of the contract—and if the mass should be destroyed before the delivery, (without any fault on the part *of A) the* loss of the hundred bushels would fall upon B*,* the purchaser and owner of them. And this Is but a parallel to the ease of debt, where A should sell to B, and *receive his* pay *for,* an hundred dollars' worth of value out of his (A's) whole estate; and should promise that this hundred dollars worth of value should be separated from the mass of his estate, (in which it is merged.) converted Into money, and delivered to II, the purchaser, (or creditor,) in one month from the time of the contract. In this case, as in the case of the grain, the right of property in the hundred dollars' worth of value, would pass to B, the purchaser of it, *at the time of the contract;* and if the whole estate of *A,* in which *B's* hundred dollars' worth of value—was merged, should then be lost or destroyed prior to the delivery, without any fault or culpable neglect on the part of A, (the bailee, or debtor,) the loan of the hundred dollars' worth of value would fall upon 13, the purchaser and owner of it. Return

17. The delivery may sometimes be Important as evidence of the right of property, when there is no other evidence of it. But it is of no Importance to the right itself, if time right can be proved by any other testimony. And a promise to deliver property, and an acknowledgment that the property has been paid for, (as in the ease of a promissory note,) are as good evidence that the right of property has passed to the promisee, as is the delivery itself. Return

18. The validity of this assent, for the conveyance of property, results from the facts that men have an inherent right to dispose of their property; that they can dispose of only *by* the consent, or assent of their mind, or wills to do so; and that, consequently, whenever this consent, or assent, takes place, it actually passes the right of property, (in the thing to which it applies,) to the person to whom the proprietor designs it to go. It is true the law requires some outward manifestation of this assent — such as a delivery of the thing sold, or a written or oral contract as proof of' it — before it (the law) will declare that the right of property has actually passed to another — but this is required, not because the outward manifestation is of any intrinsic importance, but because we can have no evidence of a man's mental sensations except from some outward exhibition of them. Return

19. Although a deed of land, or a bill of sale of a horse may contain an agreement that the possession shall remain in the seller for a time; and although such an agreement would imply that the horse or form was left in his possession to be used by him, still It would not, as to the coos of' a note, (or bill *of* sate of dollars,) imply that the horse or farm might, In the mean time, ha converted Into *any* other shape for use, or be exchanged for any other commodity; because the horse and form, unlike the money, are productive and useful In their present shape. Return

20. It will be understood, when I say that the right of property in the "money" passes to the purchaser at the time It is sold, or contracted for, (though not delivered until a future time,) that I mean, not the right of property In the Identical pieces of money that are to be delivered, or paid, but (for the reasons heretofore given) the right of property in an *amount* of *value,* existing in some shape or other, In the debtor's hands, equivalent to the money, and which Is to be converted Into money In time for the delivery. Return

21. This distinction between the liability of a debtor, *on his contract,* for the money itself, and his liability for the same amount, *in an action on the case for damage*, where the loss has been occasioned by his fault or negligence, is an important one in several respects, as regards both debtors and creditors, (as has heretofor been shown,) notwithstanding the amount recoverable in each case should be the same. Return

22. the prima facie claim my be defeated as to any particular property in the hand of the debtor, clearly distinguishable from the bulk of his property, and which the

debtor can show to have been either *loaned* or *given* to him since his debt was created. Return

23. That is, he risks his labor, alt over and above his necessary subsistence while laboring ; which is no more than the capitalist would be obliged to risk if he hired his labor; and which, therefore, is not entitled to be considered as a risk created by the loan. Return

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