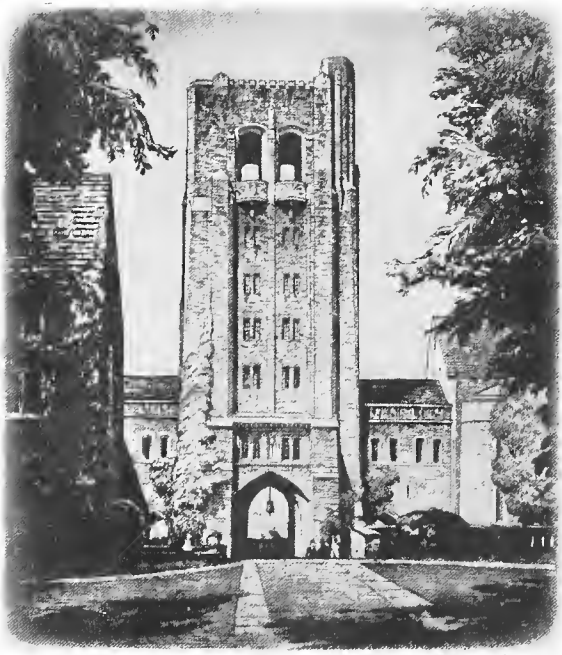

PRINCIPLES OF CONTRACT

AT LAW AND IN EQUITY

A TREATISE ON THE

GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND AND AMERICA

BY

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THIRD AMERICAN FROM THE SEVENTH ENGLISH EDITION

WITH

ANNOTATIONS AND ADDITIONS

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AND

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"This notion of contract is part of men's common stock even outside the field of legal science, and to men of law so familiar and necessary in its various applications that we might expect a settled and just apprehension of it to prevail everywhere. Nevertheless we are yet far short of this."—SAVIGNY, *System des heutigen römischen Rechts*, § 140.

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PREFACE.

This book owes its origin, as the title implies, to the work of the late Gustavus H. Wald. He devoted much time in his early manhood to the preparation of two earlier editions of Sir Frederick Pollock's work, the later of which appeared in 1885, and the thorough and scholarly character of his American annotations won deserved recognition. Having in mind the possibility of further editions Mr. Wald habitually noted in their appropriate places in an interleaved copy of his book all decisions bearing on topics therein discussed, which his regular examination of current reports brought to his attention. At his untimely death in June, 1902, these manuscript annotations containing citations of the decisions of the courts for the preceding seventeen years came into the possession of his brother, Mr. Richard H. Wald, who, impressed with their value, and feeling that properly prepared for the press, they would furnish the basis for a new edition, put the material, both printed and unprinted, into my hands. His only stipulation in so doing was that the book which I should prepare should be "Wald's Pollock on Contracts," and it is rightly so called. The material necessarily had to be recast and put in shape for the printer. In doing this I have had a free hand and have endeavored simply to make as good a book as I could with the use not only of Mr. Wald's materials but of matter which I had accumulated while teaching the subject of contracts at the Harvard Law School. It has not been practicable to distinguish in the American notes between the late Mr. Wald's work and my own. Where I have thought I could make an improvement I have done so, and few of the notes are in the exact form in which Mr. Wald left them, but the great bulk of the work — not only the collection of cases, but the statement of their effect and the comment upon them — is Mr. Wald's.

Sir Frederick Pollock has unfortunately never fully completed his book on contracts. In the preface to the fourth edition he expressed the hope of filling in later editions gaps left by the

omissions of such topics as the performance and discharge of contracts. The chapter entitled Duties under Contract, first inserted in the fifth edition, is the only chapter, however, which has been added by the author, and this, though excellent as far as it goes, is not a full presentation of the subject with which it deals. In order to make this edition, so far as possible, a complete treatise on the law of contracts, I have written a chapter on the discharge of contracts and portions of chapters on promises for the benefit of a third person and on the repudiation of contracts. The responsibility for these additions is wholly mine. They are included in pages 237–278, 333–369, 811–880.

The American annotations are printed in full lines at the bottom of the pages and are numbered with arabic figures, being thus readily distinguishable from the English notes, which are printed in half lines and headed with italic letters. In a few instances additional matter has been inserted in the English notes, but such additions are always in brackets. The English text has not been altered.

My thanks are due to Sir Frederick Pollock for his cordial assent to my request for permission to prepare this edition.

SAMUEL WILLISTON.

Cambridge, *November* 1, 1905.

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*PRINCIPLES OF CONTRACT. [1

CHAPTER I.

Agreement, Proposal, and Acceptance.

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The law of Contract may be described as the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. Accordingly the most popular description of a contract that can be given is also the most exact one, namely that it is a promise or set of promises which the law will enforce. The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way. This is apt to be obscured in common cases, but is easily seen to be true. Suppose that A. agrees to sell to B. a thing of which not he but C. is the true owner. C. gives the thing to B. Here, though B. has got the thing he wanted, and

on better terms than he expected, A. has not kept his promise; and, if the other requisites of a lawful contract were present as between himself and B., he has broken his contract. The primary questions, then, of the law of contract are first, what is a promise? and next, what promises are enforceable?

2] *The importance and difficulty of the first of these questions depend on the fact that men can justly rely on one another's intentions, and courts of justice hold them bound to their fulfilment, only when they have been expressed in a manner that would convey to an indifferent person, reasonable and reasonably competent in the matter in hand, the sense in which the expression is relied on by the party claiming satisfaction. Judges and juries stand in the place of this supposed indifferent person, and have to be convinced that the dealings in the particular case contained or amounted to the promise alleged to have been made and relied upon.

Our first business must therefore be to separate and analyse the elements which, generally speaking, must concur in the formation of a contract. A series of statements in the form of definitions, though necessarily imperfect, may help to clear the way.

1. **Contract.** Every agreement and promise enforceable by law is a contract.

2. **Agreement.** An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them (*a*).

3. **Expression of consent.** Such declaration may take place by

(a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or

(b) an offer made by some or one of them, and accepted by the others or other of them.

4. **Promise and offer.** The declaration of any party to an agreement, so far as relates to anything to be done or forborne on his part,

3] *is called a promise. The expression of a person's willingness to become, according to the terms expressed, a party to an agreement, is called an offer or proposal.

An offer may become a promise by acceptance, but is not a promise unless and until it is accepted (*b*).

(*a*) This statement has been adopted by Kekewich J. *Foster* v. *Wheeler* (1887) 36 Ch. D. 695, 698, 57 L. J. Ch. 149.

(*b*) This does not imply that every offer is revocable until acceptance. How far that is so is a question not of definition but of substantive law.

5. **Void agreement.** An agreement which has no legal effect is said to be void. An agreement which ceases to have legal effect is said to become void or to be discharged.

6. **Voidable contracts.** An agreement is said to be a voidable contract if it is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others.

We proceed to develop and explain these statements, so far as appears convenient at the outset of the work.

1. **Definition of agreement — Nature and scope of consent.** The first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention. But in order that their consent may make an agreement of which the law can take notice, other conditions must be fulfilled. The agreement must be, in our old English phrase, an act in the law: that is, it must be on the face of the matter capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention. An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal *duty or right, or any change in [4 existing ones (*c*).[1] Again, there must not only be an act in the law, but an act which determines duties and rights of the parties. A con-

"Offer" and "proposal" are synonymous terms: "proposal" is often convenient as allowing "proposer" to be used as a correlative term rather than the legitimate but clumsy "offeror."

(*c*) Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind. A. asks B. to dinner and B. accepts. Here is proposal and acceptance of something to be done by B. at A.'s request, namely, coming to A.'s house at the appointed time, and the trouble and expense of doing this are ample consideration for A.'s promise to provide a dinner. Why is A. not legally bound to have meat and drink ready for B., so that if A. had forgotten his invitation and gone elsewhere B. should have a right of action? Only because no legal bond was intended by the parties. It might possibly be said that these are really cases of contract, and that only social usage and the trifling amount of pecuniary interest involved keep them out of courts of justice. But I think Savigny's view, which is here adopted, is the better one. There is not a contract which it would be ridiculous to enforce, but the original proposal is not the proposal of a contract.

1 If the parties intended by an agreement merely a joke or banter, there will be no contract. Keller *v.* Holderman, 11 Mich. 248; McClurg *v.* Terry, 21 N. J. Eq. 225; Theiss *v.* Weiss, 166 Pa. 9; Bruce *v.* Bishop, 43 Vt. 161; Nyulasy *v.* Rowan, 17 Vict. L. R. 5. But see Armstrong *v.* McGhee, Add. (Pa.) 261; Stamper *v.* Temple, 6 Humph. 113.

sent or declaration of several persons is not an agreement if it affects only other people's rights, or even if it affects rights or duties of the persons whose consent is expressed without creating any obligation between them. The verdict of a jury or the judgment of a full Court is a concurrent declaration of several persons affecting legal rights; but it is not an agreement, since the rights affected are not those of the judges or jurymen. If a fund is held by the trustees of a will to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them. There is a common duty to the beneficiary, but no mutual obligation.

Obligation. By obligation we mean the relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing (*d*). An agreement
5] might *be defined, indeed, as purporting to create an obligation; and the mark which distinguishes an obligation so created from any other kind of obligation is that its contents are wholly determined by the will of the parties (*e*). But for the purposes of English law we prefer to say (what is in effect the same) that an agreement contemplates something to be done or forborne by one or more of the parties for the use of the others or other. The word *use* (representing the Latin *opus* through an Anglo-French form *oeps,* not *usus*) is familiar in English law-books from early times in such a connexion as this.

Proof of consent. The common intention of the parties to an agreement is a fact, or inference of fact, which, like any other fact, has to be proved, according to the general rules of evidence. When it is said, therefore, that the true intent of the parties must govern the decision of all matters of contract, this means such an intent as a court of justice can take notice of. If A., being a capable person, so bears himself towards B. that a reasonable man in B.'s place would naturally understand A. to make a promise, and B. does take A.'s words or conduct as a promise, no further question can be made about what

(*d*) Savigny, Syst. i. 338–9; Obl. i. 4, *seq.*

(*e*) That is, their will as ascertained by the proper rules of interpretation, not necessarily a will completely expressed on the face of the transaction.

was passing in A.'s mind. "Mental acts or acts of the will," it has been well said, "are not the materials out of which promises are made" (*f*).[2] Under such circumstances, as well as in certain other more special cases, the law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear. But in the common and regular course of things the consent to which the law gives effect is real as well as apparent.

2. **Ways of declaring consent — Proposal and acceptance.** Two distinct modes of the formation of an agreement are here specified. It is *possible, however, to analyse and define agreement as constituted [6 in every case by the acceptance of a proposal. In fact this is done in the Indian Contract Act. And it is appropriate to most of the contracts which occur in daily life, buying and selling, letting and hiring, in short all transactions which involve striking a bargain. One party proposes his terms; the other accepts, rejects, or meets them with a counter-proposal: and thus they go on till there is a final refusal and breaking off, or till one of them names terms which the other can accept as they stand. The analysis is presented in a striking form by the solemn question and answer of the Roman Stipulation, where the one party asked (specifying fully the matter to be contracted for): That you will do so and so, do you covenant? and the other answered with the same operative word: I covenant (*g*). Yet the importance of proposal and acceptance as elements of contract has, until of late years, been much more distinctly brought out in the Common Law than by writers on the modern civil law.

Is the analysis universally applicable? It seems overstrained to apply this analysis to a case in which the consent of the parties is declared in a set form, as where they both execute a deed or sign a written agreement. Some say that, although there is no proposal or acceptance in the final transaction, the terms of the document must have

(*f*) Langdell, Summary, § 180.

(*g*) No doubt the formula *Spondes? spondeo*, originally the only binding one and almost certainly of religious origin, was in early times supposed to have a kind of magical effect. But it was necessary that the stipulator should hear the promisor's answer. Cp. Palgrave, Commonwealth of England, 2, cxxxvii. cxli.

2 Assent in the sense of the law is a matter of overt acts, not of inward unanimity of motives, design or the interpretation of words. O'Donnell *v.* Clinton, 145 Mass. 461, 463. See also Stoddard *v.* Ham, 129 Mass. 383, and *infra*, p. *244.

Even overt acts, when neither communicated nor done at the request of the other party, are insufficient. Therefore cross-proposals by mail, made by each of the proposers in ignorance of the other's act, do not constitute a contract. Tinn *v.* Hoffman, 29 L. T. N. S. 271. See also Madden *v.* Boston, 177 Mass. 350.

been settled by a process reducible to the acceptance of a proposal; but this hardly suffices: for the formal instrument has a force apart from and beyond that of the negotiation which fixed its terms. And it may well be, and sometimes is the case, that the parties intend not to be legally bound to anything until their consent is formally de-
7] clared. In such a case it cannot be said that the proposal and *acceptance constitute the final and legal agreement. Take the common case of a lease. There is generally an enforceable agreement, constituted by letters or memorandum, before the lease is executed. But the lease itself is (besides its effect as a transfer of property) a new contract or series of contracts. In this who is the proposer and who the acceptor? Are we to say that the lessor is the proposer because in the common course he executes the lease before the lessee executes the counterpart? Or are we to take the covenants severally, and say that in each one the party with whom it is made is the proposer, and the party bound is the acceptor? What, again, if two parties are discussing the terms of a contract and cannot agree, and a third indifferent person suggests terms which they both accept? Shall we say that he who accepts them first thereby proposes them to the other? And what if they accept at the same moment? The case of competitors in a race who, by accepting rules laid down by the managing committee, become bound to one another to observe those rules (*h*), is even stronger. The truth is, as I venture to think, that the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions.

3. **Promise — Effect of deed in making simple promise operative.** Except in the case of simultaneous declaration just mentioned, a promise is regularly either the acceptance of an offer or an offer accepted. Where the promise is embodied in a deed, there is an apparent anomaly; for the deed is irrevocable and binding on the promisor from the moment of its execution by him, even before any acceptance by the
8] promisee (*i*).[3] But this *depends on the peculiar nature of a

(*h*) *Clarke* v. *Earl of Dunraven* [1897] A. C. 59, 66 L. J. P. 1. Here we are driven to say that every party is an acceptor as regards every one who has sent in his name earlier, and a proposer as regards every one who comes in later.

(*i*) *Xenos* v. *Wickham* (1886) L. R. 2 H. L. 296, 323; *Doe* d. *Garnons* v. *Knight* (1826) 5 B. & C. 671,

[3] Many of the American cases hold acceptance by the promisee or grantee a prerequisite to the validity of a deed. Most of the numerous decisions relate to conveyances of land. See Meigs *v.* Dexter, 172 Mass. 217; Gray's Cases on Property, III, 633–735; Devlin on Deeds, § 260. The English case of Xenos *v.* Wickham is sharply criticised in Holland, Jurisprudence (9th ed.), 265, *n.* 1.

deed in our law. The party who sets his hand and seal to a deed witnessing his promise does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound, under normal conditions. In fact it is only in modern times that special defences, on the ground of fraud and the like, have been allowed to avail a man against his own deed. Thus the questions of consent and acceptance are not open, as ordinary questions of fact, to any discussion. The party has recorded his own promise in solemn form, and cannot require proof that any other positive condition was satisfied. As matter of history, the very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof, and to substitute the authenticated will of the parties themselves for an appeal to the hazards of oath, ordeal, or judicial combat. It is not that an anomalous liability is created; the contracting party is estopped (special and exceptional causes excepted) from disputing that he is liable. Not the promise, but the deed itself, is irrevocable and operative without need of external confirmation. Whether it is convenient, on the whole, for the purposes of modern law to retain the deed with its ancient qualities is a question beyond our present limits (*j*).

4. Definition of contract — Restriction of contract to enforceable agreements. The term *contract* is here confined to agreements enforceable by law. This restriction, suggested perhaps by the Roman distinction between *contractus* and *pactum*, is believed to have been first introduced in English by the Indian Contract Act. It seems a manifest improvement, and free from the usual drawbacks of innovations in terminology, as it makes the legal meaning of the words more precise without any violent interference with their accustomed use.

***5. Void agreements — Void agreement; distinction of void and voidable.** [9 The distinction between *void* and *voidable* transactions is a fundamental one, though it is often obscured by carelessness of language. An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no person's rights, whether he be a party or a stranger, are affected. A *voidable* act, on the contrary, takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled so to do.

29 R. R. 355, and see Pref. to 29 R. R. v—ix. [Roberts *v.* Security Co. [1897] 1 Q. B. 111].

(*j*) The old law has been altered in various ways in many American States.

The definitions of the Indian Contract Act on this head are simpler in form than those given above: but certain peculiarities of English law prevent us from adopting the whole of them as they stand. It is not correct as an universal proposition in England that "an agreement not enforceable by law is said to be void," for we have agreements that cannot be sued upon, and yet are recognized by law for other purposes and have legal effect in other ways (*k*).

6. **Voidable contracts.** The definition here given is from the Indian Contract Act. The idea is not an easy one to express in terms free from objection. Perhaps it would be better to say that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him. The Anglo-Indian definition certainly covers rather more than the ordinary use of the terms. Cases occur in English law where, by the effect of peculiar enactments, there is a contract enforceable by one party alone, and yet we should not naturally call it a voidable contract. An example is an agreement required by the Statute of Frauds to be in writing, which has been signed by one party and not by the other. **10]** Here the party who has signed is bound and *the other is free. "Voidable contract" seems not exactly the appropriate name for such a state of things. And it may even be said that a contract which has been completely performed on one side is literally "enforceable by law at the option of one of the parties" only. But the definition as it stands cannot practically mislead (*l*).

Consideration. Consideration is sometimes treated as if it were among the necessary elements of an agreement (*m*). But the conception, in the generality with which we use it, combined with its restriction within the limits of exchangeable value of some kind, is peculiar to the Common Law. It does not exist in the jurisprudence of the Continent or of Scotland. In our law we require, for the validity of an informal contract, not merely agreement or deliberate intention, but bargain; a gratuitous promise is not enforceable unless included in the higher obligation of a deed. The rules as to proposal and acceptance cannot be fully understood without bearing this

(*k*) See Ch. XIII, below.

(*l*) There is a similar but slighter difficulty about the use of the word *void*. A contract when it is fully performed ceases to have legal effect; it is *discharged*, but there is something harsh in saying that it becomes void, a term suggestive of inefficacy rather than of completed effect. Hence in the fifth definition I have introduced the word *discharged* as an alternative.

(*m*) Thus it is defined in the interpretation clause of the Indian Contract Act.

in mind; still the requirement of consideration is a condition imposed by positive law and has nothing universal or necessary about it.

Hereafter a fuller discussion will be given: for the present it may serve to describe consideration as an act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other, as an inducement to that other's act or promise.[4]

Special rules governing proposal and acceptance. Proposal and acceptance, though not strictly necessary parts of the general conception of Contract, are in practice the normal and most important elements. When agreement has reached the stage of being embodied in a form of *words adopted by both parties, the contents of the document [11 and the consent of the parties are generally simple and easily proved facts: and the only remaining question (assuming the other requirements of a valid contract to be satisfied) is what the words mean. The acceptance of a proposal might seem at first sight an equally simple fact. But the complexity of human affairs, the looseness of common speech, the mutability of circumstances and of men's intentions, and the exchange of communications between parties at a distance, raise questions which have to be provided for in detail.

We may have to consider separately whether the offer of a contract was made; what the terms of that offer were; whether there was any acceptance of it; and whether the acceptor was a person to whom the offer was made.

Communications in general.

Proposal and acceptance — Express or tacit. The proposal or acceptance of an agreement may be communicated by words or by conduct, or partly by the one and partly by the other. In so far as a proposal or acceptance is conveyed by words, it is said to be express. In so far as it is conveyed by conduct, it is said to be tacit.

It would be as difficult as it is needless to adduce distinct authority for this statement. Cases are of constant occurrence, and naturally in small matters rather than in great ones, where the proposal, or the

[4] There is a distinction between consideration and motive; the motive for making a promise may be something entirely different from the act, or forbearance, or promise thereof, which is offered and accepted in exchange for the promise. "Nothing is consideration that is not regarded as such by both parties." Philpot *v.* Gruninger, 14 Wall. 570, 577; Thomas *v.* Thomas, 2 Q. B. 859, per Patterson, J.; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 579; Morris *v.* Norton, 75 Fed. Rep. 912, 926; Peck Colorado Co. *v.* Stratton, 95 Fed. Rep. 741. 744; Levy, etc., Co. *v.* Kauffman. 114 Fed. Rep. 170, 174; Sterne *v.* Bank, 79 Ind. 549, 551; Devecmon *v.* Shaw, 69 Md. 199; Ellis *v.* Clark, 110 Mass. 389; cp. Holmes on the Common Law, 293–295.

acceptance, or both, are signified not by words but by acts.[5] For example, the passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off. In the case of obtaining a chattel from an automatic machine (where putting in our coin is the acceptance of a standing offer made by the owner of the machine) there is no possibility of accepting in words.

12] ***Distinction of tacit from fictitious promises.** A promise made in this way is often said to be implied: but this tends to obscure the distinction of the real though tacit promise in these cases from the fictitious promise "implied by law," as we shall immediately see, in certain cases where there is no real contract at all, but an obligation *quasi ex contractu,* and in others where definite duties are annexed by rules of law to special kinds of contracts or to relations arising out of them.[6] Sometimes it may be difficult to draw the line. "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, *the law will imply* [fictitious contract] *or the jury may infer* [true contract] a promise by each party to do what is to be done by him" (*n*).[7] It was held in the case cited that an innkeeper promises in this sense to keep his guests' goods safely. The case of a carrier is analogous. So where A. does at B.'s request something not apparently illegal or wrongful, but which in fact exposes A. to an action at the suit of a third person, it seems to be not a proposition

(*n*) Per Cur. *Morgan* v. *Ravey* (1861) 6 H. & N. 265, 30 L. J. Ex. 131.

5 "Whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and carefnl the one of them would make a promise to the other it may properly be inferred that both of them understood that such a promise was given and accepted." *Ex parte* Ford, 16 Q. B. D. 305, 307. Cases discussing or involving the principles of tacit proposal or acceptance are Brogden *v.* Metropolitan Rwy. Co., 2 App. Ca. 666; Titcomb *v.* United States, 14 Ct. Cl. 263; Miller *v.* McManis, 57 Ill. 126; Hobbs *v.* Massassoit Whip Co., 158 Mass. 194; Wheeler *v.* Klaholt, 178 Mass. 141; Prescott *v.* Jones, 69 N. H. 145; Yale *v.* Curtiss, 151 N. Y. 598; Royal Ins. Co. *v.* Beatty, 119 Pa. 6; Indiana Mfg. Co. *v.* Hayes, 155 Pa. 160; Haines *v.* Dearborn, 199 Pa. 474; Rutledge *v.* Greenwood, 2 Desaus. 389; Raysor *v.* Berkeley Co., 26 S. C. 610. See also cases in the following notes.

6 Montgomery *v.* Water Works, 77 Ala. 248; Bixby *v.* Moore, 51 N. H. 402; Railway Co. *v.* Gaffney, 65 Ohio St. 104, 114, 118. "An implied promise does not differ from an express promise, except in the evidence by which it is proved." Chilcott *v.* Trimble, 13 Barb. 502.

An agreement "is express none the less that it is expressed by conduct and not by words." Gallagher *v.* Hathaway, etc., Corp., 172 Mass. 230, 232.

7 Nevada Co. *v.* Farnsworth, 89 Fed. Rep. 164, 167.

of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A. (*o*).

If A. with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labour is worth. And this is a pure inference of fact, the question being whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The *doing of the work with B.'s knowledge is [13 the proposal of a contract, and B.'s conduct is the acceptance.[8] The like inference cannot be made if the work is done without B.'s knowledge. For by the hypothesis the doing of the work is not a proposal, not being communicated at the time: B. has no opportunity of approving or countermanding it, and cannot be bound to pay for it when he becomes aware of the facts, although he may have derived some benefit from the work; it may be impossible to restore or reject that benefit without giving up his own property (*p*).[9] If A. of his

(*o*) *Dugdale* v. *Lovering* (1875) L. R. 10 C. P. 196, 44 L. J. C. P. 197.

(*p*) Cp. *dicta* of Pollock C. B. 25 L. J. Ex. at p. 332. The effect of a subsequent express promise to pay for work already done comes under the doctrine of Consideration.

[8] See McColley *v.* The Brabo, 33 Fed. Rep. 884; Cincinnati R. Co. *v.* Bensley, 51 Fed. Rep. 738, 742; Travelers' Ins. Co. *v.* Johnson City, 99 Fed. Rep. 663; Goodnow *v.* Moulton, 51 Ia. 555, 557; Day *v.* Caton, 119 Mass. 513; Cooper *v.* Cooper, 147 Mass. 370; Spencer *v.* Spencer, 181 Mass. 471; Cicotte *v.* Church of St. Anne, 60 Mich. 552; Holmes *v.* Board of Trade, 81 Mo. 137; Fogg *v.* Portsmouth Athenaeum, 44 N. H. 115; Ashley *v.* Henahan, 56 Ohio St. 559, 574; Kiser *v.* Holladay, 29 Oreg. 338; Hertzog *v.* Hertzog, 29 Pa. 465; Curry *v.* Curry, 114 Pa. 367; Gross *v.* Caldwell, 4 Wash. 670. Services intended to be gratuitous at the time when they are rendered cannot subsequently be used to raise an implied promise to pay for them. Osier *v.* Hobbs, 33 Ark. 215; Allen *v.* Bryson, 67 Ia. 591; Collins *v.* Martin, 43 Kan. 182; Johnson *v.* Kimball, 172 Mass. 398; Potter *v.* Carpenter, 76 N. Y. 157; Taylor *v.* Lincumfelter, 1 Lea, 83, even though the person rendering them was moved so to do by reason of a state of facts mistakenly supposed to exist. Coleman *v.* United States, 152 U. S. 96; Jones County *v.* Norton, 91 Ia. 680; St. Joseph's Orphan Asylum *v.* Wolpert, 80 Ky. 86; Cole *v.* Clark, 85 Me. 336; Newberry *v.* Creedon, 146 Mass. 134; Forster *v.* Green, 111 Mich. 264; Boardman *v.* Ward, 40 Minn. 399; Albany *v.* McNamara, 117 N. Y. 168. But see *contra*, Thomas *v.* Thomasville Club, 121 N. C. 238. See further Keener on Quasi Contracts, 317 and *Re* Rhodes, 44 Ch. D. 94; Payne's Appeal, 65 Conn. 397; Frailey's Adm. *v.* Thompson, (Ky.) 49 S. W. Rep. 13; Graham *v.* Stanton, 177 Mass. 321; Sceva *v.* True, 53 N. H. 627; Pickett *v.* Gore, (Tenn. Ch.) 58 S. W. Rep. 402. Cp. Anderson *v.* Eggers, 61 N. J. Eq. 85.

[9] Thompson Mfg. Co. *v.* Hawes, 73 L. T. 369; Mann *v.* Farnum, 17 Col. 427; Davis *v.* School District, 24 Me. 349, 351; Ulmer *v.* Farnsworth, 80 Me. 500;

own motion sends goods to B. on approval, this is an offer which B. accepts by dealing with the goods as owner. If he does not choose to take them, he is not bound to return them; nor indeed is he bound to take any active care of them till A. reclaims them (*q*).

Duties quasi ex contractu in English law. But it does not follow that because there is no true contract, there may not be cases falling within this general description in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. In fact there are such cases:[10] and as the forms of our common law did not recognize obligations *quasi ex contractu* in any distinct manner, these cases were dealt with by the fiction of an implied previous request, which often had to be supplemented (as in the action for money had and received) by an equally fictitious promise. The promise, actual or fictitious, was then supposed to relate back to the fictitious request, so that the transaction which was the real foundation of the matter was treated as forming the consideration in a fictitious contract of the regular type. Here, as in many other instances, the law was content to rest in a compromise between
14] the forms of pleading and the convenience *of mankind. These fictions have long ceased to appear on the face of our pleadings, but they have become so established in legal language that it is still necessary to understand them (*r*).

Under Indian Contract Act. The Indian Act provides for matters of this kind more simply in form and more comprehensively in substance than our present law, by a separate chapter, entitled "Of certain Relations resembling those created by Contract" (ss. 68—72, cp. s. 73). The term *constructive contract* might properly be applied to these obligations; it would be exactly analogous to "constructive pos-

(*q*) It is prudent, however, to inform the sender that the goods sent without request are at his disposal and risk.

(*r*) For details see notes to *Lampleigh* v. *Brathwait* in 1 Sm. L. C. and *Osborne* v. *Rogers*, 1 Wms. Saund. 357.

O'Conner *v.* Hurley, 147 Mass. 145; Holmes *v.* Board of Trade, 81 Mo. 137; Bartholomew *v.* Jackson, 20 Johns. 28; Hart *v.* Norton, 1 McCord, 22; and see Limer *v.* Traders Co., 44 W. Va. 175. *Contra*, is Chase *v.* Corcoran, 106 Mass. 286; with which cp. Earle *v.* Coburn, 130 Mass. 596; Skinner *v.* Tirrell, 159 Mass. 474.

[10] See Louisiana *v.* Mayor, 109 U. S. 285; Nevada Co. *v.* Farnsworth, 89 Fed. Rep. 164; Northern Bank *v.* Hoopes, 98 Fed. Rep. 935, 938; Sceva *v.* True, 53 N. H. 627; People *v.* Speir, 77 N. Y. 144, 150; Columbus, &c., Ry. Co. *v.* Gaffney, 65 Ohio St. 104, 113; Hertzog *v.* Hertzog, 29 Pa. 465, 467. Cp. Milford *v.* Commonwealth, 144 Mass. 64.

session" and "constructive notice." But it has never come into use. The term *Quasi-Contract* is now current in America and recognized in England.

Performance of conditions, &c., as acceptance. A corollary from the general principle of tacit acceptance, which in some classes of cases is of considerable importance, is thus expressed by the Indian Contract Act (s. 8): —

> "Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal." [11]

Offers by advertisement. This rule contains the true legal theory of offers of reward made by public advertisement for the procuring of information, the restoration of lost property, and the like. On such offers actions have many times been brought with success by persons who had done the things required as the condition of obtaining the reward.

It appears to have been once held that even after performance an offer thus made did not become a binding promise, because "it was not averred nor declared to whom the promise was made" (*s*). But the established modern doctrine is that there is a contract with any person who *performs the condition mentioned in the advertise- [15
ment (*t*). That is, the advertisement is a proposal which is accepted by performance of the conditions. It is an offer to become liable to any person who happens to fulfil the contract of which it is the offer (*u*).[12] Until some person has done this, it is a proposal

(*s*) Noy, 11; 1 Rolle Ab. 6 M. pl. 1.
(*t*) *Williams* v. *Carwardine* (1833) 4 B. & Ad. 621, 38 R. R. 328.
(*u*) Per Willes J. *Spencer* v. *Harding* (1870) L. R. 5 C. P. 563. See too *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley L.J. at p. 262, per Bowen L.J. at p. 268, 62 L. J. Ch. 257.

11 As to the distinction between unilateral and bilateral contracts in the matter of acceptance, see *post*, p. 22, n. 21.

12 The performance of an act, for the doing of which a reward is offered, gives rise to a unilateral contract.

The promise of a reward "was but an offer until its terms were complied with. When that was done it thenceforth became a binding contract, which the offerer was bound to perform his share of." Cummings *v.* Gann, 52 Pa. St. 484, 490.

"Until something is done in pursuance of it, it is a mere offer and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor, for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation."

and no more. It ripens into a promise only when its conditions are fully satisfied. As Sir W. Anson has well put it, "an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person" (*x*).[13]

In the same manner each bidding at a sale by auction is a proposal; and when a particular bid is accepted by the fall of the hammer (but

(*x*) Principles of the English Law of Contract, p. 39, 9th ed. We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes. The Germans call it *Auslobung*.

Wentworth *v.* Day, 3 Met. 352, 354; Furman *v.* Parke, 21 N. J. L. 310; Gilmore *v.* Lewis, 12 Ohio, 281; Ryer *v.* Stockwell, 14 Cal. 134; Janvrin *v.* Exeter, 48 N. H. 83; Alvord *v.* Smith, 63 Ind. 58, 62; Harson *v.* Pike, 16 Ind. 140.

To entitle one to the reward, he must show that the terms of the offer have been complied with. Williams *v.* West Chicago Ry. Co., 191 Ill. 610; Cornelson *v.* Insurance Co., 7 La. Ann. 345; Furman *v.* Parke, 21 N. J. L. 310; Jones *v.* Bank, 8 N. Y. 228; Fitch *v.* Snedaker, 38 N. Y. 248; Clanton *v.* Young, 11 Rich. L. 546; Blain *v.* Pacific Exp. Co., 69 Tex. 74. Cp. Mosley *v.* Stone, 108 Ky. 492.

The decisions in Symmes *v.* Frazier, 6 Mass. 344, and Hawk *v.* Marion County, 48 Ia. 472, that where a reward is offered for the recovery of a sum of money lost, the finder of a part is entitled to a *pro rata* portion of the reward offered, cannot, it is believed, be sustained. And see *contra*, Blain *v.* Pacific Ex. Co., 69 Tex. 74.

Where several persons successively give the information requested by the offer the first one only can recover the reward. Lancaster *v.* Walsh, 4 M. & W. 16; United States *v.* Simons, 7 Fed. Rep. 709. As to the rights of parties where the consideration requested has been performed by the combined efforts of several persons, see Janvrin *v.* Exeter, 48 N. H. 83; Whitcher *v.* State, 68 N. H. 605; Fargo *v.* Arthur, 43 How. Pr. 193.

It has been held in several cases that it is not necessary that the person who does the act, for doing which the reward is offered, should have had any knowledge of the offer, in order to entitle him to the reward. Gibbons *v.* Proctor, 64 L. T. N. S. 594; Burke *v.* Wells Fargo, 50 Cal. 218; Eagle *v.* Smith, 4 Houst. 293; Dawkins *v.* Sappington, 26 Ind. 199; Auditor *v.* Ballard, 9 Bush, 572; Coffey *v.* Commonwealth (Ky.), 37 S. W. Rep. 575; Russell *v.* Stewart, 44 Vt. 170. See also Drummond *v.* United States, 35 Ct. Claims, 356.

But this is utterly inconsistent with the idea that the obligation to pay the reward arises out of contract. "Where a contract is proposed to all the world, in the form of a proposition, any party may assent to it, and it is binding, but he cannot assent without knowledge of the proposition." Howland *v.* Lounds, 51 N. Y. 604, 609; Chicago, &c., R. R. Co. *v.* Sebring, 16 Ill. App. 181; Ensminger *v.* Horn, 70 Ill. App. 605; Williams *v.* West Chicago St. Ry. Co., 191 Ill. 610; Lee *v.* Flemingsburg, 7 Dana, 28 (overruled); Ball *v.* Newton, 7 Cush. 599; Mayor of Hoboken *v.* Bailey, 36 N. J. L. 490; Fitch *v.* Snedaker, 38 N. Y. 248; Stangler *v.* Temple, 6 Humph. 115. See also City Bank *v.* Bangs, 2 Edw. Ch. 95; Brecknock School District *v.* Frankheuser, 58 Pa. 380.

That the act must be done not only with knowledge of, but with the intention of accepting the offer, see Hewitt *v.* Anderson, 56 Cal. 476; Vitty *v.* Eley, 51 N. Y. App. Div. 44; *infra*, p. 21. See further on rewards, 54 Cent. L. J. 184.

[13] A covenant "with such person as may be the wife of A, at his decease" to pay her a sum of money is invalid. It does not purport to create a present agreement, nor to be a continuing offer, it is "an attempt to create a covenant to arise wholly in the future between a defendant and a party who at the time was unascertained, and from whom no consideration was to move." Saunders *v.* Saunders, 154 Mass. 337.

not before), there is a complete contract with the particular bidder to whom the lot is knocked down (*y*).[14]

Difficulties in application. The principle is sufficiently clear, but its application is not wholly free from difficulties. These are partly reducible to questions of fact or of interpretation, but partly arise from decisions which appear to give some countenance to a fallacious theory.

Distinction between offer and invitation of offers. First, we have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration (*z*). This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction. *Evidently it may be [16 an important one, but due weight has not always been given to it.

The proposal of a definite service to be done for reward, which is in fact a request (in the sense of the ordinary English law of contract) for that particular service, though not addressed to any one individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do business with them in a particular manner. The person who publishes such an invitation does indeed contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it. But acts so done are merely incidental to the real object; they are not elements of a contract but preliminaries. It does not seem reasonable to construe such preliminaries into the consideration for a contract which the parties had no intention of making. Yet there are some modern decisions which seem to disregard the distinction between mere invitations or declarations of intention and binding contracts (*a*). We shall now examine these cases.

Examination of cases: In *Denton* v. *G. N. Railway Co.* (*b*), the facts were shortly these: The plaintiff had come from London to Peter-

(*y*) *Payne* v. *Cave* (1789) 3 T. R. 148, 1 R. R. 679. Prof. Langdell (Summary, § 19) thinks it would have been better to hold that every bid constitutes "an actual sale, subject to the condition that no one else shall bid higher."

(*z*) In German this is *Aufforderung zu Anträgen* as opposed to *Antrag*.

(*a*) Compare the judgments in *Harris* v. *Nickerson* (1873) L. R. 8 Q. B. 286, 42 L. J. Q. B. 171.

(*b*) (1856) 5 E. & B. 860, and better in 25 L. J. Q. B. 129, where the case stated is given at length.

14 Sale of Goods Act, § 58 (2); Blossom *v.* Railroad Co., 3 Wall. 96; Grotenkemper *v.* Achtermyer, 11 Bush, 222; Head *v.* Clark, 88 Ky. 362, 364; Fisher *v.* Seltzer, 23 Pa. 308. It is so provided also in the German Bürgerliches Gesetzbuch, § 156.

borough, had done his business there, and wanted to go on to Hull the same night. He had made his arrangements on the faith of the company's current time-tables, and presented himself in due time at the Peterborough station, applied for a ticket to Hull by a train advertised in those tables as running to Hull at 7.20 p.m., and offered to pay the proper fare. The defendant company's clerk refused to issue such a ticket, for the reason that the 7.20 train no longer went to Hull. The fact was that beyond Milford Junction the line to Hull belonged to the North Eastern Railway Company, who formerly
17] ran a *train corresponding with the Great Northern train, for which the Great Northern Railway Company issued through tickets by arrangement between the two companies. This corresponding train had now been taken off by the N. E. R. Co., but the G. N. R. time-table had not been altered. The plaintiff was unable to go further than Milford Junction that night, and so missed an appointment at Hull and sustained damage. The cause was removed from a County Court into the Queen's Bench, and the question was whether on the facts as stated in a case for the opinion of the Court the plaintiff could recover (*c*).

It was held by Lord Campbell C.J. and Wightman J. that when anyone offered to take a ticket to any of the places to which the train was advertised to carry passengers the company contracted with him to receive him as a passenger to that place according to the advertisement. Lord Campbell treated the statement in the time-table as a conditional promise which on the condition being performed became absolute. This proposition, reduced to exact language, amounts to saying that the time-table is a proposal, or part of a proposal, addressed to all intending passengers and sufficiently accepted by tender of the fare at the station in time for the advertised train.[15] Cromp-

(*c*) As to the measure of damages, which here was not in dispute, see *Hamlin* v. *G. N. R. Co.* (1856) 1 H. & N. 408, 26 L. J. Ex. 20 (where a ticket having been taken there was an unquestionable contract). [See 36 Cent. L. Jl. 390].

15 In Gordon *v.* Railroad Co., 52 N. H. 596, it was held that the company would not be liable for failure to transport the plaintiff (who was the holder of a season ticket over its road) in accordance with its published time-table, if it "had done all that due care and skill could do" to transport him punctually.

"The publication of a time-table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence." Cp. Sears *v.* Railroad Co., 14 Allen, 433. In Crocker *v.* Railroad Co., 24 Conn. 249, the defendants had established, and given public notice of, a regulation that the fare on their line from N. to

ton J. (*d*) did not accept this view, nor was it necessary to the actual decision: for the Court had only to say whether on the given facts the plaintiff could succeed in any form of action, and they were unanimously of opinion that there was a good cause of action in tort for a false representation;[16] an opinion itself questionable, but not in this place (*e*).

Warlow v. Harrison. In *Warlow* v. *Harrison* (*f*) a sale by auction was *announced as without reserve, the name of the owner not [18 being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. The Court of Queen's Bench held that this was wrong; the Court of Exchequer Chamber affirmed the judgment on the pleadings as they stood, but thought the facts did show another cause of action. Watson and Martin BB. and Byles J. considered that the auctioneer con-

(*d*) The fuller report of his judgment is that in 5 E. & B.

(*e*) See Pollock on Torts, 6th ed. 290, 518.

(*f*) (1858–9) 1 E. & E. 295, 28 L. J. Q. B. 18, in Ex. Ch. 1 E. & E. 309, 29 L. J. Q. B. 14.

N. L. would be fifty cents to passengers purchasing tickets before entering their cars, and to others fifty-five cents. Plaintiff took a seat in the train at N., and after it had started, being called upon by the conductor, offered to pay fifty cents, and refused to pay more for his fare from N. to N. L., and was thereupon removed from the train by defendants' servants. An action of trespass having been brought by him for having been wrongfully removed from the train, it appeared that plaintiff, on going a reasonable time before the time of departure of the train to defendants' office where tickets were usually sold, found it closed, and was unable then, or afterward at any time before the train left, to procure a ticket, of which facts he informed the conductor when the latter demanded his fare. The regulation of defendants was admitted to be lawful and reasonable. *Held:* "1. That as common carriers the defendants were under no legal obligation to furnish tickets, or carry passengers from N. to N. L. for less than fifty-five cents each. 2. That the plaintiff's claim to such a passage for fifty cents rested entirely on the assumed engagement of the defendants to furnish tickets, and the plaintiff's endeavor to procure one, defeated by the defendants. 3. That said regulation of the defendants was not a contract, creating a legal debt or duty, but a mere proposal, which might be suspended or withdrawn, by closing the defendants' office, and the retirement of their agent therefrom. 4. That the proposal being withdrawn, the parties were in the same condition as before it was made; the defendants continuing common carriers were bound to carry the plaintiff for fifty-five cents, but not otherwise. 5. That the plaintiff refusing said sum, the conductor had a right to remove him from the cars, using no unnecessary force for that purpose, and that for such removal the defendants were not liable in an action for trespass." Cp. Johnston *v.* Georgia Co., 108 Ga. 496; Railroad Co. *v.* Dalby, 19 Ill. 353; Railroad Co. *v.* South, 43 Ill. 176; Railway Co. *v.* Birney, 71 Ill. 391; Railroad Co. *v.* Rogers, 28 Ind. 1; 38 Ind. 116; Railroad Co. *v.* Rinard, 46 Ind. 293; Railroad Co. *v.* Beckett, 11 Ind. App. 547; Du Larans *v.* Railroad Co., 15 Minn. 49; Swan *v.* Railroad Co., 132 Mass. 116; Hansley *v.* Railway Co., 117 N. C. 565; Hall *v.* Railroad Co., 28 S. C. 261; Phettiplace *v.* Railway Co., 84 Wis. 412.

[16] Heirn *v.* McCaughan, 32 Miss. 17.

tracted with the highest *bona fide* bidder that the sale should be without reserve. They said they could not distinguish the case from that of a reward offered by advertisement, or of a statement in a time-table, thus holding in effect (contrary to the general rule as to sales by auction) that where the sale is without reserve the contract is completed not by the acceptance of a bidding, but by the bidding itself, subject to the condition that no higher *bona fide* bidder appears. In other words, every bid is in such a case not a mere proposal but a conditional acceptance. Willes J. and Bramwell B. preferred to say that the auctioneer by his announcement warranted that he had authority to sell without reserve, and might be sued for a breach of such warranty. The result was that leave was given to the plaintiff to amend and proceed to a new trial, which however was not done (*g*).

Doctrine of Warlow v. Harrison doubted. The opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a Court of Error, and have been in fact regarded with some doubt in a later case where the Court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without
19] reserve (*h*). Later, again, the same Court held that when *an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold (*i*). In an analogous case (*k*) it was decided that a simple offer of stock in trade for sale by tender does not amount to a contract to sell to the person who makes the highest tender.[17]

(*g*) The parties agreed to a *stet processus;* see note in the L. J. report.

(*h*) *Mainprice* v. *Westley* (1865) 6 B. & S. 420, 34 L. J. Q. B. 229. But in *Johnston* v. *Boyes* [1899] 2 Ch. 73, 68 L. J. Ch. 425, Cozens-Hardy J. was prepared to hold on the authority of *Warlow* v. *Harrison* that there is a contract by the vendors with the highest bidder that he shall be the purchaser, distinct from the contract of sale. The plaintiff failed on another point. [See Taylor *v.* Hassett, 55 N. Y. Supp. 988].

(*i*) *Harris* v. *Nickerson* (1873) L. R. 3 Q. B. 286, 42 L. J. B. 171. [See Fare *v.* John, 23 Ia. 286].

(*k*) *Spencer* v. *Harding* (1870) L. R. 5 C. P. 561, 39 L. J. C. P. 332. In each of these cases we have the unanimous decision of a strong Court.

17 So the lowest bidder for a public contract, in the absence of statute, has no enforceable right. Even where the bid had been accepted by formal vote, but the written contract which was to be executed had not been signed, there was held to be no contract in Edge Moor Bridge Works *v.* Bristol, 170 Mass. 528. See also Weitz *v.* Independent District, 79 Ia. 423; Walsh *v.* St. Louis Exposition, 16 Mo. App. 502, 90 Mo. 459; Anderson *v.* Board of Public Schools, 122 Mo. 61; Leskie *v.* Haseltine, 155 Pa. 98.

Difficulties of decisions. The doctrine of these cases, though capable, as we have seen, of being expressed in a manner conformable to the normal analysis of contract, goes to the utmost limit warranted by sound principle, and is not likely to be extended. If a man advertises that he has goods to sell at a certain price, does he contract with any one who comes and offers to buy those goods that until further notice communicated to the intending buyer he will sell them at the advertised price? (*l*)[18] Again, does the manager of a theatre contract with every one who comes to the theatre and is ready to pay for a place that the piece announced shall be performed?[19] or do directors or committee-men who summon a meeting contract with all who come that the meeting shall be held? Offers to negotiate, in other words expressions of willingness to consider offers, must not be confounded with offers to be bound (*m*).

Canning v. Farquhar. The distinction between the proposal of a contract and the mere preliminaries is clearly brought out by a later

(*l*) See per Crompton J. in *Denton* v. *G. N. R. Co. supra.*

(*m*) See per Bowen L.J. *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, 268.

[18] In Moulton *v.* Kershaw, 59 Wis. 316, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full car-load lots of eighty to ninety-five bbls. delivered in your city at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." On the following day the plaintiff telegraphed: "Your letter of yesterday received and noted. You may ship me 2,000 bbls. Michigan fine salt, as offered in your letter. Answer." It was held that the letter and telegram did not together make a contract; the letter was construed as being in the nature of an advertisement that the writers were in a condition to supply salt at the price named, and requesting the person to whom it was addressed to deal with them, but not an offer by which, if accepted, defendants were to be bound.

In Beaupré *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155, the plaintiff wrote: "Have you any more northwestern mess pork? also extra mess? Telegraph price on receipt of this." The reply was telegraphed: "Letter received. No light mess here. Extra mess $28.75." The plaintiffs replied by telegraph: "Despatch received. Will take two hundred extra mess, price named." The Court held there was no contract.

In Johnston *v.* Rogers, 30 Ont. 150, the defendants wrote in the course of a letter "We quote you" specified goods at specified price, "car lots only." The plaintiffs telegraphed "We will take two cars . . . at your offer of yesterday;" it was held that no offer had been made and there was no contract. See also Harvey *v.* Facey, [1893] A. C. 552; Strobridge Lith. Co. *v.* Randall, 73 Fed. Rep. 619; Talbot *v.* Pettigrew, 3 Dak. 141; Knight *v.* Cooley, 34 Ia. 218; Howard *v.* Industrial School, 78 Me. 230; Smith *v.* Gowdy, 8 Allen, 566; Ashcroft *v.* Butterworth, 136 Mass. 511; Ahearn *v.* Ayres, 38 Mich. 692; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Allen *v.* Kirwan, 159 Pa. 612; Kinghorne *v.* Montreal Tel. Co., U. C. 18 Q. B. 60.

Cp. Seymour *v.* Armstrong, 62 Kan. 720; College Mill *v.* Fidler, [Tenn.] 58 S. W. Rep. 382.

[19] See Pearce *v.* Spalding, 12 Mo. App. 141.

decision of the Court of Appeal. A "proposal" in the usual form was made to a life assurance society; the actuary wrote a letter stating that the proposal had been accepted at a certain premium, but 20] adding this note: "No *assurance can take place until the first premium is paid." Afterwards, and before the time limited for that payment, an accident happened to the assured which affected his health, and the society, being informed of this, refused the premium when tendered. It was held that they were entitled to do so. The letter of acceptance did not conclude a contract, first, because the amount of premium was then first specified, and the assured had therefore not consented to that material term of the agreement; next, because of the express declaration of contrary intention (*n*).

Another matter for remark is the effect of notice of revocation. Suppose the traveller had seen and read a new and correct edition of the time-table in the booking-office immediately before he offered to take his ticket. This would clearly have been a revocation of the proposal of the company held out in the incorrect time-table, and accordingly no contract could arise. Similarly if on putting up a particular lot the auctioneer expressly retracted as to that lot the statement of the sale being without reserve, there could be no such contract with the highest *bona fide* bidder as supposed in *Warlow* v. *Harrison* (*o*): yet the traveller's or bidder's grievance would be the same.

Difficulty of fixing the supposed contract. There is also difficulty in determining what are the contents and consideration of the contract supposed to be made. In the case of the time-table, for example, it is not sufficient to say that the statements of the table are a term in the company's ordinary contract to carry the passenger. They may well be so after he has taken his ticket. But here we 21] have a contract said to be concluded by the *mere demand of a ticket and tender of the fare, which, therefore, cannot be the ordinary contract to carry. So in the case of the auction we have a contract alleged to be complete not on the acceptance but on the making of a bid. The anomalous character of these contracts may

(*n*) *Canning* v. *Farquhar* (1886) 16 Q. B. Div. 727, 55 L. J. Q. B. 225; cp. *Wallace's case* [1900] 2 Ch. 671, 69 L. J. Ch. 777 (application for shares under an amalgamation agreement by a shareholder in the old company).

(*o*) The Continental doctrine that the revocation must be so communicated as to amount to reasonable notice is not admissible in our law: see note to *Frost* v. *Knight* (1870) L. R. 5 Ex. at p. 337, and pp. 26, 27, below. As to the somewhat analogous suggestion made in that case, see s. c. in Ex. Ch. L. R. 7 Ex. at p. 117.

further be illustrated by considering whether it would be possible to maintain a remedy *ex contractu* in the case of a merely capricious refusal to issue tickets or hold the sale, as the case might be. On the whole it seems that at least some of the *dicta* in this class of cases cannot be supported.

Must there be a real acceptance? Another difficulty (though for English lawyers hardly a serious one) is raised by the suggestion that in these cases the first offer or announcement is not a mere proposal, but constitutes at once a kind of floating contract with the unascertained person, if any, who shall fulfil the prescribed condition. Savigny quite justly held that on this theory the right of action could not be supported: there cannot be a *vinculum iuris* with one end loose; but he strangely missed the true explanation (*p*). To a certain extent, however, this notion of a floating obligation is countenanced by the language of the judges in the cases above discussed, and also in the much earlier case of *Williams* v. *Carwardine* (*q*). There a reward had been offered by the defendant for information which should lead to the discovery of a murder. A statement which had that effect was made by the plaintiff, but not (as the jury found) with a view to obtaining the reward; it does not appear to whom it was made, or whether with any knowledge that a reward had been offered. The Court held, nevertheless, that the plaintiff had a good cause of action, because "there was a contract with any person who performed the condition mentioned in the advertisement," and the motive with which the information was given was immaterial: but on *this [22 it must be observed that the question is not of motive but of intention. The decision seems to set up a contract without any privity between the parties. Such a doctrine cannot now be received (*r*),[20] though the decision may have been right on the facts. There cannot be an acceptance constituting a contract without any communication of the proposal to the acceptor, or of the acceptance to the proposer.[21]

(*p*) Obl. 2, 90. Yet within a few pages he does gives the true analysis for the not dissimilar case of a sale by auction.

(*q*) (1833) 4 B. & Ad. 621, s. c. at N. P. 5 C. & P. 566, 38 R. R. 328.

(*r*) Cf. Langdell, § 3, and American authorities collected in 28 Am. Law Reg. 2d S. 116. The solitary modern case of *Gibbons* v. *Proctor* (1891) 64 L. T. 594, would no doubt support or even extend *Williams* v. *Carwardine* if it could be relied on. But it cannot be law as reported.

[20] See *ante*, p. 13, n. 12.

[21] Although communication of the proposal to the acceptor is, communication of the acceptance to the proposer is here not necessary. Carlill *v.* Car-

The question may arise whether the party claiming the reward has in fact performed the required condition according to the terms of

bolic Smoke Ball Co., [1892] 2 Q. B. 484, [1893] 1 Q. B. 256, 269, per Bowen, J., p. 262, per Lindley, J.; Matthewson *v.* Fitch, 22 Col. 86; Perkins *v.* Hadsell, 50 Ill. 216; Harson *v.* Pike, 16 Ind. 140; Hayden *v.* Souger, 56 Ind. 42; First Nat. Bank *v.* Watkins, 154 Mass. 385; Bishop *v.* Eaton, 161 Mass. 496; Niedermeyer *v.* Curators, 61 Mo. App. 654; Todd *v.* Weber, 95 N. Y. 181, 191; Miller *v.* McKenzie, 95 N. Y. 575; Fry *v.* Insurance Co., 40 Ohio St. 108; Cooper *v.* Altimus, 62 Pa. 486; Patton's Ex. *v.* Hassinger, 69 Pa. 311; Reif *v.* Page, 55 Wis. 496. As stated, *supra*, p. 13, n. 12, the performance of an act for the doing of which a reward is offered gives rise to a unilateral contract, and unless by the terms of the offer proposing a unilateral contract communication of its acceptance is expressly or impliedly required as part of the consideration to be performed, it need not be made. In a bilateral contract communication of acceptance of the proposal is always necessary. A bilateral differs from a unilateral contract in this respect, for the reason that the consideration of a unilateral contract is something done, while the consideration of a bilateral contract is on each side a promise. In a bilateral contract the promise made in the proposal remains without consideration until there is an acceptance by means of a counter promise, and this counter promise has no existence until it is communicated, while the consideration of a unilateral contract is furnished by performance of the act or acts requested to be done, and for doing which compensation is promised. An offer proposing a unilateral contract, therefore, becomes a binding promise immediately upon the performance of the act or acts requested to be done so that unless communication to the proposer is one of the things requested it is not necessary. That notice is not necessary for the validity of a unilateral contract seems clearly recognized except in the case of offers of guaranty conditional upon giving credit to a third person. In such cases the weight of American authority (though there are many contrary decisions) holds that the offerer cannot be held unless notice is given by the acceptor that he has given credit as requested. The numerous cases are exhaustively collected in Ames's Cases on Suretyship, pp. 225–237. See also Parsons on Contracts, Vol. II, p. *13, n. 1. It is often supposed that the reason of this requirement is that notice of acceptance is always an essential element to the formation of a contract. Davis *v.* Wells, 104 U. S. 159; Barnes Co. *v.* Reed, 84 Fed. Rep. 603; Newman *v.* Streator, 19 Ill. App. 594; Ruffner *v.* Love, 33 Ill. App. 601; Kincheloe *v.* Holmes, 7 B. Mon. 5; Lachman *v.* Block, 47 La. Ann. 505; Howe *v.* Nickels, 22 Me. 175; Winnebago Mills *v.* Travis, 56 Minn. 480; Mitchell *v.* Railton, 45 Mo. App. 273; Kay *v.* Allen, 9 Pa. 320; Kellogg *v.* Stockton, 29 Pa. 460; Wilkins *v.* Carter, 84 Tex. 438.

The better reason of the rule is well expressed by Knowlton, J., in Bishop *v.* Eaton, 161 Mass. 496. The offer to guarantee "was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor." See also Oaks *v.* Weller, 13 Vt. 106.

the advertisement.[22] In *Carlill* v. *Carbolic Smoke Ball Co.* (*s*) it arose in a curious manner. The advertisement of a remedy for influenza and similar diseases offered a sum of money to any one who should contract such disease "after using" the remedy according to the directions supplied with it, and for a certain time. A buyer who used the remedy as directed, and caught influenza while still using it, was held entitled to the sum offered, notwithstanding the argument strenuously urged for the defendant that the offer was too vague to be taken seriously, and the performance could not be verified.

Revocation of offer by advertisement. The Supreme Court of the United States has held that a general proposal made by public announcement may be effectually revoked by an announcement of equal publicity, such as an advertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. For "he should have known," it is said, "that it could be revoked in the manner in which it was made" (*t*). In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. *This may be a convenient rule, and may per- [23 haps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind: yet it seems a rather strong piece of judicial legislation.[23]

(*s*) [1893] 1 Q. B. 256, 62 L. J. Q. B. 257, C. A.

(*t*) *Shuey* v. *United States* (1875) 92 U. S. 73.

22 Cases which involve this question are: Lancaster *v.* Walsh, 4 M. & W. 16; Smith *v.* Moore, 1 C. B. 438; Thatcher *v.* England, 3 C. B. 254, 15 L. J. C. P. 241; Tarner *v.* Walker, L. R. 1 Q. B. 641, 2 Q. B. 301; England *v.* Davidson, 11 A. & E. 856; Shuey *v.* U. S., 92 U. S. 73; Morrell *v.* Quarles, 35 Ala. 544; Central, &c., R. Co. *v.* Cheatham, 85 Ala. 292; Ryer *r.* Stockwell, 14 Cal. 134; Burke *r.* Wells, Fargo & Co., 50 Cal. 221; Marvin *v.* Treat, 37 Conn. 96; Matter of Kelly, 39 Conn. 159; Bank *v.* Hart, 55 Ill. 62; Loring *v.* Boston, 7 Met. 409; Crawshaw *v.* Roxbury, 7 Gray, 374; Jenkins *r.* Kebren, 12 Gray, 330; Besse *v.* Dyer, 9 Allen, 151; Kincaid *r.* Eaton, 98 Mass. 139; Pilie *v.* New Orleans, 19 La. Ann. 274; Salbadore *v.* Insurance Co., 22 La. Ann. 338; Haskell *v.* Davidson, 91 Me. 488; Goldsborough *r.* Cradie, 28 Md. 477; Brown *v.* Bradlee, 156 Mass. 28; Bank *v.* Bangs, 2 Edw. Ch. 95; Pierson *v.* Morch, 82 N. Y. 503; Wilmoth *r.* Hensel, 151 Pa. 200; Kasling *v.* Morris, 71 Tex. 584.

One finding lost property for the restoration of which a reward is offered, has a lien upon it so that he need not deliver it until the reward is paid. Everman *v.* Hyman, 3 Ind. App. 459; Wentworth *v.* Day, 3 Met. 352; Cummings *v.* Gann, 52 Pa. St. 484.

23 An offer of reward expires after lapse of a reasonable time. In Drummond *v.* United States, 35 Ct. Cl. 356, it was held that a right to a reward offered for the arrest of a criminal was gained by making the arrest ten years after the offer was made, the criminal being still a fugitive from justice.

In Mitchell *v.* Abbott, 86 Me. 338, it was held that a lapse of twelve years

Other general proposals.—Other kinds of general proposals have also been dealt with as capable of acceptance by any one to whose hands they might come.

Ex parte Asiatic Banking Corporation.—In *Ex parte Asiatic Banking Corporation* (*u*), the following letter of credit had been given by Agra and Masterman's Bank to Dickson, Tatham and Co.

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394, of the 31st of October, 1865."

The Asiatic Banking Corporation held for value bills drawn on the Agra and Masterman's Bank under this letter; the Bank stopped payment before the bills were presented for acceptance, and Dickson, Tatham and Co. were indebted to the Bank in an amount exceeding what was due on the bills: but the Corporation claimed nevertheless to prove in the winding-up for the amount, one of the grounds being "that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the Bank to accept the bills." Cairns L.J. adopted this view, holding that the letter did amount to "a general invitation" to take bills drawn by Dickson, Tatham and Co. on the Agra and Masterman's Bank, on the assurance that the Agra and Masterman's Bank would accept such bills on presentation; and that the acceptance of the offer in this letter by the Asiatic Banking Corporation con-
24] stituted a binding legal contract *against the Agra and Masterman's Bank (*x*). The difficulties above discussed do not seem to

(*u*) (1867) L. R. 2 Ch. 391, 36 L. J. Ch. 222. Cp. *Bhugwandass* v. *Netherlands, &c. Insce. Co.* (1888) 14 App. Ca. (J. C.) 83, decided on the ground that the "open cover" was a proposal of insurance addressed to any one having insurable interest in the cargo.

(*x*) In *Scott* v. *Pilkington* (1862) 2 B. & S. 11, 31 L. J. Q. B. 81, on the other hand, an action was brought on a judgment of the Supreme Court of New York on a very similar state of facts. [Scott *v.* Pilkington, 15 Abb. Pr. 280.] The decision of the English Courts was that the law applicable to the case was the law of New York, and that the judgment having been given by a court of competent jurisdiction in a case to which the local law was properly applicable, there was no room to question its correctness in an English court. So far as any

between the time when the reward was offered and the time of performance was more than a reasonable time.

In The Matter of Keily, 39 Conn. 159, it was held that an offer of reward for a particular crime would not lapse until the Statute of Limitations barred conviction for the crime. See also Loring *v.* Boston, 7 Met. 409; Shaub *v.* Lancaster, 156 Pa. 362; Langdell Sum. Cont., § 155.

exist in this case. From an open letter of credit (containing too in this instance an express request to persons negotiating bills under it to indorse particulars) there may be inferred without any violence either to law or to common reason a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in the letter. This undertaking must then be treated as addressed to any one who shall so advance money: the thing to be performed by way of consideration for the undertaking is definite and substantial, and is in fact the main object of the transaction.[24] If any question arose as to a revocation of the proposal, it would be decided by the rules which apply to the revocation of proposals made by letter in general (*y*).

Statute of Frauds. The bearing of the Statute of Frauds on these contracts made by advertisements or general offers was discussed incidentally in a case brought before the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South

opinion was expressed by the Court as to what should have been the decision on the same facts in a case governed by the law of England, it was against any right of action at law being acquired by the bill-holders. This however was by the way, and as a concession to the defendants, and is therefore no positive authority.

(*y*) See however *Shuey* v. *United States*, p. *22, above. [Also Bank *v.* Clark, 61 Md. 400; Quick *v.* Wheeler, 78 N. Y. 300.]

24 "A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." Coolidge *v.* Payson, 2 Wheat. 66, 75; Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Pet. 111; Bayard *v.* Lathy, 2 McLean, 462; Lafargue *v.* Harrison, 70 Cal. 380; Brown *v.* Ambler, 66 Md. 391; Storey *v.* Logan, 9 Mass. 55; Bank *v.* Rice, 98 Mass. 288; Bank *v.* Richards, 109 Mass. 413; Woodward *v.* Griffiths, &c., Co., 43 Minn. 260; Greele *v.* Parker, 5 Wend. 414; Goodrich *v.* Gordon, 15 Johns. 6; Steman *v.* Harrison, 42 Pa. 49.

See II. Ames' Cas. B. & N. 787, 788: "An absolute authority to draw is equivalent to an unconditional promise to pay a bill of exchange." Ruiz *v.* Renauld, 100 N. Y. 256.

Further, it is well settled that if A. give to B. a letter (which, though addressed to B., is designed to be shown to and acted upon by others), promising to pay any bills which B. may draw, or to stand as surety for any indebtedness which he may incur, an action will lie against A. in favor of any person who gives value to B. on the faith of and within the terms of the letter. Lawrason *v.* Mason. 3 Cr. 492; Russell *v.* Wiggin, 2 Story, 213; Cassell *v.* Dows, 1 Blatchf. 335; Smith *v.* Ledyard, 49 Ala. 279; Whilden *v.* Bank, 64 Ala. 1; Nelson *v.* Bank, 48 Ill. 36; Nisbett *v.* Galbraith, 3 La. Ann. 690; Bank *v.* Lynch, 52 Md. 270; Barney *v.* Newcomb, 9 Cush. 46; Bissell *v.* Lewis, 4 Mich. 450; Bank *v.* Coster's Ex., 3 N. Y. 203; Johannessen *v.* Munroe, 158 N. Y. 641; Lonsdale *v.* Bank, 18 Ohio, 126; Dorland *v.* Mulhollan, 10 Ohio St. 192; Lowry *v.* Adams, 22 Vt. 160; McNaughton *v.* Conkling, 9 Wis. 316. Cp. Posey *v.* Bank, 7 Col. App. 108; Bank *v.* Luce, 139 Mass. 488; Putnam Bank *v.* Snow, 172 Mass. 569; Bank *v.* Kaufman, 93 N. Y. 273.

Wales (*z*). It is settled that the requirements of the statute in the cases where it applies are generally not satisfied unless the written evidence of the contract shows who both the contracting parties are. But it was suggested in the Colonial Court that in the case of a
25] proposal made by advertisement, where the *nature of the contract (*e.g.* a guaranty) was such as to bring it within the statute, the advertisement itself might be a sufficient memorandum, the other party being indicated as far as the nature of the transaction would admit (*a*). The Judicial Committee, however, showed a strong inclination to think that this view is not tenable, and that in such a case the evidence required by the statute would not be complete without some further writing to show who in particular had accepted the proposal.[25] It was observed that as a matter of fact the cases on advertisements had been of such a kind that the statute did not apply to them, and it was a mere circumstance that the advertisement was in writing (*b*). We are not aware of the point having arisen in any later case.

Formation of contract by indirect communication. It is possible for a contract to be formed without any direct communication between the parties or any persons who in an ordinary sense are their agents. Where competitors enter for a club race under express rules prescribed or adopted by the managing committee, and those rules declare that any competitor breaking them shall be liable for damages arising therefrom, this is sufficient to create a mutual contract between the competitors to be liable for and discharge any such damages (*c*). Here the secretary of the club who receives the entries may be regarded as an agent to receive, as between the competitors, the offer of every competitor to be bound by the rules, and the acceptance of every other competitor; and his authority to do so is implied in the nature of the transaction. There may be cases of this kind in which it would be hard, if the question were raised, to de-

(*z*) *Williams* v. *Byrnes* (1863) 1 Moo. P. C. N. S. 154.

(*a*) Per Stephen C.J. at pp. 167, 184.

(*b*) See at p. 198. The language of the headnote is misleading; there is no suggestion in the judgment of any such proposition of law as that the Statute of Frauds is not applicable to contracts made in this manner.

(*c*) *Clarke* v. *Earl of Dunraven* (*The "Satanita"*) [1897] A. C. 59, 66 L. J. P. 1. The only question seriously argued in the H. L. was on the construction of the rules.

25 This objection was raised by counsel, but did not prevail, in Bank *v.* Coster's Ex'rs, 3 N. Y. 203, and Griffin *v.* Rembert, 2 S. C. 410. See also Board of Marion Co. *v.* Shipley, 77 Ind. 553.

termine whether the parties intended to create a legal or a merely honorary obligation.

**Revocation.* [26

Revocation of offer. An offer may be revoked at any time before acceptance but not afterwards.

Cooke v. Oxley — Dickinson v. Dodds. For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything (*d*).[26] So that even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed.[27] He is not bound to keep it open unless there is a distinct contract to that effect, founded on a distinct consideration. If in the morning A. offers goods to B. for sale at a certain price, and gives B. till four o'clock in the afternoon to make up his mind, yet A. may sell the goods to C. at any time before four o'clock, so long as B. has not accepted his offer (*e*). But if B. were to say to

(*d*) The same rule applies to a proposal to vary an existing agreement: *Gilkes* v. *Leonino* (1858) 4 C. B. N. S. 485.

(*e*) Admitted in *Cooke* v. *Oxley* (1790) 1 R. R. 783, 3 T. R. 653; affd. in Ex. Ch., see note; Finch Sel. Ca. 2nd ed. 85. The decision goes farther, and has been the subject of much criticism. For the conflicting views see Benjamin on Sale, 69 (4th ed.) and Langdell's Summary, § 182. I now agree with Mr. Langdell that it cannot be supported in any sense. If the defendant's offer had been revoked before the plaintiff's acceptance, it was for the defendant to plead and prove it. [Wilson *v.* Stump, 103 Cal. 255, 258; Quick *v.* Wheeler, 78 N. Y. 300]. The decision would have been right if the action had been on a promise to keep the offer open, as seems to be supposed by Lush J. in *Stevenson* v. *McLean* (1880) 5 Q. B. D. at p. 351, 49 L. J. Q. B. 701. But the action was for not delivering goods, as on a complete bargain and sale; and this was insisted upon in the argument. The Court may possibly have supposed that acceptance of an offer made any appreciable time before was not complete without a fresh sign of consent from the proposer. Cp. *Kennedy* v. *Lee* (1817) 3 Mer. 441, 17 R. R. 110. [The decision in Cooke *v.* Oxley has been generally condemned in this country. "The criticisms which have been made upon the case are sufficient to destroy its authority," 2 Kent 477 n. (d). "It can not be considered as of any authority," Railroad Co. *v.* Bartlett, 3 Cush. 224, 228; and see Metcalf on Contracts, 19–23; 1 Duer on Insurance, 118; 2 Amer. Jurist N. S. 17 *seq.* Also the Australian case of Nyulasy *v.* Rowan, 17 Vict. L. R. 663.]

[26] Stitt *v.* Huidekopers, 17 Wall. 384; Travis *v.* Ins. Co., 104 Fed. Rep. 486; McDonald *v.* Huff, 77 Cal. 279; Crocker *v.* Railroad Co., 24 Conn. 249, 261; Harding *v.* Gibbs, 125 Ill. 85; Gross *v.* Arnold, 177 Ill. 575; Burton *v.* Shotwell, 13 Bush, 271; Bryant's Pond Co. *v.* Felt, 87 Me. 234; Railroad Co. *v.* Bartlett, 3 Cush. 224; Craig *v.* Harper, 3 Cush. 158; Foster *v.* Boston, 22 Pick. 33; Hudson Co. *v.* Tower, 156 Mass. 82; McDonald *v.* Bewick, 51 Mich. 79; Wilcox *v.* Cline, 70 Mich. 517; Brown *v.* Rice, 29 Mo. 322; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Engine Co. *v.* Green, 143 Pa. 269; Cady *v.* Straus, 97 Va. 701; Johnson *v.* Filkington, 39 Wis. 62.

[27] Brown *v.* Savings Union, 134 Cal. 448; Bosshardt Co. *v.* Crescent Oil Co.,

A.: "At present I do not know, but the refusal of your offer for a definite time is worth something to me; I will give you so much to keep it open till four o'clock," and A. were to agree to this, then A. would be bound to keep his offer open, not by the offer itself, but by the subsequent independent contract (*f*).[28] If A. on Wednesday **27]** hands to *B. a memorandum offering to sell a house at a certain price, with a postscript stating that the offer is to be "left over" till nine o'clock on Friday morning, A. may nevertheless sell the house to C. at any time before the offer is accepted by B. If B., with notice of A.'s dealing with C., tenders a formal acceptance to A., this is inoperative (*g*). It is different in modern Roman law. There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign: nay, there is held in effect to be in every proposal an implied promise to keep it open for a reasonable time (*h*). In our own law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit;[29] that is, it operates as a warning that an accept-

(*f*) We find something like this in early Germanic law, where earnest on a sale was not payment on account of a completed contract, but the price of the seller's forbearance to sell to any other person for a limited time. Heusler, Inst. des D. P. R. ii. 256, cp. Glanv. x. 14, showing the law to be then still doubtful in England.

(*g*) *Dickinson* v. *Dodds* (1876) 2 Ch. Div. 463, 45 L. J. Ch. 777. The case suggests, but does not decide, another question, which will be presently considered. *Contra* Langdell, Summary, p. 244; and on principle perhaps rightly.

(*h*) See L. R. 5 Ex. 337, *n*.

171 Pa. 109; Weaver *v.* Burr, 31 W. Va. 736. Where, on a treaty for a sale, an article is taken on trial, with an option to purchase if liked, there is no contract, but only an offer until the option is determined; Sturm *v.* Boker, 150 U. S. 312; Davis, &c., Works *v.* McHugh, 115 Ia. 415; Hunt *v.* Wyman, 100 Mass 198; Omaha Bank *v.* Kraus, 62 Neb. 77. But where the article is taken with an option to return if not liked, there is a contract in the first place, subject to a right of rescission; Foley *v.* Felrath, 98 Ala. 176; Withersby *v.* Sleeper, 101 Mass. 138. See further, 9 Harv. L. Rev. 110.

[28] So an option or offer under seal is irrevocable during the time which it specifies. Willard *v.* Taylor, 8 Wall. 557; Johnston *v.* Trippe, 33 Fed. Rep. 530; Mansfield *v.* Hodgdon, 147 Mass. 304, 307; O'Brien *v.* Boland, 166 Mass. 481; Walker *v.* Bamberger, 17 Utah, 239.

[29] When an offer is in terms made to remain open until a fixed time, the proposal so limited comes to an end of itself at the end of that time, but a willingness to contract on the part of the party making the offer on the terms named in it, is presumed to continue during the time limited. Henthorn *v.* Fraser [1892], 2 Ch. 31; Haldane *v.* United States, 69 Fed. Rep. 819; Smith *v.* Bateman, 8 Col. App. 336; Larmon *v.* Jordan, 56 Ill. 204; Galena, &c. R. *v.* Ennor, 116 Ill. 55; Crandall *v.* Willig, 166 Ill. 233; Coleman *v.* Applegarth, 68 Md. 21; Railroad Co. *v.* Bartlett, 3 Cush. 224, 227; Wilson *v.* Cline, 70 Mich. 517; Mactier's Adm'rs *v.* Frith, 6 Wend. 103, 122; Cheney *v.* Cook, 7 Wis. 413; Sherley *v.* Peehl, 84 Wis. 46.

ance will not be received after the lapse of the time named, not as an undertaking that if given sooner it shall be. In fact, the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept.[30] This leads us to the next rule, namely:—

Conditions of offer.

Determination of offer by lapse of time. The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted.[31] If no time is prescribed, the acceptance must be communicated to him within a reasonable time. In neither case is the acceptor answerable for any delay which is the consequence of the proposer's own default. If no manner or form is prescribed, the acceptance may be communicated in any reasonable or usual manner or form.

This is almost self-evident, standing alone; we shall see *the importance of not losing sight of it in dealing with the difficulties to be presently considered. Note, however, that though the proposer may prescribe a form or time of *acceptance,* he cannot prescribe a form or time of *refusal,* so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time (*i*).[32] [28

Among other conditions, the proposal may prescribe a particular *place* for acceptance, and if it does so, an acceptance elsewhere will not do (*k*). The question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

There is direct authority for the statement that the proposal must

(*i*) *Felthouse* v. *Bindley* (1862) 11 C. B. N. S. 869, 875, 31 L. J. C. P. 204.

(*k*) *Eliason* v. *Henshaw* (1819) (Sup. Ct. U. S.) 4 Wheat. 225. Langdell, Sel. Ca. on Cont. 48, Finch Sel. Ca. 56.

30 Larmon *v.* Jordan, 56 Ill. 204; Potts *v.* Whitehead, 20 N. J. Eq. 55, 59; Longworth *v.* Mitchell, 26 Ohio St. 334, 342. See also Haldane *v.* United States, 69 Fed. Rep. 819, and cases cited in the preceding note.

31 Where the proposal stipulated for an acceptance by return mail, and the acceptance was not posted until two days after the receipt of the proposal, it was held that the promisor was not bound. Maclay *v.* Harvey, 90 Ill. 525. See further as to the effect of these words, Tinn *v.* Hoffman, 29 L. T. N. S. 271; Carr *v.* Duval, 14 Pet. 77, 82; Ortman *v.* Weaver, 11 Fed. Rep. 358, 362; Bernard *v.* Torrance, 5 G. & J. 383; Taylor *v.* Rennie, 35 Barb. 272; Palmer *v.* Insurance Co., 84 N. Y. 69; Howells *v.* Stroock, 50 N. Y. App. Div. 344.

32 Barton *v.* London & N. W. Ry. Co., 24 Q. B. D. 77; Wiedemann *v.* Walpole [1891], 2 Q. B. 534; *Re* Lloyd Edwards, 61 L. J. Ch. 23; Grice *v.* Noble, 59 Mich. 515, 523; Prescott *v.* Jones, 69 N. H. 305.

at all events be taken as limited to a reasonable time (*l*);[33] nor has it ever been openly disputed. The rule is obviously required by convenience and justice. It may be that the proposer has no means of making a revocation known (*e. g.*, if the other party changes his address without notice to him, or goes on a long journey), and he cannot be expected to wait for an unlimited time. Words of present obligation (but not capable of operating to that effect) have been held to constitute an offer with limit of time (*m*).

Limits of Revocation.

Revocation must be communicated before acceptance. A proposal is revoked by communication to the other party of the proposer's intention to revoke it, and the revocation can take effect only when that communication is made before acceptance.

29] *The communication may be either express or tacit, and notice received in fact, whether from the proposer or from any one in his behalf or otherwise, is a sufficient communication.

A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn (*n*). But that person's refusal or counter-offer puts an end to the original offer (*nn*).[34]

Revocation after acceptance too late. The first point under this head is that an express revocation communicated after acceptance, though

(*l*) *Baily's case* (1868) L. R. 5 Eq. 428, L. R. 3 Ch. 592, 37 L. J. Ch. 255; *Ramsgate Hotel Co.* v. *Montefiore; same Co.* v. *Goldsmid* (1866) L. R. 1 Ex. 109, 35 L. J. Ex. 90.

(*m*) *Hindley's case* [1896] 2 Ch. 121, 65 L. J. Ch. 591, C. A.

(*n*) Lord Herschell, *Henthorn* v. *Fraser* [1892] 2 Ch. 27, 31, 61 L. J. Ch. 373, 66 L. T. 439.

(*nn*) *Hyde* v. *Wrench* (1840) 3 Beav. 334, 52 R. R. 144. [Tinn *v.* Hoffman, 29 L. T. N. S. 271.]

33 Minnesota Oil Co. *v.* Collier Lead Co., 4 Dillon, 431; De Witt *v.* Railway Co., 41 Fed. Rep. 484; Hargadine *v.* McKittrick Co., 64 Fed. Rep. 560; Averill *v.* Hedge, 12 Conn. 424; Ferrier *v.* Storer, 63 Ia. 484; Trounstine *v.* Sellers, 25 Kans. 447; Moxley *v.* Moxley, 2 Met. (Ky.) 309; Loring *v.* Boston, 7 Met. 457; Park *v.* Whitney, 148 Mass. 278; Railroad Co. *v.* Dane, 43 N. Y. 240; Mizell *v.* Burnett, 4 Jones L. 240; Sherley *v.* Peehl, 84 Wis. 46.

34 A counter-offer rejects the original offer. National Bank *v.* Hall, 101 U. S. 43, 50; Minneapolis, &c., Ry. Co. *v.* Columbus Rolling Mills, 119 U. S. 149; Ortman *v.* Weaver, 11 Fed. Rep. 358; Arthur *v.* Gordon, 37 Fed. Rep. 558; W. & H. M. Goulding Co. *v.* Hammond, 54 Fed. Rep. 639 (C. C. A.); James *v.* Darby, 100 Fed. Rep. 224; Anglo-American Co. *v.* Prentiss, 157 Ill. 506; Grenier *v.* Cota, 92 Mich. 23; Baker *v.* Johnson Co., 37 Ia. 186, 189; Cartmel *v.* Newton, 79 Ind. 1, 8; Fox *v.* Turner, 1 Ill. App. 153; Egger *v.* Nesbitt, 122 Mo. 667; Harris *v.* Scott, 67 N. H. 437; Russell *v.* Falls Mfg. Co., 106 Wis. 329.

determined upon before the date of the acceptance, is too late.[35] This was decided so lately as in 1880 in two distinct cases (*o*). It will suffice to give shortly the facts of the earlier one (*p*). The defendants at Cardiff wrote to the plaintiffs at New York on the 1st of October, 1879, offering for sale 1000 boxes of tinplates on certain terms. Their letter was received on the 11th, and on the same day the plaintiffs accepted the offer by telegraph, confirming this by a letter sent on the 15th. Meanwhile the defendants on the 8th of October had posted a letter withdrawing their offer of the 1st: this reached the plaintiffs on the 20th. The plaintiffs insisted on completion of the contract; the defendants maintained that there was no contract, the offer having been, in their view, withdrawn before the acceptance was either received or despatched. Lindley J. stated as follows the questions to be considered: "1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?" The *first he answered [30 in the negative, on the principle "that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all."[36] The second he likewise answered in

(*o*) (1880) *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344, 49 L. J. C. P. 316, Finch Sel. Ca. 104; *Stevenson* v. *McLean* (1880) 5 Q. B. D. 346, 49 L. J. Q. B. 701; *Henthorn* v. *Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373, fully confirms these decisions.

(*p*) *Byrne* v. *Van Tienhoven*, last note.

[35] Revocation is ineffectual until received by the offeree: *Re* London & Northern Bank, [1900] 1 Ch. 220; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390; Patrick *v.* Bowman, 149 U. S. 411, 424; The Palo Alto, 2 Ware, 343; Kempner *v.* Cohn, 47 Ark. 519; Sherwin *v.* Nat. Casb Register Co., 5 Col. App. 162; Wheat *v.* Cross, 31 Md. 99; Brauer *v.* Shaw, 168 Mass. 198. The contrary implications in Cooke *v.* Oxley, 3 T. R. 653; Adams *v.* Lindsell, 1 B. & Ald. 681; Head *v.* Diggon, 3 Man. & R. 97; Hebb's Case, L. R. 4 Eq. 9, must be regarded as overruled.

In Patrick *v.* Bowman, 149 U. S. 411, the Court, after holding that a revocation of an offer not received before acceptance was ineffectual, said (at p. 424): "There is indeed, in a case of this kind, some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act."

[36] The principle that the law takes no notice of mere mental operations apart from a physical expression of them, was quaintly stated by Brian, C J., 17 Edw. IV, T. Pasch., case 2, who said, as quoted by Lord Blackburn, in Brogden *v.* Metropolitan Rwy. Co., 2 App. Cas. 666, 692, "it is trite law that

the negative, on grounds of both principle and convenience, and notwithstanding an apparent, but only apparent, inconsistency with the rule as to acceptances by letter which will be presently considered. This doctrine has been accepted by the Supreme Court of the United States (*q*).

Tacit revocation. It seems impossible to find any reason in principle why the necessity for communication should be less in the case of a revocation which is made not by words but by conduct, as by disposing to some one else of a thing offered for sale. Nor does it seem practicable in the face of the decisions just cited, though they do not actually cover such a case, to say that any such difference is recognized by the law of England. The authority most in point, *Dickinson* v. *Dodds* (*r*), is not of itself decisive. The facts were these. A. offered in writing to sell certain houses to B., adding a statement that the offer was to be "left over" until a time named; which statement, as we have already seen, could have no legal effect unless to warn B. that an acceptance would not be received at any later time. B. made up his mind the next morning to accept, but delayed communicating his acceptance to A. In the course of the day he heard from a person who was acting as his agent in the matter that A. had meanwhile offered or agreed to sell the property to C. Early on the following day (and within the time limited by A.'s memorandum) B. sought out A. and handed a formal acceptance to him; but A. answered, "You are too late. I have sold the property." It was held in the first instance by Bacon V.C. that A. had made to B. 31] an offer which up to the time of acceptance he had *not revoked, and that consequently there was a binding contract between A. and B. But in the Court of Appeal it was said that, although no "express and actual withdrawal of the offer" had reached B., yet by his own showing B., when he tendered his acceptance to A., well knew that A. had done what was inconsistent with a continued intention of contracting with B. Knowing this, B. could not by a formal acceptance force a contract on A. (*s*). It does not appear

(*q*) *Patrick* v. *Bowman* (1893) 149 U. S. 411, 424.

(*r*) (1876) 2 Ch. Div. 463, 45 L. J. Ch. 777. One or two immaterial details are omitted in stating the facts.

(*s*) The headnote says: "*Semble*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the

the thought of man is not triable, for even the devil does not know what the thought of man is." See also Bowman *v.* Patrick, 36 Fed. Rep. 138, 144; The Palo Alto, Davies, 343, 357; O'Donnell *v.* Clinton, 145 Mass. 461, 463; Prescott *v.* Jones, 69 N. H. 305, 307; White *v.* Corlies, 46 N. Y. 467, 469.

that the knowledge which B. in fact had was conveyed to him or his agent by or through A., or any one intending to communicate it on A.'s behalf. Yet the Court held that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation.[37] But what if B. had communicated his acceptance to A. without knowing anything of A.'s dealings with C.? This question remains open, and must be considered on principle.

Possibility of double acceptance. Suppose that A. offers to sell one hundred tons of iron to B., not designating any specific lot of iron, and that B. desires time to consider, and A. assents. Then A. meets with C., they talk of the price of iron, and C. offers A. a better price than he has asked from B., and they strike a bargain for a hundred tons. Then B. returns, and in ignorance of A.'s dealings with C. accepts A.'s offer formerly made to him. Here are manifestly two good contracts. A. is bound to deliver 100 tons of iron to B. at one price, and 100 tons to C. at another. And if A. has in fact only 100 tons, and was thinking only of those hundred tons, it makes no difference. He would be equally bound to B. and C. if he had none. He must deliver them iron of the quantity and quality contracted *for, or pay damages. How then will the case stand [32 if, other circumstances being the same, the dealing is for specific goods, or for a house?[38] Here it is impossible that A. should perform his agreement with both B. and C., and therefore they cannot both make him perform it; but that is no reason why he should not be answerable to both of them. The one who does not get performance may have damages. It remains to ask which of them shall have the option of claiming performance, if the contract is otherwise such that its performance can be specifically enforced. The most convenient solution would seem to be that he whose acceptance is first in point of time should have the priority: for the preference must be given to some one, and the first acceptance makes the first complete contract. There is no reason for making the contract relate back for this purpose to the date of the proposal. This is consistent with everything that was really decided in

offer was first made had no knowledge of the sale." But this seems unwarranted by the judgments. See the remarks of James L.J. at p. 472, and of Mellish L.J. at p. 475, and per Lord Herschell, *Henthorn* v. *Fraser* [1892] 2 Ch. at p. 33.

[37] McCauley *v.* Coe, 150 Ill. 311, 319; Coleman *v.* Applegarth, 68 Md. 21, *acc.* Cp. Wickham *v.* Winchester, 75 Ia. 327; Brauer *v.* Shaw, 168 Mass. 198.

[38] See Ahern *v.* Baker, 34 Minn. 98.

Dickinson v. *Dodds* (*t*). The reasons given for that decision cannot, it is submitted, be relied on.

It is right to add that *Cooke* v. *Oxley* (*u*) may be so read as to support the opinion that a tacit revocation need not be communicated at all. But the apparent inference to this effect is expressly rejected in *Stevenson* v. *McLean* (*x*). If *Cooke* v. *Oxley* be still authority for anything, it is not authority for that.[39]

(*t*) 2 Ch. Div. 463, 45 L. J. Ch. 777. Note that the suit was for specific performance, and cp. Langdell, Summary, 245–6, and Anson, 33–35. There was also a claim for damages, but apparently nothing was said about it.

(*u*) (1790) 1 R. R. 783, 3 T. R. 653.

(*x*) (1880) 5 Q. B. D. at p. 351, 49 L. J. Q. B. 701.

39 One of the most troublesome questions in regard to revocation relates to the right of an offerer to revoke an offer to make a unilateral contract after the consideration has been partly performed but before it has been completely performed. On principle it is hard to see why the offerer may not thus revoke his offer. He cannot be said to have already contracted, because by the terms of his offer he was only to be bound if something was done, and it has not as yet been done, though it has been begun. Moreover, it may never be done, for the promisee has made no promise to complete the act and may cease performance at his pleasure. To deny the offerer the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration. The practical hardship of allowing revocation under such circumstances is all that can make the decision of the question doubtful. The only reference to the matter in the English books is in Offord *v.* Davies, 12 C. B. N. S. 748, where in the course of the argument Williams, J., asked: "Suppose I guarantee the price of a carriage to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, may I recall my guaranty?" The counsel replied: "Not after the coach builder has commenced the carriage," and Erle, C. J., added: "Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach builder has prepared the materials he would probably be found by the jury to have contracted." A somewhat similar suggestion is made by the Illinois Supreme Court in Plumb *v.* Campbell, 129 Ill. 101, 107: Appellant (the offerer) could be bound in three ways: "First by appellee engaging within a reasonable time to perform the contract on his part; second, by beginning such performance in a way which would bind him to complete it, and third, by actual performance." See also Blumenthal *v.* Goodall, 89 Cal. 251; Los Angeles Traction Co. *v.* Wilshire, 135 Cal. 654, 658; Society *v.* Brumfield, 102 Ind. 146.

The difficulty with these solutions of the problem is that they fail to take into account the offerer's right to impose such conditions as he chooses in his offer. An offer conditional on the performance of an act does not become a contract by the doing of anything else, such as part performance or giving the offerer a promise to do the act. See White *v.* Corlies, 46 N. Y. 467. Nor can it be admitted that beginning performance by one to whom an offer of a unilateral contract has been made imports any promise on his part to complete the performance. The decision in Biggers *v.* Owen, 79 Ga. 658, therefore, seems sound, although the result is harsh. In that case it was held that an offer of reward might be withdrawn, after the plaintiff had nearly completed the performance requested. See also Cook *v.* Casler, 87 N. Y. App. Div. 8.

By express provision of the codes in many European countries, an offer is

Limits of Acceptance or of its Revocation.

Communication of acceptance. There is a material distinction, though it is not fully recognized in the language of our authorities, between the acceptance of an offer which asks for a promise, and of an offer which asks for an act, as the condition of the offer becoming a promise.[40] Where the acceptance is to consist of a *promise, it [33 must be communicated to the proposer (*y*). But where the acceptance is to consist of an act — as despatching goods ordered by post — it seems that no further communication of the acceptance is necessary than the performance of the proposed act, or at any rate the proposer

(*y*) *Mozley* v. *Tinkler* (1835) 1 C. M. & R. 692, 40 R. R. 675; *Russell* v. *Thornton* (1859) 4 H. & N. 788, 798, 804, 29 L. J. Ex. 9; *Hebb's case* (1867) L. R. 4 Eq. 9.

irrevocable until the person addressed has had a reasonable time to answer it. See Valéry, Contrats par Correspondance, p. 167. In the absence of such legislation the weight of opinion in the civil law is that an offer may be revoked, *ibid.* There has been much difference of opinion, however, as to the liability of an offerer who revokes his offer for such damage as the person addressed may have incurred by acting in reliance on the offer. The theory of the offerer's liability was first elaborated by von Ihering, Jahrbücher für Dogmatik, IV, p. 1 *seq.*, under the heading of *culpa in contrahendo.* For the varying views of other writers, see Windscheid, Lehrbuch des Pandektenrechts, II. § 307, n. 8 (8th ed.); Valéry, § 185.

[40] When the consideration on each side is a promise, the contract is bilateral; a binding promise, the consideration of which is anything else than a promise, is a unilateral contract; see Langdell, Summary, § 183. In a bilateral contract, both parties must be bound at the same time, or neither is bound. In a unilateral contract the offeree is not bound to perform at all, nor until performance by him is the offerer bound, but upon performance by the offeree the proposal of the offerer is converted into a binding promise. "Thus if A. promises B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B. at the time of the promise does not engage to do the act;" Train *v.* Gold, 5 Pick. 380, 385; Matthews *v.* Fitch, 22 Cal. 86; Perkins *v.* Hadsell, 50 Ill. 216; Plumb *v.* Campbell, 129 Ill. 101; Cottage Street Church *v.* Kendall, 121 Mass. 528, 530; Wellington *v.* Apthorp, 145 Mass. 69; McMillan *v.* Ames, 33 Minn. 257; Stensgaard *v.* Smith, 43 Minn. 11; Barnes *v.* Perrine, 9 Barb. 202; L'Amoureux *v.* Gould, 7 N. Y. 349; Todd *v.* Weber, 95 N. Y. 181, 191–192; Miller *v.* McKenzie, 95 N. Y. 575; Beckwith *v.* Brackett, 97 N. Y. 52; Morse *v.* Bellows, 7 N. H. 549; Gurin *v.* Cromartie, 11 Ired. 174; Stahl *v.* Van Vleck, 53 Ohio St. 136, 148.

The distinction between unilateral and bilateral contracts was fully recognized three hundred years ago, but lack of appropriate names caused the importance of the distinction to be frequently overlooked. The earliest use of the words bilateral or unilateral in our law seems to have been by Judge Dillon, in Barrett *v.* Dean, 21 Ia. 423. The terms were popularised by Professor Langdell, and are now in common use in the reports. See, *e. g.*, Stevenson *v.* McLean, 5 Q. B. D. 346, 351; Davis *v.* Wells, 104 U. S. 159, 166; Harmon *v.* Adams, 120 U. S. 363, 365; Los Angeles Traction Co. *v.* Wilshire, 135 Cal. 654, 658; Nowlin *v.* Pyne, 40 Ia. 166; Coleman *v.* Applegarth, 68 Md. 21, 25, 27; First Bank *v.* Watkins, 154 Mass. 385, 387; Thomas *v.* Barnes, 156 Mass. 581; McMillan *v.* Ames, 33 Minn. 257; Stensgaard *v.* Smith, 43 Minn. 11, 15; Barrow S. S. Co. *v.* Mexican Cent. Ry. Co., 134 N. Y. 15, 24.

may dispense with express communication, and an intention to dispense with it may be somewhat readily inferred from the nature of the transaction (*z*).

Means authorized by proposer. Further, even when the acceptance consists of a promise, and therefore must be communicated, any reasonable means of communication prescribed or contemplated by the proposer are deemed sufficient as between the acceptor and himself.

Post or telegraph. If an acceptance by means wholly or partly beyond the sender's control, such as the public post or telegraph (*a*), is contemplated by the parties, then an acceptance so despatched is complete as against the proposer from the time of its despatch out of the sender's control; and, what is more, is effectual notwithstanding any miscarriage or delay in its transmission happening after such despatch.

The parties are presumed to contemplate acceptance by post or telegraph whenever the circumstances are such as to make such acceptance reasonable in the usual course of business (*b*).

General rule of communication. It should seem obvious that an uncommunicated mental assent, since it is neither the communication of a promise nor an overt act of performance, cannot make a contract in any class of cases; though so lately as 1877 it was found needful to **34]** reassert this principle in the House of Lords (*c*). *At the same time a proposer who prescribes a particular manner of communication may preclude himself from afterwards showing that it was not in fact sufficient. In Lord Blackburn's words, "when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing there is a complete contract." The most important application of this exception will come before us immediately. But it is not true "that a simple acceptance in your own mind, without any intimation to the other party, and expressed

(*z*) *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley L.J. at pp. 262–3, Bowen L.J. at p. 269. [See *ante*, p. 21, n. 21.]

(*a*) As to the telegraph being on the same footing as letter post, *Cowan* v. *O'Connor* (1888) 20 Q. B. D. 640, 57 L. J. Q. B. 401.

(*b*) *Henthorn* v. *Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373.

(*c*) *Brogden* v. *Metropolitan Ry. Co.* (1877) 2 App. Ca. at p. 688 (Lord Selborne), at p. 691 (Lord Blackburn), and at p. 697 (Lord Gordon). The judgments in the Court below which gave rise to these remarks are not reported.

by a mere private act, such as putting a letter into a drawer," will, as a rule, serve to conclude a contract (*d*).[41]

Contracts by correspondence. We now come to the special rules which, after much uncertainty, have been settled by our Courts as to contracts entered into by correspondence between persons at a distance. Before dealing with authorities it may be useful to show the general nature of the difficulties that arise. We start with the principle that the proposer is bound from the date of acceptance. Then we have to consider what is for this purpose the date of acceptance, a question of some perplexity, and much vexed in the books. It appears just and expedient, as concerning the accepting party's rights, that the acceptance should date from the time when he has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid, and disregard any revocation that *reaches him afterwards. Hence the conclusion is suggested that [35 at this point the contract is irrevocable and absolute. But are we to hold it absolute for all purposes? Shall the proposer be bound, though, without any default of his own, the acceptance never reach him? Shall the acceptor remain bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance? The first question is answered by our Courts in the affirmative; the second is still open. On principle a negative answer to both would seem the more reasonable. The proposer cannot, at all events, act on the contract before the acceptance is communicated to him; as against him, therefore, a revocation should be in time if it reaches him together with or before the original acceptance, whatever the relative times of their despatch. On the other hand, it seems not reasonable that he should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has been received (*e*), or whether it is accepted or not, for the other party

(*d*) As to a different rule formerly supposed to have been introduced in the case of agreements to take shares under the Companies Act, 1862, see *Gunn's case* (1867) L. R. 3 Ch. 40, 37 L. J. Ch. 40. There need not be formal notice of allotment; acting towards the applicant on the footing that he has got the shares, *e. g.* appointing him to an office under the company for which the shares are a necessary qualification, is enough. This of course is quite in accordance with general principles. *Richards* v. *Home Assurance Association* (1871) L. R. 6 C. P. 591, 40 L. J. C. P. 290. [See Coffin *v.* Portland, 43 Fed. Rep. 411, 413.]

(*e*) It is possible to obtain an official acknowledgment of the due

[41] Trounstine *v.* Sellers, 25 Kan. 447. See McClure *v.* Times Pub. Co., 169 Pa. 213; *ante*, p. 14, n. 12.

need not answer at all. The acceptor might more reasonably be left to take the more avoidable risk of his acceptance miscarrying.

Theories proposed in English cases. In the judicial treatment of these questions, however, considerations of a different kind have prevailed. It has been assumed that there must be some one moment at which the consent of the parties is to be deemed complete, and the contract absolute as against both of them and for all purposes; and further, a peculiar character has been attributed to the post-office as a medium of communication. In some of the cases it is said that the acceptance of a proposal by post completes the contract as soon as the letter is despatched, because the post-office is the common agent of both parties. **36]** This may be so as regards the *property in the letter, but the promise expressed by the words written on the paper is not a subject of bailment. But the reason has been put in a different way; namely, that a man who requests or authorizes an acceptance of his offer to be sent in a particular way must take the risks of the mode of transmission which he has authorized, and that in the common course of affairs the sending of a written offer by post amounts to an authority to send the answer in the same manner; and still more lately (*f*) it has been put on the broader ground that persons who are not in immediate neighbourhood contemplate the post-office as the ordinary and reasonable means of communication. But if the proposer of a contract by letter does not really choose the post as a means of communication any more than the acceptor, it is not easy to see why the risk of miscarriage should be thrown on him by preference.

Revocation arriving before acceptance. Much of the language that has been used suggests, though it only suggests, the consequence that even a revocation despatched after the acceptance and arriving before it would be inoperative. If the contract is absolutely bound by posting a letter of acceptance, a telegram revoking it would be too late; and this even if the letter never arrived at all, so that the revocation were the only notice received by the proposer that there ever had been an acceptance.

This is a startling consequence at first sight, but the hardship is less than it seems, for a party wishing to reserve his freedom of action as long as possible will still have two ways of doing so: he may make his acceptance in writing expressly subject to revocation by telegraph,

delivery of a registered letter; but this does not prove that the contents have actually come to the knowledge of the addressee.

(*f*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, 61 L. J. Ch. 373.

or he may abstain from answering by letter at all, and only telegraph his final decision. English Courts may now be bound to hold that an unqualified acceptance, once posted, cannot be revoked even by a telegram or special messenger outstripping its arrival.

*** Earlier cases on contracts by correspondence.** Turning to the au- [37 thorities, we need not dwell much on the earlier cases, of which an account is given in the Appendix (*g*). They established that an acceptance by post, despatched in due time as far as the acceptor is concerned, concludes the contract notwithstanding delay in the despatch by the proposer's fault (as if the offer is misdirected), or accidental delay in the delivery; and that the contract, as against the proposer, dates from the posting, so that he cannot revoke his offer after the acceptance is despatched.[42] Until 1879 it was uncertain whether a letter of

(*g*) See Note B. For recent Continental opinions see Prof. J. Kohler, Vertrag unter Abwesenden, in Archiv für bürgerl. Recht, March, 1889: Valéry, Des Contrats par Correspondance, Paris, 1895.

[42] The same rule applies in the United States and Canada: Tayloe *v.* Merchants' F. Ins. Co., 9 How. 390; Patrick *v.* Bowman, 149 U. S. 411; Winterport, &c., Co. *v.* The Jasper, 1 Holmes, 99; *Re* Dodge, 9 Ben. 482; Darlington Iron Co. *v.* Foote, 16 Fed. Rep. 646; Sea Ins. Co. *v.* Johnston, 105 Fed. Rep. 286, 291, (C. C. A.); Levisohn *v.* Waganer, 76 Ala. 412; Linn *v.* McLean, 80 Ala. 360; Kempner *v.* Cohn, 47 Ark. 519; Levy *v.* Cohen, 4 Ga. 1; Bryant *v.* Booze, 55 Ga. 438; Haas *v.* Myers, 111 Ill. 421; Chytraus *v.* Smith, 141 Ill. 231, 257; Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96; Moore *v.* Pierson, 6 Ia. 279; Ferrier *v.* Storer, 63 Ia. 484; Siebold *v.* Davis, 67 Ia. 560; Hunt *v.* Higman, 70 Ia. 406; Gipps Brewing Co. *v.* De France, 91 Ia. 108, 112; Chiles *v.* Nelson, 7 Dana, 281; Bailey *v.* Hope Ins. Co., 56 Me. 474; Wheat *v.* Cross, 31 Md. 99; Lungstrass *v.* German Ins. Co., 48 Mo. 201; Lancaster *v.* Elliot, 42 Mo. App. 503; Egger *v.* Nesbitt, 122 Mo. 667, 674; Horton *v.* New York Life Ins. Co., 151 Mo. 604; Abbott *v.* Shepard, 48 N. H. 14; Davis *v.* Ætna Mut. F. I. Co., 67 N. H. 218; Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Commercial Ins. Co. *v.* Hallock, 27 N. J. L. 645; Northampton, &c., Ins. Co. *v.* Tuttle, 40 N. J. L. 476; Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 11 N. Y. 441; Trevor *v.* Wood, 36 N. Y. 307; Watson *v.* Russell, 149 N. Y. 388, 391; Hacheny *v.* Leary, 12 Ore. 40; Hamilton *v.* Lycoming M. I. Co., 5 Pa. St. 339; McClintock *v.* South Penn. Oil Co., 146 Pa. 144, 161; Otis *v.* Payne, 86 Tenn. 663; Blake *v.* Hamburg-Bremen F. I. Co., 67 Tex. 160; Haarstick *v.* Fox, 9 Utah, 110; Durkee *v.* Vermont Central R. R. Co., 29 Vt. 127; Hartford Ins. Co. *v.* Lasher Stocking Co., 66 Vt. 439; Washburn *v.* Fletcher, 42 Wis. 152; McGiverin *v.* James, 33 U. C. Q. B. 203. The only contrary decision not overruled seems to be McCulloch *v.* Eagle Ins. Co., 1 Pick. 278. Whether this case would now be followed in Massachusetts may be doubted. See Brauer *v.* Shaw, 168 Mass. 198; Insurance Co. *v.* Knabe Co., 171 Mass. 265. The letter must be properly directed and stamped. Potts *v.* Whitehead, 5 C. E. Green, 55; Britton *v.* Phillips, 24 How. Pr. 111; Blake *v.* Hamburg-Bremen F. I. Co., 67 Tex. 160. But see Schultz *v.* Insurance Co., 77 Fed. Rep. 395. In the Transvaal decision of Bal *v.* Van Staden, 20 S. African L. Jl. 407, it was held that where postal communication was interrupted by war, mailing a letter did not complete the contract.

The case of *Ex parte* Cote, L. R. 9 Ch. 27, seems to indicate that the English doctrine is based on the assumption that a letter when mailed is no longer

acceptance that miscarried altogether was binding on the proposer. In that year the point came before the Court of Appeal (*h*). An application for shares in the plaintiff company, whose office was in London, was handed by the defendant to a country agent for the company. A letter of allotment, duly addressed to the defendant, was posted from the London office, but never reached him. The company went into liquidation, and the liquidator sued for the amount due on the shares. It was held by Thesiger and Baggallay L.JJ. that "if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery" (*i*); that, on the grounds and reasoning of the authorities, this extends to the case of a letter wholly failing to reach its address; that in the case in hand the defendant must under the circumstances be taken to have authorized the sending by post of a letter of allotment; and that in the result he was bound. They were dis-
38] posed to limit the rule "to cases in *which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly au-

(*h*) *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. Div. 216, 48 L. J. Ex. 577, Finch Sel. Ca. 133.

(*i*) Baggallay L.J. 4 Ex. Div. at p. 224.

within the control of the sender, and that where as in France the sender may reclaim his letter the contract should not be regarded as completed by the mailing of an acceptance. In the United States, by complying with required formalities, the sender of a letter may regain it. Postal Regulations, §§ 531, 533. See also Crown Point Iron Co. *v.* Ætna Ins. Co., 127 N. Y. 608, 619. But in McDonald *v.* Chemical Nat. Bank, 174 U. S. 610, 620, the Court says: "Nor can it be conceded that except on some extraordinary occasion and on evidence satisfactory to the post-office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post-office, they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the parties to whom they are addressed. United States *v.* Pond, 2 Curtis, C. C. 265; Buell *v.* Chapin, 99 Mass. 594; Morgan *v.* Richardson, 13 Allen, 410; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390." In Canterbury *v.* Sparta, 91 Wis. 53, a letter was mailed in acceptance of an offer, containing a draft payable to the offerer. The sender induced the post-office officials to return the letter to him, but the court held him liable to the offerer for the amount of the draft.

If the use of the telegraph is authorized expressly or impliedly, the delivery of the acceptance to the telegraph office is held to complete the contract. Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. 431; Garretson *v.* North Atchison Bank, 47 Fed. Rep. 867; Andrews *v.* Schreiber, 93 Fed. Rep. 369; Haas *v.* Myers, 111 Ill. 421, 427; Cobb *v.* Foree, 38 Ill. App. 255; Trevor *v* Wood, 36 N. Y. 307; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380. *Contra* is Beaubien Produce Co. *v.* Robertson, Rap. Jud. Quebec, 18 C. S. 429.

thorized"(*k*). Cases outside these limits, however, are not likely to be frequent; and now, in *Henthorn* v. *Fraser* (*l*), it is decided that an offer delivered by hand may authorize, or, in the terms preferred by the Court, contemplate, an acceptance by post (*m*).[43] In *Grant's case* Bramwell L.J. delivered a vigorous dissenting judgment, in which he pointed out among other things the absurdity of treating a revocation which overtakes the acceptance as ineffectual, but relied mainly on the broad ground that a letter not delivered at all is not a communication (*n*). In *Henthorn* v. *Fraser* Kay L.J. did not conceal his dissatisfaction with the reasoning of the authorities by which the Court was bound. It may perhaps not be too presumptuous, but it seems useless, to regret that these views could not prevail. It will be seen by reference to the Appendix that the decisions of the Court of Appeal confirm that sense in which a previous decision of the House of Lords was generally understood. The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time. It would be impossible to contend that a man so doing could be bound by an acceptance which either wholly miscarried or arrived later than the specified time (*o*).

* **Acceptance does not relate back.** We have seen that in general the [39 contract dates from the acceptance; and though the acceptance be in form an acknowledgment of an existing agreement, yet this will not

(*k*) Baggallay L.J. 4 Ex. Div. at p. 228; the same limitation seems admitted by Thesiger L.J. at p. 218.

(*l*) [1892] 2 Ch. 27, 61 L. J. Ch. 373.

(*m*) Delivery to a postman who is not authorized to receive letters for the post is not equivalent to posting: *Re London and Northern Bank* [1900] 1 Ch. 220, 69 L. J. Ch. 24. [But in the United States letter carriers are authorized to receive letters and consequently handing to a carrier is equivalent to posting. Pearce *v.* Langfit, 101 Pa. 507, 511. Depositing in a street letter box is, of course, posting. Wood *v.* Calnan, 61 Mich. 402, 411; Greenwich Bank *v.* De Groot, 7 Hun, 210; Watson *v.* Russell, 149 N. Y. 388, 391.]

(*n*) 4 Ex. Div. at p. 234.

(*o*) See per Thesiger L.J. 4 Ex. Div. at p. 223, and per Bramwell L.J. at p. 238. Held acc. in Massachusetts (where, however, the general doctrine that an acceptance by post concludes the contract from the date of posting is not received); *Lewis* v. *Browning* (1880) 130 Mass. 173. [Dicta to the same effect are in Haas *v.* Myers, 111 Ill. 421; Vassar *v.* Camp, 11 N. Y. 441, 451. See also Haldane *v.* United States, 69 Fed. Rep. 819.]

43 The use of the telegraph was held to be impliedly authorized under somewhat similar circumstances in Perry *v.* Mt. Hope Iron Co., 15 R. I. 380. See also Wilcox *v.* Cline, 70 Mich. 517; but see Scottish Am. Mortgage Co. *v.* Davis, (Tex.) 74 S W. Rep. 17.

make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons (*p*).

Death of proposer, a revocation though not known to other party. There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it (*q*).[44] There is no distinct authority to show whether notice to the other party is material or not;[45] but in the analogous case of agency the death of the principal in our law, though not in Roman law, puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties (*r*). It would probably be impossible not to follow the analogy of this doctrine. The Indian Contract Act makes the knowledge of the other party before acceptance a condition of the proposal being revoked by the proposer's death.

Insanity no revocation. As for insanity, which is treated in the same way by the Indian Act, that would not in general operate as a revocation by the law of England,[46] for we shall see that the contract of a lunatic (not so found by inquisition) is only voidable even if his state of mind is known to the other party. But it has been said that "if a

(*p*) *Felthouse* v. *Bindley* (1862) 11 C. B. N. S. 869, 31 L. J. C. P. 204.

(*q*) Per Mellish L.J. in *Dickinson* v. *Dodds* (1876) 2 Ch. Div. at p. 475, 45 L. J. Ch. 777.

(*r*) *Blades* v. *Free* (1829) 9 B. & C. 167, 32 R. R. 620; *Campanari* v. *Woodburn* (1854) 15 C. B. 400, 24 L. J. C. P. 13, 2 Kent Comm. 646, D. 46, 3, de solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (*c*), adopts the Roman rule.

44 The Palo Alto, 2 Ware, 343, 359; Paine *v.* Insurance Co., 51 Fed. Rep. 689; Grand Lodge *v.* Farnham, 70 Cal. 158; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First Church, 96 Ill. 179; Aitken *v.* Lang's Adm., 106 Ky. 652; Twenty-third St. Church *v.* Cornell, 117 N. Y. 601; Wallace *v.* Townsend, 43 Ohio St. 537; Phipps *v.* Jones, 20 Pa. 260; Helfenstein's Est., 77 Pa. 328; Foust *v.* Board of Publication, 8 Lea, 555. See also Jordan *v.* Dobbins, 122 Mass. 168; Browne *v.* McDonald, 129 Mass. 66. This rule is the same in the civil law. Valéry, Contrats par Correspondance, § 204; Windscheid, Pandektenrecht, § 307 (2). The Bürgerliches Gesetzbuch, however, has changed the rule in Germany. It provides, § 153, "A contract is not prevented from coming into existence by the death or incapacity of the offerer before acceptance, unless the offerer has expressed a contrary intention."

45 Held immaterial in Wallace *v.* Townsend, 43 Ohio St. 537.

46 That insanity of the proposer before acceptance will operate as a revocation of the offer, see Beach *v.* First Church, 96 Ill. 177; The Palo Alto, Davies, 343.

man becomes so far *insane as to have no mind, perhaps he ought [40 to be deemed dead for the purpose of contracting" (*s*).

Certainty of Acceptance.

Acceptance must be unqualified. The next rule is in principle an exceedingly simple one. It is that

"In order to convert a proposal into a promise the acceptance must be absolute and unqualified" (*t*).[47]

For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately — in other words, proposals and counter-proposals. Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. It will be seen that the question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument. The cases in which such questions have been decided are numerous (*u*), and we

(*s*) Bramwell L.J. *Drew* v. *Nunn* (1879) 4 Q. B. Div. at p. 669, 48 L. J. Q. B. 591. [See Dexter *v.* Hall, 15 Wall, 9, 20.]

(*t*) Indian Contract Act, s. 7, sub-s. 1.

(*u*) For collected authorities, see (*inter alia*) Fry on Specific Performance, c. 2.

47 Eliason *v.* Henshaw, 4 Wheat. 225, 228; Deshon *v.* Fosdick, 1 Woods, 286; Merriam *v.* Lapsley, 2 McCrary, 606; Martin *v.* Northwestern Fuel Co., 22 Fed. Rep. 596; Hamblet *v.* Insurance Co., 36 Fed. Rep. 118; Robinson *v.* Weller, 81 Ga. 704; Sawyer *v.* Brossart, 67 Ia. 678; Gilbert *v.* Baxter, 71 Ia. 327; Plant Seed Co. *v.* Hall, 14 Kan. 553; Seymour *v.* Armstrong, 62 Kan. 720; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80; Barrow *v.* Ker, 10 La. Ann. 120; Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; Harlow *v.* Curtis, 121 Mass. 320; Johnson *v.* Stephenson, 26 Mich. 63; Eggleston *v.* Wagner, 46 Mich. 610; Wilkins Mfg. Co. *v.* H. M. Loud Co., 94 Mich. 158; Bruner *v.* Wheaton, 46 Mo. 363; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378; Egger *v.* Nesbitt, 122 Mo. 667; Potts *v.* Whitehead, 23 N. J. Eq. 512; Hough *v.* Brown, 19 N. Y. 111, 115; M'Cotter *v.* Mayor, 37 N. Y. 325; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Barrow S. S. Co. *v.* Mexican Central Co., 134 N. Y. 15; N. W. Iron Co. *v.* Meade, 21 Wis. 474; Baker *v.* Holt, 56 Wis. 100; Clark *v.* Burr, 85 Wis. 649. "Acceptance upon terms varying from those offered is a rejection of the offer," Bank *v.* Hall, 101 U. S. 43, 50; Baker *v.* Johnson Co., 37 Ia. 186, 189; Cartmell *v.* Newton, 79 Ind. 1, 8. It is in effect a counter offer and as such terminates the original offer. See *ante*, p. 30. Where parties are dealing orally face to face, if the acceptance varies from the offer, a jury may infer the offerer's assent to the variation from his silence. Earle *v.* Angell, 157 Mass. 294.

shall here give by way of illustration only a selection of modern ones (*x*).

In *Honeyman* v. *Marryat* (*y*), before the House of Lords, a proposal for a sale was accepted "subject to the terms of a contract being arranged" be-
41] tween the vendor's and purchaser's solicitors: this was clearly no *contract. Compare with this *Hussey* v. *Horne-Payne* (*z*), from which it seems that an acceptance of an offer to sell land "subject to the title being approved by our solicitors" is not a qualified or conditional acceptance, but means only that the title must be investigated in the usual way; in other words, it expresses the conditions annexed by law to contracts of this class, that a good title shall be shown by the vendor.

In *Appleby* v. *Johnson* (*a*), the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "a list of the merchants to be regularly called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday. (Signed) — J. Appleby.— P.S.— I have made a list of customers which we can consider together." It was held that on the whole, and especially having regard to the postscript, which left an important term open to discussion, there was no complete contract.

In *Crossley* v. *Maycock* (*b*), an offer to buy certain land was accepted, but with reference to special conditions of sale not before known to the intending purchaser. Held only a conditional acceptance.

In *Lloyd* v. *Nowell* (*c*), an agreement "subject to the preparation by my solicitor and completion of a formal contract" was held (1) to exclude the formation of a binding agreement; (2) not to be a condition which the vendor could waive as being only for his benefit. But in *North* v. *Percival* (*d*), the words "heads of agreement . . subject to approval of conditions and form of agreement by purchaser's solicitor" were held by Kekewich J. consistent with a complete contract.

In *Filby* v. *Hounsell*, [1896] 2 Ch. 737, 65 L. J. Ch. 852, an acceptance by a purchaser "subject to contract *as agreed*," *i.e.* a form set out on the vendor's own conditions of sale, was held without difficulty to be absolute.

In *Stanley* v. *Dowdeswell* (*e*), an answer in this form: "I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. C., who will arrange matters with you," was held insufficient to make a contract, as not being complete and unqualified, assuming (which was doubtful) that the letter of which it was part did otherwise sufficiently refer to the terms of the proposal.

42] *In *Addinell's case* (*f*) and *Jackson* v. *Turquand* (*g*), a bank issued a cir-

(*x*) Cp. also the French case in the Court of Cassation given in Langdell's Select Cases on Contract, 155.

(*y*) (1857) 6 H. L. C. 112, 26 L. J. Ch. 619, by Lord Wensleydale. The case was not argued, no one appearing for the appellant.

(*z*) (1879) 4 App. Ca. 311, 322, 48 L. J. Ch. 846. [See also James *v.* Darby, 100 Fed. Rep. 224 (C. C. A.); Pacific Rolling Mill Co. *v.* Railway Co., 90 Cal. 627; Corcoran *v.* White, 117 Ill. 118.]

(*a*) (1874) L. R. 9 C. P. 158, 43 L. J. C. P. 146. [See also Bowen *v.* Hart, 101 Fed. Rep. 376; Krum *v.* Chamberlain, 57 Neb. 220.]

(*b*) (1874) L. R. 18 Eq. 180, 43 L. J. Ch. 379, followed in *Jones* v. *Daniel* [1894] 2 Ch. 332, 63 L. J. Ch. 562.

(*c*) [1895] 2 Ch. 744, 64 L. J. Ch. 744.

(*d*) [1898] 2 Ch. 128, 67 L. J. Ch. 321.

(*e*) (1874) L. R. 10 C. P. 102. Compare *Smith* v. *Webster* (1876) 3 Ch. Div. 49, 45 L. J. Ch. 528. [Hackley *v.* Ockford, 98 Fed. Rep. 781; Wills *v.* Carpenter, 62 Mich. 50.]

(*f*) (1865) L. R. 1 Eq. 225.

(*g*) (1869) L. R. 4 H. L. 305, 39 L. J. Ch. 11.

cular offering new shares to existing shareholders in proportion to their interests, and also asking them to say if in the event of any shares remaining they should wish to have any more. Certain shareholders wrote in answer, accepting their proportion of shares, and also desiring to have a certain number of additional shares, if they could, on the terms stated in the circular. In reply to this the directors sent them notices that the additional shares had been allotted to them, and the amount must be paid to the bank by a day named, or the shares would be forfeited. It was held by Kindersley V.-C. and confirmed by the House of Lords, that as to the first or proportional set of shares the shareholder's letter was an acceptance constituting a contract, but as to the extra shares it was only a proposal; and that as the directors' answers introduced a material new term (as to forfeiture of the shares if not paid for within a certain time), there was no binding contract as to these.

In *Wynne's case* (*h*) two companies agreed to amalgamate. The agreement was engrossed in two parts, and contained a covenant by the purchasing company to pay the debts of the other. But the purchasing company (which was unlimited) before executing its own part inserted a proviso limiting the liability of its members under this covenant to the amount unpaid on their shares. This being a material new term, the variance between the two parts as executed made the agreement void. In this, and later in *Beck's case* (*i*), in the same winding-up, a shareholder in the absorbed company applied for shares in the purchasing company credited with a certain sum according to the agreement, and received in answer a letter allotting him shares to be credited with a "proportionate amount of the net assets" of his former company. It was held that, apart from the question whether the allotment was conditional on the amalgamation being valid, there was no contract to take the shares.

A. telegraphs to B.: "Will you sell us Whiteacre? Telegraph lowest cash price, answer paid." B. telegraphs in reply: "Lowest price for Whiteacre, 900*l*." This has been held not to amount to an offer to sell, so that a telegram from A. purporting to agree to the purchase at 900*l*. is itself only an offer (*k*).

Where a seller undertook to accept the highest net money tender made by either of two competitors for the purchase, and one of them offered such sum as would exceed by 200*l*. the sum (unknown) which might be offered by the other: this was held no acceptance of the seller's terms, and incapable of constituting a contract (*l*).

Instances of sufficient acceptance. On the other hand, the following instances will show that the rule *must be cautiously applied. An accept- [43
ance may be complete though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of *dissent*, so that the whole thing may be described as a "grumbling assent" (*m*).

Again, an acceptance is of course not made conditional by adding words that in truth make no difference; as where the addition is simply immaterial (*n*)[48], or a mere formal memorandum is enclosed for signature, but not

(*h*) (1873) L. R. 8 Ch. 1002.

(*i*) (1874) L. R. 9 Ch. 392, 43 L. J. Ch. 531.

(*k*) *Harvey* v. *Facey* (J. C.) [1893] A. C. 552, 62 L. J. P. C. 127.

(*l*) *South Hetton Coal Co.* v. *Haswell, &c. Coal Co.* [1898] 1 Ch. 465, 67 L. J. Ch. 238, C. A.

(*m*) *Joyce* v. *Swann* (1864) 17 C. B. N. S. 84; cp. per Lord St. Leonards, 6 H. L. C. 277–8 (in a dissenting judgment).

(*n*) *Clive* v. *Beaumont* (1847) 1 De G. & S. 397.

[48] See McFadden *v.* Henderson, 128 Ala. 221; Phillips *v.* Moor, 71 Me. 78; De Jonge *v.* Hunt, 103 Mich. 94; King *v.* Dahl, 82 Minn. 240; Bruner *v.* Wheaton, 46 Mo. 363; Egger *v.* Nesbitt, 122 Mo. 667; Clark *v.* Dales, 20 Barb. 42; Brisban *v.* Boyd, 4 Paige, 17; Fitzhugh *v.* Jones, 6 Munf. 83; Matteson *v.* Scofield, 27 Wis. 671.

shown to contain any new term (*o*). And further, if the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will if possible be so construed (*p*).

Again, the unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself (*q*).

An acceptance on condition is absolute if expressed in a manner which estops the acceptor from denying that the condition has been performed, or that he has waived its performance (*r*).

Parties may postpone conclusion of contract, till the terms are embodied in a formal instrument. One further caution is needed. All rules about the formation and interpretation of contracts are subject to the implied proviso, "unless a contrary intention of the parties appears." And it may happen that though the parties are in fact agreed upon the terms — in other words, though there has been a proposal sufficiently accepted to satisfy the general rule — yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is **44]** no agree*ment independent of that stipulation" (*s*).[49] Whether

(*o*) *Gibbins* v. *N. E. Metrop. Asylum District* (1847) 11 Beav. 1.

(*p*) *English and Foreign Credit Co.* v. *Arduin* (1870–1) L. R. 5 H. L. 64, per Lord Westbury, at p. 79, 40 L. J. Ex. 108.

(*q*) *Baines* v. *Woodfall* (1859) 6 C. B. N. S. 657, 28 L. J. C. P. 338. The facts unfortunately do not admit of abridgment.

(*r*) *Roberts* v. *Security Co.* [1897] 1 Q. B. 111, 66 L. J. Q. B. 119, C. A.

(*s*) *Chinnock* v. *Marchioness of Ely* (1865) 4 D. J. S. 638, 646.

[49] In the following cases it was held that no contract existed until the execution of a written contract, the signing of which was one of the terms of a previous agreement. Spinney *v.* Downing, 108 Cal. 666; Fredericks *v.* Fasnacht, 30 La. Ann. 117; Ferre Canal Co. *v.* Burgin, 106 La. 309; Mississippi, &c. S. S. Co. *v.* Swift, 86 Me. 248; Willes *v.* Carpenter, 75 Md. 80; Lyman *v.* Robinson, 14 Allen, 242; Sibley *v.* Felton, 156 Mass. 273; Edge Moor Bridge Works *v.* Bristol, 170 Mass. 528; Eads *v.* Carondelet, 42 Mo. 113; Bourne *v.* Shapleigh, 9 Mo. App. 64; Morrill *v.* Tehama Co., 10 Nev. 125; Water Commissioners *v.* Brown, 32 N. J. L. 504; Donnelly *v.* Currie Hardware Co., 66 N. J. L. 388; Brown *v.* N. Y. Central R. R. Co., 44 N. Y. 79; Commercial Tel. Co. *v.* Smith, 47 Hun, 494; Nicholls *v.* Granger, 7 N. Y. App. Div. 113; Arnold *v.* Rothschild's Sons Co., 37 N. Y. App. Div. 564, aff'd 164 N. Y. 562; Franke *v.* Hewitt, 56 N. Y. App. Div. 497; Congdon *v.* Darcy, 46 Vt. 478; Boisseau *v.* Fuller, 96 Va. 45.

In Mississippi, &c. S. S. Co. *v.* Swift, 86 Me. 248, 258, the Court say: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention

such is in truth the understanding is a question which depends on the circumstances of each particular case; if the evidence of an agreement consists of written documents, it is a question of construction (not subject to any fixed rule of presumption) whether the expressed agreement is final (*t*). For this purpose the whole of a continuous correspondence must be looked at, although part of it, standing alone, might appear to constitute a complete contract (*u*).[50]

It is not to be supposed, "because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (*x*).[51] Still more is this the case if the first record of the terms agreed upon is in so many words expressed to be "subject to the preparation and approval of a formal contract" (*y*):[52] or where a certain act, such as payment of the first premium of insurance, is expressly mentioned to fix the commencement of the contract (*z*). But again: "it is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain" (*a*).[53] And in *Brogden* v. *Metropolitan Ry. Co.* (*b*),

(*t*) *Rossiter* v. *Miller* (1878) 3 App. Ca. 1124, 1152, 48 L. J. Ch. 10.

(*u*) *Hussey* v. *Horne-Payne* (1879) 4 App. Ca. 311, 48 L. J. Ch. 846.

(*x*) *Ridgway* v. *Wharton* (1856–7) 6 H. L. C. 238, 264, 268, per Lord Cranworth C., and see per Lord Wensleydale at pp. 305–6, 27 L. J. Ch. 46.

(*y*) *Winn* v. *Bull* (1877) 7 Ch. D. 29.

(*z*) *Canning* v. *Farquhar* (1886) 16 Q. B. Div. 727, 55 L. J. Q. B. 225.

(*a*) James L.J. in *Bonnewell* v. *Jenkins* (1878) 8 Ch. Div. 70, 73, 47 L. J. Ch. 758; *Bolton* v. *Lambert* (1889) 41 Ch. Div. 295, 305. [See also Filby *v.* Hounsell [1896] 2 Ch. 737; North *v.* Percival [1898] 2 Ch. 128.]

(*b*) (1877) 2 App. Ca. 666: see Lord Cairns' opinion.

to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

50 Strobridge Co. *v.* Randall, 73 Fed. Rep. 619.

51 Lyman *v.* Robinson, 14 Allen, 242, 254; Allen *v.* Chouteau, 102 Mo. 309; Methudy *v.* Ross, 10 Mo. App. 101, 106; Brown *v.* Railroad Co., 44 N. Y. 79, 86; Virginia Hot Springs Co. *v.* Harrison, 93 Va. 569.

52 Lloyd *v.* Nowell, [1895] 2 Ch. 744; Page *v.* Norfolk, 70 L. T. N. S., 781; Sibley *v.* Felton, 156 Mass. 273.

53 In the following cases it was held that there was a contract, though it was agreed that a written contract should be subsequently prepared. Post *v.* Davis, 7 Kan. App. 217; Bell *v.* Offutt, 10 Bush 632; Montague *v.* Weil, 30 La. Ann. 50; Cheney *v.* Eastern Transportation Line, 59 Md. 557; Allen *v.*

it was held by the House of Lords that the conduct of the parties, who
45] in fact *dealt for some time on the terms of a draft agreement which had never been formally executed, was inexplicable on any other supposition than that of an actual though informal consent to a contract upon those terms.

The tendency of recent authorities is to discourage all attempts to lay down any fixed rule or canon as governing these cases. The question may however be made clearer by putting it in this way — whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be prepared (*c*).

Certainty of Terms.

Agreement must be certain. An agreement is not a contract unless its terms are certain or capable of being made certain.

For the Court cannot enforce an agreement without knowing what the agreement is. Such knowledge can be derived only from the manner in which the parties have expressed their intention. It is their business to find such expressions as will convey their meaning with reasonable certainty to a reasonable man conversant with affairs of the kind in which the contract is made. The question then is whether such certainty be present in the particular case. One or two instances will serve as well as many. A promise by the buyer of a horse that if the horse is lucky to him, he will give 5*l*. more, or the buying of another horse, is "much too loose and vague to be considered in a court of law." "The buying of another horse" is a term to which the Court cannot assign any definite meaning (*d*). An agreement to sell an estate, reserving "the necessary land for making a railway," is too vague (*e*). An agreement to take a house "if put
46] into *thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style," has been dismissed as too uncertain to be specifically enforced (*f*). A statement by a parent to his daughter's future husband that she will have "a share"

(*c*) Lord Blackburn, 3 App. Ca. at p. 1151. In addition to cases already cited see *Lewis* v. *Brass* (1877) 3 Q. B. Div. 667.

(*d*) *Guthing* v. *Lynn* (1831) 2 B. & Ad. 232.

(*e*) *Pearce* v. *Watts* (1875) L. R. 20 Eq. 492, 44 L. J. Ch. 492.

(*f*) *Taylor* v. *Portington* (1855) 7 D. M. & G. 328. This of course did not decide that an action for damages would not lie.

Chouteau, 102 Mo. 309; Green *v.* Cole (Mo.), 24 S. W. Rep. 1058; Wharton *v.* Stoutenbourgh, 35 N. J. Eq. 266; Sanders *v.* Pottlitzer Co., 144 N. Y. 209; Blaney *v.* Hoke, 14 Ohio St. 292; Mackey *v.* Mackey's Adm., 29 Gratt. 158; Paige *v.* Fullerton Woollen Co., 27 Vt. 485; Lawrence *v.* Milwaukee, &c. Ry Co., 84 Wis 427; Cohn *v.* Plumer, 88 Wis. 622.

of his property cannot be construed as a promise of an equal share (*g*).[54] On the other hand an agreement to execute a deed of separation containing "usual covenants" is not too vague to be enforced (*h*).[55]

Illusory promises. To this head those cases are perhaps best referred in which the promise is illusory, being dependent on a condition which in fact reserves an unlimited option to the promisor. "Nulla promissio potest consistere, quae ex voluntate promittentis statum capit" (*i*).[56] Thus where a committee had resolved that for certain services "such remuneration be made as shall be deemed right," this gave no right of action to the person who had performed the services; for the committee alone were to judge whether any or what recompense was right (*k*). Moreover a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. In *Roberts* v. *Smith* (*l*)

(*g*) *Re Fickus* [1900] 1 Ch. 331, 69 L. J. Ch. 161.
(*h*) *Hart* v. *Hart* (1881) 18 Ch. D. 670, 684, 50 L. J. Ch. 697.
(*i*) D. 45, 1. de verb. obl. 108, § 1.
(*k*) *Taylor* v. *Brewer* (1813) 1 M. & S. 290, 21 R. R. 831.
(*l*) (1859) 4 H. & N. 315, 28 L. J. Ex. 164.

54 An agreement between parties "that they will in the future make such contract as they may then agree upon amounts to nothing." Shepard *v.* Carpenter, 54 Minn. 153. An agreement by the plaintiffs to work defendant's mi at a certain rate based on the ore produced "as long as they could m pay" imposes no obligation for the future. Davie *v.* Lumbermen's Mi 93 Mich. 491. An agreement to give a lease of premises to be according to plans "to be mutually agreed upon" is unenfor McCreery, 119 N. Y. 434. As is an agreement to renew term. Baurman *v.* Binzen, 16 N. Y. Supp. 342, and a out" the plaintiff. Blakistone *v.* Bank, 87 Md. 302. [1892] 2 Q. B. 478; Erwin *v.* Erwin, 25 Ala. 236; 272; Whelan *v.* Sullivan, 102 Mass. 204; Marble *v* 553; Hall *v.* First Bank, 173 Mass. 16; Cur Long *v.* Battle Creek, 39 Mich. 323; Bumr Buckmaster *v.* Consumers' Ice Co., 5 Da York Press Co., 164 N. Y. 406; Monnett Sherman *v.* Kitzmiller, 17 S. & R. 45.

55 Nor an agreement to give a lease in t premises are situated. Scholtz *v.* North (C. C. A.).

56 See Montreal Gas Co. *v.* Vasey, [1 41 Fed. Rep. 41; Lee's Appeal, 53 Con Fairplay *v.* O'Neal, 127 Ind. 95; Hunt *v.* Lumberman's Mining Co., 93 Mich 538; Mullaly *v.* Greenwood, 127 Mo. Strong *v.* Sheffield, 144 N. Y. 392; (Civ. App. 57.

there was an agreement between A. and B. that B. should perform certain services, and that in one event A. should pay B. a certain salary, but that in another event A. should pay B. whatever A. might think reasonable. That other event having happened, the Court held **47]** there was no contract which B. could enforce. Services *had indeed been rendered, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have been a good cause of action for reasonable reward. But here B. had expressly assented to take whatever A. should think reasonable (which might be nothing), and had thus precluded himself from claiming to have whatever a jury should think reasonable. It would not be safe, however, to infer from this case that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which can be found as a fact not to be illusory. The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties; and "I leave it to you" may well mean in particular circumstances (as in various small matters it notoriously does), "I expect what is reasonable and usual, and I leave it to you to find out what that is," or, "I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man" (*m*).[57]

Another somewhat curious case of an illusory promise (though mixed up to some extent with other doctrines) is *Moorhouse* v. [illegible] (*n*).[58] There a testator, having made a will by which he left [illegible]able legacy to his daughter, wrote a letter in which he said, [illegible]g her other expectations, "this is not all: she is and

[illegible] it can be sup- [illegible]on it in *Rob-* [illegible] v. *Flight* [illegible]here the [illegible]hat it was for the jury to ascertain how much the defendant, acting *bona fide*, would or ought to have awarded. (*n*) (1851) 15 Beav. 341, 348, affd. by L.JJ. *ib.* 350, *n.*

[illegible]o., [1901] 2 Ch. 37; Henderson Bridge Co. *v.* [illegible]hington *v.* Beeman, 91 Fed. Rep. 232; Millar Winona Mill Co., 28 Minn. 205; Stewart *v.* Dugan, (Tex.) 39 S. W. Rep. 148; Tolmie *v.* Fawcett, (Tex.) 55 S. W. Rep. 611. [illegible]] 1 Ch. 331; Smithers *v.* Junker, 41 Fed. 86; Davie *v.* Lumberman's Co., 93 Mich. Thompson *v.* Stevens, 71 Pa. 161; Wall's 155 Pa. 64; Gulf, &c. Ry. Co. *v.* Winton, dispense with performance of an act so no consideration for a counter-promise. ; Strong *v.* Sheffield, 144 N. Y. 392.

shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband, *to whom the letter had with [48 the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. But it was held that the testator's language expressed nothing more than a vague intention, although it would have been binding had it referred to the specific sum then standing in the will, so as to fix that sum as a minimum to be expected at all events.

Promise to make contract with third person. A promise to enter into a certain kind of agreement with a third person is obviously dependent for its performance on the will of that person, but is not thereby rendered so uncertain as not to afford a cause of action as between the parties to it. The consent of a third person is not more uncertain than many other things which parties may and do take on themselves to warrant (*o*).[59]

(*o*) *Foster* v. *Wheeler* (1888) 38 Ch. Div. 130, 57 L. J. Ch. 149, 871.

[59] Where by the terms of the agreement an article is to be furnished which shall be satisfactory to the defendant, if he is genuinely, though unreasonably dissatisfied therewith, neither the contract price nor reasonable remuneration can be recovered. Andrews *v.* Belfield, 2 C. B. N. S. 779; Silsby Mfg. Co. *v.* Chico. 24 Fed. Rep. 893; Campbell Printing Press Co. *v.* Thorp, 36 Fed. Rep. 414; Giles *v.* Paxson, 40 Fed. Rep. 283; Allen *v.* Mut. Compress Co., 101 Ala. 574; Hallidie *v.* Sutter St. Ry. Co., 63 Cal. 575; Bush *v.* Koll, 2 Col. App. 48; Zaleski *v.* Clark, 44 Conn. 218; Goodrich *v.* Nortwick, 43 Ill. 445; Buckley *v.* Meidroth, 93 Ill. App. 460; McCarren *v.* McNulty, 7 Gray, 139; Brown *v.* Foster, 113 Mass. 136; Lockwood Co. *v.* Mason Co., 183 Mass. 25; Gibson *v.* Cranage, 39 Mich. 49; Wood Machine Co. *v.* Smith, 50 Mich. 565; Sax *v.* Detroit Ry. Co., 125 Mich. 252; Platt *v.* Broderick, 70 Mich. 577; Fire Alarm Co. *v.* Big Rapids, 78 Mich. 67; Honsding *v.* Solomon. 127 Mich. 654; McCormick Machinery Co. *v.* Chesrown, 33 Minn. 32; O'Dea *v.* Winona, 41 Minn. 424; Magee *v.* Scott Lumber Co., 78 Minn. 11; Gwynne *v.* Hitchner, 65 N. J. L. 67; Hoffman *v.* Gallaher, 6 Daly, 42; Tyler *v.* Ames, 6 Lans. 280; Gray *v.* Central R. R. Co., 11 Hun, 534; Haven *v.* Russell, 34 N. Y. Supp. 292; Singerly *v.* Thayer, 108 Pa. 291; Seeley *v.* Welles, 120 Pa. 69; Howard *v.* Smedley, 140 Pa. 81; Adams Radiator Works *v.* Schnader, 155 Pa. 394; Pennington *v.* Howland, 21 R. I. 65; Rossiter *v.* Cooper, 23 Vt. 522; McClure *v.* Briggs, 58 Vt. 82; Osborne *v.* Francis, 38 W. Va. 312; Exhaust Ventilator Co. *v.* Chicago, &c. Ry. Co., 66 Wis. 218, 69 Wis. 454. Cp. Daggett *v.* Johnson, 49 Vt. 345.

"Such agreements usually are construed, not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts, but as requiring an honest expression." Hawkins *v.* Graham, 149 Mass. 284; Richardson *v.* Coffman, 87 Ia. 121; McCormick Co. *v.* Ockerstrom, 114 Ia. 260; Lockwood Mfg. Co. *v.* Mason Co., 183 Mass. 25; Frary *v.* American Rubber Co., 52 Minn. 264.

As a matter of construction "when the consideration furnished is of such a nature that its value will be lost, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested

Acceptance by Conduct.

Tacit acceptance must be unambiguous. Conduct which is relied on as constituting the acceptance of a contract must (no less than words relied on for the same purpose) be unambiguous and unconditional (*p*).

Where the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention.

(*p*) *Warner* v. *Willington* (1856) 3 Drew. 523, 533, 25 L. J. Ch. 662.

party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant." Hawkins *v.* Graham, 149 Mass. 284.

In New York the courts go so far as always to construe a contract which does not involve from its nature a question of taste as requiring only such performance as would be satisfactory to a reasonable man, although personal satisfaction is expressly stipulated for. Duplex Co. *v.* Garden, 101 N. Y. 387; Doll *v.* Noble, 116 N. Y. 230; Hummel *v.* Stern, 164 N. Y. 603; and a few other States have followed the New York rule. Keeler *v.* Clifford, 165 Ill. 544; Boyd *v.* Hallowell, 60 Minn. 225; Pope Iron Co. *v.* Best, 14 Mo. App. 502; Barnett *v.* Sweringen, 77 Mo. App. 64; Richeson *v.* Mead, 11 S. Dak. 639. See also Schleicher *v.* Montgomery Light Co., 114 Ala. 228; Baltimore, &c. R. Co. *v.* Brydon, 60 Md. 404; J. I. Case Works *v.* Marr, 33 Neb. 215. This rule makes necessary a distinction, often troublesome, between contracts involving taste and those which do not. See Smith *v.* Robson, 148 N. Y. 252; Crawford *v.* Mail & Express Co., 163 N. Y. 404. Cp. Sax *v.* Detroit Ry. Co., 125 Mich. 252.

A promise made by a stockholder on receiving stock to offer it, on a certain contingency, to the corporation at a valuation then to be made by the latter is binding. New England Trust Co. *v.* Abbott, 162 Mass. 148.

Where one executed a written instrument under seal, acknowledging an indebtedness to another, and promising to pay the same whenever in his opinion his circumstances should enable him to do so, such instrument was held to impose no legal obligation enforceable by action. Nelson *v.* Von Bonnhorst, 29 Pa. 352. But see Smithers *v.* Junker, 41 Fed. Rep. 101; Pistel *v.* Imperial Ins. Co., 88 Md. 552; Page *v.* Cook, 164 Mass. 116; Lewis *v.* Tipton, 10 Ohio St. 88. A promise to pay when able is generally held to impose an obligation to that exact extent. Cole *v.* Saxby, 3 Esp. 159; Davies *v.* Smith, 4 Esp. 36; Tell City Co. *v.* Nees, 63 Ind. 245; Stainton *v.* Brown, 6 Dana, 249; Eckler *v.* Galbraith, 12 Bush, 71; Denney *v.* Wheelwright, 60 Miss. 733; Work *v.* Beach, 13 N. Y. Supp. 678; *Re* Knab, 78 N. Y. Supp. 292; Salinas *v.* Wright, 11 Tex. 572. In Work *v.* Beach, it was held that the defendant several years after making a promise to pay about $14,000 on such a promise was not liable though he had been continuously in receipt of a salary of $15,000 a year, as he saved nothing therefrom.

In some cases, however, it has been held that one who makes such a promise is bound to pay within a reasonable time. Nunez *v.* Dantel, 19 Wall. 562; Works *v.* Hershey, 35 Ia. 340; De Wolf *v.* French, 51 Me. 420; Crooker *v.* Holmes, 65 Me. 195; Lewis *v.* Tipton, 10 Ohio St. 88; Noland *v.* Bull, 24 Oreg. 479, and in Kincaid *v.* Higgins, 1 Bibb, 396, the promisor was held bound to pay at once.

If the promisor has once become able to pay a right of action vests, which is not divested by supervening inability. Denney *v.* Wheelwright, 60 Miss. 733, 744.

Cases of special conditions on tickets. Difficult questions may arise on this point, and in particular have arisen in cases where public companies entering into contracts for the carriage or custody of goods have sought to limit their liability by special conditions printed on a ticket delivered to the passenger or depositor at the time of making the contract. The tendency of the earlier cases on the subject is to hold that (apart from the statutory restrictions of the Railway and Canal Traffic Act, *1854, which do not apply to contracts with [49 steamship companies, nor to contracts with railway companies for the mere custody as distinguished from the carriage of goods) such conditions are binding. A strong opposite tendency is shown in *Henderson* v. *Stevenson* (*q*), where the House of Lords decided that in the case of a passenger traveling by sea with his luggage an indorsement on his ticket [60] stating that the shipowners will not be liable for loss does not prevent him from recovering for loss caused by their negligence, unless it appears either that he knew and assented to the special terms, or at any rate that he knew there were some special terms and was content to accept them without examination (*r*).[61]

(*q*) (1875) L. R. 2 Sc. & D. 470. Lord Chelmsford's and Lord Hatherley's *dicta* (pp. 477, 479) go farther, and suggest that the contract is complete before the ticket is delivered at all, so that some other communication of the special terms would have to be shown. But the later cases have not adopted this view.

(*r*) Followed in *Richardson & Co.* v. *Rowntree* [1894] A. C. 217, 63 L. J. Q. B. 283.

[60] The ticket as such is a mere token or voucher that the holder has paid his fare, not the contract between the parties. Erie R. Co. *v.* Winter's Adm., 143 U. S. 60; Scolfield *v.* Penna. Co., 112 Fed. Rep. 855; The Minnetonka, 132 Fed. Rep. 52; Burnham *v.* Railroad Co., 63 Me. 298; Quimby *v.* Vanderbilt, 17 N. Y. 306; Rawson *v.* Railroad Co., 48 N. Y. 212; Elmore *v.* Sands, 54 N. Y. 512, 515; Railroad Co. *v.* Campbell, 36 Ohio St. 647, 658; Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333; Frank *v.* Ingalls, 41 Ohio St. 560; Wilson *v.* Railroad Co., 21 Gratt. 654. Also an article on tickets by Professor J. H. Beale, 1 Harv. L. Rev. 17. But see Western R. Co. *v.* Stockdale, 83 Md. 245; Rahilly *v.* St. Paul, &c. Co., 66 Minn. 153; People *v.* Tyroler, 157 N. Y. 116, 123.

[61] See The Majestic, 166 U. S. 375; The Kensington, 183 U. S. 263; The New England, 110 Fed. Rep. 415; The Minnetonka, 132 Fed. Rep. 52; Railway Co. *v.* Deloney, 65 Ark. 177; Railroad Co. *v.* Cox, 29 Ind. 360; Railroad Co. *v.* Rodebaugh, 38 Kan. 45; Malone *v.* Railroad Co., 12 Gray, 388; Brown *v.* Railroad Co., 11 Cush. 97; Railway Co. *v.* Holmes, 75 Miss. 371; Madan *v.* Sherard, 73 N. Y. 329; Blossom *v.* Dodd, 43 N. Y. 264; Rawson *v.* Railroad Co., 48 N. Y. 212; Railroad Co. *v.* Campbell, 36 Ohio St. 647; Railroad Co. *v.* Turner, 100 Tenn. 213; Railway Co. *v.* Newman, 17 Tex. Civ. App. 606; Ranchau *v.* Railroad Co., 71 Vt. 142; Wilson *v.* Railroad Co., 21 Gratt. 654; cp. Fonseca *v.* Cunard S. S. Co., 153 Mass. 553; O'Regan *v.* Cunard S. S. Co., 160 Mass. 356; Steers *v.* Steamship Co., 57 N. Y. 1.

Common carriers, it is to be remembered, are bound to serve every one who applies to them, and to their calling certain duties and liabilities are, by law, attached; it requires no contract to create these; it does require one to divest them. It is well settled that a mere notice is not enough to relieve the carrier from his common law liability without proof of its having been not only

Since this there have been reported cases arising out of the deposit of goods, for safe custody or otherwise, in exchange for a ticket on which were endorsed conditions limiting the amount of the receiver's liability (*s*). The result, as it stands at present, appears to be that it is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to contract only on special
50] terms. A person who, knowing this (*l*), enters *into the con-

(*s*) *Harris* v. *G. W. R. Co.* (1876) 1 Q. B. D. 515, 45 L. J. Q. B. 729; *Parker* v. *S. E. R. Co.* (1876); *Gabell* v. *S. E. R. Co.* (1877) 2 C. P. Div. 416, 46 L. J. C. P. 768, reversing in *Parker's case* the judgment of the C. P. Div. 1 C. P. D. 618, 46 L. J. C. P. 768; *Watkins* v. *Rymill* (1883) 10 Q. B. D. 178, 52 L. J. Q. B. 121, where the former cases are fully reviewed by Stephen J. Compare *Burke* v. *S. E. R. Co.* (1879) 5 C. P. D. 1, 49 L. J. C. P. 107.

(*t*) Knowledge that there are special conditions must be found as a fact. It may be inferred from reasonable means of knowledge; in deciding whether the means offered are reasonable all the circumstances, such as the class of persons to whom the notice is addressed, are properly taken into account: *Richardson &*

actually seen, but also assented to by the other party. When goods are delivered to a carrier under a notice, if any implication is to be indulged in, "it is as strong that the owner intended to insist upon his rights as it is that he assented to their qualification." New Jersey Steam Nav. Co. *v.* Bank, 6 How. 344, 383; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Judson *v.* Railroad Co., 6 Allen, 486, 491; Moses *v.* Railroad Co., 24 N. H. 71; Same *v.* Same, 32 N. H. 523; Hollister *v.* Nowlen, 19 Wend. 234; Jones *v.* Voorhees, 10 Ohio, 145; Railroad Co. *v.* Barrett, 36 Ohio St. 448, 453; Brown *v.* Express Co., 15 W. Va. 812.

When concurrently with his delivery of the goods to the carrier, a bill of lading containing restrictive conditions is given to the shipper and retained by him, it is held in some States that he is estopped to deny that he assented to its terms, and that evidence to show that he never read it is inadmissible. Railroad Co. *v.* Brownlee, 14 Bush, 590; Grace *v.* Adams, 100 Mass. 505; Cox *v.* Railroad Co., 170 Mass. 129; McMillan *v.* Railroad Co., 16 Mich. 80; O'Bryan *v.* Kinney, 74 Mo. 125; Insurance Co. *v.* Railroad Co., 72 N. Y. 90; Hill *v.* Railroad Co., 73 N. Y. 351; Zimmer *v.* Railroad Co., 137 N. Y. 460. See also The Kensington, 183 U. S. 263; Lawson, Contracts of Carriers, § 102. But compare on the other hand, Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Express Co. *v.* Haynes, 42 Ill. 89; Express Co. *v.* Stettaners, 61 Ill. 184; Transportation Co. *v.* Dater, 91 Ill. 195; Railway Co. *v.* Simon, 160 Ill. 648; Express Co. *v.* Moon, 39 Miss. 822.

As to similar questions arising in contracts with telegraph companies, see Primrose *v.* Western Union Tel. Co., 154 U. S. 1; Stamey *v.* Western Union Tel. Co., 92 Ga. 613.

Where goods are delivered to a carrier under a verbal contract, not limiting the carrier's liability, and afterwards a bill of lading containing restrictive conditions is given to the shipper, it requires for the release of the carrier from his common law liability not only the express assent of the shipper (Railway Co. *v.* Jurey, 111 U. S. 594; Railroad Co. *v.* Boyd, 91 Ill. 268; Gott *v.* Dinsmore, 111 Mass. 45; Bostwick *v.* Railroad Co., 45 N. Y. 712; Gaines *v.* Transportation Co., 28 Ohio St. 418); but also, it is submitted, a new consideration. Railroad Co. *v.* Reynolds, 17 Kan. 251; Hendrick *v.* Railroad Co., 170 Mass. 44, 47; Railway Co. *v.* Carter, 9 Tex. Civ. App. 677; Railway Co. *v.* Avery, 19 Tex. Civ. App. 235; Railway Co. *v.* Wright, 20 Tex. Civ. App. 136; Strohn *v.* Railroad Co., 21 Wis. 562. See 5 C. L. J. 134.

tract, is then deemed to assent to the special terms; but this, again, is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt.

Promises expressed in deeds. It has already been pointed out that the ordinary rules of proposal and acceptance do not apply to promises embodied in a deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos* v. *Wickham* (*u*), in the House of Lords, that a promise so made is at once operative without any question of acceptance;[62] and this because it derives its force not from anything passing between the parties, but from the promisor's — or, in the regular language of conveyancing, covenantor's — solemn admission that he is bound. Thus an obligation is created which whenever it comes to the other party's knowledge

Co. v. *Rowntree* [1894] A. C. 217, 63 L. J. Q. B. 283. [Cp. with this case O'Regan *v.* Cunard S. S. Co., 160 Mass. 356.] Compare Ulpian's remarks on a fairly analogous case, D. 14, 3, de inst. act. 11, § 2, 3. De quo palam proscriptum fuerit, ne cum eo contrahatur, is praepositi lŏco non habetur. . . . . Proscribere palam sic accipimus: claris litteris, unde de plano recte legi possit, ante tabernam scilicet, vel ante eum locum, in quo negotiatio exercetur, non in loco remoto, sed in evidenti . . . . Certe si quis dicat ignorasse se litteras, vel non observasse quod propositum erat, cum multi legerent, cumque palam esset propositum, non audietur. Before the recent cases on the subject the conditions printed by railway companies on their tickets, and the corresponding notices exhibited by them, were not often, they are still not always, "claris litteris, unde de plano recte legi possit," or "in loco evidenti." As to conditions on passenger tickets see per Wills and Wright JJ. in *G. N. R. Co.* v. *Palmer* [1895] 1 Q. B. 862, 64 L. J. Q. B. 316, where the point whether there was sufficient notice of the condition was not open.

(*u*) (1886) L. R. 2 H. L. 296. The previous cases were *Doe* d. *Garnons* v. *Knight* (1826) 5 B. & C. 671, 29 R. R. 355 (a mortgage); *Exton* v. *Scott* (1833) 6 Sim. 31, 38 R. R. 72 (the like); *Hall* v. *Palmer* (1844) 13 L. J. Ch. 352 (bond to secure annuity after obligor's death); *Fletcher* v. *Fletcher* (1845) 14 L. J. Ch. 66 (covenant for settlement to be made by executors). *Xenos* v. *Wickham* might have been decided on the ground that the company's execution of the policy was the acceptance of the plaintiffs' proposal, and the plaintiffs' broker was their agent to receive communication of the acceptance. But that ground is distinctly not relied upon in the opinions of the Lords: see L. R. 2 H. L. at pp. 320, 323. [Xenos *v.* Wickham was followed in Roberts *v.* Security Co. [1897] 1 Q. B. 111. See also Malott *v.* Wilson [1903] 2 Ch. 494.]

62 See also Crawford *v.* Insurance Co., 125 Cal. 609; Dibble *v.* Insurance Co., 70 Mich. 1; McMillan *v.* Ames, 33 Minn. 257; Waggoner's Est., 174 Pa. 558. But in Meigs *v.* Dexter, 172 Mass. 217, it was said: "It is well settled in this Commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, and whose act of acceptance is afterwards ratified." See also Nelson *v.* Insurance Co., 120 N. C. 302. Almost all of the cases on the essentials of delivery of a deed have arisen in regard to conveyances, and the subject is generally treated in connection with the law of real property. Devlin on Deeds, § 260 *et seq.*; Gray's Cases on Property, Vol. III, pp. 633–735.

affords a cause of action without any other signification of his assent, and in the meanwhile is irrevocable.[63] But if the promisee refuses his assent when the promise comes to his knowledge the contract is avoided.

51] *"If A makes an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., then B. may refuse it *in pais*" (*i.e.* without formality) "and thereby the obligation will lose its force." (*x*).[64]

(*x*) *Butler* and *Baker's case*, 3 Co. Rep. 26, quoted by Blackburn J. L. R. 2 H. L. at p. 312. "Obligation" here, as always in our older books, means the special form of deed otherwise, and now exclusively, called a bond.

63 That a promissory note also differs from a simple contract in this respect, namely, that, if delivered, a payee may recover upon it, though not aware of its existence until after the maker's death, see Dean *v.* Carruth, 108 Mass. 242; Worth *v.* Case, 42 N. Y. 362; 2 Ames, Cas. on Bills and Notes, 878, s. v. Specialty, § 18. As to an indorsee, see Lysaght *v.* Bryant, 9 C. B. 46; Williams *v.* Galt, 95 Ill. 172.

64 See in accord Merrills *v.* Swift, 18 Conn. 257 (a mortgage); Ensworth *v.* King, 50 Mo. 477 (the like), and the following cases of simple conveyances: Munro *v.* Bowles, 187 Ill. 346; Schlicher *v.* Keeler, 61 N. J. Eq. 394; Robbins *v.* Rascoe, 120 N. C. 79; Mitchell *v.* Ryan, 3 Ohio St. 377, 382. But see *contra*, Bell *v.* Bank, 11 Bush, 34 (a mortgage); Welch *v.* Sackett, 12 Wis. 270 (the like, cp. Sargeant *v.* Solberg, 22 Wis. 132); Knox *v.* Clark, 15 Col. App. 356 (a deed). See also 49 Am. L. Reg. (O. S.) 116.

*CHAPTER II. [52

Capacity of Parties.

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Variations in personal capacity. All statements about legal capacities and duties are taken, unless the contrary be expressed, to be made with reference to "lawful men," citizens, that is, who are not in any manner unqualified or disqualified for the full exercise of a citizen's normal rights. There are several ways in which persons may be or become incapable, wholly or partially, of doing acts in the law, and among other things of becoming parties to a binding contract.

Infancy. All persons must attain a certain age before they are admitted to full freedom of action and disposition of their property. This is but a necessary recognition of the actual conditions of man's life. The age of majority, however, has to be fixed at some point of time by positive law. By English law it is fixed at twenty-one years; and every one under that age is called an infant (Co. Litt. 171 *b*).

Coverture. Every woman who marries has to sustain, as incident to her new status, technically called coverture, a loss of legal capacity in various respects; a loss expressed, and once supposed to be sufficiently explained, by the fiction that husband and wife are one person.

Insanity, &c. Both men and women may lose their legal capacity, permanently or for a time, by an actual loss of reason. This we call insanity when it is the result of established mental disease, intoxication when it is the transient effect of drink or narcotics. Similar consequences, again, may be attached by provisions of positive law to **53]** conviction for *criminal offences. Deprivation of civil rights also may be, and has been in England in some particular cases, a substantive penalty; but it is not thus used in any part of our law now in practical operation.[1]

Extension of natural capacity: agency. On the other hand, the capacity of the "lawful man" receives a vast extension in its application, while it remains unaltered in kind, by the institution of agency. One man may empower another to perform acts in the law for him and acquire rights and duties on his behalf. By agency the individual's legal personalty is mutiplied in space, as by succession it is continued in time. The thing is now so familiar that it is not easy to realize its importance, or the magnitude of the step taken by legal theory and practice in its full recognition. We may be helped to this if we remember that in the Roman system there is no law of agency

[1] The system of slavery which formerly existed in this country involved the incapacity of slaves to contract. "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting that of marriage." Hall *v.* United States, 92 U. S. 27, 30.

as we understand it. The slave, who did much of what is now done by free servants and agents, was regarded as a mere instrument of acquisition for his owner, except in the special classes of cases in which either slaves or freemen might be in a position analogous, but not fully equivalent, to that of a modern agent. As between the principal and his agent, agency is a special kind of contract. But it differs from other kinds of contract in that its legal consequences are not exhausted by performance. Its object is not merely the doing of specified things, but the creation of new and active legal relations between the principal and third persons. Hence it may fitly have its place among the conditions of contract in general, though the mutual duties of principal and agent belong rather to the treatment of agency as a species of contract.

Artificial persons. While the individual citizen's powers are thus extended by agency, a great increase of legal scope and safety is given to the conjoint action of many by their association in a corporate body or artificial person. The development of corporate action presupposes a developed law of agency, *since a corporation can execute its [54 intentions only through natural persons generally or specially authorized to act on its behalf. And as a corporation, in virtue of its perpetual succession and freedom from all or most of the disabilities which may in fact or in law affect natural persons, has powers exceeding those of a natural person, so those powers have to be defined and limited by sundry rules of law, partly for the protection of the individual members of the corporation, partly in the interest of the public.

We proceed to deal with these topics in the order indicated: and first of the exceptions to the capacity of natural persons to bind themselves by contract.

PART I.

I. Infants.

General statement of the law. An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract (*a*). His acts and contracts are voidable at his option, subject to certain statutory and other exceptions.

By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either before (*b*) his attaining his majority or within a reasonable time afterwards.

Where the obligation is incident to an interest (or at all events to a

(*a*) Stated in this form by Hayes J. 14 Ir. C. L. Rep. at p. 356.

(*b*) As to this see p. *61, below.

beneficial interest) in property, it cannot be avoided while that interest is retained.

Some agreements are, exceptionally, not voidable but void.

By the Infants' Relief Act, 1874, loans of money to infants, contracts for the sale to them of goods other than necessaries, and ac-
55] counts stated with them are absolutely *void; and no action can be brought on a ratification of *any* contract made during infancy.

(When the agreement of an infant is such that it cannot be for his benefit, it has been said to be absolutely void at common law; but this distinction is believed to be exploded by modern authorities.)

On the other hand an infant is bound to pay a reasonable price for necessaries sold and delivered to him; where "necessaries" mean goods suitable to his condition in life and his actual requirements at the time (*c*).

An infant's express contract may be valid if it appears to the Court to be beneficial to the infant.[2]

In certain other cases infants are enabled to make binding contracts by custom or statute.

An infant is not liable for a wrong arising out of or immediately connected with his contract, such as a fraudulent representation at the time of making the contract that he is of full age. But an infant who has represented himself as of full age is bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it.

1. *Of the contracts of infants in general at common law, and as affected by the Act of* 1874.

Supposed rule distinction that some contracts of infants are wholly void. It was once commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his
56] option (*d*). *But this distinction is in itself unreasonable, and is really unsupported by authority, while there is considerable au-

(*c*) Sale of Goods Act, 1893, s. 2. This confirms the opinion that an infant's obligation to pay for necessaries is not created by agreement but imposed by law; in other words, that there is not a true contract but a quasi-contract.

(*d*) An infant's deed is generally voidable, Litt. s. 259, but it is said that if it is not such as to take effect "by the delivery of his own hand," it is void, Perk. 12, Shepp. Touch. 232–3, Co. Litt. 51 *b*, *n.*, 3 Burr. 1805, 2 Dr. & W. 340. It is assumed in modern practice that an infant's sale or gift of personal chattels with

[2] Clements *v.* London, &c. Ry. Co. [1894], 2 Q. B. 482.

thority against it. The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject matters it has been held to mean only *voidable* in formal instruments (*e*) and even in Acts of Parliament (*f*).[3]

Rule unsupported by authority. Actual decision is the only safe guide; and as early as 1813 it was clearly laid down in the Exchequer Chamber, as the general rule of law, that the contract of an infant may be avoided or not at his own option. The Court refused to recognize any variation of the rule as generally applicable to trading contracts (*g*).

There is nothing to set against this in any reported case of co-ordinate authority. Dicta in cases of inferior authority to the effect that trade contracts of infants are void (as distinct from voidable) could not prevail against a decision of the Exchequer Chamber even if they were necessary to the judgments in which they occur. Examination shows that they were superfluous in every case cited for the formerly current doctrine; but it seems needless to repeat what was said in earlier editions, as that doctrine is now, I believe, abandoned everywhere.

Contract of service. In a modern case, indeed, the following opinion was given by the Court of Queen's Bench on the conviction of *a [57 servant for unlawfully absenting himself from his master's employment:—

"Among many objections one appears to us clearly fatal. He was an infant at the time of entering into the agreement, which authorizes the master to stop his wages when the steam engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit (*h*); but an

actual delivery is good: *Taylor* v. *Johnston* (1880) 19 Ch. D. 603, 608. According to the old books it would seem to be voidable.

(*e*) *Lincoln College's case* (1595) 3 Co. Rep. 59 *b*; *Doe* d. *Bryan* v. *Bancks* (1821) 4 B. & Ald. 401, 23 R. R. 318; *Malins* v. *Freeman* (1838) 4 Bing. N. C. 395, 44 R. R. 737.

(*f*) Compare *Davenport* v. *Reg.* (1877) (J. C. from Queensland) 3 App. Ca. at p. 128, 47 L. J. P. C. 8, with *Governors of Magdalen Hospital* v. *Knotts* (1879) 4 App. Ca. 324, 48 L. J. Ch. 579, in which case this latitude has at last been restrained.

(*g*) *Warwick* v. *Bruce*, 6 Taunt. 118, affg. s.c. M. & S. 205, 14 R. R. 638.

(*h*) It seems that *prima facie* it is so, even if it contains clauses imposing penalties, or giving a power of dismissal, in certain events: *Wood* v.

[3] See remarks of Bell, J., in State *v.* Richmond, 26 N. H. 232. See also *Re* Brall, [1893] 2 Q. B. 381; Ewell *v.* Daggs, 108 U. S. 143; Minah Min. Co. *v.* Briscoe, 47 Fed. Rep. 276; Railroad Co. *v.* Continental Trust Co., 95 Fed. Rep. 497, 525; Van Shaack *v.* Robbins, 36 Ia. 201; Allis *v.* Billings, 6 Met. 415; Terrill *v.* Auchauer, 14 Ohio St. 80, 85; National Bank *v.* Wheelock, 52 Ohio St. 534; Pearsoll *v.* Chapin, 44 Pa. 9.

agreement which compels him to serve at all times during the term but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed"(*i*).

But this is mere laxity of language. Court decided only that the agreement was not enforceable against the infant. It cannot have meant to say that if the master had arbitrarily refused to pay wages for the work actually done the infant could not have sued him on the agreement.

Leases. Again, it is said that a lease made by an infant, without reservation of any rent (or even not reserving the best rent), is absolutely void. But this opinion was disapproved by Lord Mansfield, whose judgment Lord St. Leonards adopted as good law, though the actual decision was not on this particular point in either case (*j*). And in a modern Irish case (*k*) it was expressly decided that at all
58] events *a lease made by an infant reserving a substantial rent, whether the best rent or not, is not void but voidable; and further that it is not well avoided by the infant granting another lease of the same property to another person after attaining his full age. There is good English authority for the proposition that if a lease made by an infant is beneficial to him he cannot avoid it at all (*l*).

Sale, &c., of land. It appears to be agreed that the sale, purchase (*m*), or exchange (*n*) of land by an infant is both as to the contract and as to the conveyance only voidable at his option.[4]

Fenwick (1842) 10 M. & W. 195; *Leslie* v. *Fitzpatrick* (1877) 3 Q. B. D. 229, 47 L. J. M. C. 22, distinguishing *Reg.* v. *Lord* (next note).

(*i*) *Reg.* v. *Lord* (1848) 12 Q. B. 757, 17 L. J. M. C. 181, where the headnote rightly says "void *against the infant*." [See also Corn *v.* Matthews, [1893] 1 Q. B. 310.]

(*j*) *Zouch* v. Parsons (1765) 3 Burr. 1794 (where the decision was that the reconveyance of a mortgagee's infant heir, the mortgage being properly paid off, could not be avoided by his entry before full age); *Allen* v. *Allen* (1842) 2 Dr. & W. 307, 340; and see Bac. Ab. 4, 361.

(*k*) *Slator* v. *Brady* (1863) 14 Ir. C. L. Rep. 61. The Court inclined to think that some act of notoriety by the lessor would be required, such as entering, bringing ejectment, or demanding possession (note that a freehold estate for the life of the lessor or twenty-one years had passed by the original lease); however there was another reason, namely, that the second lease might be construed as only creating a future interest to take effect on the determination of the first.

(*l*) *Maddon* v. *White* (1787) 2 T. R. 159, 1 R. R. 453.

(*m*) Co. Lit. 2 *b*, Bac. Ab. Infancy, I. 3 (4, 360).

(*n*) Co. Lit. 51 *b*.

[4] If an infant make a feoffment of land, since he must be in possession to make it, he must again re-enter, in order to avoid it; and hence his mere deed to another, without a re-entry, is not a disaffirmance of the feoffment

Partnership and shareholding. Again, there is no doubt that an infant may be a partner[5] or shareholder (though in the latter case the company may refuse to accept him) (*o*); and though he cannot be made liable for partnership debts during his infancy, he is bound by the partnership accounts as between himself and his partners and cannot claim to share profits without contributing to losses.[6] And if on coming of age he does not expressly disaffirm the partnership he is considered to affirm it, or at any rate to hold himself out as a partner,

(*o*) But the company cannot dispute the validity of a transfer to an infant after the infant has transferred over to a person *sui iuris:* *Gooch's case* (1872) L. R. 8 Ch. 266, 42 L. J. Ch. 381. And see Lindley, 82–84.

first made. But in this country conveyance by bargain and sale, and not by feoffment, is the mode generally adopted, and hence a re-entry by the infant is not usually necessary. Where the infant remains in possession of the land granted by him, his deed to another, on arriving at majority, is a complete disaffirmance; where the grantee of the infant goes into possession, there is a subsequent deed of the grantor will, or will not be effectual as a disaffirmance, according as the law of the State where the land lies, is, or is not, that one out of possession of land can make a good deed of it without re-entry. Tucker *v.* Moreland, 10 Pet. 58; Bagley *v.* Fletcher, 44 Ark. 153; Harris *v.* Cannon, 6 Ga. 382; Ritcher *v.* Laycock, 7 Ind. 398; Vallandingham *v.* Johnson, 85 Ky. 288; Dawson *v.* Helmes, 30 Minn. 107; Norcum *v.* Shehan, 21 Mo. 25; Peterson *v.* Laik, 24 Mo. 541; Jackson *v.* Carpenter, 11 Johns. 539; Jackson *v.* Burchin, 14 Johns. 124; Bool *v.* Mix, 17 Wend. 119; Hoyle *v.* Stowe, 2 Dev. & Bat. L. 320; Cresinger *v.* Welch, 15 Ohio, 156; Scott *v.* Buchanan, 11 Humph. 468, 473, 474; Mustard *v.* Wohlford, 15 Gratt. 329.

In Biggs *v.* Fisk, 64 Ind. 100, it was held that although a conveyance, made by a grantor on attaining the age of twenty-one years, of lands adversely held by one claiming title thereto, under a conveyance made by the same grantor during his infancy, is void as against the adverse holder, yet it operates as a disaffirmance of the first deed, and authorizes the grantee thereunder to sue the adverse holder in the name of the grantor for the recovery of such lands.

In order that a later deed should operate as a disaffirmance of an earlier, the two must be so inconsistent that both cannot stand together. Leitensdorfer *v.* Hempstead, 18 Mo. 269; Buchanan *v.* Griggs, 18 Neb. 121; Eagle Fire Co. *v.* Lent, 6 Paige, 635; McGann *v.* Marshall, 7 Humph. 121.

Heirs of a dead minor may disaffirm his deed. Walton *v.* Gaines, 94 Tenn. 420. Cp. Mansfield *v.* Gordon, 144 Mass. 168.

[5] Bush *v.* Linthicum, 59 Md. 344; Dana *v.* Stearns, 3 Cush. 372; Dunton *v.* Brown, 31 Mich. 182; Osborn *v.* Farr, 42 Mich. 134; Bank *v.* Strauss, 137 N. Y. 148; Parker *v.* Oakley, (Tenn.) 57 S. W. Rep. 426; Penn *v.* Whitehead, 17 Gratt. 503.

[6] In Moley *v.* Brine, 120 Mass. 324, the members of a partnership, one of whom was an infant, contributed to the common stock in unequal proportions, with an agreement that the profits should be equally divided between them. The firm dissolved; the assets remaining at the time of the dissolution being insufficient to pay back the contributions of the several members in full, it was held that the loss of capital must fall upon the partners in equal proportions, and that the infant could not throw upon his co-partners the obligation of making up the deficiency. Moley *v.* Brine was followed in Page *v.* Morse, 128 Mass. 99. See also Conary *v.* Sawyer, 92 Me. 463; Pelletier *v.* Couture, 148 Mass. 269; Sparman *v.* Keim, 83 N. Y. 245; Shirk *v.* Schultz, 113 Ind. 571, 27 Am. L. Reg. 520, and note.

and is thereby liable for the debts of the firm contracted since his majority (*p*).[7]

The liability of an infant shareholder who does not repudiate his shares to pay calls on them rests, as far as existing authorities go, on a somewhat different form of the same principle (of which afterwards). As to contribution in the winding up of a company, Lord Lindley (*q*) "is not aware of any case in which an infant has been 59] put on the list of contributories. Upon principle, however, *there does not appear to be any reason why he should not, if it be for his benefit; and this, if there are surplus assets, might be the case." Otherwise he cannot be deprived of his right to repudiate the shares, unless perhaps by fraud; but in any case if he "does not repudiate his shares, either while he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory," and still more so if after that time he does anything showing an election to keep the shares. On the whole it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable (*r*).

Marriage. Marriage is on a different footing from ordinary contracts (*s*), and it is hardly needful to say that the possibility of a minor contracting a valid marriage has never been doubted in our Courts. Even if either or both of the parties be under the age of consent (fourteen for the man, twelve for the woman) the marriage is not absolutely void, but remains good if when they are both of the age of consent they agree to it (*t*).[8] But the Marriage Act, 4 Geo. 4,

(*p*) Lindley on Companies, 5th ed. 811, 828; *Goode* v. *Harrison* (1821) 5 B. & Ald. 147, 24 R. R. 307.

(*q*) On Companies, 809.

(*r*) *Lumsden's case* (1868) L. R. 4 Ch. 31; *Gooch's case*, last page; cp. p. *65, *infra*.

(*s*) Continental writers have wasted much ingenuity in debating with which class of contracts it should be reckoned. Sav. Syst. § 141 (3, 317); Ortolan on Inst. 2. 10.

(*t*) Bacon, Abr. 4. 336.

7 In Miller *v.* Sims, 2 Hill (S. C.), 479, where an infant partner after attaining full age, transacted the business of the firm, received its moneys and paid its debts, it was held that these acts unexplained amounted to a confirmation of the partnership, and made him liable for a debt of the firm contracted during his infancy, although he was ignorant of the existence of the debt at the time of such confirmation, and had, on being informed of it, refused to pay it. But see Crabtree *v.* May, 1 B. Mon. 289; Tobey *v.* Wood, 123 Mass. 88; Minock *v.* Shortridge, 21 Mich. 304.

8 Goodwin *v.* Thompson, 2 Greene (Ia), 329; State *v.* Lowell, 78 Minn. 166; Koonce *v.* Wallace, 7 Jones L. 194; Warwick *v.* Cooper, 5 Sneed, 659. Cp. Beggs *v.* State, 55 Ala. 108; Walls *v.* State, 32 Ark. 565 with Shafher *v.* State, 20 Ohio, 1.

c. 76 (ss. 8, 22), makes it very difficult, though not impossible, for a minor to contract a valid marriage without the consent of parents or guardians (*u*).

Promises to marry. As to promises to marry and marriage settlements, it *has long been familiar law that just as in the case of [60 his other voidable contracts an infant may sue for a breach of promise of marriage, though not liable to be sued (*x*).[9]

Marriage settlements. An infant's marriage settlement is not binding on the infant unless made under the statute (see *post,* pp. *73, *75), and the Court of Chancery has no power to make it binding in the case of a ward (*y*). A settlement of a female infant's general personal property, the intended husband being of full age and a party, can indeed be enforced, but as the contract not of the wife but of the husband; the wife's personal property passing to him by the marriage, he is bound to deal with it according to his contract (*z*). And particular covenants in an infant's settlement may be valid (*a*). In any case the settlement is not void but only voidable; it may be confirmed by the subsequent conduct of the party when of full age and *sui iuris* (*b*), and can be repudiated only within a reasonable time after attaining full age (*c*).

(*u*) In most Continental countries the earliest age of legal marriage is fixed: In France it is eighteen for the man, fifteen for the woman, and consent of parents or lineal ancestors is required up to the ages of twenty-five and twenty-one respectively: Code Civ. 144 sqq. But this consent may be dispensed with in various ways by matter subsequent or lapse of time: see art. 182, 183, 185. The marriage law of other states (except a very few where the canon law may still prevail) appears to differ little on the average from the law of France in this particular.

(*x*) Bacon, Abr. Infancy and Age, l. 4 (4. 370). Per Lord Ellenborough, *Warwick* v. *Bruce* (1813) 2 M. & S. 205, 14 R. R. 634.

(*y*) *Field* v. *Moore* (1855) 7 D. M. & G. 691, 710, 25 L. J. Ch. 66.

(*z*) Davidson, Conv. 3, pt. 2, 728.

(*a*) *Smith* v. *Lucas* (1881) 18 Ch. D. 531, not overruled on this point by *Edwards* v. *Carter* [1893] A. C. 360, 63 L. J. Ch. 100.

(*b*) *Davies* v. *Davies* (1870) L. R. 9 Eq. 468, 39 L. J. Ch. 343. This is not affected by the Infants' Relief Act, 1874: *Duncan* v. *Dixon* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437. A woman married under age is not disabled by the coverture from confirming an ante-nuptial settlement after she is of age: *Re Hodson's Settlement* [1894] 2 Ch. 421, 63 L. J. Ch. 609.

(*c*) Without regard to the date at which any particular interest affected may fall into possession: *Edwards* v. *Carter* [1893] A. C. 360, 63 L. J. Ch. 100, with which *Re Jones* [1893] 2 Ch. 461. 62 L. J. Ch. 996, does not seem reconcilable. And election must be made once for all, not separate elections for each acquisition — see *Viditz* v. *O'Hagan* [1899] 2 Ch. pp. 569, 576.

9 Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone, 7 Cow. 22; Bush *v.* Wick, 31 Ohio St. 521; Warwick *v.* Cooper, 5 Sneed, 659; Wells *v.* Hardy, 21 Tex. Civ. App. 648; Pool *v.* Pratt, 1 Chip. 252.

Negotiable instruments. Again an infant's contract on a bill of exchange or promissory note was once supposed to be wholly void, but is now treated as only voidable (*d*).[10]

Accounts stated. The same holds of an account stated (*e*).[11]

Infant cannot have specific performance. There is one exception to the rule that an infant may enforce his voidable contracts against the 61] other party *during his infancy,[12] or rather there is one way in which he cannot enforce them. Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound (*f*).[13]

When infant may avoid his contracts. An infant may avoid his voidable contracts (with practically few or no exceptions) either before or

(*d*) Undisputed in *Harris* v. *Wall* (1847) 1 Ex. 122, 16 L. J. Ex. 270, foll. *In re Hodson's Settlement* [1894] 2 Ch. 421, 63 L. J. Ch. 609.

(*e*) *Williams* v. *Moor* (1843) 11 M. & W. 256, 264, 266, 12 L. J. Ex. 253.

(*f*) *Flight* v. *Bolland* (1828) 4 Russ. 298, 28 R. R. 101.

[10] Heady *v.* Boden, 4 Ind. App. 475; Insurance Co. *v.* Hilliard, 63 Ohio St. 478; Mission Ridge Co. *v.* Nixon, (Tenn.) 48 S. W. Rep. 405; Daniel on Neg. Inst. § 223 seq; 1 Ames, Cas. on Bills and Notes, 463, note.

[11] "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries; the only act which he is under a legal incapacity to perform is the appointment of an attorney; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election;" 1 Am. L. C. 300; Shropshire *v.* Burns, 46 Ala. 108; Hyer *v.* Hyatt, 3 Cr. C. C. 276; Bozeman *v.* Browning, 31 Ark. 364, 373; Cole *v.* Pennoyer, 14 Ill. 158; Fetrow *v.* Wiseman, 40 Ind. 148; Rice *v.* Boyer, 108 Ind. 472; Mansfield *v.* Gordon, 144 Mass. 168, 169; McDonald *v.* Sargent, 171 Mass. 492; Baker *v.* Kennett, 54 Mo. 82, 88; Necker *v.* Koehn, 21 Neb. 559; Englebert *v.* Troxell, 40 Neb. 195; Beardsley *v.* Hotchkiss, 96 N. Y. 201; Bank *v.* Strauss, 137 N. Y. 148, 152; Skinner *v.* Maxwell, 66 N. C. 45, 47; Harner *v.* Dipple, 31 Ohio St. 72; Lemmon *v.* Beeman, 45 Ohio St. 505, 509; Insurance Co. *v.* Hilliard, 63 Ohio St. 478, 491; Mustard *v.* Wohlford, 15 Gratt. 329.

However, there are even some recent cases approving the threefold division into binding, voidable and void promises. See Green *v.* Wilding, 59 Ia. 679; Robinson *v.* Weeks, 56 Me. 102; Dunton *v.* Brown, 31 Mich. 182; Swafford *v.* Ferguson, 3 Lea, 292.

A power of attorney or agent's appointment was held void in Trueblood *v.* Trueblood, 8 Ind. 195; Pyle *v.* Cravens, 4 Litt. 17; Lawrence *v.* McArter, 10 Ohio, 37. But voidable only in Hastings *v.* Dollarhide, 24 Cal. 195; Hardy *v.* Waters, 38 Me. 450; Whitney *v.* Dutch, 14 Mass. 457, 461; Coursolle *v.* Weyerhauser, 69 Minn. 328.

[12] The other party cannot refuse to perform a contract because of the infant's inability to bind himself conclusively. Holt *v.* Ward Clarencieux, 2 Strange, 937; Insurance Co. *v.* Hilliard, 63 Ohio St. 478, 491; O'Rourke *v.* John Hancock Ins. Co., 23 R. I. 457, 462. See also Atwell *v.* Jenkins, 163 Mass. 362.

[13] Richards *v.* Green, 23 N. J. Eq. 536, 538; Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 51. But see Seaton *v.* Tohill, 11 Col. App. 211.

within a reasonable time after coming of age: the rule is that "matters *in fait* [*i.e.*, not of record] he shall avoid either within age or at full age," but matters of record only within age (Co. Lit. 380 *b*) (*g*). Subject to the general rule, established for the benefit of innocent third persons, that voidable transactions are not invalid until ratified but valid until rescinded (*h*), an infant cannot deprive himself of the right to elect at full age, and only then can his election be conclusively determined (*i*).[14]

(*g*) See per Parke B. *Newry and Enniskillen Ry. Co.* v. *Coombe* (1849) 3 Ex. 565, 18 L. J. Ex. 325; per Cur. *L. & N. W. R.* v. *M'Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97. As to an infant being bound when he comes of age by an acknowledgment made in a Court of Record, see Y. B. 20 & 21 Ed. 1. p. 320.

(*h*) Per Lord Colonsay, L. R. 2 H. L. 375.

(*i*) *L. & N. W. R.* v. *M'Michael*, *supra*, note (*g*); *Slator* v. *Trimble* (1861) 14 Ir. C. L. Rep. 342.

[14] In Edgerton *v.* Wolf, 6 Gray, 453, it was decided that an infant having during his minority rescinded a contract for the sale of a horse, this was final, and precluded his afterwards avoiding the rescission. So in Pippen *v.* Insurance Co., 130 N. C. 23, it was held that an infant's surrender of a policy for its cash value was conclusive. Cp. Lansing *v.* Michigan Central R. Co., 126 Mich. 663. As to real estate, the rule in this country generally is that an infant cannot avoid his deed until his majority. Hastings *v.* Dollarhide, 24 Cal. 195; Chapman *v.* Chapman, 13 Ind. 396; Welch *v.* Bunce, 83 Ind. 382; Baker *v.* Kennett, 54 Mo. 82, 88; Shipley *v.* Bunn, 125 Mo. 445; Emmons *v.* Murray, 16 N. H. 385; Bool *v.* Mix, 17 Wend. 119; McCormick *v.* Leggett, 8 Jones L. 425. Rescission after majority is a final election. McCarty *v.* Woodstock Iron Co., 92 Ala. 463. Contracts of a personal kind, or relating to personal estate, he may avoid during infancy. Shipman *v.* Horton, 17 Conn. 481; Riley *v.* Mallory, 33 Conn. 201; Carpenter *v.* Carpenter, 45 Ind. 142; Childs *v.* Dobbins, 55 Ia. 205; Bailey *v.* Barnberger, 11 B. Mon. 113; Towle *v.* Dresser, 73 Me. 252; Adams *v.* Beall, 67 Md. 53; Gillis *v.* Goodwin, 180 Mass. 140; Simpson *v.* Prudential Ins. Co., 184 Mass. 348; Cogley *v.* Cushman, 16 Minn. 397; Heath *v.* West, 26 N. H. 191; Carr *v.* Clough, 26 N. H. 280; Chapin *v.* Shafer, 49 N. Y. 407; Pippen *v.* Insurance Co., 130 N. C. 23; Price *v.* Furman, 27 Vt. 268; Hoyt *v.* Wilkinson, 57 Vt. 404. *Contra*, Dunton *v.* Brown, 31 Mich. 182; Armitage *v.* Widoe, 36 Mich. 124; Lansing *v.* Michigan Central R. Co., 126 Mich. 663. Any attempted affirmance during infancy is ineffectual. Sanger *v.* Hibbard, 104 Fed. Rep. 445 (C. C. A.).

Money paid by a minor under a contract which has not yet been performed by the other party may be recovered back. Robinson *v.* Weeks, 56 Me. 102; Medbury *v.* Watrous, 7 Hill, 110; Shurtleff *v.* Millard, 12 R. I. 272.

An infant may avoid an express contract of hiring and service, and recover upon *quantum meruit* the value of the services he has rendered under it. Ray *v.* Haines, 52 Ill. 485; Van Pelt *v.* Corwine, 6 Ind. 363; Meredith *v.* Crawford, 34 Ind. 399; Derocher *v.* Continental Mills, 58 Me. 217; Vent *v.* Osgood, 19 Pick. 572; Gaffney *v.* Hayden, 110 Mass. 137; Dubé *v.* Beaudry, 150 Mass. 448; Lowe *v.* Sinklear, 27 Mo. 308; Lupkin *v.* Mayall, 25 N. H. 82; Whitmarsh *v.* Hall, 3 Denio, 375; Medbury *v.* Watrous, 7 Hill, 110; Dearden *v.* Adams, 19 R. I. 217; Railroad Co. *v.* Elliott, 1 Cold. 611; Hoxie *v.* Lincoln, 25 Vt. 206.

Some of the cases cited hold that the infant can recover only the value of his services, less the damage suffered by his employer by reason of the breach of his contract. But this makes the engagement of the infant a contract binding on him to the extent of holding him liable for a breach of it, leaving it voidable prospectively only, and not *ab initio*, and seems clearly wrong on

Money paid under avoided contract, when not recoverable. If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age. Such is the case of a premium paid for a

principle. Cp. McCarthy *v.* Henderson, 138 Mass. 310; O'Rourke *v.* John Hancock Ins. Co., 23 R. I. 457.

An infant's agreement to labor, in consideration of being furnished board, clothing, etc., may amount to a contract for necessaries, and if it is reasonable and has been executed will be binding. James *v.* Gillen, 3 Ind. App. 472; Stone *v.* Dennison, 13 Pick. 1; Squires *v.* Hydliff, 9 Mich. 274; Ormsby *v.* Rhoades, 59 Vt. 505. Cp. Breed *v.* Judd, 1 Gray, 455; Spicer *v.* Earl, 41 Mich. 191. See Genereaux *v.* Sibley, 18 R. I. 42.

Where a contract is executory on the part of the infant, and has been performed on the part of the other party, if the infant avoids the contract, he thereby divests himself of all right to what he may have received under it, if then still possessed by him in specie, and the other party may repossess himself thereof in whatever condition it may then be, but if the infant have allowed it to deteriorate, or wasted or consumed it, the other party has no remedy therefor. Brandon *v.* Brown, 106 Ill. 519, 527; Badger *v.* Phinney, 15 Mass. 359; Miller *v.* Smith, 26 Minn. 248; Nichols, &c., Co. *v.* Snyder, 78 Minn. 502; Brantley *v.* Wolf, 60 Miss. 420; Kitchen *v.* Lee, 11 Paige, 107; Mustard *v.* Wohlford, 15 Gratt. 329; Bedinger *v.* Wharton, 27 Gratt. 857.

And in the case of an executed contract of sale, or exchange, if the infant no longer possesses the consideration received by him, having consumed or disposed of it during infancy, he may avoid the contract without putting the other party in *statu quo*. Tucker *v.* Moreland, 10 Pet. 58, 73, 74; Manning *v.* Johnson, 26 Ala. 446; Eureka Co. *v.* Edwards, 71 Ala. 248; Carpenter *v.* Carpenter, 45 Ind. 142; Dill *v.* Bowen, 54 Ind. 204; Chandler *v.* Simmons, 97 Mass. 508; Morse *v.* Ely, 154 Mass. 458; White *v.* New Bedford, &c., Co., 178 Mass. 665; Gillis *v.* Goodwin, 180 Mass. 140; Simpson *v.* Prudential Ins. Co., 184 Mass. 348; Brantley *v.* Wolf, 60 Miss. 420; Harvey *v.* Briggs, 68 Miss. 60; Craig *v.* Van Bebber, 100 Mo. 584; Clark *v.* Tate, 7 Mont. 171; Bloomer *v.* Nolan, 36 Neb. 51; Englebert *v.* Troxell, 40 Neb. 195; Green *v.* Green, 69 N. Y. 553; Cresinger *v.* Welch, 15 Ohio, 156; Lemmon *v.* Beeman, 45 Ohio St. 505; Bullock *v.* Sprowls, 93 Tex. 188; Price *v.* Furman, 27 Vt. 268; Wiser *v.* Lockwood, 42 Vt. 720. But see, on the other hand, Bozeman *v.* Browning, 31 Ark. 364; Bailey *v.* Barnberger, 11 B. Mon. 113; Johnson *v.* Insurance Co., 56 Minn. 365; Kerr *v.* Bell, 44 Mo. 120; Bartlett *v.* Bailey, 59 N. H. 354; Hall *v.* Butterfield, 59 N. H. 408; Smith *v.* Evans, 5 Humph. 70; Lane *v.* Dayton, &c., Co., 101 Tenn. 581; Stuart *v.* Baker, 17 Tex. 417; Folty *v.* Ferguson, 77 Tex. 301.

In Lane *v.* Dayton, &c., Co., 101 Tenn. 581, it was held that an infant could not avoid an accord and satisfaction without returning the consideration he had received, if he still had it.

In McGreall *v.* Taylor, 167 U. S. 688, an infant made a trust deed to secure money borrowed to pay off incumbrances and make improvements on the infant's land, and the money was so used. The deed having been disaffirmed, the lender was held subrogated to the rights of the incumbrancers who had been paid, and the money spent on improvements was considered still in the infant's hands. Somewhat similarly an infant grantor of land was held liable to the grantee for improvements made by the latter. Rundle *v.* Spencer, 67 Mich. 189.

If the infant, after reaching majority, sell, or, for an unreasonable time, retain what he has received under the contract, this will be treated as an affirmance, and will preclude him from subsequently avoiding it. McCarthy *v.* Nierosi, 72 Ala. 332; Pursley *v.* Hays, 17 Ia. 310; Robinson *v.* Hoskins, 14 Bush, 393; Boody *v.* McKenny, 23 Me. 517; Hilton *v.* Shepherd, 92 Me. 160;

lease (*k*), or of the price of goods (not being necessaries) sold and delivered to an infant and paid for by him: and so if an infant enters into a partnership and pays a premium, he cannot either before or after his full age recover it back,[15] nor therefore prove for it in the bankruptcy of his partners (*l*).

* **Infants' Relief Act, 1874.** We must now consider the Act of 1874 [62 (37 & 38 Vict. c. 62), which enacts as follows: —

1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for

(*k*) *Holmes* v. *Blogg* (1817) 8 Taunt. 35, 508, S. C. 1 Moore, 466, 2 Moore, 552, 19 R. R. 445.

(*l*) *Ex parte Taylor* (1856) 8 D. M. & G. 254, 258. But if the infant has received no consideration at all he can recover: *Hamilton* v. *Vaughan-Sherrin, &c. Co.* [1894] 3 Ch. 589, 63 L. J. Ch. 795.

Boyden *v.* Boyden, 9 Met. 519; Robbins *v.* Eaton, 10 N. H. 561; Williams *v.* Mabee, 3 Halst. Ch. 500; State *v.* Rousseau, 94 N. C. 355; Mission Ridge Co. *v.* Nixon, (Tenn.) 48 S. W. Rep. 405. *Contra*, as to lumber built into a house. Bloomer *v.* Nolan, 36 Neb. 51.

But mere acquiescence for any length of time short of the statutory period of limitation will not operate as an affirmance of an infant's deed of land, in the absence of other circumstances sufficient to raise an equitable estoppel. Irvine *v.* Irvine, 9 Wall. 617, 627; Sims *v.* Everhardt, 102 U. S. 300, 312; Kountz *v.* Davis, 34 Ark. 590; Wells *v.* Seixas, 24 Fed. Rep. 82; Richardson *v.* Pate, 93 Ind. 423; Davis *v.* Dudley, 70 Me. 236; Prout *v.* Wiley, 28 Mich. 164; Donovan *v.* Ward, 100 Mich. 601; Wallace *v.* Latham, 52 Miss. 291, 297; Shipp *v.* McKee, 80 Miss. 741; Cresinger *v.* Welch, 15 Ohio 156; Gillespie *v.* Bailey, 12 W. Va. 70. *Contra*, Hastings *v.* Dollarhide, 24 Cal. 195; Bentley *v.* Greer, 100 Ga. 35; Goodnow *v.* Empire Lumber Co., 31 Minn. 468, and cases cited.

Where a person of full age promises to perform a contract entered into during his minority, he thereby ratifies the contract, although he does not know at the time of the promise, that by reason of his minority at the time of the contract he is not legally liable thereon. American Mtge. Co. *v.* Wright, 101 Ala. 658; Bestor *v.* Hickey, 71 Conn. 181; Clark *v.* Van Court, 100 Ind. 113; Morse *v.* Wheeler, 4 Allen, 570; Taft *v.* Sergeant, 18 Barb. 320; Ring *v.* Jamison, 66 Mo. 424; Anderson *v.* Soward, 40 Ohio St. 325. *Contra*, Trader *v.* Lowe, 45 Md. 1; Turner *v.* Gaither, 83 N. C. 357; Hinely *v.* Margaritz, 3 Pa. St. 428; Hatch *v.* Hatch's Est., 60 Vt. 160.

Ratification in ignorance of the fact that the party ratifying was an infant at the time of the original transaction is not binding. Ridgeway *v.* Herbert, 150 Mo. 606, 614.

When an infant purchases property, and in pursuance of the contract gives a purchase-money mortgage upon it, he cannot avoid the mortgage without also avoiding the purchase and restoring the property; and in such case, if the infant sells the mortgaged property, his purchaser takes it subject to the mortgage. Cogley *v.* Cushman, 16 Minn. 397; Oltman *v.* Moak, 3 Sandf. Ch. 431; Curtis *v.* McDougal, 26 Ohio St. 66; Knaggs *v.* Green, 48 Wis. 601. And see, Weed *v.* Beebe, 21 Vt. 495.

Acknowledgment or part payment of a debt incurred during minority does not amount to a ratification. Thrupp *v.* Fielder, 2 Esp. 628; Kendrick *v.* Neisz, 17 Col. 506; Catlin *v.* Haddox, 49 Conn. 492; Ford *v.* Phillips, 1 Pick. 202; Hale *v.* Gerrish, 8 N. H. 374; Baker *v.* Kennett, 54 Mo. 82; Goodsell *v.* Myers, 3 Wend. 479. *Contra*, American Mtge. Co. *v.* Wright, 101 Ala. 658. Nor is a promise to a third party sufficient. Bigelow *v.* Grannis, 2 Hill, 120.

15 Adams *v.* Beall, 67 Md. 53.

goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as The Infants' Relief Act, 1874.

Ratification still operative for some purposes. The 2nd section (*m*) forbids an action to be brought on any promise or ratification of a contract made during infancy, and it applies to a ratification since the Act of a promise made in infancy before the passing of the Act (*n*), whether the agreement is or is not one of those included in s. 1 (*o*). It probably also prevents the ratification from being available by way of set-off (*p*). This, however, is a different thing from depriving the ratification of all effect. For it may have other effects than giving a right of action or set-off, and these are not touched. While the matter was governed by Lord Tenterden's Act (*m*) there were many cases where a contract made during infancy might be adopted or confirmed without any ratification in writing so as to produce important results. Thus in the case of a marriage settlement the mar-
63] ried persons are bound not so *much by liability to be sued (though in some cases and for some purposes the husband's covenants are of importance) as by inability to interfere with the disposition of the property once made and the execution of the trusts once constituted: and so far as concerns this an infant's marriage settlement may, as we have seen, be sufficiently confirmed by his or her conduct after full age (*q*). Again an infant partner who does not avoid the partnership at his full age is, as between himself and his partners,

(*m*) It supersedes the 5th section of Lord Tenterden's Act (9th Geo. 4, c. 14), by which no ratification of such a contract could be sued upon unless in writing and signed by the party to be charged, since expressly repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

(*n*) *Ex parte Kibble* (1875) L. R. 10 Ch. 373, 44 L. J. Bk. 63.

(*o*) *Coxhead* v. *Mullis* (1878) 3 C. P. D. 439, 47 L. J. C. P. 761. It is held, however, that in a case which would before the Act have been one of ratification it may be left to the jury to say whether the conduct of the parties amounts to a new promise: *Ditcham* v. *Worrall* (1880) 5 C. P. D. 410, 49 L. J. C. P. 688, by Lindley and Denman JJ. *diss.* Lord Coleridge C.J.

(*p*) *Rawley* v. *Rawley* (1876) 1 Q. B. Div. 460, 45 L. J. Q. B. 675.

(*q*) *Davies* v. *Davies* (1870) L. R. 9 Eq. 468, 39 L. J. Ch. 343, *supra*, p. *60. In *Duncan* v. *Dixon* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437, an attempt was made to bring an infant's marriage settlement within s. 1, on the ground that it must be read as including all contracts whatever. The Act is not quite so ill-drawn as to admit this construction.

completely bound by the terms on which he entered it without any formal ratification; and in taking the partnership accounts the Court would apply the same rule to the time of his minority as to the time after his full age. Again an infant shareholder who does not disclaim may after his full age, at any rate, be made liable for calls without any express ratification; on the contrary, the burden of proof is on him to show that he repudiated the shares within a reasonable time (*r*).

And as Lord Tenterden's Act did not formerly stand in the way of these consequences of the affirmation or non-repudiation of an infant's contract, so the Act of 1874 will not stand in the way of the same or like consequences in the future. In fact the operation of the present Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes. Other examples of such agreements and of their legal effect will be found in the chapter specially assigned to that subject.

Specific performance. A collateral result of this enactment appears to be that one who has made a contract during his infancy is not *now able to obtain specific performance of it after his full age, [64 for the same reason that he cannot and formerly could not do so sooner (*s*).

Proviso as to new consideration. The proviso as to new consideration meets such cases as that of an attempt to set up as a new contract the compromise of an action brought on the original promise (*t*). It is reinforced by s. 5 of the Betting and Loans (Infants) Act, 1892, which absolutely avoids all agreements and instruments (even negotiable ones), made for the payment of money representing or connected with a loan advanced during infancy (*u*).

Section 1, making certain contracts void. In the first section of the principal Act, the words concerning the purchase of goods are not free from obscurity. If we might construe the Act as if it said "*for payment* for goods supplied," &c., it would be clear enough: but it is not so clear what is the precise operation of an enactment that contracts "for goods supplied or to be supplied," other than necessaries, shall be void. It seems to follow that no property will pass

(*r*) See pp. *58, *66.

(*s*) *Flight* v. *Bolland* (1828) 4 Russ. 298, 28 R. R. 101, p. *61, *supra*.

(*t*) *Smith* v. *King* [1892] 2 Q. B. 543, 67 L. T. 420.

(*u*) 55 Vict. c. 4. The rest of the Act is criminal.

to the infant by the attempted contract of sale, and that if he pays the price or any part of it before delivery of the goods he may recover it back; as indeed he might have done before the Act, for the contract was voidable, and he was free to rescind it within reasonable time. But it does not follow that if the goods are delivered no property passes or that if they are paid for the money may be recovered back. At all events an infant who has paid for goods and received and used them cannot recover the money back (*x*). The contrary construction would be unreasonable, and is not required by the policy of the statute, which is to protect infants from running into debt, not to disable them from making purchases for ready money. It is certain that when a particular class of contracts is simply declared to be un-
65] lawful, this does not prevent property from passing by an *act competent of itself to pass it, though done in pursuance or execution of the forbidden contract (*y*). Moreover it has been held that an infant may be guilty of larceny as a bailee though the goods were delivered to him on an agreement void under the Act (*z*). On the whole it seems that the contract is voidable, but that goods actually delivered can be returned, and the price recovered back, only so far and so long as complete restitution is possible.

It has been suggested that the exception of "contracts for necessaries" may include loans of money advanced and in fact used for the purpose of buying necessaries. The point is not known to have been judicially considered.

It is doubtful whether a bond, bill of exchange, or note given by a man of full age, for which the consideration was in fact the supply of goods not necessaries during his infancy, would be void under s. 1 (*a*). But s. 2 (which indeed seems altogether more useful than s. 1) would no doubt effectually prevent it from being enforced as between the immediate parties, though perhaps the words are not the most apt for that purpose.

The Building Societies Act, 1874, enables an infant to be a member, but this does not imply any exemption from the disability to mortgage his real estate created by the Infants' Relief Act: for that is not the sole purpose or a necessary purpose of membership (*aa*).

(*x*) *Valentini* v. *Canali* (1889) 24 Q. B. Div. 166, 59 L. J. Q. B. 74.

(*y*) *Ayers* v. *South Australian Banking Co.* (1871) L. R. 3 P. C. 548, 559, 40 L. J. C. P. 22.

(*z*) *R.* v. *McDonald* (1885) 15 Q. B. D. 323, 52 L. T. 583.

(*a*) Cp. *Flight* v. *Reed* (1863) 1 H. & C. 703, 32 L. J. Ex. 265.

(*aa*) *Thurstan* v. *Nottingham, &c. Building Soc.* [1902] 1 Ch. 1, 71 L. J. Ch. 83, C. A.

2. *Of the liability of infants on obligations incident to interests in permanent property.*

Liability on obligations incident to property. In an old case reported under various names in various books (*b*), it was decided that an infant lessee who con*tinues to occupy till he comes of full age is [66 after his full age liable for arrears of rent incurred during his infancy. In like manner a copyholder who was admitted during his minority and has not disclaimed is bound to pay the fine (*c*). The same principle is applied to the case of infant shareholders in railway companies. An infant is not incapable of being a shareholder (*d*), and as such is *prima facie* liable when he comes of age to be sued for calls on his shares. He can avoid the liability (which, though regulated by statute, has the general incidents of contract) only by showing that he repudiated the shares either before attaining his full age (*e*), or in a reasonable time afterwards (*f*). A railway shareholder is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obligations attached to it; and those obligations he is bound to discharge, though they arose while he was a minor, unless he has renounced the interest. A mere absence of ratification is no sufficient defence, even if coupled with the allegation that the defendant has derived no profit from the shares. For if the property is unprofitable or burdensome, it is the holder's business to disclaim it on attaining his full age, if not before; and perhaps he could not exonerate himself even during his minority by showing that the interest was not at the time beneficial, unless he actually disclaimed it (*g*). Comparing the anal*ogous case of a lease, [67 the Court said — "We think the more reasonable view of the case is

(*b*) *Kettle* v. *Eliot* (1614) Rolle Ab. 1, 731, K., Cro. Jac. 320, Brownlow, 120, 2 Bulst. 69. See the judgment of the Court of Exchequer in *L. & N. W. Ry. Co.* v. *M'Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97.

(*c*) *Evelyn* v. *Chichester* (1765) 3 Burr. 1717.

(*d*) He can subscribe a memorandum of association: *Luxon & Co.* (No. 2) (1891) 40 W. R. 621.

(*e*) *Newry & Enniskillen Ry. Co.* v. *Coombe* (1849) 3 Ex. 565, 18 L. J. Ex. 325.

(*f*) A plea which merely alleged repudiation after full age was therefore held bad in *Dublin & Wicklow Ry. Co.* v. *Black* (1852) 8 Ex. 181, 22 L. J. Ex. 94. At one time it seems to have been thought that even an infant shareholder was made absolutely liable by the general form of the enactment in the Companies Clauses Consolidation Act defining the liability of shareholders. See per Lord Denman C.J. and Patteson J. in *Cork & Bandon Ry. Co.* v. *Cazenove* (1847) 10 Q. B. 935. This view was afterwards abandoned as inconsistent with the established rule that general words in statutes are not to be construed so as to deprive infants, lunatics, &c., of the protection given to them by the common law.

(*g*) It is submitted that in such a case the disclaimer if made would conclusively determine his interest and not merely suspend it.

that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and if he has not disclaimed, at all events unless he still be a minor"(*h*). Similarly an infant member of a building society who has purchased land by means of an advance from the society cannot claim to hold the property free from the society's charge for the money advanced (*i*). In all the decided cases the party appears to have been of full age at the time of the action being brought, but there is nothing to show that (except possibly in the case of a disadvantageous contract) he might not as well be sued during his minority.

The same results, except as to suing the shareholder while still a minor, would follow from the general principles of the law of partnership even if the company in which the shares were held had not any permanent property.

3. *Of the liability of an infant when the contract is for his benefit, and especially for necessaries.*

Liability on beneficial contract. It has been laid down in general terms that if an agreement be for the benefit of an infant at the time, it shall bind him (*j*), or even that the contract is binding unless manifestly to the infant's prejudice (*k*).[16] An infant's contract of apprenticeship (*l*), or an ordinary contract to work for wages, will, if it be reasonable, be considered binding on the infant, so that he may no less than an adult incur the statutory penalties for unlawfully
68] absenting *himself from his master's employment (*m*). An infant entered the service of a railway company and, as a condition of the service, became a member of an insurance society established by the company; the funds were augmented by the company to the extent of five-sixths of the premiums payable by the members. The

(*h*) *L. & N. W. Ry. Co.* v. *M'Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97, 101.

(*i*) *Thurstan* v. *Nottingham Permanent Benefit Building Soc.* [1901] 1 Ch. 88; affirmed on this point [1902] 1 Ch. 1, 71 L. J. Ch. 83.

(*j*) *Maddon* v. *White* (1787) 2 T. R. 159, 1 R. R. 453.

(*k*) *Cooper* v. *Simmons* (1862) 7 H. & N. 707, 721; per Wilde B. Not so strongly put in the L. J. report, 31 L. J. M. C. 138, 144.

(*l*) *Wood* v. *Fenwick* (1842) 10 M. & W. 195.

(*m*) In *Leslie* v. *Fitzpatrick* (1877) 3 Q. B. D. 229, 47 L. J. M. C. 22, a case of summary proceedings under the Employers and Workmen Act, 1875, it may be collected that the facts were of the same kind, though the employer's plaint was in terms for a breach of contract. As to infant apprentices in London see p.*74, below.

[16] Contracts for necessaries are alone binding in this country. Henderson *v.* Fox, 5 Ind. 489; Tupper *v.* Cadwell, 12 Met. 550; Insurance Co. *v.* Noyes, 32 N. H. 345; O'Rourke *v.* John Hancock Ins. Co., 23 R. I. 457, 462; *supra*, p. 66, note 11.

rules provided for compensation in all cases of accident not due to the member's own wilful act or gross negligence, and bound the members to accept the benefits of the society in lieu of any claims under the Employers' Liability Act. The Court of Appeal held that the infant was bound by this agreement as being on the whole for his benefit (*n*). But an action will not lie against an infant on a covenant in apprenticeship indentures (*o*); and if the terms are not reasonable the agreement is void for all purposes, so that an action will not lie against a stranger for enticing away the apprentice (*p*). Again there are many conceivable cases in which it might be for an infant's benefit, or at least not manifestly to his prejudice, to enter into trading contracts, or to buy goods other than necessaries: one can hardly say for example that it would be manifestly to the disadvantage of a minor of years of discretion to buy goods on credit for re-sale in a rising market; yet there is *no doubt whatever that such a [69 contract would at common law be voidable at his option. A contract whereby an infant agrees with a railway company, in consideration of being allowed to make a certain habitual journey to and fro on special terms, to waive all claims for accident to himself or his property, is detrimental to the infant and not binding on him (*q*). Nor has it ever been suggested that an infant partner or shareholder is at liberty to disclaim at full age only in case the adventure has been unprofitable or is obviously likely to become so. However, inasmuch as since the Infants' Relief Act, 1874, an infant's contract, if not binding on him from the first, can never be enforced against him at all, it seems quite possible that the Courts may in future be disposed to extend rather than to narrow the description of contracts which are considered binding because for the infant's benefit (*r*).

(*n*) *Clements* v. *L. & N. W. Ry. Co.* [1894] 2 Q. B. 482, 63 L. J. Q. B. 837. It seems, though it was not necessary to decide the point, that the principle of an infant's contract being valid when the Court is satisfied that it was for his benefit is not confined (as was argued for the plaintiff) to contracts of apprenticeship or labour; see especially the judgment of Kay L.J.

(*o*) *De Francesco* v. *Barnum* (No. 1) (1889) 43 Ch. D. 165, 59 L. J. Ch. 151.

(*p*) *De Francesco* v. *Barnum* (No. 2) (1890) 45 Ch. D. 430, 63 L. T. 438. A clause enabling the master to suspend the apprentice's wages in an event which may be due to the master's own act, say a lock-out, is not reasonable: *Corn* v. *Matthews* [1893] 1 Q. B. 310, 62 L. J. M. C. 61, C. A., dist. *Green* v. *Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. 719, where the exception was of days when the business should be at a standstill by accidents beyond the control of the master.

(*q*) *Flower* v. *L. & N. W. Ry. Co.* [1894] 2 Q. B. 65, 63 L. J. Q. B. 547, C. A.

(*r*) In an action brought by an infant, an undertaking given by the infant's next friend is not binding if the circumstances are such that it cannot be for the infant's benefit: *Rhodes* v. *Swithenbank* (1889) 22 Q. B. Div. 577, 58 L. J. Q. B. 287.

3a. Contracts for necessaries.

Liability for necessaries. By the Sale of Goods Act, 1893, s. 2 —

. . . "Where necessaries are sold and delivered to an infant . . . or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"'Necessaries' in this section mean goods suitable to the condition in life of such infant . . or other person, and to his actual requirements at the time of the sale and delivery."

This enactment is a legislative declaration of the law as settled by a series of authorities, of which the judgment of the Exchequer Chamber in *Ryder* v. *Wombwell* is the chief:—

"The general rule of law is clearly established, and is that an infant is 70] *generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries, and is accurately stated by Parke B. in *Peters* v. *Fleming* (*s*). 'From the earliest time down to the present the word necessaries is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word necessaries in its unqualified sense, but with the qualification above pointed out'" (*t*).

What are necessaries. What in any particular case may fairly be called necessary in this extended sense, is what is called a question of mixed fact and law: that is, a question for a jury, subject to the Court being of opinion that there is evidence on which the jury may not reasonably find for the plaintiff.

The station and circumstances of the defendant and the particulars of the claim being first ascertained, it is then for the Court to say whether the things supplied are *prima facie* such as a jury may reasonably find to be necessaries for a person in the defendant's circumstances, or "whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception [*i.e.*, are necessaries], and then whether there is any sufficient evidence to satisfy that onus." In the latter case the plaintiff must show that although the articles would generally not be necessary for a person in the defendant's position, yet there exist in the case before the Court special circumstances that make them necessary. Thus articles of diet which are *prima facie* mere luxuries may become necessaries if prescribed by medical advice (*u*). It is said that in general the

(*s*) (1840) 6 M. & W. at p. 46.

(*t*) (1868) L. R. 4 Ex. 32, 38; in the Court below L. R. 3 Ex. 90, 38 L. J. Ex. 8.

(*u*) See *Wharton* v. *Mackenzie* (1844) 5 Q. B. 606, 13 L. J. Q. B. 130, and per Bramwell B. L. R. 3 Ex. at p. 96.

test of necessity is usefulness, and that nothing can be a necessary which cannot possibly be *useful: but the converse does not [71 hold, for a useful thing may be of unreasonably costly fashion or material. It is to be borne in mind that the question is not whether the things are such that a person of the defendant's means may reasonably buy and pay for them, but whether they can be reasonably said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without. For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society (*x*).

If the Court does not hold that there is no evidence on which the supplies in question may reasonably be treated as necessaries, then it is for the jury to say whether they were in fact necessaries for the defendant under all the circumstances of the case.[17]

Supply from other sources. The Act has laid down, in accordance with the weight of authority (*y*), that the buyer's actual requirements must be considered. If the goods supplied are necessary, the tradesman will not be the less entitled to recover because he made no inquiries as to the infant's existing supplies; but if the infant is already so well supplied that these goods are in truth not necessary, the tradesman's ignorance of that fact will not make them necessary, and he cannot recover. There is no rule of law casting on him a posi-

(*x*) L. R. 4 Ex. at p. 40.

(*y*) *Brayshaw* v. *Eaton* (1839) 5 Bing. N. C. 231, 7 Scott, 183, 50 R. R. 773; *Foster* v. *Redgrave* (1866) L. R. 4 Ex. 35, *n.*; to the contrary, *Ryder* v. *Wombwell* (1868) L. R. 3 Ex. 90, 38 L. J. Ex. 8; (the point was left open in Ex. Ch., L. R. 4 Ex. 42); but this was dissented from in *Barnes* v. *Toye* (1884) 13 Q. B. D. 410, and (by members of the C. A. sitting as a Divisional Court) *Johnstone* v. *Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6.

17 McKanna *v.* Merry, 61 Ill. 177; Beeler *v.* Young, 1 Bibb, 519; Tupper *v.* Cadwell, 12 Met. 559, 563; Merriam *v.* Cunningham, 11 Cush. 40; Decell *v.* Lewenthal, 57 Miss. 331; Englebert *v.* Troxell, 40 Neb. 195.

If the infant is already supplied, he cannot bind himself even for articles of a necessary kind. Conboy *v.* Howe, 59 Conn. 112; Davis *v.* Caldwell, 12 Cush. 512; Trainer *v.* Trumbull, 141 Mass. 527; Perrin *v.* Wilson, 10 Mo. 451; Jones *v.* Colvin, 1 McMull. L. 14; Kraker *v.* Byrum, 13 Rich. L. 163; Elrod *v.* Meyers, 2 Head, 33; Parsons *v.* Keys, 43 Tex. 557.

Ignorance on the part of the seller that the infant was already partially or wholly supplied makes no difference; he contracts with the infant at his peril. Kline *v.* L'Amoureux, 2 Paige, 419; Nichol *v.* Steger, 2 Tenn. Ch. 328; affd., 6 Lea, 393.

Where one sells to an infant articles, necessaries in kind, but in inordinate quantity, a recovery can be had for such quantity only as was actually necessary. Johnson *v.* Lines, 6 W. & S. 80.

tive duty to make inquiries, but he omits to do so at his peril.[18] But the defendant having an income out of which he might keep himself supplied with necessaries for ready money is not equivalent to his being actually supplied, and does not prevent him from contracting for necessaries on credit (*z*).[19]

72] ***Apparent means of buyer not material.** It would be natural for juries, if not warned against it, to fall into a way of testing the necessary character of supplies, not so much by what the means and position of the buyer actually were, as by what they appeared to be to the seller, and such a view was not altogether without countenance from authority (*a*). It is conceived, however, that the knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not. It may be said that the question for the Court will, as a rule, be whether articles of the general class or description were *prima facie* necessaries for the defendant, and the question for the jury will be whether, being of a general class or description allowed by the Court as necessary, the particular items were of a kind and quality necessary for the defendant, having regard to his station and circumstances. For instance, it would be for the Court to say whether it was proper for the defendant to buy a watch on credit, and for the jury to say whether the particular watch was such a one as he could reasonably afford. But this will not hold in extreme cases. In *Ryder* v. *Wombwell* (*b*) the Court of Exchequer Chamber held, reversing the judgment of the majority below on this point, that because a young man must fasten his wrist-bands somehow it does not follow that a jury are at liberty to find a pair of jewelled solitaires at a price of 25*l.* to be necessaries even for a young man of good fortune.

What the term "necessaries" includes. Hitherto we have spoken of a tradesman supplying goods, this being by far the most common case.

(*z*) *Burghart* v. *Hall* (1839) 4 M. & W. 727, 51 R. R. 788. *Contra Mortara* v. *Hall* (1834) 6 Sim. 465. The doctrine there laid down seems superfluous, for the supplies there claimed for (such as 209 pairs of gloves in half a year) could not have been reasonably found necessary in any case.

(*a*) In *Dalton* v. *Gib* (1839) 5 Bing. N. C. 128, 50 R. R. 758, and Preface; 7 Scott, 117, much weight is given to the *apparent* rank and circumstances of the party. This amounts to supposing that an infant may be liable, by a kind of holding out, for goods which are not necessary in fact.

(*b*) (1868) L. R. 4 Ex. 32, 38 L. J. Ex. 8.

18 The plaintiff does not have to prove that the infant had no parent whose duty it was to provide for him. The burden is on the defendant to show that he had such a parent. Goodman *v.* Alexander, 165 N. Y. 289.

19 See Nicholson *v.* Wilborn, 13 Ga. 467; Rivers *v.* Gregg, 5 Rich. Eq. 274.

But the range of possible contracts for "necessaries" is a much *wider one. "It is clearly agreed by all the books that speak of [73 this matter that an infant may bind himself to pay for his necessary meat, drink, apparel, physic [including, of course, fees for medical attendance, &c., as well as the mere price of medicine[20]], and such other necessaries and likewise for his good teaching and instruction, whereby he may profit himself afterwards" (*c*). Thus learning a trade may be necessary, and on that principle an infant's indenture of apprenticeship has been said to be binding on him (*d*).[21] The preparation of a settlement containing proper provisions for her benefit has been held a necessary for which a minor about to be married may make a valid contract, apart from any question as to the validity of the settlement itself (*e*).[22]

A more remarkable extension of the definition of necessaries is to be found in the case of *Chapple* v. *Cooper* (*f*), where an infant widow was sued for her husband's funeral expenses. The Court held that decent burial may be considered a necessary for every man, and husband and wife being in law the same person, the decent burial of a

(*c*) Bac. Abr. Infancy and Age, I. (4. 335). And see *Chapple* v. *Cooper* (1844) 13 M. & W. 252, 13 L. J. Ex. 286. As to instruction in trade, &c., *Walter* v. *Everard* [1891] 2 Q. B. 369, 60 L. J. Q. B. 738, C. A.

(*d*) *Cooper* v. *Simmons* (1862) 7 H. & N. 707, 31 L. J. M. C. 138, per Martin B. See, however, p. 63, *supra*.

(*e*) *Helps* v. *Clayton* (1864) 17 C. B. N. S. 553, 34 L. J. C. P. 1, see the pleadings, and the judgment of the Court *ad fin.*

(*f*) (1844) 13 M. & W. 252, 13 L. J. Ex. 286.

[20] Strong *v.* Foote, 42 Conn. 203 (a dentist's bill for filling teeth).

[21] See Pardey *v.* American Windlass Co., 19 R. I. 461.

A common-school education is, but a collegiate or professional education is not, recognized as one of the necessaries for an infant. Turner *v.* Gaither, 83 N. C. 357; Bouchell *v.* Clary, 3 Brev. 194; Middlebury College *v.* Chandler, 16 Vt. 683.

[22] A "wedding suit" has been held to be a necessary for an infant about to be married. Sams *v.* Stockton, 14 B. Mon. 232. So a bridal outfit. Jordan *v.* Coffield, 70 N. C. 110.

An infant is liable for counsel fees for services rendered in a criminal or quasi-criminal proceeding against him. Barker *v.* Hibbard, 54 N. H. 539; Askey *v.* Williams, 74 Tex. 294. So for services rendered in prosecuting suit for personal injuries. Hanlon *v.* Wheeler, 45 S. W. Rep. 821 (Tex. C. A.). Cp. Phelps *v.* Worcester, 11 N. H. 51; Thrall *v.* Wright, 38 Vt. 494.

Timber furnished an infant to enable him to build a dwelling on his land, Freeman *v.* Bridger, 4 Jones L. 1, repairs upon his dwelling-house, Tupper *v.* Cadwell, 12 Met. 559; Phillips *v.* Lloyd, 18 R. I. 99, insurance of his property against fire, Insurance Co. *v.* Noyes, 32 N. H. 345, a bicycle, Pyne *v.* Wood, 145 Mass. 558; Rice *v.* Butler, 160 N. Y. 578, a buggy, Howard *v.* Simpkins, 70 Ga. 322, a wagon, Paul *v.* Smith, 41 Mo. App. 275, have been held not to be necessaries.

Other cases deciding what are, and what are not, necessaries, are, Munson *v.* Washband, 31 Conn. 303; Darrell *v.* Hastings, 28 Ind. 478; House *v.* Alexander, 105 Ind. 109; Beeler *v.* Young, 1 Bibb, 519; Merriam *v.* Cunningham, 11 Cush. 40; Ryan *v.* Smith, 165 Mass. 303; Epperson *v.* Nugent, 57 Miss. 45; Glover *v.* Ott, 1 McCord, 572; Rainwater *v.* Durham, 2 Nott & M. 524; Aaron *v.* Harley, 6 Rich. L. 26; Grace *v.* Hale, 2 Humph. 27.

deceased husband is therefore a necessary for his widow. It would perhaps have been better to adopt the broader ground that a contract entered into for the purpose of performing a moral and social, if not legal, duty, which it would have been scandalous to omit, is of as necessary a character as any contract for personal service or purchase of goods for personal use.[23]

The liability is on simple contract only. The supply of necessaries to an infant creates only a liability as on simple contract, and it cannot **74]** be made the *ground of any different kind of liability.[24] Coke says: "If he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him" (*g*). *A fortiori*, a deed given by an infant to secure the repayment of money advanced to buy necessaries is voidable (*h*). But in these and similar cases the infant's liability on simple contract, or rather *quasi*-contract, is not affected (*i*). An infant is not in any circumstances liable on a bill of exchange or promissory note (*k*).[25]

(*g*) Co. Lit. 172 *a*, cp. 4 T. R. 363.
(*h*) *Martin* v. *Gale* (1876) 4 Ch. D. 428, 46 L. J. Ch. 84.
(*i*) *Walter* v. *Everard* [1891] 2 Q. B. 369, 60 L. J. Q. B. 738, C.A.
(*k*) *Re Soltykoff, Ex parte Margrett* [1891] 1 Q. B. 413, 60 L. J. Q. B. 339, C.A.

23 In Rowe *v.* Raper, 23 Ind. App. 27, it was held the funeral expenses of a deceased infant were not a charge upon his estate, if he left a father surviving and able to pay them. See remarks upon this case in 13 Harv. L. Rev. 306.

24 The obligation of the infant for necessaries furnished seems rather to be *quasi ex contractu* than a real contract. He can make no binding executory contract to purchase necessaries. Gregory *v.* Lee, 64 Conn. 407; Wells *v.* Hardy, 21 Tex. Civ. App. 454; Pool *v.* Pratt, 1 Chip. 252, 254.

Where necessaries have been furnished him, the law creates an obligation to pay for them, though the infant may have been too young to understand the nature of a contract. Hyman *v.* Cain, 3 Jones L. 111. And where an express promise is made, the price stipulated is not binding, but the seller recovers only the reasonable value of the article furnished. Hyer *v.* Hyatt, 3 Cr. C. C. 276; Gregory *v.* Lee, 64 Conn. 407; Ayers *v.* Burns, 87 Ind. 245; Trainer *v.* Trumbull, 141 Mass. 527; Locke *v.* Smith, 41 N. H. 346; Parsons *v.* Keys, 43 Tex. 557; and see also the cases cited in note 25, *infra*. At common law a loan of money could not be deemed equivalent to necessaries, though actually spent on necessaries: Bac. Abr. 4. 356. But though not liable at law for money loaned him with which to purchase necessaries, an infant is liable for money paid at his request to a third person for necessaries furnished. Kilgore *v.* Rich, 83 Me. 305; Swift *v.* Bennett, 10 Cush. 436; Conn *v.* Coburn, 7 N. H. 368; Randall *v.* Sweet, 1 Denio, 460; Haines' Adm'r *v.* Tarrant, 2 Hill (S. C.), 400; Bradley *v.* Pratt, 23 Vt. 378.

Where one lends money to an infant with which to purchase necessaries, and the money is so applied, the lender may recover in equity. Price *v.* Sanders, 60 Ind. 310; Beeler *v.* Young, 1 Bibb, 519; Watson *v.* Cross, 2 Duv. 147, 149.

25 In some States it is held that no action lies on a note or bond given by an infant for necessaries. Morton *v.* Steward, 5 Ill. App. 533; Henderson *v.*

What contracts an infant can make by custom. There are some particular contracts of infants valid by custom. By custom incident to the tenure of gavelkind an infant may sell his land of that tenure at the age of fifteen, but the conveyance must be by feoffment, and is subject to other restrictions (*l*). This, however, is not really a capacity of contracting, for there is no reason to suppose that an action could be brought against the infant for a breach of the contract for sale, or specific performance of it enforced.

"Also by the custom of London an infant unmarried and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London by indenture with proper covenants; which covenants by the custom of London shall be as binding as if he were of full age," and may be sued upon in the superior courts as well as in the city courts (*m*).

What contracts an infant can make by statute. Infants, or their guardians in their names, are empowered by statute (11 Geo. 4 & 1 Wm. 4, c. 65, ss. 16, 17) to grant renewals of leases, and make leases under the direction of the Court of Chancery, and in like manner to surrender *leases and accept new leases (s. 12) (*n*). And by a **[75** later Act (18 & 19 Vict. c. 43) (*o*), infants may with the sanction of the Court make valid marriage settlements of both real and personal property.

(*l*) Robinson on Gavelkind, 194.

(*m*) Bacon, Abr. Infancy, B. 4. 340; 21 E. IV. 6, pl. 17.

(*n*) See Dan. Ch. Pr. 2. 1917; *Re Clark* (1866) L. R. 1 Ch. 292, 35 L. J. Ch. 314; *Re Letchford* (1876) 2 Ch. D. 719, 45 L. J. Ch. 530. (The provisions as to renewals of leases extend also to married women.)

(*o*) This Act does not affect coverture or any disability other than infancy: *Seaton* v. *Seaton* (1888) 13 App. Ca. 61, 57 L. J. Ch. 661. And *qu.* whether it applies to post-nuptial settlements. It does apply to covenants to settle after-acquired property: *Moore* v. *Johnson* [1891] 3 Ch. 48, 60 L. J. Ch. 499.

Fox, 5 Ind. 489; Ayers *v.* Burns, 87 Ind. 245; Beeler *v.* Young, 1 Bibb, 519; McCrillis *v.* How, 3 N. H. 348; Fenton *v.* White, 1 South. 111; Swasey *v.* Vanderheyden, 10 Johns. 33; Bouchell *v.* Clary, 3 Beav. 194; McMinn *v.* Richmonds, 6 Yerg. 9.

In others, that the infancy of the promisor, being shown, is *prima facie* a bar to the action, but that it is competent for the plaintiff to show that the note was given for the price of necessaries, in which event he will recover only so much of the note as shall appear to have been given for necessaries at their fair value, without regard to the price stipulated to be paid by the minor. Guthrie *v.* Morris, 22 Ark. 411; Cooper *v.* State, 37 Ark. 421; Earle *v.* Reed, 10 Met. 387; Dubose *v.* Wheddon, 4 McCord, 221; Haines' Adm'r *v.* Tarrant, 2 Hill (S. C.), 400; Askey *v.* Williams, 74 Tex. 294; Bradley *v.* Pratt, 23 Vt. 378.

4. *Of an infant's immunity as to wrongs connected with contract.*

Infant not liable for wrong where the claim is in substance ex contractu. An infant is generally no less liable than an adult for wrongs committed by him, subject only to his being in fact of such age and discretion that he can have a wrongful intention, where such intention is material; but he cannot be sued for a wrong, when the cause of action is in substance *ex contractu,* or is so directly connected with the contract that the action would be an indirect way of enforcing the contract — which, as in the analogous case of married women (*p*), the law does not allow.[26] Thus it was long ago held that an infant innkeeper could not be made liable in an action on the case for the loss of his guest's goods (*q*). There is another old case reported in divers books (*r*), where it was decided that an action of deceit will not lie upon an assertion by a minor that he is of full age.[27] It was said that if such actions were allowed all the infants in England would

(*p*) See p. *80, *infra.*

(*q*) Rolle Ab. 1. 2, Action sur Case, D. 3.

(*r*) *Johnson* v. *Pie* (1665) Sid. 258, 1 Lev. 169, 1 Keb. 913, fully cited by Knight Bruce V.C. in *Stikeman* v. *Dawson* (1847) 1 De G. & Sm. 113, 16 L. J. Ch. 205; and see other cases collected *ib.* at p. 110, where "the case mentioned in Keble" is that which, as stated in the text, occurs in his report of *Johnson* v. *Pie.*

[26] Green *v.* Greenbank, 2 Marsh. 485; Vasse *v.* Smith, 6 Cr. 226; Brown *v.* Durham, 1 Root, 272; Caswell *v.* Parker, 96 Me. 39; Prescott *v.* Norris, 32 N. H. 101; Lowery *v.* Cate, 108 Tenn. 54; Gibson *v.* Spear, 38 Vt. 311; Morrill *v.* Aden, 19 Vt. 505; West *v.* Morse, 14 Vt. 447. See also Drude *v.* Curtis, 183 Mass. 317; *contra,* Vance *v.* Word, 1 Nott & McC. 197.

[27] Acc. Slayton *v.* Barry, 175 Mass. 513; Brown *v.* McCune, 5 Sandf. 224; Curtin *v.* Patton, 11 S. & R. 305, 309. But see Rice *v.* Boyer, 108 Ind. 472; Fitts *v.* Hall, 9 N. H. 441; New York Bg. Co. *v.* Fisher, 23 N. Y. App. Div. 363. See also 8 Yale L. J. 235.

The infant was held not liable in trover for obtaining goods by representing himself of age in Slayton *v.* Barry, 175 Mass. 513.

Nor will the representation estop the infant. Burdett *v.* Williams, 30 Fed. Rep. 697; McKamy *v.* Cooper, 81 Ga. 679; Carpenter *v.* Carpenter, 45 Ind. 142; Merriam *v.* Cunningham, 11 Cush. 40; Conrad *v.* Lane, 26 Minn. 389; Alt *v.* Groff, 65 Minn. 191; Burley *v.* Russell, 10 N. H. 184; Conroe *v.* Birdsall, 1 Johns. Cas. 127; Studwell *v.* Shapter, 54 N. Y. 249; Carolina Assoc. *v.* Black, 119 N. C. 323; Norris *v.* Vance, 3 Rich. L. 164; Whitcomb *v.* Joslyn, 51 Vt. 79. Otherwise by statute in Iowa, Code of 1897, § 3190.

In Schmitheimer *v.* Eiseman, 7 Bush, 298, it was held that "a deed made by an infant *feme covert* cannot be avoided by her on the ground of her infancy, when to induce an innocent purchaser to make the purchase, she and her husband made oath before a notary that to the best of their knowledge and information she was then more than twenty-one years of age." And see Damron *v.* Comm., 22 Ky. L. Rep. 1717; Ferguson *v.* Bobo, 54 Miss. 121; Brantley *v.* Wolf, 60 Miss. 420; Kilgore *v.* Jordan, 17 Tex. 341.

In Sims *v.* Everhardt, 102 U. S. 300, on the contrary, it was decided that the infant was not estopped by any declaration which at the time of executing the deed she made in regard to her age. Acc. McGreal *v.* Taylor, 167 U. S. 688, 698; Watson *v.* Billings, 38 Ark. 278; Wieland *v.* Koebick, 110 Ill. 16. And see Wilson's Gdn. *v.* Wilson, 20 Ky. L. Rep. 1971; Baker *v.* Stone, 136 Mass. 405; Alt *v.* Groff, 65 Minn. 191; Charles *v.* Hastedt, 51 N. J. Eq. 171.

be ruined, for though not bound by their contracts, they would be made liable as for tort; and it appears in Keble's report that an infant had *already been held not liable for representing a false jewel [76 not belonging to him as a diamond and his own. The modern case usually cited for this rule is *Jennings* v. *Rundall* (*s*), where it was sought to recover damages from an infant for overriding a hired mare.[28]

Infant liable for wrong apart from contract, though touching the subject-matter of a contract. But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable.[29] The distinction is established and well marked by a modern case where an infant had hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose; the defendant allowed his companion to use the horse for jumping, whereby it was injured and ultimately died. It was held that using the horse in this manner, being a manner positively forbidden by the contract, was a mere trespass, for which the defendant was liable (*t*).[30]

(*s*) 8 T. R. 335, 4 R. R. 680. It is also recognized in *Price* v. *Hewett* (1852) 8 Ex. 146 (not a decision on the point).

(*t*) *Burnard* v. *Haggis* (1863) 14 C. B. N. S. 45, 32 L. J. C. P. 189. A bailment at will would have been determined, as where a bailee commits theft at common law by "breaking bulk."

Although there are numerous *dicta* to the contrary, it is believed that an infant may be bound by estoppel by conduct in a case of fraud apart from contract; as if an infant owning property, and of sufficient understanding to comprehend the import of his act should, concealing his own title, induce a purchaser to buy the property from another. Whittington *v.* Wright, 9 Ga. 23; Gilbert *v.* Carlan, Ct. App. Ky., stated in Wright *v.* Arnold, 14 B. Mon. at p. 519; Ferguson *v.* Bobo, 54 Miss. 121; Hall *v.* Timmons, 2 Rich. Eq. 120; Barham *v.* Turbeville, 1 Swan, 437. But cp. Lackman *v.* Wood, 25 Cal. 147; Upshaw *v.* Gibson, 53 Miss. 341; Norris *v.* Wait, 2 Rich. L. 148. Consult Bigelow on Estoppel, p. 515.

False representations as to his age by an infant purchaser were held ground for rescission by the seller. Neff *v.* Landis, 110 Pa. 204. Cp. O'Rourke *v.* John Hancock Ins. Co., 23 R. I. 457, where it was held that a false warranty by an infant did not give the insurance company to which it was made a defense on the policy. This decision is criticised in 15 Harv. L. Rev. 739.

28 While the infant would not be liable for mere unskilifulness or negligence, he would be liable for positive willful acts causing injury to the animal. Eaton *v.* Hill, 50 N. H. 235; Campbell *v.* Stakes, 2 Wend. 137.

29 Vasse *v.* Smith, 6 Cr. 226; Oliver *v.* McClellan, 21 Ala. 675; Lewis *v.* Littlefield, 15 Me. 233, 17 Me. 40; Baxter *v.* Bush, 29 Vt. 465.

An infant has been held chargeable by action for a tort in obtaining goods fraudulently, with the intention of not paying for them. Wallace *v.* Morss, 5 Hill, 391; Mathews *v.* Cowan, 59 Ill. 341; dist. Studwell *v.* Shapter, 54 N. Y. 249. And see Walker *v.* Davis, 1 Gray, 506.

30 So an infant who hires a horse to go to a place agreed upon, but drives it to another and further place to its injury, is liable in tort. Homer *v.* Thwing,

Quære, whether liable on contract implied in law. It is doubtful whether an infant can be made liable *quasi ex contractu* (as for money received), when the real cause of action is a wrong independent of contract; but since the Judicature Acts have abolished the old forms of action, the question seems of little importance (*u*).

5. *Liability in equity on representation of full age.*

In equity liable, if he represent himself as of full age. When an infant has induced persons to deal with him by falsely representing him-
77] self as of full age, he incurs an *obligation in equity, which however in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it (*x*). Indeed it is not a contractual obligation at all.

Limitation. It is limited to the extent we have stated above (p. *55), and the principle on which it is founded is often expressed in the form: "An infant shall not take advantage of his own fraud." A review of the principal cases will clearly show the correct doctrine. In *Clarke* v. *Cobley* (*y*) the defendant being a minor had given his bond to the plaintiff for the amount of two promissory notes made by the defendant's wife before the marriage, which notes the plaintiff delivered up. The plaintiff, on discovering the truth, and after the defendant came of age, filed his bill praying that the defendant might either execute a new bond, pay the money, or deliver back the notes. The Court ordered the defendant to give back the notes, and that he should not plead to any action brought on them the Statute of Limita-

(*u*) The liability is affirmed by Leake (p. 470), [*acc.* Shaw *v.* Coffin, 58 Me. 254; Elwell *v.* Martin, 32 Vt. 217; Cooley on Torts, 112.] and disputed by Mr. Dicey (on Parties, 284), who is supported by a dictum of Willes J. assuming that infancy would be a good plea to an action for money received, though substantially founded on a wrong. *Alton* v. *Midland Ry. Co.* (1865) 19 C. B. N. S. at p. 241, 34 L. J. C. P. at p. 297. [See *Re* Seager, 60 L. T. R. 665.]

(*x*) *Acc. Bartlett* v. *Wells* (1862) 1 B. & S. 836, 31 L. J. Q. B. 57. Declaration for goods sold, &c. Plea, infancy. Equitable replication, that the contract was induced by defendant's fraudulent representation that he was of age. The replication was held bad, as not meeting the defence, but only showing a distinct equitable right collateral to the cause of action sued upon.

(*y*) (1789) 2 Cox, 173, 2 R. R. 25. It must be taken, though it is not clear by the report, that the defendant falsely represented himself as of full age.

3 Pick. 492; Churchill *v.* White, 58 Neb. 22; Freeman *v.* Boland, 14 R. I. 39; Towne *v.* Wiley, 33 Vt. 355; Ray *v.* Tubbs, 50 Vt. 688. *Contra*, Wilt *v.* Welsh, 6 Watts, 9; Penrose *v.* Curren, 3 Rawle, 351. And see Schenks *v.* Strong, 1 South. 87.

tion or any other plea which he could not have pleaded when the bond was given; but refused to decree payment of the money, holding that it could do no more than take care that the parties were restored to the same situation in which they were at the date of the bond. In *Lemprière* v. *Lange,* a quite recent case, it was held that an infant who had obtained the lease of a furnished house by representing himself of full age could not be made liable for use and occupation, although the lease could be set aside and the infant ordered to pay the costs of the action (*z*). *Cory* *v. *Gertcken* (*a*) shows that [78 when an infant by falsely representing himself to be of full age has induced trustees to pay over a fund to him, neither he nor his representatives can afterwards charge the trustees with a breach of trust and make them pay again.[31] *Overton* v. *Banister* (*b*) confirms this: it was there held, however, that the release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him. The later case of *Wright* v. *Snowe* (*c*) seems not to agree with this, though *Overton* v. *Banister* was cited, and apparently no dissent expressed. There a legatee had given a release to the executrix, representing himself to her solicitor as of full age; afterwards he sued for an account, alleging that he was an infant at the date of the release. The infancy was not sufficiently proved, and the Court would not direct an inquiry, considering that in any event the release could not be disturbed. This appears to go the length of holding the doctrine of estoppel applicable to the class of representations in question, and if that be the effect of the decision its correctness may perhaps be doubted.

There must be a positive representation. In *Stikeman* v. *Dawson* (*d*) the subject of infant's liability for wrongs in general is discussed in an interesting judgment by Knight Bruce V.-C. and the important point is decided that in order to establish this equitable liability it must be shown that the infant actually represented himself to be of full age; it is not enough that the other party did not know of his

(*z*) (1879) 12 Ch. D. 675. Followed on the question of costs, *Woolf* v. *Woolf* [1899] 1 Ch. 343, 68 L. J. Ch. 82.

(*a*) (1816) 2 Madd. 40, 17 R. R. 180.

(*b*) (1844) 3 Ha. 503.

(*c*) (1848) 2 De G. & Sm. 321.

(*d*) (1847) 1 De G. & Sm. 90, 16 L. J. Ch. 205.

31 Hayes *v.* Parker, 41 N. J. Eq. 630, *acc.* Cp. Jones *v.* Parker, 67 Tex. 76. In Ryan *v.* Growney, 125 Mo. 474, a plaintiff who had represented himself to be of age when selling property was denied equitable relief. See also Charles *v.* Hastedt, 51 N. J. Eq. 171.

minority. And as there must be an actual false representation, so it has been more lately held that no claim for restitution can be sustained unless the representation actually misled the person to whom it was made. No relief can be given if the party was not in fact deceived, but knew the truth at the time; and it makes no difference 79] where the business *was actually conducted by a solicitor or agent who did not know (*e*).

Proof in bankruptcy. A minor cannot be adjudicated a bankrupt in the absence of an express representation to the creditor that he was of full age. The mere fact of trading cannot be taken as a constructive representation (*f*). But if a minor has held himself out as an adult, and so traded and been made bankrupt, he cannot have the bankruptcy anulled on the ground of his infancy (*g*); and a loan obtained on the faith of an express representation that he is of full age is a claim provable in bankruptcy (*h*).[32]

But subsequent valid contract after full age prevails. A transaction of this kind cannot stand in the way of a subsequent valid contract with another person made by the infant after he has come of age; and the person who first dealt with him on the strength of his representing himself as of age acquires no right to interfere with the performance of the subsequent contract (*i*). This is another proof that the infant's false representation gives no additional force to the transaction as a contract.

It was also held in the case referred to that, assuming the first agreement to have been only voidable, it was clearly avoided by the act of the party in making another contract inconsistent with it after attaining his full age. But it has been decided in Ireland (as we have seen) that this is not so in the case of a lease granted by an infant; the making of another lease of the same property to another lessee after the lessor has attained full age is not enough to avoid

(*e*) *Nelson* v. *Stocker* (1859) 4 De G. & J. 458, 28 L. J. Ch. 751.

(*f*) *Ex parte Jones* (1881) 18 Ch. Div. 109, 50 L. J. Ch. 673, overruling *Ex parte Lynch* (1876) 2 Ch. D. 227, 45 L. J. Bk. 48.

(*g*) *Ex parte Watson* (1809) 16 Ves. 265; *Ex parte Bates* (1841) 2 Mont. D. & D. 337.

(*h*) *Ex parte Unity Bank* (1858) 3 De G. & J. 63, 27 L. J. Bk. 33; see observations of Jessel M.R. thereon, 18 Ch. D. at p. 121.

(*i*) *Inman* v. *Inman* (1873) L. R. 15 Eq. 260.

32 If an infant owes debts which he cannot disaffirm, he is within the scope of the Bankruptcy Law. *Re* Brice, 93 Fed. Rep. 942. Cp. Farris *v.* Richardson, 6 Allen, 118. Otherwise not. *Re* Dunnigan, 95 Fed. Rep. 428; *Re* Eidemiller, 105 Fed. Rep. 595.

the first lease (*k*). The fact that an *interest in property and [80
a right of possession has passed by the first lease, though voidable, explains the distinction.

II. Married Women.

Married women can contract only as to separate property. A married woman is capable of binding herself by a contract only "in respect of and to the extent of her separate property" (*l*). This limited capacity is created by a statute founded on the practice of the Court of Chancery, which for more than a century had protected married women's separate interests in the manner to be presently mentioned. Except as to separate property the old common law rule still exists, though with greatly diminished importance. That rule is that a married woman cannot bind herself by contract at all.

If she attempts to do so "it is altogether void, and no action will lie against her husband or herself for the breach of it" (*m*).[33] And the same consequence follows as in the case of infants, namely, that although a married woman is answerable for wrongs committed by her during the coverture, including frauds, and may be sued for them jointly with her husband, or separately if she survives him, yet she cannot be sued for a fraud where it is directly connected with a contract with her, and is the means of effecting it and parcel of the same transaction, *e. g.*, where the wife has obtained advances from the plaintiff for a third party by means of her guaranty, falsely representing herself as sole (*m*); but it is doubtful whether this extends to all cases of false representation by which credit is obtained (*n*). For the same reason — that the law will not allow the contract to be indirectly enforced — a married *woman is [81
not estopped from pleading coverture by having described herself as *sui iuris* (*o*).[34]

The fact that a married woman is living and trading apart from

(*k*) *Slator* v. *Brady* (1863) 14 Ir. C. L. Rep. 61, *supra*, p. *57.

(*l*) Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1.

(*m*) Per Cur. *Fairhurst* v. *Liverpool Adelphi Loan Association* (1854) 9 Ex. 422, 429, 23 L. J. Ex. 164.

(*n*) *Wright* v. *Leonard* (1861) 11 C. B. N. S. 258, 30 L. J. C. P. 365, where the Court was divided.

(*o*) *Cannam* v. *Farmer* (1849) 3 Ex. 698.

33 Bank *v.* Partee, 99 U. S. 325, 330; *Re* Comstock, 11 N. B. R. 169, 181; Prentiss *v.* Paisley, 25 Fla. 927; Frazee *v.* Frazee, 79 Md. 27; Tracy *v.* Keith, 11 Allen, 214; Flesh *v.* Lindsay, 115 Mo. 1, 13; Keen *v.* Hartman, 48 Pa. 497; Woodward *v.* Barnes, 46 Vt. 332. See also Earle *v.* Kingscote, [1900] 1 Ch. 203, 2 Ch. 585.

34 *Re* Comstock, 11 N. B. R. 169, 181; Kilbourn *v.* Brown, 56 Conn. 149; Levering *v.* Shockey, 100 Ind. 558; Coats *v.* Gordon, 144 Ind. 19; Lowell *v.* Daniels, 2 Gray, 161; Keen *v.* Coleman, 39 Pa. 299; Klein *v.* Caldwell, 91

her husband does not enable her at common law to contract so as to give a right of action against herself alone (*p*).[35] Nor does it make

(*p*) *Clayton* v. *Adams* (1796) 6 T. R. 605.

Pa. 140, 144; Mason *v.* Jordan, 13 R. I. 193. See also Houseman *v.* Grossman, 177 Pa. 453.

Contra, Reis *v.* Lawrence, 63 Cal. 129; Hand *v.* Hand, 68 Cal. 135; Patterson *v.* Lawrence, 90 Ill. 174; as to the rule under the civil law, Henry *v.* Gauthreaux, 32 La. Ann. 1103.

But a married woman may be bound by estoppel, not only as to her separate estate, or property held by her under statutes permitting her to contract as a *feme sole*, Bean *v.* Heath, 6 How. 228; Drake *v.* Glover, 30 Ala. 382; Lathrop *v.* Soldiers' L. & B. Ass'n, 45 Ga. 483; Hockett *v.* Bailey, 86 Ill. 74; Nixon *v.* Halley, 78 Ill. 611; Anderson *v.* Armstead, 69 Ill. 452; Spafford *v.* Warren, 47 Ia. 47; Frazier *v.* Gelston, 35 Md. 298; Levy *v.* Gray, 56 Miss. 318; Read *v.* Hall, 57 N. H. 482; Bodine *v.* Kileen, 53 N. Y. 93; Smyth *v.* Munroe, 84 N. Y. 354; Noel *v.* Kinney, 106 N. Y. 74, 81; Meiley *v.* Butler, 26 Ohio St. 535; Tone *v.* Columbus, 39 Ohio St. 281, 310; Fryer *v.* Rishell, 84 Pa. 521; White *v.* Goldsberg, 49 S. C. 530; Howell *v.* Hale, 5 Lea, 405; Cravens *v.* Booth, 8 Tex. 243; O'Brien *v.* Hilburn, 9 Tex. 297, but also independently thereof, Nat. Feather Duster Co. *v.* Hibbard, 11 Biss. 76; Ramboz *v.* Stowell, 103 Cal. 588; Birch *v.* Steppler, 11 Col. 400; Patterson *v.* Lawrence, 90 Ill. 174; Gatling *v.* Rodman, 6 Ind. 289; Wright *v.* Arnold, 14 B. Mon. 513; Rusk *v.* Fenton, 14 Bush, 490; Snow *v.* Hutchins, 160 Mass. 111; Norton *v.* Nichols, 35 Mich. 148; Robb *v.* Shephard, 50 Mich. 189; Dobbin *v.* Cordiner, 41 Minn. 165; Shivers *v.* Simmons, 54 Miss. 520; Richardson *v.* Toliver, 71 Miss. 966; Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Cooley *v.* Steele, 2 Head, 605; Galbraith *v.* Lunsford, 87 Tenn. 89; Godfrey *v.* Thornton, 46 Wis. 677, 690.

That a declaration by a wife at a public sale of her husband's realty that she will not claim dower therein will not estop her is decided in Kelso's Appeal, 102 Pa. St. 7; that it will, in Connolly *v.* Branstler, 3 Bush, 702.

Conduct of a wife in the presence of her husband will not ordinarily estop her, as she is presumed to be *sub potestate viri*. Drake *v.* Glover, 30 Ala. 382, 390; Carpenter *v.* Carpenter's Ex'rs, 27 N. J. Eq. 502; Kinsey *v.* Feller, 64 N. J. Eq. 367; Clayton *v.* Rose, 87 N. C. 106; Paul *v.* Kunz, 188 Pa. 504. But see Davis *v.* Tingle, 8 B. Mon. 539.

The preponderance of authority is to the effect that a married woman cannot, by estoppel, transfer title to her real estate. Drury *v.* Foster, 2 Wall. 24; Vansandt *v.* Weir, 109 Ala. 104; Wood *v.* Terry, 30 Ark. 385; Morrison *v.* Wilson, 13 Cal. 495; Ross *v.* Singleton, 1 Del. Ch. 149; Oglesby Coal Co. *v.* Pasco, 79 Ill. 170; Behler *v.* Weyburn, 59 Ind. 143; Unfried *v.* Heberer, 63 Ind. 67; Suman *v.* Springate, 67 Ind. 115, 121; Parks *v.* Barrowman, 83 Ind. 561; Rangley *v.* Spring, 21 Me. 130; Lowell *v.* Daniels, 2 Gray, 161; Pierce *v.* Chace, 108 Mass. 254; Todd *v.* Railroad Co., 19 Ohio St. 514; Innis *v.* Templeton, 95 Pa. 262; Davidson's Appeal, 95 Pa. 394; Glidden *v.* Strupler, 52 Pa. 400; Stivers *v.* Tucker, 126 Pa. 74; Mason *v.* Jordan, 13 R. I. 193; McLaurin *v.* Wilson, 16 S. C. 402; Daniel *v.* Mason, 90 Tex. 240. And see Merriam *v.* Railroad Co., 117 Mass. 241.

The principle upon which these cases are rested is that the greatest force is given to an estoppel when it is made equal to the deed of the person against whom it is invoked, and that the deed of a married woman is void. A man, it is true, can convey his land only by deed; but its execution is only a formality, his having complied with which he may be estopped to deny. A married woman is powerless alone to convey her land; as to her sole deed there is a question, not of compliance with a formality, but of power; as she can in no way alone convey her land, it follows that she can in no way estop herself to say that she has not conveyed it. See Collins *v.* Goldsmith, 71 Fed. Rep. 580.

[35] High *v.* Worley, 33 Ala. 196; Rogers *v.* Phillips, 8 Ark. 366; Fuller *v.* Bartlett, 41 Me. 241; Bank *v.* Bellis, 10 Cush. 276; Brown *v.* Killingsworth,

any difference if she is living separate from her husband under an express agreement for separation, as no agreement between husband and wife can change their legal capacities and characters (*q*).[36]

But may acquire contractual rights. But "a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which will survive to her on the death of the husband, unless he shall have interfered by doing some act to reduce it into possession": thus she might, before the Married Women's Property Act, buy railway stock, and become entitled to sue for dividends jointly with her husband (*r*).[37] When a third person assents to hold a sum of money at the wife's disposal, but does not pay it over, this is conferring on her a chose in action within the meaning of the rule (*s*).

During the joint lives of the husband and wife the husband is entitled *iure mariti* to receive any sum thus due; "but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must in order to receive the money take out administration to his wife;[38] and if he dies without having done so, it is necessary that letters of administration should be taken

(*q*) *Marshall* v. *Rutton* (1800) 8 T. R. 545, 5 R. R. 448.

(*r*) Per Cur. *Dalton* v. *Midland Ry. Co.* (1853) 13 C. B. 474, 22 L. J. C. P. 177. And see 1 Wms. Saund. 222, 223. On the question what amounts to reduction into possession, see Williams on Executors, 1. 734 *sqq.* (9th ed.), *Widgery* v. *Tepper* (1877) 5 Ch. D. 516, 7 Ch. Div. 423, 47 L. J. Ch. 550.

(*s*) *Fleet* v. *Perrins* (1869) L. R. 3 Q. B. 536, 4 Q. B. 500, 38 L. J. Q. B. 257.

4 McCord, 429; Freer *v.* Walker, 1 Bailey, 184; Harris *v.* Taylor, 3 Sneed, 536; Robinson *v.* Reynolds, 1 Aikens, 174; cp. *infra*, p. 91, note (*a*).

36 Parker *v.* Lambert, 31 Ala. 89.

37 Chappelle *v.* Olney, 1 Sawyer, 401; Lenderman *v.* Talley, 1 Houst. 523; Bond *v.* Conway, 11 Md. 512; Hayward *v.* Hayward, 20 Pick. 517; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Searing *v.* Searing, 9 Paige, 283; Borst *v.* Spelman, 4 N. Y. 284, 288; Snowhill *v.* Snowhill, 2 N. J. Eq. 30, 36; Revel *v.* Revel, 2 Dev. & Bat. L. 272; Weeks *v.* Weeks, 5 Ired. Eq. 111; Hoop *v.* Plummer, 14 Ohio St. 448; Wilder *v.* Aldrich, 2 R. I. 518; Johnson *v.* Lusk, 6 Coldw. 113. *Contra*, Edwards *v.* Sheridan, 24 Conn. 165.

38 Willis *v.* Roberts, 48 Me. 257; Jenkins *v.* Freyer, 4 Paige, 47; Dawson *v.* Dawson, 2 Strobh. Eq. 34; Hardin *v.* Young, (Tenn.) 41 S. W. Rep. 1080; *Contra*, Greenleaf *v.* Hill, 31 Me. 562; Goddard *v.* Johnson, 14 Pick. 352; Ryder *v.* Hulse, 24 N. Y. 372.

The statutes 21 H. VIII.; 22 and 23 Car. II., cap. 10, and 29 Car. II., cap. 3, § 25, together, gave the husband the right to administer upon his deceased wife's estate, and to take for his own benefit her chattels real, choses in action, trusts, and every species of personal property. Judge of Probate *v.* Chamberlain, 3 N. H. 129. In many, perhaps in most of the United States, the statutes prevailing describe a different rule. Bishop on the Law of Married Women, §§ 172–182.

out to the wife's estate[39] (for such is still the legal character of the 82] money), but the wife's administrator is *only a trustee for the representative of the husband" (*t*). Accordingly the Court of Probate cannot dispense with the double administration, even where the same person is the proper representative of both husband and wife, and is also beneficially entitled (*u*).

Cannot during coverture renew debt barred by Statute of Limitation. Inasmuch as according to the view established by modern decisions a promise to pay a debt barred by the Statute of Limitation operates not by way of post-dating the original contract so as to "draw down the promise" then made, but as a new contract founded on the subsisting consideration, a married woman's general incapacity to contract prevents such a promise, if made by her, from being effectual; and where before the marriage she became a joint debtor with another person, that person's acknowledgment after the marriage is also ineffectual, since to bind one's joint debtor an acknowledgment must be such as would have bound him if made by himself (*x*).[40]

The rules of law concerning a wife's power to bind her husband by contract, either as his actual or ostensible agent or, in some special circumstances, by a peculiar authority independent of agency, do not fall within the province of this work.[41]

Exceptions at common law.

Queen consort. The wife of the King of England may sue and be sued as a *feme sole* (Co. Litt. 133 *a*).

Wife of person civilly dead. The wife of a person civilly dead may sue and be sued alone (*Ib.* 132 *b*, 133 *a*). The cases dwelt on by Coke are such as practically cannot occur at this day, and it seems that the only persons who can now be regarded as civilly dead are persons con- 83] victed of felony, and not lawfully at *large under any

(*t*) Per Lord Westbury, *Partington* v. *Att.-Gen.* (1869) L. R. 4 H. L. 100, 119.

(*u*) *In the Goods of Harding* (1872) L. R. 2 P. & D. 394.

(*x*) *Pittam* v. *Foster* (1823) 1 B. & C. 248, 25 R. R. 385; 1 Wms. Saund. 172.

39 Lockwood *v.* Stockholm, 11 Paige, 87, 91.

40 Axson *v.* Blakely, 2 McCord, 6; Farrar *v.* Bessey, 24 Vt. 89.

41 As to the liability imposed on the husband irrespective of authority given by him, see Keener on Quasi Contracts, 22; Hatch *v.* Leonard, 165 N. Y. 435, 439.

license (*y*).[42] An alien enemy, though disabled from suing, is not civilly dead, and his wife cannot sue alone on a contract made with her either before or during coverture; so that while he is an alien enemy neither of them can maintain an action on the contract. The remedy may thus be irrecoverably lost by the operation of the Statute of Limitation, but this inconvenience does not take the case out of the general rule (*z*). This decision does not expressly overrule any earlier authority (and there is such authority) (*a*) for the proposition that she may be sued alone. But it is conceived that such must be the result.

Wife of alien not resident in the kingdom. It appears to be the result of the authorities that the wife of an alien husband who has never been or at least never resided in England may bind herself by contract if she purports to contract as a *feme sole* (*b*).[43]

Married woman trading in London. "By the custom of London, if a *feme covert,* the wife of a freeman, trades by herself in a trade with

(*y*) Transportation was considered as an abjuration of the realm, which could be determined only by an actual return after the sentence had expired: *Carrol* v. *Blencow* (1801) 4 Esp. 27. The analogy to Coke's "Civil Death" is discussed, *arg.* in *Ex parte Franks* (1831) 7 Bing. 762.

(*z*) *De Wahl* v. *Braune* (1856) 1 H. & N. 178, 25 L. J. Ex. 343. Perhaps it may be doubted whether "civil death" was ever really appropriate as a term of art in English courts except "when a man entereth into religion [*i.e.* a religious order in England] and is professed": in that case he could make a will and appoint executors (who might be sued as such for his debts, F. N. B. 121, O.), and if he did not, his goods could be administered (Litt. s. 200, Co. Litt. 131 *b*). Bracton, however, speaks of outlawry (426 *b*) as well as religious profession (301 *b*) as *mors civilis*. A person under the penalties of *praemunire*, which include being put out of the King's protection, would, I suppose, be in the same plight as an outlaw. The Roman *mors civilis* was a pure legal fiction, introduced not to create disabilities, but to obviate the inconvenient results of disabilities otherwise created. (Sav. Syst. 2. 164.) As to the *mort civile* of modern French law (now abolished since 1854), see *ib.* 151 *sqq.*

(*a*) *Derry* v. *Duchess of Mazarine* (1697) 1 Ld. Raym. 147.

(*b*) *Barden* v. *Keverberg* (1836) 2 M. & W. 61, 6 L. J. Ex. 66. But the question is now of little interest.

42 Wilson *v.* King, 59 Ark. 32; Smith *v.* Becker, 62 Kan. 541; Avery *v.* Everett, 110 N. Y. 317; *Re* Zeph, 50 Hun, 523; Frazer *v.* Fulcher, 17 Ohio, 260; Davis *v.* Laning, 85 Tex. 39; Baltimore *v.* Chester, 53 Vt. 315.

43 Where the husband was never within the State, or has gone beyond its jurisdiction wholly renouncing his marital rights and duties and deserting his wife, she may contract, and sue, and be sued in her own name. Rhea *v.* Renner, 1 Pet. 105; Bank *v.* Partee, 99 U. S. 325, 330; Blumenberg *v.* Adams, 49 Cal. 308; Clark *v.* Valentino, 41 Ga. 143; Smith *v.* Silence, 4 Ia. 321; Ayer *v.* Warren, 47 Me. 217; Gregory *v.* Pierce, 4 Met. 478; Abbott *v.* Bayley, 6 Pick. 89; Phelps *v.* Walther, 78 Mo. 320; Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Wagg *v.* Gibbons, 5 Ohio St. 580; Bean *v.* Morgan, 4 McCord, 148; Railway Co. *v.* Hennesey, 20 Tex. Civ. App. 316; Buford *v.* Adair, 43 W. Va. 211, 64 Am. St. Rep. 854. Cp. Stewart *v.* Conrad's Admr., 100 Va. 128. See 26 Am. L. Reg. 745.

which her husband does not intermeddle, she may sue and be sued as
84] a *feme sole,* and the husband shall be named only for *conformity; and if judgment be given against them, she only shall be taken in execution." (Bacon, Abr. Customs of London, D.) This custom applies only to the city courts (*c*), and even there the formal joinder of the husband is indispensable. But if acted upon in those courts it may be pleaded as matter of defence in the superior courts (*d*), though they do not otherwise notice the custom (*e*).

Contracts with husband as to separation, &c., may be good. In certain exceptional cases in which the wife has an adverse interest to the husband she is not incapable of contracting with him. Where a wife had instituted a suit for divorce, and she and her husband had agreed to refer the matters in dispute to arbitration, her next friend not being a party to the agreement, the House of Lords held that under the circumstances of the case she might be regarded as a *feme sole,* that the agreement was not invalid, and that the award was therefore binding (*f*).

The real object of the reference and award in this case having been to fix the terms of a separation, it was later held that the Court would not refuse to enforce an agreement to execute a deed of separation merely because it was made between the husband and wife without the intervention of a trustee (*g*).[44] In the simpler case of an agreement to live apart, with incidental provisions for maintenance, the agreement does not require the intervention of a trustee, and the wife (apart from the Married Women's Property Act, which does

(*c*) *Caudell* v. *Shaw* (1791) 4 T. R. 361.

(*d*) *Beard* v. *Webb* (1800) 2 Bos. & P. 93. Since the Act of 1882 the only effect of the custom, if any, seems to be that a married woman trading in the City of London may be subject to greater personal liability than elsewhere.

(*e*) *Caudell* v. *Shaw,* 4 T. R. 361.

(*f*) *Bateman* v. *Countess of Ross* (1813) 1 Dow, 235, 14 R. R. 55.

(*g*) *Vansittart* v. *Vansittart* (1858) 4 K. & J. 62, 27 L. J. Ch. 222; but the agreement not enforceable for other reasons; affirmed on appeal, 2 De G. & J. 249, 27 L. J. Ch. 289; but no opinion given on this point.

[44] "A parol post nuptial agreement between husband and wife, made in view of a voluntary separation, and fully executed on the part of the husband, whereby, for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the wife relinquishes all claim to a distributive share of the husband's personal estate in case she survives him, will be upheld and enforced in equity, and the intervention between them of a trustee is unnecessary." Garver *v.* Miller, 16 Ohio St. 527; and see Daniels *v.* Benedict, 97 Fed. Rep. 367; Dutton *v.* Dutton, 30 Ind. 452; King *v.* Mollohan, 61 Kan. 683; Masterson *v.* Masterson, 22 Ky. L. Rep. 1193; Stebbins *v.* Morris, 19 Mont. 115; Hendricks *v.* Isaacs, 117 N. Y. 411; Thomas *v.* Brown, 10 Ohio St. 247; Lehr *v.* Beaver, 8 W. & S. 102; Hutton *v.* Hutton's Adm'r, 3 Pa. St. 100; Burkholder's Appeal, 105 Pa. 31. The agreement must, however, be fair. Hungerford *v.* Hungerford, 161 N. Y. 550.

not apply) can sue the husband for arrears of maintenance due under it (*h*). It *does not follow that in such transactions a [85 married woman has all the powers of a *feme sole*. She has only those which the necessity of the case requires. She is apparently competent to compromise the suit with her husband (*i*): but she cannot, as a term of the compromise, bind her real estate (not being settled to her separate use) without the acknowledgment required by the Fines and Recoveries Act (*k*).

Statutory exceptions other than Married Women's Property Act.

Judicial separations and protection orders. By the Act constituting the Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 85, a wife judicially separated from her husband is to be considered whilst so separated as a *feme sole* for the purposes of (*inter alia*) contract, and suing and being sued in any civil proceeding (s. 26) (*l*); and a wife deserted by her husband who has obtained a protection order is in the same position while the desertion continues (s. 21). This section is so worded as when taken alone to countenance the supposition that the protection order relates back to the date of desertion. It has been decided, however, that it does not enable the wife to maintain an action commenced by her alone before the date of the order (*m*). Her powers of disposing and contracting apply only to property acquired after the decree for separation or the desertion (or protection order?) as the case may be (*n*). These provisions are extended by *an amending Act in certain particulars not material [86 to be noticed here (21 & 22 Vict. c. 108, ss. 6-9); and third parties are indemnified as to payments to the wife, and acts done by her with their permission, under an order or decree which is afterwards discharged or reversed (s. 10). The words as to "suing and being

(*h*) *McGregor* v. *McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 591.

(*i*) *Rowley* v. *Rowley* (1866) L. R. 2 Sc. & D. 63.

(*k*) *Cahill* v. *Cahill* (1883) 8 App. Ca. 420.

(*l*) The same consequences follow *a fortiori* on a *dissolution* of marriage, though there is no express enactment that they shall: *Wilkinson* v. *Gibson* (1867) L. R. 4 Eq. 162, 36 L. J. Ch. 646; see also, as to the divorced wife's rights, *Wells* v. *Malbon* (1862) 31 Beav. 48, 31 L. J. Ch. 344; *Fitzgerald* v. *Chapman* (1875) 1 Ch. D. 563, 45 L. J. Ch. 23; *Burton* v. *Sturgeon* (1876) 2 Ch. Div. 318, 45 L. J. Ch. 633.

(*m*) *Midland Ry. Co.* v. *Pye* (1861) 10 C. B. N. S. 179, 30 L. J. C. P. 314.

(*n*) *Waite* v. *Morland* (1888) 38 Ch. Div. 135, 57 L. J. Ch. 655; *Hill* v. *Cooper* [1893] 2 Q. B. 85, 62 L. J. Q. B. 423, C. A. As to the combined effect of this Act and s. 4 of the Married Women's Property Act, 1882, in making property subject to a married woman's disposing power assets for the payment of her debts, see *Re Hughes* [1898] 1 Ch. 529, 67 L. J. Ch. 279, C. A.

sued" in this section are not confined by the context to matters of property and contract, but are to be liberally construed: a married woman who has obtained a protection order may sue in her own name for a libel (*o*).

Equitable doctrine of separate estate.

In the eighteenth century, if not earlier, the Court of Chancery recognized and sanctioned the practice of settling property upon married women to be enjoyed by them for their separate use and free of the husband's interference or control. To this was added, towards the end of that century, the curious and anomalous device of settling property in trust for a married woman "without power of anticipation," so that she cannot deal in any way with the income until it is actually payable. During the nineteenth century a doctrine was elaborated, not without difficulty and hesitation, under which a married woman having separate property at her disposal (not subject to the peculiar restraint just mentioned) might bind that property, though not herself personally, by transactions in the nature of contract. Some account of this doctrine is given for reference in the Appendix, as being useful, if not necessary, for the full understanding of the modern law.

It should be observed that restraint on anticipation, being allowed
87] only for the purpose of protecting the fund *as capital, does not apply to income of the fund when it reaches the married woman's hands, or the hands of some person from whom she can immediately demand it. The income so paid or payable is ordinary separate property, and therefore on principle not exempt from the subsequent claims, equitable or statutory, of the married woman's creditors (*p*).

The Married Women's Property Act.

45 & 46 Vict., c. 75. The provisions of the Married Women's Property Act, 1882, extended by an amending Act of 1893, are so much wider that they may be described as a new body of law, consolidating and superseding the results of many cases in equity as well as the previous

(*o*) *Ramsden* v. *Brearley* (1875) L. R. 10 Q. B. 147, 44 L. J. Q. B. 46. She can give a valid receipt for a legacy not reduced into possession before the date of the order: *Re Coward & Adam's Purchase* (1875) L. R. 20 Eq. 179, 44 L. J. Ch. 384.

(*p*) See *Hood Barrs* v. *Heriot* [1896] A. C. 174, 65 L. J. Q. B. 352; *Whiteley* v. *Edwards* [1896] 2 Q. B. 48, 65 L. J. Q. B. 457, C. A.; this principle seems to have been overlooked by the C. A. in construing the Act of 1893 in *Barnett* v. *Howard* [1900] 2 Q. B. 784, 69 L. J. Q. B. 955. See Mr. T. Cyprian Williams's remarks in L. Q. R. xvii. 4.

Acts of 1870 and 1874, which this Act repealed. The law, as now declared, is to this effect:

Separate property is

(i) Property acquired by any married woman after January 1, 1883, including earnings (*q*):

(ii) Property belonging at the time of marriage to a woman marrying after January 1, 1883 (*r*).

Special trusts created in favour of a married woman by will, settlement or otherwise, are not affected by the Act (*s*).

Subject to any settlement (*t*), a married woman can bind herself by contract "in respect of and to the extent *of her separate [88 property," and can sue and be sued alone (*u*).

Damages and costs, if recovered by her, become her separate property; if against her, are payable out of her separate property and not otherwise (*x*). A married woman trading alone can be made bankrupt in respect of her separate property (*y*).

A contract made by a married woman

(i) Is deemed to be made with respect to and to bind her separate property (*z*), and, if made since 5 Dec. 1893, whether or not she has any separate property at the date of the contract (*a*):

(*q*) Ss. 5, 25. Property falling into possession since the Act under a title acquired before it is not included: *Reid* v. *Reid* (1886) 31 Ch. Div. 402, 55 L. J. Ch. 294.

(*r*) S. 2.

(*s*) S. 19, which "prevents the previous enactment from interfering with any settlement which would have bound the property if the Act had not passed": Cotton L.J. *Hancock* v. *Hancock* (1888) 38 Ch. Div. 78, 90, 57 L. J. Ch. 396. This provision covers both s. 2 and s. 5. See *Buckland* v. *Buckland* [1900] 2 Ch. 534, 69 L. J. Ch. 648.

(*t*) See *Stonor's Trusts* (1883) 24 Ch. D. 195, 52 L. J. Ch. 776.

(*u*) As to the retrospective operation of the Act with regard to power to sue on a cause independent of contract, see *Weldon* v. *Winslow* (1884) 13 Q. B. Div. 784, 53 L. J. Q. B. 528. As to liability on causes independent of contract, *Whittaker* v. *Kershaw* (1890) 45 Ch. Div. 320, 60 L. J. Ch. 9. The general words of s. 1 (1) do not give any greater power of disposal than is given by the specific words of ss. 2 and 5, with which s. 1 must be read: *Re Cuno, Mansfield* v. *Mansfield* (1889) 43 Ch. Div. 12, 62 L. T. 15.

(*x*) S. 1, sub-s. 2.

(*y*) S. 1, sub-s. 5. An unexecuted general power of appointment is not "separate property," and a married woman cannot be compelled to execute such a power for the benefit of her creditors: *Ex parte Gilchrist* (1886) 17 Q. B. Div. 521, 55 L. J. Q. B. 578. S. 19 does not prevent property to which she is entitled under a settlement, without restraint on anticipation, from passing to the trustee in bankruptcy: *Ex parte Boyd* (1888) 21 Q. B. Div. 264, 57 L. J. Q. B. 553.

(*z*) Formerly there was no such presumption unless she was living apart from her husband. See Appendix, Note C.

(*a*) 56 & 57 Vict. c. 63.

(ii) If so made and binding, binds her after-acquired separate property (*b*), provided, as to contracts of earlier date than 5 Dec. 1893, that there was some separate property at the date of the contract (*c*).

A married woman's separate property is liable for her ante-nuptial debts and obligations (*d*). She is also liable at common law for such debts, and judgment may go against her personally (*e*). She cannot avoid this liability by settling the property on herself without
89] power of anti*cipation (*f*). As to women married before January 1, 1883, such liability applies only to separate property acquired by them under the Act (*g*).

The Act contains other provisions as to the effect of the execution of general powers by will by married women (*h*), the title to stocks and other investments registered in a married woman's name either solely or jointly (*i*), the effecting of life assurances by a married woman, or by either husband or wife for the benefit of the family (*j*), procedure for the protection of separate property (*k*), and other matters which belong more to the law of Property than to the law of Contract.

It is not expressly stated by the principal Act whether on the termination of the coverture by the death of the husband, or by divorce, a married woman's debts contracted during the coverture with respect to her separate property do or not become her personal debts; but it has been assumed that they do (*l*), and the Act of 1893 expressly makes this the rule for contracts subsequent to its date (*m*). If not, the only remedy would be against her separate property which existed as such during the coverture, and was not subject to restraint on anticipation (*n*), so far as it could still be identified and followed.

The Act does not remove the effects of a restraint on anticipation. A married woman's creditor is not enabled to have execution or any

(*b*) 56 & 57 Vict. c. 63, ss. 1, 4.

(*c*) *Stogdon* v. *Lee* [1891] 1 Q. B. 661, 60 L. J. Q. B. 669, C. A.

(*d*) S. 13. This liability is at least doubtful in cases not under the Act: see Note C. As to the Act of 1870, *Axford* v. *Reid* (1889) 22 Q. B. Div. 548, 58 L. J. Q. B. 230.

(*e*) *Robinson, King & Co.* v. *Lynes* [1894] 2 Q. B. 577, 63 L. J. Q. B. 759.

(*f*) S. 19.

(*g*) See note (*d*), last page.

(*h*) *Re Ann* [1894] 1 Ch. 549, 63 L. J. Ch. 334.

(*i*) Ss. 6–10.

(*j*) S. 11.

(*k*) S. 12.

(*l*) *Harrison* v. *Harrison* (1888) 13 P. Div. 180; *Leak* v. *Driffield* (1889) 24 Q. B. D. 98.

(*m*) 56 & 57 Vict. c. 63, s. 1 (*c*).

(*n*) *Pelton Bros.* v. *Harrison* [1891] 2 Q. B. 422, 60 L. J. Q. B. 74, C. A.

incidental remedies against property subject to such restraint (*o*); though this affects only the remedy, not the cause of action (*p*). But the Act of *1893 gives power to order costs to be paid out of such [90 property (*q*) in any action or proceeding instituted by or on behalf of a married woman (*r*).

It was settled under the Act of 1882, after some difference of judicial opinions, that income of separate property subject to restraint on anticipation is, when paid or accrued due, "free money" and liable to satisfy a judgment not of prior date to the date of such income becoming payable (*s*). It has since been held that s. 1 of the Act of 1893 has the effect of abrogating this rule, and protecting the income actually payable from separate property which was subject to restraint on anticipation at the date of the contract, even if the restraint on the capital has been removed by the cessation of the coverture before the date of the judgment: but the soundness of this decision appears exceedingly questionable (*t*), and it is practically certain that the result is in any case foreign to the intention of the Act.

A married woman cannot free herself from a restraint on anticipation attached to any property held for her separate use by any act of her own, whether in the nature of admission, estoppel, or otherwise (*u*).

Where the surviving husband of a married woman takes her separate estate *iure mariti*, he is at once her "legal personal representative" for the purposes of the Act, and liable to her creditors to the extent of that separate estate (*x*).

*On the other hand the Act does not exclude such equitable [91 rights and remedies against a married woman's separate estate as were previously recognized. Where a married woman carries on a separate business, her husband can sue her for advances made during the

(*o*) *Draycott* v. *Harrison* (1886) 17 Q. B. D. 147. But he may when the restraint is removed by the husband's death: *Briggs* v. *Ryan* [1899] 2 Ch. 717, 68 L. J. Ch. 663 — at any rate a trustee in bankruptcy may: *ib.*

(*p*) *Whittaker* v. *Kershaw* (1890) 45 Ch. Div. 320, 327, 60 L. J. Ch. 9.

(*q*) 56 & 57 Vict. c. 63, s. 2. S. 1 does not make such property liable to satisfy a contract. See the proviso.

(*r*) *Hood Barrs* v. *Cathcart* [1894] 3 Ch. 376, 63 L. J. Ch. 793, C. A. approved, *Hood Barrs* v. *Heriot* [1897] A. C. 177, 66 L. J. Q. B. 356. This does not apply to motions, appeals, or other steps taken in a cause by a married woman who is a defendant: but it does apply to a counterclaim by her: *Hood Barrs* v. *Cathcart* [1895] 1 Q. B. 873, 64 L. J. Q. B. 520.

(*s*) *Hood Barrs* v. *Heriot* [1896] A. C. 174, 65 L. J. Q. B. 352.

(*t*) *Barnett* v. *Howard* [1900] 2 Q. B. 784, 69 L. J. Q. B. 955; see p. 87, above.

(*u*) *Bateman* v. *Faber* [1898] 1 Ch. 144, 67 L. J. Ch. 130, C. A.

(*x*) S. 23 of the principal Act, as applied in *Surman* v. *Wharton* [1891] 1 Q. B. 491, 60 L. J. Q. B. 233.

coverture for the purposes of that business (*y*), on the general principle that in respect of her separate estate she is treated as a *feme sole*. And it may still be possible in some cases not within the Act to enforce a married woman's contract by means of the equitable doctrine of imperfect exercise of a power (*z*).

With regard to a husband's liability for his wife's ante-nuptial debts, the Court of Appeal has decided in a considered judgment that it is distinct, and not merely a joint liability with the wife's separate estate; but that, for the purposes of the Statute of Limitation, there is not a distinct cause of action accruing against the husband at the date of the marriage (*a*).[45]

III. Lunatics and Drunken Persons.

It will be convenient to consider these causes of disability together, since in our modern law drunken men (so far as their capacity of contracting is affected at all) are on the same footing as lunatics.

Old law as to lunatics. The old law as to a lunatic's acts was that he could not be admitted to avoid them himself, though in certain cases the Crown, and in other cases his heir could (*b*). Even the fact of a defendant having been found lunatic by inquisition was not conclusive as against a plaintiff who was not present at the inquisition (*c*). A lunatic who has lucid intervals has apparently always been held **92]** capable of *contracting (among other acts) during such intervals (*d*). The marriage of a lunatic is void,[46] and the same degree

(*y*) *Butler* v. *Butler* (1885) 16 Q. B. Div. 374, 55 L. J. Q. B. 55.

(*z*) See per Fry L.J. *Ex parte Gilchrist* (1886) 17 Q. B. Div. at p. 532.

(*a*) *Beck* v. *Pierce* (1889) 23 Q. B. Div. 316, 58 L. J. Q. B. 516.

(*b*) See the judgment of Fry L.J. in *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. at p. 601.

(*c*) *Hall* v. *Warren* (1804) 9 Ves. 605, 609, 7 R. R. at p. 308.

(*d*) *Beverley's case* (1603) 4 Co. Rep. 123 *b*; *Hall* v. *Warren*, last note.

[45] In the various States of America statutes have been passed enlarging the rights of a married woman to contract and to acquire property. These statutes are summarized in 1 Parsons on Contracts, (9th ed.) 417 *et seq.*

[46] Rawdon *v.* Rawdon, 28 Ala. 565; Bell *v.* Bennett, 73 Ga. 784; Medlock *v.* Merritt, 102 Ga. 212; Pyott *v.* Pyott, 191 Ill. 280; Powell *v.* Powell, 18 Kan. 371; Jenkins *v.* Jenkins' Heirs, 2 Dana, 102; Middleborough *v.* Rochester, 12 Mass. 363; Ward *v.* Dulaney, 23 Miss. 410; True *v.* Ranney, 21 N. H. 52; Wightman *v.* Wightman, 4 Johns. Ch. 343; Johnson *v.* Kincade, 2 Ired. Eq. 470; Crump *v.* Morgan, 3 Ired. Eq. 91; Sims *v.* Sims, 121 N. C. 297; Waymire *v.* Jetmore, 22 Ohio St. 271; Clement *v.* Mattison, 3 Rich. L. 93; Foster *v.* Means, 1 Speer's Eq. 569.

But such a marriage was held not void for every kind of insanity in Lewis *v.* Lewis, 44 Minn. 124; and in Cole *v.* Cole, 5 Sneed, 57, it was decided that a lunatic, on regaining his senses, may, without a new solemnization, affirm a marriage celebrated while he was insane. But see the last three cases above cited. Consult 1 Bishop, Mar. & Div., § 135, *sqq.*

of sanity is required for marriage as for making a will or for any other purpose, though the burden of proof is on the party alleging insanity (*e*). Marriage, however, is a peculiar transaction, and the exceptional treatment of it in our law, though perhaps historically due to the influence, in ecclesiastical Courts, of more general rules of civil or canon law, may well be justified on grounds of convenience.

Liability for necessaries, &c. It is equally settled that a lunatic or his estate may be liable *quasi ex contractu* for necessaries supplied to him in good faith (*f*);[47] and this applies to all expenses necessarily incurred for the protection of his person or estate, such as the cost of the proceedings in lunacy (*g*).[48] A person who supplies necessaries to a lunatic or provides money to be expended in necessaries knowing him to be such can have an action against the lunatic if he incurred the expense with the intention, at the time, that it should be repaid. The circumstances must be such as to justify the Court in implying an obligation to repay; there is no doubt that such an obligation may exist in a proper case (*h*).[49] A husband is liable for necessaries supplied to his wife while he is lunatic; for the wife's authority to pledge his credit for necessaries is not a mere agency, but springs from the relation of husband and wife and is not revoked by the husband's insanity (*i*).[50] In the same way drunkenness or lunacy would be no answer to an action for money had and

(*e*) *Hancock* v. *Peaty* (1867) L. R. 1 P. & D. 335, 341, 36 L. J. Mat. 57; with which *Durham* v. *Durham* (1885) 10 P. D. 80 does not conflict on this point. The statute 15 Geo. 2, c. 30, is rep. by the Stat. Law Revision Act, 1873.

(*f*) *Bagster* v. *Earl of Portsmouth* (1826) 5 B. & C. 170, s. c. more fully, nom. *Baxter* v. *Earl P.*, 7 D. & R. 614. As to goods sold and delivered, Sale of Goods Act, 1893, s. 2.

(*g*) *Williams* v. *Wentworth* (1842) 5 Beav. 325; *Stedman* v. *Hart* (1854) Kay, 607.

(*h*) *Re Rhodes* (1890) 44 Ch. Div. 94, 59 L. J. Ch. 298.

(*i*) *Read* v. *Legard* (1851) 6 Ex. 636, 20 L. J. Ex. 309.

47 *Ex parte* Northington, 37 Ala. 496; Davis *v.* Tarver, 65 Ala. 98, 102; College *v.* Wilkinson, 108 Ind. 314, 320; Coleman *v.* Frazer, 3 Bush, 300, 310; McKee's Adm'r *v.* Purnell, 18 Ky. L. Rep. 879; Sawyer *v.* Lufkin, 56 Me. 308; Kendall *v.* May, 10 Allen, 59; Reando *v.* Misplay, 90 Mo. 251; Sceva *v.* True, 53 N. H. 627; Van Horn *v.* Hann, 39 N. J. L. 207; Richardson *v.* Strong, 13 Ired. L. 106; Surles *v.* Pipkin, 69 N. C. 513; Hosler *v.* Beard, 54 Ohio St. 398, 403; La Rue *v.* Gilkyson, 4 Pa. St. 375.

48 Hallett *v.* Oakes, 1 Cush. 296; McCrillis *v.* Bartlett, 8 N. H. 569; Carter *v.* Beckwith, 128 N. Y. 312; *In re* Meares, 10 Ch. D. 552.

49 See *Re* Renz, 79 Mich. 216.

50 Booth *v.* Cottingham, 126 Ind. 431; Pearl *v.* McDowell, 3 J. J. Marsh. 658; Shaw *v.* Thompson, 16 Pick. 198. Or for his wife's funeral expenses. *Re* Stewart, 14 N. J. L. Jl. 244.

received, or for the price of goods furnished to a drunken or insane
93] man and kept by him after he had recovered his *reason: in this last case, however, his conduct in keeping the goods would be evidence of a new contract to pay for them (*k*).

There is also express authority (which one would think hardly necessary) to show that contracts made by a man of sound mind who afterwards becomes lunatic are not invalidated by the lunacy (*l*). It seems that an agency is determined by the principal becoming insane, except as to persons who deal in good faith with the agent in ignorance of the principal's insanity (*m*).[51]

No intelligible reason is given for the early rule that a lunatic (or person who had been under temporary mental incapacity) should not be received "to disable his own person," and it has long been discarded. Suggestions, but only suggestions, may be found in various later cases to the effect that, on the contrary, a lunatic's acts are absolutely void.

Present law: Contract voidable if the lunacy, &c., known to other party. The modern rule, however, as to the contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is that such a contract is voidable at his option, but only if his state is known to the other party. The defendant who sets up his own incapacity as a defence must prove not only that incapacity but the plaintiff's knowledge of it at the date of the contract (*n*).[52]

(*k*) *Gore* v. *Gibson* (1845) 13 M. & W. 623, 14 L. J. Ex. 151.

(*l*) *Owen* v. *Davies*, 1 Ves. Sr. 82.

(*m*) See *Drew* v. *Nunn* (1879) 4 Q. B. Div. 661, 48 L. J. Q. B. 591.

(*n*) *Molton* v. *Camroux*, in Ex. Ch. (1848) 2 Ex. 487, 4 Ex. 17, 18 L. J. Ex. 68, 356; *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. 599, 61 L. J. Q. B. 449, C. A. The same principle had long before been acted upon in equity, but without deciding whether there was a contract at law: *Niell* v. *Morley* (1804) 9 Ves. 478. The rule is apparently peculiar to the Common Law, and is impugned by a learned civilian as unjust to the lunatic: Prof. Goudy, "Contracts by Lunatics," L. Q. R. xvii. 147. See *contra* Mr. Rankine Wilson, "Lunacy in relation to Contract, Tort, and Crime," L. Q. R. xviii. 21.

[51] Davis *v.* Lane, 10 N. H. 156; Matthiessen, etc., Co. *v.* McMahon's Adm'r, 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150, 157.

[52] The American law exhibits considerable conflicts on this subject.

I. Some decisions hold that if a man is so drunk, idiotic, or insane as not to know what he is about his contract is absolutely void. Edwards *v.* Davenport, 4 McCrary, 34; Caulkins *v.* Fry, 35 Conn. 170; Reinskopf *v.* Rogge, 37 Ind. 207; Atwell *v.* Jenkins, 163 Mass. 362; Burke *v.* Allen, 29 N. H. 106; Berkly *v.* Cannon, 4 Rich. L. 136; Hunter *v.* Tolbard, 47 W. Va. 258; Bursinger *v.* Bank of Watertown, 67 Wis. 75. See also Chicago, &c. Ry. *v.* Lewis, 109 Ill. 120.

Similarly a lunatic's power of attorney has been held absolutely void. Dex-

In *Molton* v. *Camroux* the action was brought by *adminis- [94
trators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase, but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered; the rule being laid down in the Exchequer Chamber in these terms: "The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory but executed in the whole or in part, and the parties cannot be restored altogether to their original positions."

ter *v.* Hall, 15 Wall. 9; Rigney *v.* Plaster, 88 Fed. Rep. 686, 97 Fed. Rep. 12; Elias *v.* Enterprise Assoc., 46 S. C. 188. *Contra*, Williams *v.* Sapieha, 94 Tex. 430.

Similarly a lunatic's deed also, has been held absolutely void. German Saving Soc. *v.* Lashmutt, 67 Fed. Rep. 399; Thompson *v.* New England Co., 110 Ala. 400; Dougherty *v.* Powe, 127 Ala. 577; Wilkins *v.* Wilkinson, 129 Ala. 279; Van Deusen *v.* Sweet, 51 N. Y. 378; Farley *v.* Parker, 6 Oreg. 105; Estate of Desilver, 5 Rawle, 111; Rogers *v.* Walker, 6 Pa. St. 371. And see Dexter *v.* Hall, 15 Wall. 9; Edwards *v.* Davenport, 4 McCrary, 34; Valpey *v.* Rea, 130 Mass. 384; Brigham *v.* Fayerweather, 144 Mass. 48.

II. The weight of American authority, however, does not go so far. A contract made by one who is drunk or of unsound mind, so as to be incapable of understanding its effect, is generally held not void, but voidable at his option. Wright *v.* Waller, 127 Ala. 557; Coburn *v.* Raymond, 76 Conn. 484; Orr *v.* Equitable Mortgage Co., 107 Ga. 499; Woolley *v.* Gaines, 114 Ga. 122; Joest *v.* Williams, 42 Ind. 565; Musselman *v.* Cravens, 47 Ind. 1; Railway Co. *v.* Herr, 135 Ind. 591; Mansfield *v.* Watson, 2 Ia. 111; Allen *v.* Berryhill, 27 Ia. 534; Van Patten *v.* Beals, 46 Ia. 62; Seaver *v.* Phelps, 11 Pick. 304; Carpenter *v.* Rodgers, 61 Mich. 384; Broadwater *v.* Darne, 10 Mo. 277; Ingraham *v.* Baldwin, 9 N. Y. 45; Bush *v.* Breinig, 113 Pa. 310. Or at the option of his administrator. Bunn *v.* Postell, 107 Ga. 490. The deed of a lunatic is thus generally held not void but only voidable. Luhrs *v.* Hancock, 181 U. S. 567, 574; Woolley *v.* Gaines, 114 Ga. 122; Scanlan *v.* Cobb, 85 Ill. 296; Nichol *v.* Thomas, 53 Ind. 42; Freed *v.* Brown, 55 Ind. 310; Schuff *v.* Ransom, 79 Ind. 458; Boyer *v.* Berriman, 123 Ind. 451; Harrison *v.* Otley, 101 Ia. 652; Gribben *v.* Maxwell, 34 Kan. 8; Hovey *v.* Hobson, 53 Me. 451; Allis *v.* Billings, 6 Met. 415; Riley *v.* Carter, 76 Md. 581; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Gibson *v.* Soper, 6 Gray, 279; Howe *v.* Howe, 99 Mass. 88, 98; Rogers *v.* Blackwell, 49 Mich. 192 (*semble*); Moran *v.* Moran, 106 Mich. 8; Riggan *v.* Green, 80 N. C. 236; Elston *v.* Jasper, 45 Tex. 409. See also Hardy *v.* Dyas, 203 Ill. 211; Sheehan *v.* Allen, 67 Kan. 712.

It was held in Coburn *v.* Raymond, 76 Conn. 484, and Mckenzie *v.* Donnell, 151 Mo. 431, that in order to avoid his deed a lunatic must restore the consideration. But see *contra*, Hovey *v.* Hobson, 53 Me. 451, 453; Bates *v.* Hyman, (Miss.) 28 South. Rep. 567, and (where he was unable to do so) Gibson *v.* Soper, 6 Gray, 279; Rea *v.* Bishop, 41 Neb. 202.

III. In some jurisdictions where a person drunk or insane contracts with one who is ignorant of his condition, if the contract be fair and has been executed, or so far executed that the parties cannot be replaced *in statu quo*, it will be treated as binding. Brodrib *v.* Brodrib, 56 Cal. 563; Wilder *v.* Weakly's Est., 34 Ind. 181; Fay *v.* Burditt, 81 Ind. 433; Copenrath *v.* Kienby,

The context shows that the statement was considered equally applicable to lunacy and drunkenness, and the law thus stated involves though it does not expressly enounce the proposition that the contract of a lunatic or drunken man is not void but at most voidable. The general rules as to the rescission of a voidable contract are then applicable, and among others the rule that it must be rescinded, if at all, before it has been executed, so that the former state of things cannot be restored: which is the point actually decided. The decision itself was fully accepted and acted on (*o*),

(*o*) *Beavan* v. *M'Donnell* (1854) 9 Ex. 309, 23 L. J. Ex. 94; *Price* v. *Berrington* (1850–1) 3 Mac. & G. 486, 495, revg. s. c. 7 Ha. 394; *Elliot* v. *Ince* (1857) 7 D. M. G. 475, 488, 26 L. J. 821.

83 Ind. 18; Insurance Co. *v.* Blankenship, 94 Ind. 535, 544; Behrens *v.* McKenzie, 23 Ia. 333; Abbott *v.* Creal, 56 Ia. 175; Bokemper *v.* Hazen, 96 Ia. 221; Gribben *v.* Maxwell, 34 Kan. 8; Flach *v.* Gottschalk Co., 88 Md. 368; Shoulters *v.* Allen, 51 Mich. 529; Schaps *v.* Lehner, 54 Minn. 208; Matthiessen, etc., Co. *v.* McMahon's Adm'r, 38 N. J. L. 537; Young *v.* Stevens, 48 N. H. 133; Insurance Co. *v.* Hunt, 79 N. Y. 541; Hosler *v.* Beard, 54 Ohio St. 398; Beals *v.* See, 10 Pa. 56; Kneedler's Appeal, 92 Pa. 428; Cooney *v.* Lincoln, 21 R. I. 246; Simms *v.* McClure, 8 Rich. Eq. 286.

And this principle applies to the case of a deed made by a lunatic. Ashcraft *v.* De Armond, 44 Ia. 229; Rusk *v.* Fenton, 14 Bush, 490; Yanger *v.* Skinner, 14 N. J. Eq. 389; Riggan *v.* Green, 80 N. C. 236. *Contra*, Nichol *v.* Thomas, 53 Ind. 42; Hovey *v.* Hobson, 53 Me. 451, 55 Me. 256, 275; Bates *v.* Hyman, (Miss.) 28 South. Rep. 567; Gilgallon *v.* Bishop, 46 N. Y. App. Div. 350; Crawford *v.* Scovell, 94 Pa. 48.

The cases last cited, in which, it is submitted, the question did not fairly arise, are based upon Gibson *v.* Soper, 6 Gray, 279, where it was held that "an insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, which deed has not since been ratified or affirmed, without first restoring the consideration to the grantee." But it does not appear in that case that the grantee was ignorant of the grantor's lunacy. See on the other hand, Scanlan *v.* Cobb, 85 Ill. 296; Eaton *v.* Eaton, 37 N. J. L. 108, 117, 118. In Seaver *v.* Phelps, 11 Pick. 304, an action of trover for a promissory note pledged to the defendant by the plaintiff while insane, it was held not to be a defense "that the defendant at the time when he took the pledge was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him, nor practice any fraud or unfairness." But the report does not disclose the nature of the contract upon which the pledge was made.

Where the consideration does not inure to the benefit of the lunatic, the contract has been held voidable, although fair in all respects, and executed by the other party in ignorance of the lunatic's condition. Insurance Co. *v.* Blankenship, 94 Ind. 535; College *v.* Wilkinson, 108 Ind. 315. But see Abbott *v.* Creal, 56 Ia. 175; Blount *v.* Spratt, 113 Mo. 48; Bank *v.* Sneed, 97 Tenn. 120.

So negotiable paper executed by a lunatic is binding in the hands of an innocent holder for value, if the lunatic received a proper consideration therefor. Bank *v.* Moore, 78 Pa. St. 407; Snyder *v.* Laubach, (S. C. Pa.) 7 W. N. C. 464, 9 C. L. J. 496 (*contra*, Hosler *v.* Beard, 54 Ohio St. 398), but is not binding if he did not; McClain *v.* Davis, 77 Ind. 419; Moore *v.* Hershey, 90 Pa. St. 196; Wirebach *v.* Bank, 97 Pa. 543.

Drunkenness of the maker was held no defense to a note in the hands of a *bona fide* holder in Caulkins *v.* Fry, 35 Conn. 170; Miller *v.* Finley, 26 Mich. 249; Bank *v.* McCoy, 69 Pa. St. 204; McSparran *v.* Neeley, 91 Pa. St. 17.

Insanity of the indorser at the time of the indorsement has been held to be a

though the merely voluntary acts of a lunatic, *e. g.*, a voluntary disentailing deed (a class of acts with which we are not here concerned) remain invalid (*p*).

Development of the doctrine: Matthews v. Baxter. The complete judicial interpretation of the result of *Molton* v. *Camroux* (*q*) was given in *Matthews* v. *Baxter* (*r*). The declaration was for breach of contract in not completing a purchase: plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of *transacting business or knowing what he was about, [95 as the plaintiff well knew: replication, that after the defendant became sober and able to transact business he ratified and confirmed the contract. As a merely void agreement cannot be ratified,[53] this neatly raised the question whether the contract were void or only voidable: the Court held that it was only voidable, and the replication therefore good.[54]

Imperial Loan Co. v. Stone. In *Imperial Loan Co.* v. *Stone* (*s*) a defendant sued on a promissory note set up the defence of insanity at the time of making the note. The jury found that he was insane when he signed the note, and could not agree whether the plaintiffs' agent, then present, knew of his insanity or not. It was held that this could not be taken as a verdict for the defendant, but there must be a new trial. The Court was unanimous, and the decision may be taken as finally settling the law if there was still any room for doubt. It also shows that a distinction formerly suggested between executed and executory contracts is not tenable.

The special doctrine of our Courts with regard to partnership (which is a continuing contract) is quite in accordance with this: it has long been established that the insanity of a partner does not of itself operate as a dissolution of the partnership, but is only a ground for dissolution by the court.[55]

(*p*) *Elliot* v. *Ince*, last note.
(*q*) Note (*n*) last *page.
(*r*) (1873) L. R. 8 Ex. 132, 42 L. J. Ex. 73.
(*s*) [1892] 1 Q. B. 599, 61 L. J. Q. B. 449, C. A. It does not appear from the argument as reported how counsel for the defendant dealt with *Molton* v. *Camroux*, which was binding on the Court.

defense to the maker of a note at the suit of the indorsee. Burke *v.* Allen, 29 N. H. 106; Peaslee *v.* Robbins, 3 Met. 164 (explained in Carrier *v.* Sears, 4 Allen, 336); Hannahs *v.* Sheldon, 20 Mich. 278.

53 Spence *v.* Wilmington Cotton Mills, 115 N. C. 210.

54 Oakley *v.* Shelley, 129 Ala. 467; Hawley *v.* Howell, 60 Ia. 79; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Carpenter *v.* Rodgers, 61 Mich. 384.

55 Raymond *v.* Vaughan, 128 Ill. 256. But it was held in Isler *v.* Baker, 6 Humph. 85, that an inquest of lunacy found against one partner dissolved the partnership *ipso facto*.

Partial delusions compatible with capacity for contracting. It is to be noted that the existence of partial delusions does not necessarily amount to insanity for the purposes of this rule. The judge or jury, as the case may be, must in every case consider the practical question whether the party was incompetent to manage his own affairs in the matter in hand (*t*).[56]

96] *IV. Convicts, etc.

Disability of convicts. At common law convicted felons (as also outlaws) could not sue, but remained liable to be sued, on contracts made by them during outlawry or conviction (*u*). Since the Act to abolish forfeitures for treason and felony, convicts are incapable of suing or making any contract, except while they are lawfully at large under any licence (*x*).[57]

Alien enemies. Alien enemies, as we have seen above, are disabled from suing in an English Court even if the cause of action arose in time of peace (*y*),[58] but not from binding themselves by contract during war between their country and England, nor from enforcing such a contract after the war has ceased (*z*),[59] unless meanwhile the right of action has been barred by the Statute of Limitation.

(*t*) *Jenkins* v. *Morris* (1880) 14 Ch. Div. 674; compare remark of Bramwell L.J. in *Drew* v. *Nunn* (1879) 4 Q. B. Div. at p. 669, 48 L. J. Q. B. 591.

(*u*) Dicey on Parties, 4.

(*x*) 33 & 34 Vict. c. 23, ss. 8, 30.

(*y*) *Le Bret* v. *Papillon* (1804) 4 East, 502, 7 R. R. 618.

(*z*) *De Wahl* v. *Braune* (1856) 1 H. & N. 178, 25 L. J. Ex. 343: note (*z*), *ante*, p. *83.

56 In the absence of fraud, mere drunkenness or lack of mental capacity is not enough to make the transaction voidable, unless it be so great as to render the person affected incapable of understanding the effect of the transaction. Bates *v.* Ball, 72 Ill. 108; English *v.* Porter, 109 Ill. 285; Harbison *v.* Lemon, 3 Blackf. 51; Jenners *v.* Howard, 6 Blackf. 240; Wilcox *v.* Jackson, 51 Ia. 208; Lassiter's Adm. *v.* Lassiter's Ex., 23 Ky. L. Rep. 481; Hovey *v.* Hobson, 55 Me. 256; Hovey *v.* Chase, 52 Me. 304; Johns *v.* Fritchey, 39 Md. 258; Farnham *v.* Brooks, 9 Pick. 212, 220; Wright *v.* Fisher, 65 Mich. 275; Dennett *v.* Dennett, 44 N. H. 531; Lozear *v.* Shields, 23 N. J. Eq. 509; Eaton *v.* Eaton, 37 N. J. L. 108, 113; Odell *v.* Buck, 21 Wend. 142; Cooney *v.* Lincoln, 21 R. I. 246; Wells *v.* Houston, 23 Tex. Civ. App. 629; Miller *v.* Rutledge, 82 Va. 863.

57 See Est. of Nerac, 35 Cal. 392.

58 Whelan *v.* Cook, 29 Md. 1; Sanderson *v.* Morgan, 39 N. Y. 231.

59 Kershaw *v.* Kelsey, 100 Mass. 561; Brown *v.* Gardner, 4 Lea, 145.

PART II.

Extension of powers. We now come to the extensions by special institutions of the ordinary power of making contracts. And first of agency.

I. AGENCY.

Analysis of contracts by agent. We have not here to do with the relations created between principal and agent by agency regarded as a species of contract, but only with the manner in which rights and duties accrue to the principal through the dealings of the agent. We must also distinguish cases of real agency from those where the agency is apparent only, and we shall further notice, for the sake of completeness, the position of the true or apparent agent as regards third persons.

*A person who contracts or professes to contract on behalf of a [97 principal may be in any one of the following positions:

1. Agent having authority (whether at the time or by subsequent ratification) to bind his principal.
   - (A) known to be an agent
     - (α) for a principal named;
     - (β) for a principal not named.
   - (B) not known to be an agent (α).

2. Holding himself out as agent, but not having authority to bind his principal.
   - (A) where a principal is named
     - (α) who might be bound, but does not in fact authorize or ratify the contract;
     - (β) who in law cannot be bound.
   - (B) where the alleged principal is not named.

Authority of agent, its constitution and termination. 1. As a rule an agent may be appointed without any special formality; though an agent to execute a deed must himself be appointed by deed, and in certain cases the appointment is required by the Statute of Frauds to be in writing. Revocation of an agent's authority takes place either by the principal's actual withdrawal of his will to be represented by the agent (which may be known either

(α) Since the cases of *Calder* v. *Dobell*, *Fleet* v. *Murton*, and *Hutchinson* v. *Tatham* (see following notes), it may perhaps be considered that the true leading distinction is whether the agent is known to be an agent or not, rather than whether the principal is named or not.

by express declaration or by conduct manifesting the same intention) or by his dying or ceasing to be *sui iuris,* and thus becoming incapable of continuing it (*b*). In these last cases the authority is said to be revoked by the act of the law. "The termination of the authority of an agent does not, so far as regards the agent, take
98] effect *before it becomes known to him, or, so far as regards third persons, before it becomes known to them" (*c*).[60] It is held in England, but anomalously, that this rule does not apply to revocation by the death of the principal (*d*).[61] It does apply in the case of the principal becoming insane,[62] and it may perhaps yet be decided that in the case of death the principal's estate is liable to the other party for the actual loss incurred by the principal's representation — which, as regards him, was a continuing one at the date of the contract—that the agent was authorized (*e*).

(*b*) On the whole subject see at large Story on Agency, §§ 474, sqq.

(*c*) I. C. A. 208, cp. Story on Agency, § 470; *Trueman* v. *Loder* (1840) 11 A. & E. 589, 52 R. R. 451.

(*d*) *Blades* v. *Free* (1829) 9 B. & C. 167, 32 R. R. 620; *Smout* v. *Ilbery* (1843) 10 M. & W. 11. *Contra,* I. C. A. s. 208 (Illust. *c.*), Code Nap. 2008, 2009, and German Civil Code, ss. 167 — 171; and see Kent, Comm. 2. 646. The dissolution of a company has the same effect as the death of a natural person: *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43, 69 L. J. Ch. 20.

(*e*) *Drew* v. *Nunn* (1879) 5 Q. B. Div. 661; see per Brett L.J. at p. 668.

[60] Hatch *v.* Coddington, 95 U. S. 48; Insurance Co. *v.* McCain, 96 U. S. 84; Johnson *v.* Christian, 128 U. S. 374; Fellows *v.* Steamboat Co., 38 Conn. 197; Diversy *v.* Kellogg, 44 Ill. 114; Ulrich *v.* McCormick, 66 Ind. 243; Jones *v.* Hodgkins, 61 Me. 480; Packer *v.* Hinckley Locomotive Works, 122 Mass. 484; Robertson *v.* Cloud, 47 Miss. 208; Beard *v.* Kirk, 11 N. H. 379; McNeilly *v.* Insurance Co., 66 N. Y. 23; Barkley *v.* Railroad Co., 71 N. Y. 205; Braswell *v.* Insurance Co., 75 N. C. 8; Morgan *v.* Stell, 5 Binn. 305; Tier *v.* Lampson, 35 Vt. 179.

[61] Long *v.* Thayer, 150 U. S. 520; Ferris *v.* Irving, 28 Cal. 645; Travers *v.* Crane, 15 Cal. 12; Lewis *v.* Kerr, 17 Ia. 73; Harper *v.* Little, 2 Me. 14; Marlett *v.* Jackman, 3 Allen, 287; Clayton *v.* Merrett, 52 Miss. 353; Weber *v.* Bridgman, 113 N. Y. 600; Farmers' Trust Co. *v.* Wilson, 139 N. Y. 284; Riggs *v.* Cage, 2 Humph. 350; Cleveland *v.* Williams, 29 Tex. 204; Davis *v.* Bank, 46 Vt. 728. It has been held in Alabama, however, that where an offer was mailed by an agent before his principal's death, a contract was made by acceptance of the offer after the principal's death, the death being unknown to the acceptor. Garrett *v.* Trabue, 82 Ala. 227; Davis *v.* Davis, 93 Ala. 173. And more generally it has been held "that a *bona fide* transaction by an agent, not necessarily to be done in the name of the principal, as a deed, etc., but a matter *in pais* merely, done after the death of the principal, but in ignorance of the event, and within the scope of the agency, is nevertheless, valid and binding on the representatives of the principal." Ish *v.* Crane, 13 Ohio St. 574; S. C., 8 Ohio St. 520. And see Dick *v.* Page, 17 Mo. 234; Dewese *v.* Muff, 57 Neb. 17; Bank *v.* Vanderhorst, 32 N. Y. 553; Cassiday *v.* McKenzie, 4 W. & S. 282. Ish *v.* Crane was, however, disapproved in McClaskey *v.* Barr, 50 Fed. Rep. 712, 714. See an article by Joseph Wilby, Esq., 19 A. L. Reg. 401.

[62] Matthiessen, etc., Co. *v.* McMahon's Adm'r, 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150. 157; Davis *v.* Lane, 10 N. H. 156; Merritt *v.* Merritt, 43 N. Y. App. Div. 68.

Ratification must in every case be within a reasonable time, and where a time is expressly limited within which an act must be done, and an unauthorized person purports to do it on behalf of the principal within that time, a ratification after the time has expired will not serve (*f*).

Authority conferred by ratification relates back, as against the other party as well as the principal, to the date of the act done by the agent (*g*).[63]

1. **Agent for existing principal.** In all cases where there is an authorized agent dealing on behalf of a real principal, the intention of the parties determines whether the agent, or the principal, or both, are to be liable on the contract and entitled to enforce it. The question is to whom credit was really given (*h*).[64] And *the [99 general rules laid down on the subject furnish only provisional answers, which may be displaced (subject to the rules as to admissibility of evidence) by proof of a contrary intention.

A. Known to be an agent: contract with principal ab initio. When the agent is known to be an agent, a contract is made, and knowingly made, by the other party with the principal, on which the principal is the proper person to sue and be sued.[65]

a. **Principal named: agent prima facie does not contract in person.** And when the principal is named at the time, then there is *prima facie* no contract with the agent: but when the principal is not named, then *prima facie* the agent, though known to be an agent, does bind himself personally, the other party not being presumed to give credit exclusively to an unknown principal (*i*).[66]

(*f*) *Dibbins* v. *Dibbins* [1896] 2 Ch. 348, 65 L. J. Ch. 724.

(*g*) *Bolton Partners* v. *Lambert* (1889) 41 Ch. Div. 295, 58 L. J. Ch. 425 (see, however, the note on this case in Fry on Specific Performance, 3rd ed.); *McClintock* v. *S. Penn. Oil Co.* [1892] 28 Am. St. Rep. 785; *Re Tiedemann* [1899] 2 Q. B. 66, 68 L. J. Q. B. 852. As to ratification by an undisclosed principal, see p. *103, below.

(*h*) Story on Agency, §§ 279 sqq. 288. *Thomson* v. *Davenport* (1829) 9 B. & C. 78, 32 R. R. 578; *Calder* v. *Dobell* (1871) L. R. 6 C. P. 486, 40 L. J. C. P. 224.

(*i*) But one who deals with an agent known to be such cannot set off against the principal's claim a

63 Gregg *v.* Wooliscroft, 52 Ill. App. 214; Baldwin *v.* Schiappacasse, 109 Mich. 170; Dodge *v.* Hopkins, 14 Wis. 630; Atlee *v.* Bartholomew, 69 Wis. 43, are contrary to the English decision. See the discussion of the question by Prof. Wambaugh, in 9 H. L. Rev. 60.

64 Usher *v.* Waddingham, 62 Conn. 412; Guest *v.* Burlington Co., 74 Ia. 457.

65 Anderson *v.* Timberlake, 114 Ala. 377.

66 Where one citizen of Massachusetts sold goods in that State to another, but at the same time disclosed to the purchaser the fact that the goods belonged to a citizen of another State, without, however, disclosing the name of the

β. Principal not named: agent prima facie does contract in person. But when the agent would not *prima facie* be a contracting party in person he may become so in various ways. Thus he is personally liable if he expressly undertakes to be so (*k*):[67] such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification (*l*),[68] though the principal is not the less also liable, whether named at the time or not (*m*),[69] or if

debt due to him from the agent. [Moline Iron Co. *v.* York Iron Co., 83 Fed. Rep. 66; Miller *v* Lea, 35 Md. 396; McLachlin *v.* Brett, 105 N. Y. 391; Parker *v.* Donaldson, 2 W. & S. 9; Evans *v.* Waln, 71 Pa. St. 69.] If he has employed an agent on his own part, tha agent's knowledge is for this purpose treated as the employer's own; and this even though the knowledge was not acquired in the course of the particular employment: *Dresser* v. *Norwood* (1863) Ex. Ch., 17 C. B. N. S. 466, 34 L. J. C. P. 48, revg. s. c. 14 C. B. N. S. 574, 32 L. J. C. P. 201. *Contra* I. C. A. s. 229. *Qu.* by design or accident? [The view of the Ex. Ch. as to notice was approved and adopted in The Distilled Spirits, 11 Wall. 356; Bank *v.* Chase, 72 Me. 226; Bank *v.* Hollenbeck, 29 Me. 322; Brown *v.* Cranberry Co., 72 Fed. Rep. 96; Westerman *v.* Evans, 1 Kan. App. 1; Hart *v.* Bank, 33 Vt. 252, 270; Shafer *v.* Insurance Co., 53 Wis. 361. But see *contra* Bank *v.* German Ins. Co., 71 Fed. Rep. 473; Pearce *v.* Smith, 126 Ala. 116. See also Trentor *v.* Pothen, 46 Minn. 298; Haines *v.* Starkey, 82 Minn. 230; Slattery *v.* Schwannecke, 118 N. Y. 543; Bank *v.* Pierce, 6 Wash. 491; Story on Agency, § 140; Mechem on Agency, § 721; Wade on Notice, §§ 667, 688].

(*k*) Story on Agency, § 269, Smith, Merc. Law, 158.

(*l*) See *Fairlie* v. *Fenton* (1870) L. R. 5 Ex. 169, 39 L. J. Ex. 107; *Paice* v. *Walker* (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109. The latter case, however, goes too far; see note (*s*), p. *101.

(*m*) *Higgins* v. *Senior* (1841) 8 M. & W. 834: the law there laid down goes to superadd the liability of the agent, not to take away that of the principal: *Calder* v. *Dobell* (1871) L. R. 6 C. P. 486, 40 L. J. C. P. 224.

owner, a subsequent discharge of the purchaser under the insolvent laws of Massachusetts was held to be no bar to an action by the owner for the price of the goods. Ilsley *v.* Merriam, 7 Cush. 242.

[67] Wilder *v.* Cowles, 100 Mass. 487, 491.

[68] Nash *v.* Towne, 5 Wall. 689; White *v.* Boyce, 21 Fed. Rep. 228; Bryan *v.* Brazil, 52 Ia. 350; Simonds *v.* Heard, 23 Pick. 120; Porter *v.* Merrill, 138 Mo. 555; Chandler *v.* Coe, 54 N. H. 561; Mills *v.* Hunt, 20 Wend. 431; Babbett *v.* Young, 51 N. Y. 238; Jarvis *v.* Schaefer, 105 N. Y. 289; Bulwinkle *v.* Cramer, 27 S. C. 376; Cream City Co. *v.* Friedlander, 84 Wis. 53. When a broker received orders from various principals and lumped them in a single contract with the plaintiff the latter was held not entitled to sue the various principals. Beckhuson *v.* Hamblet, [1900] 2 Q. B. 18. The converse also is true. Roosevelt *v.* Doherty, 129 Mass. 301.

[69] Story on Agency, § 160*a.*; Anderson *v.* Beard, [1900] 2 Q. B. 260; Darrow *v.* H. R. Horne Co., 57 Fed. Rep. 463; Moore *v.* Sun Printing Co., 101 Fed. Rep. 591, affd., 183 U. S. 642; Butler *v.* Kaulback, 8 Kan. 668; Bank *v.* Stein, 24 Md. 447; Byington *v.* Simpson, 134 Mass. 169; Smith *v.* Felter, 63 N. J. L. 30; Dykers *v.* Townsend, 24 N. Y. 57; Nicoll *v.* Burke, 78 N. Y. 581; Thayer *v.* Luce, 22 Ohio St. 62, 78; Turner *v.* Lucas, 13 Gratt. 705, 716; Stowell *v.* Eldred, 39 Wis. 614. Chandler *v.* Coe, 54 N. H. 561, holds otherwise in case the principal is named.

he himself has an interest in the subject-matter of *the contract, [100 as in the case of an auctioneer (*n*).[70] And when the agent is dealing in goods for a merchant resident abroad, it is held on the ground of mercantile usage and convenience that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person (*o*).[71]

Technical rule as to deed of agent. When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties (*p*).[72] And it is also held that a party who takes a deed

(*n*) 2 Sm. L. C. 399. As to an auctioneer's personal liability for non-delivery to a purchaser of goods bought at the auction, *Woolfe* v. *Horne* (1877) 2 Q. B. D. 355, 46 L. J. Q. B. 534; *New Zealand Land Co.* v. *Watson* (1881) 7 Q. B. Div. 374, 50 L. J. Q. B. 433. [Shell *v.* Stephens, 50 Mo. 375; Mills *v.* Hunt, 20 Wend. 431; and see Bush *v.* Cole, 28 N. Y. 261 (sale of real estate)].

(*o*) *Armstrong* v. *Stokes* (1872) L. R. 7. Q. B. 598, 605, *Acc. Elbinger Actien-Gesellschaft* v. *Claye* (1873) L. R. 8 Q. B. 313, 41 L. J. Q. B. 253 (affirmed on another point, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211), showing that the foreign principal cannot sue on the contract: *Hutton* v. *Bulloch* (1873) L. R. 8 Q. B. 331, affirmed in Ex. Ch. L. R. 9 Q. B. 572, that he cannot be sued: *New Zealand Land Co.* v. *Watson* (1881) 7 Q. B. D. 374, 50 L. J. Q. B. 433. In *Maspons y Hermano* v. *Mildred* (1883) 9 Q. B. Div. 530, 53 L. J. Q. B. 33, the Court of Appeal refused to extend this doctrine to a case where the commission agent as well as the principal was foreign; the decision was affirmed in H. L., 8 App. Ca. 874, but this point not discussed.

(*p*) *Lord Southampton* v. *Brown* (1827) 6 B. & C. 718, 30 R. R. 511; *Beckham* v. *Drake* (1841) 9 M. & W. at p. 95, affirmed sub nom. *Drake* v. *Beckham*, 11 *ib.* 315, 12 L. J. Ex. 486.

[70] Beller *v.* Block, 19 Ark. 566; Flannegan *v.* Crull, 53 Ill. 352; Seemuller *v.* Fuchs, 64 Md. 217; Tyler *v.* Freeman, 3 Cush. 261; Hulse *v.* Young, 16 Johns. 1; Minturn *v.* Main, 7 N. Y. 220.

"An auctioneer employed to sell real estate on terms which contemplate the payment of a deposit into his hands by the buyer at the time of the auction, and before the completion of the sale by the delivery of the deed, may sue for such deposit in his own name whenever an action for it, separate from the other purchase-money, may become needful." Thompson *v.* Kelly, 101 Mass. 291; Johnson *v.* Buck, 35 N. J. L. 338.

[71] The rule is not recognized as absolute in this country; that the principal is resident in a foreign country is only one circumstance entering into the controlling question, "to whom was credit in fact given?" It is doubtful if the different States of the Union can be considered as foreign to each other within the operation of the rule. Oelricks *v.* Ford, 23 How. 49; Berwind *v.* Schultz, 25 Fed. Rep. 912; Vawter *v.* Baker, 23 Ind. 63; Newcastle M'f'g Co. *v.* Railroad Co., (La.) 1 Rob. 145; Rogers *v.* March, 33 Me. 106; Bray *v.* Kettell, 1 Allen, 80; Barry *v.* Page, 10 Gray, 398; McKenzie *v.* Nevins, 22 Mo. 138; Kirkpatrick *v.* Stainer, 22 Wend. 244; Taintor *v.* Prendergast, 3 Hill, 72; Merrick's Est., 5 W. & S. 9. See 13 Am. L. Rev. 663.

[72] Badger Mining Co. *v.* Drake, 88 Fed. Rep. 48; Hall *v.* Cockrell, 28 Ala. 507; Farmington *v.* Hobert, 74 Me. 416; Huntington *v.* Knox, 7 Cush. 371,

under seal from an agent in the agent's own name elects to charge the agent alone (*q*).[73] A similar rule has been supposed to exist as to negotiable instruments: but modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand (*r*).[74]

(*q*) *Pickering's claim* (1871) L. R. 6 Ch. 525. C. B. 583, 17 L. J. C. P. 123. Cp. *Edmunds* v. *Bushell* (1865) L. R. 1 Q. B. 97, 35 L. J. Q. B. 20.

(*r*) *Lindus* v. *Bradwell* (1848) 5

374; New England Co. *v.* Rockport Co., 149 Mass. 381; Tobin *v.* Central Vt. Ry. Co., 185 Mass. 337, 339; Ferris *v.* Snow, 124 Mich. 559; 130 Mich. 254; Mahoney *v.* McLean, 26 Minn. 415; Borcherling *v.* Katz, 37 N. J. Eq. 150; Briggs *v.* Partridge, 64 N. Y. 357; Tuthill *v.* Wilson, 90 N. Y. 423; Henricus *v.* Englert, 137 N. Y. 488; Steele *v.* McElroy, 1 Sneed, 341; Story on Agency, § 160; cp. Stowell *v.* Eldred, 39 Wis. 614; Moore *v.* Granby Mining, etc., Co., 80 Mo. 86.

[73] Cp. Wharton on Agency, § 283.

[74] See May *v.* Hewitt, 33 Ala. 161; Bank *v.* Joy, 41 Me. 568; cp. Minard *v.* Mead, 7 Wend. 68.

In this country the rule is general that the legal liability of an unnamed principal to be sued on a negotiable instrument cannot be shown by oral evidence. Cragin *v.* Lovell, 109 U. S. 194; Fuller *v.* Hooper, 3 Gray, 334, 341; Williams *v.* Robbins, 16 Gray, 77; Brown *v.* Parker, 7 Allen, 337; Sparks *v.* Despatch Transfer Co., 104 Mo. 531; Chandler *v.* Coe, 54 N. H. 561; Pentz *v.* Stanton, 10 Wend. 271; Anderton *v.* Shoup, 17 Ohio St. 125; Bank *v.* Cook, 38 Ohio St. 442. This rule, however, does not apply to warehouse receipts made negotiable by statute. Anderson *v.* Portland Mills, 37 Oreg. 483.

Though not liable on the instrument, the principal may be liable for the value of the consideration where that inures to his benefit. Pope *v.* Meadow Spring Distilling Co., 20 Fed. Rep. 35; Allen *v.* Coit, 6 Hill, 318; Pentz *v.* Stanton, 10 Wend. 271; Kayton *v.* Barnett, 116 N. Y. 625; Harper *v.* Bank, 54 Ohio St. 425.

A person may become a party to a negotiable instrument by any mark or designation he chooses to adopt as a substitute for his name; Brown *v.* Bank, 6 Hill, 443; DeWitt *v.* Walton, 9 N. Y. 571; hence when a bill or note is signed with a name under which the defendant has chosen to do business, that may be shown to make him liable. Pease *v.* Pease, 35 Conn. 131; Salmon *v.* Hopkins, 61 Conn. 47; Chemical Bank *v.* City Bank, 156 Ill. 149; Melledge *v.* Boston Iron Co., 5 Cush. 158; Fuller *v.* Hooper, 3 Gray, 334; Chandler *v.* Coe, 54 N. H. 561; Bank *v.* Monteath, 1 Den. 402; Froehlich *v.* Froehlich Trading Co., 120 N. C. 39; Abbott *v.* McKinley, 2 Miles, 220; Devendorf *v.* W. Va. Oil, etc., Co., 17 W. Va. 135.

Where this is also the name of the agent who signs the note "it requires very clear and cogent proof to show that it was not designed to be his contract." Williams *v.* Robbins, 16 Gray, 77, 82. And see Pease *v.* Pease, 35 Conn. 131, 148; Devendorf *v.* W. Va. Oil, etc., Co., 17 W. Va. 135.

And in Heffron *v.* Pollard, 73 Tex. 96, it was held not permissible to show by parol evidence that a contract signed by an agent in his principal's name per himself as agent, was meant to bind the agent and that he used the principal's name as his own business name.

Where a partnership business is carried on in the individual name of a member of the firm, the authorities differ as to the presumption which arises in the case of a note executed in the name of such member, with reference to its being a partnership or individual obligation. The decided weight of

Evidence of contrary intention. Again, an agent who would otherwise be liable on the *contract made by him may exempt him- [101
self from liability by contracting in such a form as makes it appear on the face of the contract that he is contracting as agent only and not for himself as principal (*s*) : but even then he may be treated as a contracting party and personally bound as well as his principal by the custom of the particular trade in which he is dealing (*t*). Or he may limit his ability by special stipulations, *e.g.* when a charter-party is executed by an agent for an unnamed freighter, and the agent's signature is unqualified, but the charter-party contains a clause providing that the agent's responsibility shall cease as soon as the cargo is shipped (*u*).

(*s*) Words in the body of a document which amount to a personal contract by the agent are not deprived of their effect by a qualified signature: *Lennard* v. *Robinson*, (1855) 5 E. & B. 125, 24 L. J. Q. B. 275; *Hutcheson* v. *Eaton* (1884) 13 Q. B. Div. 861, see per Brett M. R. at p. 865; [Metcalf *v.* Williams, 104 U. S. 93, 98]; and the description of him as agent in the body of the document may under special circumstances not be enough to make him safe: *Paice* v. *Walker* (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109; see the remarks on that case in *Gadd* v. *Houghton* (1876) 1 Ex. Div. 357, 46 L. J. Ex. 71, which decides that a contract "on account of" a named principal conclusively discharges the agent. *Paice* v. *Walker* is nearly but not quite overruled: see *Hough* v. *Manzanos* (1879) 4 Ex. D. 104, 48 L. J. Ex. 398.

(*t*) *Humfrey* v. *Dale* (1857) 7 E. & B. 266, E. B. & E. 1004, 26 L. J. Q. B. 137; *Fleet* v. *Murton* (1871) L. R. 7 Q. B. 126, 129, 41 L. J. Q. B. 49; *Hutchinson* v. *Tatham* (1873) L. R. 8 C. P. 482, 42 L. J. C. P. 260; *Pike* v. *Ongley* (1887) 18 Q. B. Div. 708, 56 L. J. Q. B. 373. On the general question of the construction of contracts made by brokers for their principals, see *Southwell* v. *Bowditch* (1876) 1 C. P. Div. 374, 45 L. J. C. P. 374, 630.

(*u*) *Oglesby* v. *Yglesias* (1858) E. B. & E. 930, 27 L. J. Q. B. 356; *Carr* v. *Jackson* (1852) 7 Ex. 382, 21 L. J. Ex. 137.

authority is, that these facts alone appearing are insufficient to establish the liability of the partnership. Yorkshire Banking Co. *v.* Beaston, 5 C. P. D. 109; United States *v.* Binney, 5 Mason, 176; Buckner *v.* Lee, 8 Ga. 285; Bank *v.* Winship, 5 Pick. 11; Germon *v.* Hoyt, 90 N. Y. 631; Oliphant *v.* Mathews, 16 Barb. 608; Bank *v.* Ingraham, 58 Barb. 290; Bank *v.* Monteath, 1 Den. 402; Miflin *v.* Smith, 17 S. & R. 165.

In Fosdick *v.* Van Horn, 40 Ohio St. 459, it was decided that "if there are two firms of the same name in the same community, each consisting of the same persons, but each engaged in different kinds of business, one of which contains a dormant partner and the other does not, and suit is brought on a promissory note for borrowed money bearing the signature of the common firm name, the presumption is that it is the note of the firm not containing the dormant partner. The plaintiff, to recover against the dormant partner, must prove either that the money for which the note was given was borrowed on the credit of the firm in which the dormant partner was interested, or that, when obtained, it was used in the business, or for the benefit of that firm; and the fact that the money was borrowed on the credit of that firm may be proved by representations to that effect made by the ostensible partners at the time of the transaction, or it may be proved by circumstances." See also Baker *v.* Nappier, 19 Ga. 520; Bank *v.* Hibbard, 48 Mich. 452; Cushing *v.* Smith, 43 Tex. 261.

It is also a rule that an agent for a government is not personally a party to a contract made by him on behalf of that government by reason merely of having made the contract in his own name (*x*).[75] In some cases the agent, though *prima facie* not a party to the contract as agent, can yet sue or be sued as principal on a contract which he has made as agent. These will be mentioned under another head of this subject (*y*).

102] *Where an undertaking is given in general terms, no promisee being named, to a person who obviously cannot be a principal in the matter, it may be inferred as a fact from the circumstances that some other person interested is the real unnamed principal, and that person may recover on the contract (*z*).

B. **Agent not known to be an agent.** When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it, as well as the agent with whom the contract is made in the first instance (*a*).[76]

(*x*) *Macbeath* v. *Haldimand* (1786) 1 T. R. 172. cp. *ib.* 674, 1 R. R. 177: *Gidley* v. *Lord Palmerston* (1822) 3 Brod. & B. 275, 24 R. R. 668; Story on Agency, § 302, sqq.

(*y*) *Infra*, pp. *109—*111.

(*z*) *Weidner* v. *Hoggett* (1876) 1 C. P. D. 533.

(*a*) The rule is not excluded by the contract being in writing (not under seal) and signed by the agent in his own name: *Beckham* v. *Drake* (1841) 9 M. & W. at p. 91. See p. *100, *supra*.

[75] Parks *v.* Ross, 11 How. 362; Sheets *v.* Selden, 2 Wall. 177; Belknap *v.* Schild, 161 U. S. 10, 17; Hodgson *v.* Dexter, 1 Cr. 345; Murray *v.* Carrothers, 1 Met. (Ky.) 71; De Bebian *v.* Gola, 64 Md. 262; Brown *v.* Austin, 1 Mass. 208; Dawes *v.* Jackson, 9 Mass. 490; Ghent *v.* Adams, 2 Kelly, 214; Copes *v.* Matthews, 10 S. & M. 398; Tutt *v.* Hobbs, 17 Mo. 486; Knight *v.* Clark, 48 N. J. L. 22; Osborne *v.* Kerr, 12 Wend. 179; Walker *v.* Swartwout, 12 Johns. 444; Hamarskold *v.* Bull, 11 Rich. L. 493; Enloe *v.* Hall, 1 Humph. 303; Walker *v.* Christian, 21 Gratt. 291. Where he is not personally bound he cannot sue upon the contract. Bainbridge *v.* Downie, 6 Mass. 253. Nor is he subject to the rule that an agent warrants his authority. Dunn *v.* McDonald, [1897] 1 Q. B. 401, 555, *post*, p. *109.

[76] Ford *v.* Williams, 21 How. 287; Darrow *v.* H. R. Horne Co., 57 Fed. Rep. 463; Buchanan *v.* Cleveland Oil Co., 91 Fed. Rep. 88; Bell *v.* Reynolds, 78 Ala. 511; McFadden *v.* Henderson, 128 Ala. 221; Ruiz *v.* Norton, 4 Cal. 355; Sullivan *v.* Shailor, 70 Conn. 733; Woodruff *v.* McGehee, 30 Ga. 158; Nutt *v.* Humphreys, 32 Kan. 100; Edwards *v.* Gildermeister, 61 Kan. 141; Cushing *v.* Rice, 46 Me. 303; Balto. Coal Tar & Mfg. Co. *v.* Fletcher, 61 Md. 288; Lerned *v.* Johns, 9 Allen, 419; Foster *v.* Graham, 166 Mass. 202; Chandler *v.* Coe, 54 N. H. 561; Bryant *v.* Wells, 56 N. H. 152: Smith *v.* Felter, 63 N. J. L. 30; Briggs *v.* Partridge, 64 N. Y. 357, 362; Coleman *v.* Bank, 53 N. Y. 388; Ludwig *v.* Gillespie, 105 N. Y. 653; Milliken *v.* W. U. Telegraph Co., 110 N. Y. 403, 410; Brady *v.* Nally, 151 N. Y. 258; Thayer *v.* Luce, 22 Ohio St. 62, 78; Hubbert *v.* Borden, 6 Whart. 79; Hubbard *v.* Tenbrook, 124 Pa. 291; Edwards *v.* Golding, 20 Vt. 30; Bank *v.* Nolting, 94 Va. 263; Deitz *v.* Insurance Co., 31 W. Va. 851; Stowell *v.* Eldred, 39 Wis. 614.

Even though the contract stipulates that it shall not be assignable without the co-contractor's consent. Prichard *v.* Budd, 76 Fed. Rep. 710.

Contract with the undisclosed principal. It has been held that an undisclosed principal is as much liable as a known one for contracts made by the agent within the general apparent authority of agents in that business (*b*).[77]

Exceptions. But the limitations of this rule are important. In the first place, it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. There the principal cannot afterwards sue on the contract (*c*).[78] Much less, of course, could he do so if the nature of the contract itsef (for instance, partnership) were inconsistent with a principal unknown at the time taking the place of the apparent contracting party. Likewise, "if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name" (*d*).

It was long undecided whether an agent for an undis*closed [103 principal must have authority at the time, or a man might adopt as principal an act not purporting at the time to be done on behalf of any principal, and not then authorized by him. A majority of the Court of Appeal held in a late case that such ratification was possible, but this was reversed by the House of Lords as contrary to such authority as there was (with one obscure exception) and to the general reluctance of the Common Law to give effect to alleged intentions which were not disclosed or recorded at the time when, if at all, they were material (*e*).

(*b*) *Watteau* v. *Fenwick* [1893] 1 Q. B. 346; *sed qu.*, see L. Q. R. ix. 111.

(*c*) *Humble* v. *Hunter* (1848) 12 Q. B. 310, 17 L. J. Q. B. 350.

(*d*) *Ferrand* v. *Bischoffsheim* (1858) 4 C. B. N. S. 710, 716, 27 L. J. C. P. 302.

(*e*) *Durant* v. *Roberts & Co.* [1900] 1 Q. B. 629, 69 L. J. Q. B. 382, *diss.* A. L. Smith L. J., revd. nom. *Keighley, Maxsted & Co.* v. *Durant* [1901] A. C. 240, 70 L. J. K. B. 662.

77 Cp. Miles *v.* McIlwraith, 8 App. Cas. 120.

78 Winchester *v.* Howard, 97 Mass. 303; Harner *v.* Fisher, 58 Pa. 453.

The rule does not apply to a contract which by reason of its personal character would not be assignable. King *v.* Batterson, 13 R. I. 117. But the principal may be sued on principles of quasi-contract for any benefit he has received, even though in the course of the negotiation the plaintiff expressly declared that he would not sell to the defendant, and the agent assured him he was buying for himself. Kayton *v.* Barnett, 116 N. Y. 625; cp. Rodliff *v.* Dallinger, 141 Mass. 1.

Conversely if the plaintiff represents himself as a mere agent he cannot sue as principal. Fox *v.* Tabel, 66 Conn. 397.

Limitations of the rule when it applies. Again, in the cases to which the rule does apply, the rights of both the undisclosed principal and the other contracting party are qualified as follows:

Rights of principal. The principal "must take the contract subject to all equities in the same way as if the agent were the sole principal" (*f*). Accordingly if the principal sues on the contract the other party may avail himself of any defence which would have been good against the agent (*g*):[79] thus a purchaser of goods through a factor may set off a claim against the factor in an action by the factor's principal for the price of the goods (*h*).[80] "Where a con-

(*f*) Story on Agency, § 420; per Parke B. *Beckham* v. *Drake*, (1841) 9 M. & W. at p. 98. P. 100, *supra*.

(*g*) If the agent sues in his own name the other party cannot set off a debt due from the principal whom he has in the meantime discovered, there being no mutual debt within the statute of set-off; *Isberg* v. *Bowden* (1853) 8 Ex. 852, 22 L. J. Ex. 322. Under the Judicature Acts, however, he can make the principal a party to the action by counterclaim and have the whole matter disposed of.

(*h*) *George* v. *Clagett* (1797) 7 T. R. 359, 4 R. R. 462; *Sims* v. *Bond* (1833) 5 B. & Ad. 389, 393, 39 R. R. 511, 515. Per Cur., *Isberg* v. *Bowden*, 8 Ex. at p. 859. It does not matter whether the factor is or is not actually authorized by his principal to sell in his own name without disclosing the agency: *Ex parte Dixon* (1876) 4 Ch. Div. 133, 46 L. J. Bk. 20; nor what restrictions may, as between himself and the principal, be imposed on him as to the price he is to sell at: *Stevens* v. *Biller* (1883) 25 Ch. Div. 31.

[79] If the agent sues in his own name, any defense good against the principal is available against the agent. Holden *v.* Rutland R. R., 73 Vt. 317. But if the agent is sued on the contract he cannot by way of set-off avail himself of a debt due to his principal by the plaintiff. Forney *v.* Shipp, 4 Jones L. 527.

[80] "Where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defense, whether it be by common law or by statute, payment, or set-off, as he was entitled to at the time against the agent — the apparent principal." Miller *v.* Lea, 35 Md. 396; Gardner *v.* Allen's Exr., 6 Ala. 187; Huntsville *v.* Huntsville Gas Light Co., 70 Ala. 190; Rosser *v.* Darden, 82 Ga. 219; Allison *v.* Sutlive, 99 Ga. 151; Koch *v.* Willi, 63 Ill. 147; Eclipse Windmill Co. *v.* Thornton, 46 Ia. 181; Traub *v.* Milliken, 57 Me. 63; Huntington *v.* Knox, 7 Cush. 371; Barry *v.* Page, 10 Gray, 398; Hogan *v.* Shorb, 24 Wend. 458; Parker *v.* Donaldson, 2 W. & S. 9; Frame *v.* Coal Co., 97 Pa. 309; Bulfield *v.* National Supply Co., 189 Pa. 189.

But this does not apply to a purchase from a mere broker, who has not the possession or is not intrusted with the indicia of property in the goods. Bernshouse *v.* Abbott, 45 N. J. L. 531.

Of course it does not apply if the seller was known to be an agent. Maspons *v.* Mildred, 9 Q. B. D. 530, 544; Parker *v.* Donaldson, 2 W. & S. 9; Admr. of Conyers *v.* Magrath, 4 McCord, 392.

Nor where after an executory contract to sell the agent before delivery under the contract advises the purchaser that the property belongs to a third person for whom the seller is acting as agent. McLachlin *v.* Brett, 105 N. Y. 391.

And it seems that the same result follows where, without actual knowledge

tract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, *"*that* [104 *the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal,* and consequently he is to have the same right of set-off which he would have against the agent" (*i*).[81] And his claim to be allowed such set-off is not effectually met by the reply that when he dealt with the agent he had the means of knowing that he was only an agent. The existence of means of knowledge is not material except as evidence of actual knowledge (*k*).[82] On the other hand this equity against an undisclosed principal depends (so the House of Lords has held) on the third person's actual belief that he was dealing with a principal in that particular transaction. Mere absence of knowledge or belief whether the agent is dealing as an agent or on his own account is not enough (*l*).

Rights of the other party. It has been said that conversely the right of the other contracting party to hold the principal liable is subject to the qualification that the state of the account between the principal and the agent must not be altered to the prejudice of the principal. But this doctrine has been disapproved by the Court of Appeal as going too far. The principal is discharged as against the other party by payment to his own agent only if that party has by his conduct led the principal to believe that he has settled with the agent, or, perhaps, if the principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone, and would naturally, from some peculiar character of the business or otherwise, be supposed by the principal to do so (*m*).[83] *Again, the other party may choose to give credit to [105

(*i*) Per Willes J. *Dresser* v. *Norwood* (1863) 14 C. B. N. S. 574, 589, 32 L. J. C. P. 201, 205. The reversal of this case in the Ex. Ch. 17 C. B. N. S. 466, 34 L. J. C. P. 48, does not affect this statement of the general law. The principle is not confined to the sale of goods, *e.g.* *Montagu* v. *Forwood* [1893] 2 Q. B. 350, C. A.

(*k*) *Borries* v. *Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38, 43 L. J. C. P. 3.

(*l*) *Cooke* v. *Eshelby* (1887) 12 App. Ca. 271, 56 L. J. Q. B. 505. It is useless to criticize the decision in England; but see L. Q. R. iii. 358.

(*m*) *Irvine* v. *Watson* (1880) 5 Q. B. Div. 414, 49 L. J. Q. B. 531, which seems on this point to reduce the

of the agency, the circumstances are such as fairly to put the purchaser on inquiry. Miller *v.* Lea, 35 Md. 396; Baxter *v.* Sherman, 73 Minn. 434; Wright *v.* Cabot, 89 N. Y. 570, 574; cp. Elwell *v.* Mersick, 50 Conn. 272.

81 Ruiz *v.* Norton, 4 Cal. 355; Peel *v.* Shepherd, 58 Ga. 365; Woodruff *v.* McGehee, 30 Ga. 158; Balto. Coal Tar & Mfg. Co. *v.* Fletcher, 61 Md. 288; Bank *v.* Plimpton, 17 Pick. 159; Miller's Ex. *v.* Sullivan, 39 Ohio St. 79.

82 But see *supra*, note 80 *ad fin.*

83 Fradley *v.* Hyland, 37 Fed. Rep. 49; Thomas *v.* Atkinson, 38 Ind. 248.

the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements or conduct of the party which lead the principal to believe that the agent only will be held liable, and on the faith of which the principal acts, will have the same result (*n*).[84] And though the party may elect to sue the principal, yet he must make such election within a reasonable time after discovering him (*o*). When it is said that he has a right of election, this means that he may sue either the principal or the agent, or may commence proceedings against both, but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other. Such is the rule as to principal and agent in general,[85] and there is no exception in the case of a shipowner and freighter. (*p*).

The mere commencement of proceedings against the agent or his estate after the principal is discovered, although it may possibly be evidence of an election to charge the agent only, does not amount to an election in point of law (*q*).[86]

Professed agent not having authority. 2. We have now to point out the results which follow when a man professes to make a contract as agent, but is in truth not an agent, that is, has no responsible principal.

106] We may put out of consideration all cases in which the *professed agent is on the face of the contract personally bound as well

authority of *Armstrong* v. *Stokes* (1872) L. R. 7 Q. B. 598, 41 L. J. Q. B. Div. 414, 49 L. J. Q. B. 531, peculiar facts.

(*n*) Story on Agency, §§ 279, 288, 291; *Horsfall* v. *Fauntleroy* (1830) 10 B. & C. 755; but the principal is not discharged unless he has actually dealt with the agent on the faith of the other party's conduct so as to change his position: *Wyatt* v. *Hertford* (1802) 3 East, 147. [Muldon *v.* Whitlock, 1 Cow. 290; Rathbone *v.* Tucker, 15 Wend. 498; Davis *v.* Allen, 3 N. Y. 168; cp. Fitler *v.* Commonwealth, 31 Pa. St. 406.]

(*o*) *Smethurst* v. *Mitchell* (1859) 1 E. & E. 622, 28 L. J. Q. B. 241.

(*p*) *Priestley* v. *Fernie* (1865) 3 H. & C. 977, 983, 34 L. J. Ex. 173; cp. L. R. 6 C. P. 499.

(*q*) *Curtis* v. *Williamson* (1874) L. R. 10 Q. B. 57, 44 L. J. Q. B. 27.

[84] Berwind *v.* Schultz, 25 Fed. Rep. 912; Hyde *v.* Wolff, 4 La. 234; Brown *v.* Telegraph Co., 30 Md. 39; French *v.* Price, 24 Pick. 13; Paige *v.* Stone, 10 Met. 160; Cheever *v.* Smith, 15 Johns. 276.

[85] Kingsley *v.* Davis, 104 Mass. 178; Jones *v.* Insurance Co., 14 Conn. 501; Tuthill *v.* Wilson, 90 N. Y. 423.

But it has been held, and there is much reason for the position, that where a contract is made with one who does not disclose his agency, an unsatisfied judgment obtained against him is not a bar to an action against the principal. Beymer *v.* Bonsall, 79 Pa. 298; Brown *v.* Reiman, 48 N. Y. App. Div. 295.

"A judgment against an agent for a fraud committed while acting within the scope of his agency, on which no collection or payment has been made, is no bar to an action against the principal for the same fraud." Maple *v.* Railroad Co., 40 Ohio St. 313; Interstate Tel. Co. *v.* Baltimore Tel. Co., 51 Fed. Rep. 49.

[86] Ferry *v.* Moore, 18 Ill. App. 135; Steele-Smith Co. *v.* Potthast, 109 Ia. 413; Cobb *v.* Knapp, 71 N. Y. 348; Nason *v.* Cockroft, 3 Duer, 366.

as his pretended principal: for his own contract cannot be the less valid because the contract he professed at the same time to make for another has no effect. But when the contract is not by its form or otherwise such as would of itself make the professed agent a party to it there are several distinctions to be observed.

Principal named. First, let us take the cases where a principal is named. The other party *prima facie* enters into the contract on the faith of that principal's credit. But credit cannot be presumed to be given except to a party who is capable of being bound by the contract: hence it is material whether the alleged principal is one who might authorize or ratify the contract, but does not, or is one who could not possibly do so.

Who might be responsible. The more frequent case is where the party named as principal is one who might be responsible.

It is settled law that there, subject to the qualifications which will appear, the pretended agent has not either the rights or the liabilities of a principal on the contract.

Professed agent cannot sue on the contract. First, as to his rights. In *Bickerton* v. *Burrell* (*r*)[87] the plaintiff had signed a memorandum of purchase at an auction as agent for a named principal. Afterwards he sued in his own name to recover the deposit then paid from the auctioneer, and offered evidence that he was really a principal in the transaction. But he was non-suited at the trial, and this was upheld by the full Court, who laid down that "where a man assigns himself as agent to a person named, the law will not allow him to shift his position, declaring himself principal and the other a creature of straw. . . . A man who has dealt with another as agent (*s*) is not at liberty to retract that character *without notice* and to turn round and sue in the *character of principal. The plaintiff misled the [107 defendant and was bound to undeceive him before bringing an action." This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing: but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff or to repudiate it at once.

Contrary decision of Fellowes v. Lord Gwydyr. One reported case, however (*t*), appears to be directly opposed to *Bickerton* v. *Burrell*. The

(*r*) (1816) 5 M. & S. 383.
(*s*) *I. e.* for a named and responsible principal.
(*t*) *Fellowes* v. *Lord Gwydyr* (1826–9) 1 Sim 63, 1 Russ. & M. 83, 32 R. R. 148.

87 See also Fox *v.* Tabel, 66 Conn. 397.

facts were shortly these. Lord Gwydyr was entitled as Deputy Grand Chamberlain to the decorations used in Westminster Hall at the coronation of George IV. He sold these to the plaintiff Fellowes, who re-sold them to the defendant Page at an advanced price, but professed to be selling as the agent of Lord Gwydyr, and signed the agreement for sale in that character. Fellowes, being unable to procure Lord Gwydyr's consent to his name being used in an action, sued Page in his own name in equity for a balance due on the agreement. It was argued for the defendant that he had been misled "as to a most important ingredient in the contract, as to the person, namely, with whom he had really contracted" (*u*). However it was held by Sir John Leach V.C. and by Lord Lyndhurst on appeal, that Page could not resist the performance of the contract without showing that he had been actually prejudiced by having it concealed from him that Fellowes was the real principal. It is submitted that this decision is contrary to the principles laid down in *Bickerton* v. *Burrell* and the other cases to be presently cited, and is not law (*x*).[88]

108] * **Rayner v. Grote.** The doctrine under consideration was further defined in *Rayner* v. *Grote* (*y*). There the plaintiff sued to recover a balance due upon the sale by him to the defendants of a quantity of soda ash according to a bought note in this form:—"I have this day bought for you the following goods *from J. & T. Johnson* — 50 tons soda ash, ... J. H. Rayner." It was proved that the plaintiff was the real owner of the goods, and 13 tons out of the 50 had been delivered to the defendants and accepted by them at a time when there was strong evidence to show that they knew the plaintiff to be the real principal. The law was stated as follows (*z*):—

"In many such cases [*viz.* where the contract is wholly unperformed] such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then

(*u*) 1 Russ. & M. at pp. 85, 88.

(*x*) It may have been right on the facts, on the ground that Page continued to act under the contract after knowing the true state of things (as was said in argument for the plaintiff, 1 Russ. & M. 83, 32 R. R. 151), which would bring the case within *Rayner* v. *Grote* (1846) 15 M. & W. 359, 16 L. J. Ex. 79, but this is not mentioned in the judgments. Equitable cause of action there was really none. No judicial comment on the case has been met with.

(*y*) (1846) 15 M. & W. 359, 16 L. J. Ex. 79.

(*z*) Per Cur. 15 M. & W. at p. 365; and see the remarks on *Bickerton* v. *Burrell, ad fin.*

88 This criticism of Fellowes *v.* Lord Gwydyr is justified by the contrary decision in Archer *v.* Stone, 78 L. T. Rep. 34. See also Fisher *v.* Worrall, 5 W. & S. 475, 483; Ames's Cas. Eq. Jur. 354, *n.*

show himself to be the real principal and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule."

But here part performance had been accepted by the defendants with full knowledge that the plaintiff was the real principal, and it was therefore considered that the plaintiff was entitled to recover.

The professed agent cannot be sued on the contract. Next, as to the pretended agent's liability. It was at one time thought that an agent for a named principal who turned out to have no authority might be sued as a principal on the contract (*a*).[89] But it has been determined that he is not liable on the contract itself (*b*).[90]

Implied warranty of authority. He is liable however on an implied warranty of his authority to bind his principal. This was decided in *Collen* v. **Wright* (*c*), and has been followed in several later [109 cases (*d*).[91] In the rare case of a person purporting to contract as

(*a*) Cp. Pothier, Obl. § 75.

(*b*) *Lewis* v. *Nicholson* (1852) 18 Q. B. 503, 21 L. J. Q. B. 311.

(*c*) (1857) 7 E. & B. 301, 26 L. J. Q. B. 147; in Ex. Ch. 8 E. & B. 647, 27 L. J. Q. B. 215.

(*d*) *Richardson* v. *Williamson* (1871) L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; *Cherry* v. *Colonial Bank of Australasia* (1869) L. R. 3 P. C. 24, 31; *Oliver* v. *Bank of England* [1901] 1 Ch. 652, 70 L. J. Ch. 377 [aff'd [1902] 1 Ch. 610]. But the representation of the agent that he has authority must be a representation of matter of fact and not of law: *Beattie* v. *Lord Ebury* (1872) L. R. 7 Ch. 777, 7 H. L. 102, 41 L. J. Ch. 804, 44 *ib.* 20; *Weeks* v. *Propert* (1873) L. R. 8 C. P. 427, 437, 42 L. J. C. P. 129. And the rule cannot be applied to make a public servant acting on behalf of the Crown personally liable: *Dunn* v. *Macdonald* [1897] 1 Q. B. 555, 66 L. J. Q. B. 420, C.A. As to the measure of damages, *Simons* v. *Patchett* (1857) 7 E. & B. 568, 26 L. J. Q. B. 195; *Spedding* v. *Nevell* (1869) L. R. 4 C. P. 212, 38 L. J. C. P. 133; *Godwin* v. *Francis* (1870) L. R. 5 C. P. 295, 39 L. J. C. P. 121; *Ex parte Panmure* (1883) 24 Ch. Div. 367.

[89] Coffman *v.* Harrison, 24 Mo. 524; Byars *v.* Doore's Adm'r, 20 Mo. 284; Weare *v.* Gove, 44 N. H. 196; Walker *v.* Bank, 9 N. Y. 582, 585; Oliver *v.* Morawetz, 97 Wis. 332.

[90] The Serapis, 37 Fed. Rep. 436; Lander *v.* Castro, 43 Cal. 497; Duncan *v.* Niles, 32 Ill. 532; Noyes *v.* Loring, 55 Me. 408; Simpson *v.* Garland, 76 Me. 203; Bartlett *v.* Tucker, 104 Mass. 336; Sheffield *v.* Ladue, 16 Minn. 388; White *v.* Madison, 26 N. Y. 117.

[91] Bank *v.* Friend, 90 Fed. Rep. 703; Seeberger *v.* McCormick, 178 Ill. 404; Railroad Co. *v.* Richardson, 135 Mass. 473, 475; Conant *v.* Alvord, 166 Mass. 311; Tinken *v.* Tallmadge, 54 N. J. L. 117; White *v.* Madison, 26 N. Y. 117; Baltzen *v.* Nicolay, 53 N. Y. 467; Simmons *v.* More, 100 N. Y. 140; Taylor *v.* Nostrand, 134 N. Y. 108; Farmers' Trust Co. *v.* Floyd, 47 Ohio St. 525; Cochran *v.* Baker, 34 Oreg. 555; or in a special action on the case: McHenry *v.* Duffield, 7 Blackf. 41; Noyes *v.* Loring, 55 Me. 408; Abbey *v.* Chase, 6 Cush. 54; Bartlett *v.* Tucker, 104 Mass. 336; Sheffield *v.* Ladue, 16 Minn. 388; Kroeger *v.* Pitcairn, 101 Pa. 311.

If an agent in good faith contracts with one to whom he discloses the facts relating to his supposed authority, or who is equally with the agent chargeable with a knowledge of them, he does not become personally liable.

agent for a named principal, and at the same time expressly disclaiming any present authority, the implied warranty is excluded, for the other party does not rely on the existence of authority and is not misled, but is content to take the chance of ratification for what it may be worth (*e*). The pretended agent is also generally liable to an action in tort if he did not believe that he had authority (*f*). The liability on implied warranty is not affected by the supposed agent's good faith where he does so believe, and it has been suggested that the rule now applies even where a real authority has been determined, unknown to the agent, by the death of the principal (*g*).

(*e*) *Halbot* v. *Lens* [1901] 1 Ch. 344, 70 L. J. Ch. 125. It would seem arguable that in such a case there is nothing capable of ratification.

(*f*) *Randell* v. *Trimen* (1856) 18 C. B. 786, 25 L. J. C. P. 307. The object of establishing the liability *ex contractu* was to have a remedy against executors.

For a somewhat similar doctrine applied to the contract to marry, see *Millward* v. *Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2, and *Wild* v. *Harris* (1849) 7 C. B. 999, 18 L. J. C. P. 297. Here however there is not properly a warranty, for the promisor's undertaking that he is legally capable of marrying the promisee is a term in the principal contract itself. See Chap. VII. below, *ad fin.* [In accord see Paddock *v.* Robinson, 63 Ill. 99; Davis *v.* Pryor, 3 Ind. Ty. 396; Kelly *v.* Riley, 106 Mass. 339; Stevenson *v.* Pettis, 12 Phila. 468; Coover *v.* Davenport, 1 Heisk. 368.

In Blattmacher *v.* Saal, 29 Barb. 22, and Pollock *v.* Sullivan, 53 Vt. 507, it was held that an action of deceit would lie. See also Morrill *v.* Palmer, 68 Vt. 1.

If the woman knew the man to be married the agreement would, of course, be unlawful. Davis *v.* Pryor, 112 Fed. Rep. 274; Paddock *v.* Robinson, 63 Ill. 99; Eve *v.* Rogers, 12 Ind. App. 623; Noice *v.* Brown, 38 N. J. L. 228; 39 N. J. L. 133.

Where a statute made absolutely void the marriage of a person incurably impotent, it was held that no action would lie for the breach of such person's promise of marriage made to one who knew his condition. Gulick *v.* Gulick, 41 N. J. L. 13. And see Haviland *v.* Halstead, 34 N. Y. 643.

In Price *v.* Price, 75 N. Y. 244, it was decided that an action to recover damages for fraud on the part of defendant, in that he induced plaintiff to marry and cohabit with him by means of false and fraudulent representations that his first wife was dead, and that he was legally capable of marrying, did not survive against his personal representatives. *Acc.* Payne's App., 65 Conn. 397; Gremm *v.* Carr's Adm., 31 Pa. 533. *Contra*, Withee *v.* Brooks, 65 Me. 14.]

(*g*) *Halbot* v. *Lens*, note (*e*) above.

N. Y. & C. Steamship Co. *v.* Harbison, 16 Fed. Rep. 688; Ware *v.* Morgan, 67 Ala. 461; Ogden *v.* Raymond, 22 Conn. 378; Mann *v.* Richardson, 66 Ill. 481; Newman *v.* Sylvester, 42 Ind. 106; Watson *v.* Rickard, 25 Kan. 662; Murray *v.* Carrothers, 1 Met. (Ky.) 71; Southworth *v.* Flanders, 33 La. Ann. 190; Sanborn *v.* Neal, 4 Minn. 126; Walker *v.* Bank, 9 N. Y. 582, 587; Snow *v.* Hix, 54 Vt. 478; McCurdy *v.* Rogers, 21 Wis. 197.

As to the measure of damages, see Railroad Co. *v.* Richardson, 135 Mass. 473; Skaaraas *v.* Finnegan, 31 Minn. 48; White *v.* Madison, 26 N. Y. 117; Dung *v.* Parker, 52 N. Y. 494, 500; Farmers' Trust Co. *v.* Floyd, 47 Ohio St. 525.

β. **Rules applicable only where alleged principal could be such.** The rules last stated are applicable only where the alleged principal was ascertained and existing at the time the contract was made, and might have been in fact principal.

*Here the doctrine of ratification is important. When a prin- [110
cipal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification: for "ratification must be by an existing person on whose behalf a contract might have been made at the time" (*h*).[92]

There fall under this head contracts entered into by professed agents on behalf of wholly fictitious persons, or uncertain persons or sets of persons with whom no contract can be made by the description given, persons in existence but incapable of contracting, and lastly (which is in practice the most important case) proposed companies which have not yet acquired a legal existence (*i*).[93] Now when a principal is named who might have authorized the contract, there is at the time of the contract a possibility of his being bound by subsequent ratification. But when the alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the pro-

(*h*) Per Willes J. and Byles J. *Kelner* v. *Baxter* (1866) L. R. 2 C. P. 174, 185, 36 L. J. C. P. 94; *Scott* v. *Lord Ebury* (1867) L. R. 2 C. P. 255, 267, 36 L. J. C. P. 161. When ratification is admitted, the original contract is imputed by a fiction of law to the person ratifying; and the fiction is not allowed to be extended beyond the bounds of possibility. Perhaps there is no solid reason for the rule, but it is an established one.

(*i*) *Kelner* v. *Baxter* (1866) L R. 2 C. P. 174, and authorities there referred to: *Scott* v. *Lord Ebury* (1867) *ib.* 255; *Empress Engineering Co.* (1880) 16 Ch. Div. 125, overruling *Spiller* v. *Paris Skating Rink Co.* (1878) 7 Ch. D. 368. Companies have been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract. Action upon such an agreement by the company, under the mistaken belief that it is binding, cannot be treated as evidence of a new agreement: *Re Northumberland Avenue Hotel Co.* (1886) 33 Ch. Div. 16, 54 L. T. 777.

[92] It is essential that the party ratifying should be able to do the act ratified not merely at the time the act was done, but also at the time of ratification. Cook *v.* Tullis, 18 Wall. 332, 338. National Works *v.* Oconto Water Co., 68 Fed. Rep. 1006; Hardware Co. *v.* Deere, 53 Ark. 140; McCracken *v.* San Francisco, 16 Cal. 591; McDonald *v.* McCoy, 121 Cal. 55; McArthur *v.* Times Printing Co., 48 Minn. 319; Pollock *v.* Cohen, 32 Ohio St. 514; Railroad *v.* Christy, 79 Pa. 54; Milford *v.* Water Co., 124 Pa. 610.

[93] Winters *v.* Hub Mining Co., 57 Fed. Rep. 287; Abbott *v.* Hapgood, 150 Mass. 248; Carmody *v.* Powers, 60 Mich. 26; Wonderly *v.* Booth, 36 N. J. L. 250; Weatherford Co. *v.* Granger, 86 Tex. 350; 36 Am. L. Reg. N. S. 545, 560, 609, 673.

But a note given by a corporation, after its formation, for services rendered previously was held valid in Smith *v.* Hartford Water Works, 73 Conn. 626.

fessed agent. It is construed accordingly *ut res magis valeat quam pereat,* and he is held to have contracted in person (*k*).[94]

This principle has been carried so far that in a case where certain persons, churchwardens and overseers of a parish, covenanted "for themselves and for their successors, churchwardens and overseers of
111] the parish," and there was *an express proviso that the covenant should not bind the covenantors personally, but was intended to bind the churchwardens and overseers of the parish for the time being as such churchwardens, &c., but not otherwise, it was held that since the funds of the parish could not be bound by the instrument in the manner intended, the effect of the proviso was to make no one liable on the covenant at all, and therefore the proviso was repugnant and void, and the covenantors were personally liable (*l*).[95]

Accordingly the proper course for the other contracting party is to sue the agent as principal on the contract itself, and he need not resort to the doctrine of implied warranty (*m*).[96] And as the agent

(*k*) *Kelner* v. *Baxter* (1866) L. R. 2 C. P. at pp. 183, 185.

(*l*) *Furnival* v. *Coombes* (1843) 5 M. & Gr. 736, 12 L. J. C. P. 265. But the doctrine of this case will certainly never be extended (see *Williams* v. *Hathaway* (1877) 6 Ch. D. 544); and *qu.* whether it would apply to an instrument not under seal. It is clearly competent to the parties to such an instrument to make its operation as a contract conditional on any event they please; and in such a case as this why may they not agree that nobody shall be bound if the principal cannot be? In *Kelner* v. *Baxter* oral evidence was offered that such was the intention, but was rejected as contrary to the terms of the writing sued upon.

(*m*) *Kelner* v. *Baxter,* note (*k*), last page. Cp. *West London Commercial Bank* v. *Kitson* (1884) 12 Q. B. D. 157, where a bill was accepted by directors on behalf of a company which had no power to accept bills; the liability was put on the ground of deceit in 13 Q. B. Div. 360, 53 L. J. Q. B. 345.

[94] N. Y. & C. Steamship Co. *v.* Harbison, 16 Fed. Rep. 688; Allen *v.* Pegram, 16 Ia. 163; Woodbury *v.* Blair, 18 Ia. 572; Blakeley *v.* Benneke, 59 Mo. 193; Codding *v.* Munson, 52 Nebr. 580; Learn *v.* Upstill, 52 Nebr. 271; Wonderly *v.* Booth, 36 N. J. L. 250; cp. Jefts *v.* York, 10 Cush. 392. See also Knickerbocker *v.* Wilcox, 83 Mich. 200.

[95] In Bank *v.* Dix, 123 Mass. 148, the instrument sued upon was in the form of a promissory note, beginning, "We as trustees but not individually promise to pay," and was signed, "A., B. and C. trustees." The makers were held not personally liable. The court said: "Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose, and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law."

[96] Patrick *v.* Bowman, 149 U. S. 411, 412: Lewis *v.* Tilton, 64 Ia. 220.

can be sued, so it is apprehended that, in the absence of fraud, he might sue on the contract in his own name.

When professed agent may be his own unnamed principal. A slightly different case is where a man professes to contract as agent, but without naming his principal. He is then (as said above) *prima facie* personally liable in his character of agent. But even if the contract is so framed as to exclude that liability (and therefore any correlative right to sue), he is not precluded from showing that he himself is the principal and suing in that character. This was decided in *Schmaltz* v. *Avery* (*n*).[97] The action was on a charter-party. The charter-party in terms stated that *it was made by Schmaltz & [112 Co. (the plaintiffs) as agents for the freighters; it then stated the terms of the contract, and concluded in these words: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." This clause was not referred to in the declaration, nor was the character of the plaintiff as agent mentioned, but he was treated as principal in the contract. At the trial it was proved that the plaintiff was in point of fact the real freighter. Before the Court in banc the cases of *Bickerton* v. *Burrell* and *Rayner* v. *Grote* (*o*) were relied on for the defence, but it was pointed out that in those cases the agent named a principal on the faith of whose personal credit the other party might have meant to contract. Here "the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters [could] be surmised. . . . The plaintiff might contract as agent for the freighter, whoever the freighter might turn out to be, and might still adopt that character of freighter himself if he chose" (*p*).[98] And conversely, a man who has contracted in this form may nevertheless be sued on the contract as his own undisclosed principal, if the

(*n*) (1851) 16 Q. B. 655 (the statement of the facts is taken from the judgment of the Court, p. 658), 20 L. J. Q. B. 228.

(*o*) See pp. *106—*108, above.

(*p*) In a later case in the Exchequer Chamber (*Sharman* v. *Brandt* (1871) L. R. 6 Q. B. 720, 40 L. J. Q. B. 312), there are some expressions not very consistent with this, but they were by no means necessary for the decision. Moreover *Schmaltz* v. *Avery* was not cited.

97 But see Paine *v.* Loeb, 96 Fed. Rep. 164 (C. C. A.).

98 See also Huffman *v.* Long, 40 Minn. 473; cp. Ellsworth *v.* Randall, 78 Ia. 141.

But where A. refused to sell goods to B. personally, and B. falsely stating that he was acting as agent for another, induced A. to let him have the goods, the sale was held void. Rodliff *v.* Dallinger, 141 Mass. 1; cp. Kayton *v.* Barnett, 116 N. Y. 625.

other party can show that he is in truth the principal, but not otherwise (*q*). In the same manner it is open to one of several persons with whom a contract was nominally made to show that he alone was the real principal, and to sue alone upon the contract accordingly (*r*).

113] *II. Artificial Persons.

Nature of artificial persons: In a complex state of civilization, such as that of the Roman Empire, or still more of the modern Western nations, it constantly happens that legal transactions have to be undertaken, rights acquired and exercised, and duties incurred by or on behalf of persons who are for the time being charged with offices of a public nature involving the tenure and administration of property for public purposes, or interested in carrying out a common enterprise or object. This enterprise or object may or may not be of a kind likely to be worked out within a definite time, and may or may not further involve purposes and interests of a public nature. The rights and duties thus created as against the world at large are wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions. Those persons deal with interests beyond their own, though in many cases including or involving them, and it is not to their personal responsibility that third parties dealing with them are accustomed to look.

This distinction (the substantial character of which it is important to bear in mind) is conveniently expressed in form by the Roman invention, adopted and largely developed in modern systems of law, of treating the collective persons who from time to time hold such a position — or, in some cases and according to some opinions, the property or office itself — as a single and continuous artificial person (*s*) or ideal subject of legal capacities and duties. It is possible to regard the artificial person as a kind of fictitious substance conceived as supporting legal attributes; and in fact this was, until lately, the prevailing theory of modern civilians on the Continent (*t*).

114] But it is equally *possible, and it seems not only more philo-

(*q*) *Carr* v. *Jackson* (1852) 7 Ex. 382, 2 L. J. Ex. 137.

(*r*) *Spurr* v. *Cass* (1870) L. R. 5 Q. B. 656, 39 L. J. Q. B. 249.

(*s*) Fr. *corps* or *être moral*, *personne morale* (but this does not necessarily import capacity to sue or be sued in a corporate name); Germ. *juristische Person*; Ital. *ente morale*. Kent, Comm. 2. 268, uses the term "moral person," but it has not been generally adopted by English writers. Observe that the English term "artificial" is not the same as "fictitious."

(*t*) See Prof. Maitland's Introduction to Gierke's Political Theories of the Middle Age, Cambridge 1900; further references there, at p. xxvi.

sophical but more business-like, to hold that what we call the artificial identity of a corporation is within its own sphere and for its own purposes just as real as any other identity (*u*). The corporation becomes, within the limits assigned to its existence, "a body distinct from the members composing it, and having rights and obligations distinct from those of its members." [99] This is often called a fiction: but it represents a class of facts not confined to legal usage or legal purposes. In the case of an ordinary partnership the firm is treated by mercantile usage as an artificial person, though not recognized as such by English law; and other voluntary and unincorporated associations are constantly treated as artificial persons in the language and transactions of every-day life. An even more remarkable instance is furnished by the artificial personality which is ascribed to the public journals by literary custom or etiquette,

(*u*) In the United States a corporation duly created by the laws of any state is treated as a person dwelling in, and therefore a citizen of, that state within the meaning of the constitutional provision which enables the Federal courts to entertain suits between citizens of different states. See *Marshall* v. *Baltimore and Ohio Railr. Co.* 1853) 16 Howard, 314. [Railway Co. *v.* James, 161 U. S. 545; Railway Co. *v.* Louisville Trust Co., 174 U. S. 552, 565. A corporation is not, however, a citizen within art. 4 sec. 2 of the Constitution. Blake *v.* McClung, 172 U. S. 240, 176 U. S. 59, 65. Nor within the 14th amendment. Paul *v.* Virginia, 8 Wall. 168; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 561. But the property rights of a corporation are protected under the 14th amendment, as if it were a "person." Railway Co. *v.* Ellis, 165 U. S. 150; Smyth *v.* Ames, 169 U. S. 466.] On the philosophy of legal personality cp. R. Wallaschek, Studien zur Rechtsphilosophie, Leipzig, 1889.

[99] It is "too familiar to everybody to require being formally stated and explained that a corporation is a person in law distinct from all the members composing it;" per Shaw, C. J., in Bank *v.* Morton, 4 Gray, 156, 159; Society of Practical Knowledge *v.* Abbott, 2 Beav. 559, 567; Graham *v.* Railroad Co., 102 U. S. 148, 160; Edison *v.* Hawthorne, 108 Fed. Rep. 839, 840; Moore, &c. Co. *v.* Towers Co., 87 Ala. 206; Gorham *v.* Gilson, 28 Cal. 479; Buffalo, &c. Co. *v.* Medina Gas Co., 162 N. Y. 67, 76; Bank *v.* Irebein Co., 59 Ohio St. 316; Button *v.* Hoffman, 61 Wis. 20. But see Ohio *v.* Standard Oil Co., 49 Ohio St. 137; Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 200.

A deed of lands belonging to a corporation, executed by all the members, does not pass the title of the corporation. Gashwiler *v.* Willis, 33 Cal. 11, 19; Wheelock *v.* Moulton, 15 Vt. 519. But see Phœnix Assur. Co. *v.* Davenport, 16 Tex. Civ. App. 283; McElroy *v.* Percheron Horse Co., 96 Wis. 317. And the covenant of all the members that the corporation will do a certain thing is not binding as the covenant of the corporation. Tileston *v.* Newell, 13 Mass. 406; Peabody *v.* Flint, 6 Allen, 52, 55. And see Grant on Corporations, 15; Bristol Milling & Manufacturing Co. *v.* Probasco, 64 Ind. 406.

If a single stockholder acquires all the shares of a corporation, it does not dissolve the corporation, and it, not he, is the owner of the corporate property. Keys *v.* Weaver, 95 Ia. 13; Louisville Banking Co. *v.* Eisenman, (Ky.) 40 Am. & Eng. Corp. Cas. 243, and note; Randall *v.* Dudley, 111 Mich. 437; Harrington *v.* Connor, 51 Neb. 214.

and is so familiar in writing and conversation that its curiosity most commonly escapes attention. The existence of these artificial persons by private convention, if we may so call them, shows that, if indeed there be any fiction in the matter, it is not superfluous or arbitrary (*w*).

Corporations in the Common Law. In the Common Law no speculative opinion on the subject has been definitely adopted (*x*), though it seems likely that only Coke's incapacity for grasping any gen-
115] eral *theory, good or bad, saved us from what is now known as the "fiction theory" among Continental publicists (*y*).

In our authorities and practice the necessary marks of legal corporate existence are a recognized collective name (which however need not be expressly conferred at the outset), and capacity to sue, be sued, and do other acts in the law, in that name.

Perpetual succession, that is, the existence of a body independent of the natural life of any one or more members, and a common seal to authenticate the corporate acts, are consequences or incidents of incorporation rather than primary constituents. A corporation legally qualified to act as such can exist only with the sanction of the State, which may be expressed in England by a royal charter (*z*) or by statute. The statutory sanction may take the form—as in the familiar case of the Companies Acts—of authorizing persons who are so minded to constitute themselves into corporations by fulfilling specified general conditions. In this class of cases, at any rate, it would seem that the operative registration, or other appointed formality, is not properly considered as involving fiction of any kind, but is the official recognition and regulation of substantial matters of fact. With us the official sanction is a matter of procedure and public convenience. In the Roman law of the Empire it was an offence to form any kind of association without public authority;

(*w*) "The orthodox doctrine of the common law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen". Harv. Law Rev. xv. 311.

(*x*) Hobbes gives an admirable exposition of the purely individualist view in the 16th chapter of his Leviathan, but of course without regard to authority.

(*y*) The slight reference to Roman law in the *Sutton's Hospital case*, 10 Co. Rep. at fo. 29 *b*, shows that, if any theory had been formulated, it would have been the then received one of the civilians.

(*z*) The want of this has to be supplied in some cases by the fiction of a lost grant: Blackst. Comm. i. 473. See the whole chapter (Book 1. ch. 18) for a literary exposition of the Common Law doctrine as it stood in the latter part of the 18th century.

thus the early Christian churches were exposed to penalties by the mere fact of being *collegia illicita*. This principal has largely survived in the modern public law of the Continent; only the faintest signs of any attempt to imitate it occur in ours (*a*).

*The holders of ecclesiastical benefices and dignities are said, [116 by an analogy which is of no great antiquity, to be "corporations sole." [1] Little or no useful result seems to be attained, for the alleged corporate character of a parson does not prevent the freehold of the church from being in abeyance when he dies, though a grant to an existing parson and his successors is effectual. By a still more doubtful extension of the analogy, the Crown is said to be a corporation sole (*b*);[2] and the same description has been applied by statute to the holders of a certain number of public offices (*c*). It may be sufficient to observe, so far as the principle is concerned, that for many centuries the Vatican and its contents—to say nothing of the spiritual powers and other formal temporal possessions of the Holy See—have been held under an absolutely unique system of succession, but it has never occurred to any one to call the Pope a corporation sole. At any rate, the persons whom we have to call corporations sole in England can do very little in their corporate capacity, and in particular cannot bind or even benefit their official successors by contract, except in one or two peculiar cases (*d*). We therefore have nothing to learn in that quarter for the purposes

(*a*) It is said to be an offence to "assume to act as a corporation," but this is far short of the Roman prohibition.

(*b*) The theory of the King's "body politic" is given at some length in Plowd. 213. It would seem to have been a fashionable novelty at the time.

(*c*) See Prof. Maitland, The Corporation Sole, L. Q. R. xvi. 335; The Crown as Corporation, *ib.* xvii. 131. The notion of a corporation sole appears to date only from the 16th century.

(*d*) Generally "bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but it will go to the executors." *Arundel's case*, Hob. 64; 20 E. iv. 2, pl. 7; *Howley* v. *Knight* (1849) 14 Q. B. 240, 19 L. J. Q. B. 3. "Regularly no chattel can go in succession in a case of a sole corporation": Co. Litt. 46 *b*; [See Overseers *v.* Sear, 22 Pick. 122, 126.] it was otherwise in the case of the head of a religious house, as he could not make a will. Ro. Ab. 1. 515. See the old authorities summed up in Blackst. Comm. ii. 431—433, who attempts to find reasons. A curious recent case where a fund of stock was vested in certain rectors and their successors by a private Act is *Power* v. *Banks* [1901] 2 Ch. 487, 70 L. J. Ch. 700.

1 See. *e.g.*, Terrett *v.* Taylor, 9 Cr. 43; Church Wardens *v.* Mayor, 82 Ga. 656; Weston *v.* Hunt, 2 Mass. 500; Brunswick *v.* Dunning, 7 Mass. 445; Overseers *v.* Sear, 22 Pick. 122, 125–126.

2 The Governor of a State has been held to be a corporation sole. The Governor *v.* Allen, 8 Humph. 176.

of this work, and we may practically confine our attention to corporations aggregate.

We have to ascertain what contracts corporate bodies can make, 117] and how they are to be made. The second of *these questions is reserved for the following chapter on the Form of Contracts. The first cannot be adequately treated except in connexion with a wider view of the capacities, powers, and liabilities of corporations in general.

Natural limitations of capacities and liabilities of corporation. The capacities of corporations are limited

(i) By natural possibility, *i. e.*, by the fact that they are artificial and not natural persons:

(ii) By legal possibility, *i. e.*, by the restrictions which the power creating a corporation may impose on the legal existence and action of its creature.

First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons. The requirement of a common seal (of which elsewhere) is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is however enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no executive act except by an agent; and a corporate seal is only one way of showing that the person entrusted with it is an authorized agent of the corporate body. We say that executive acts of a corporation must be done by an agent. It does not seem necessary or plausible to extend the proposition to deliberative acts and resolutions. When, for example, the assembled Fellows of a College resolve to grant a lease of certain college land, their resolution, whether unanimous or by the statutable majority, would seem to be the act not of agents but of the College itself. For if the Fellows voting are agents, who authorized them, and when? But when they proceed to order the affixing of the College seal to the lease, then the officer of the College who is directed to affix it is an appointed agent, whether he is himself a member of the governing body or not. There seem also to be cases in which the permanent authority of the head or other 118] acting member *of a corporation is derived not from any authority specifically conferred on him, but from the original constitution of the corporation. Here, however, the conception of an implied agency is convenient and fairly applicable. Indeed, the Common Law doctrine of agency is so wide and flexible that we practically tend to regard all acts whatever done in the name of a

corporation as derived from some authority, general or special, vested in the natural persons by whom they are done. This appears not to be a strictly correct view, but it has largely saved us from the speculative questions which have vexed Continental jurists ever since the thirteenth century, and probably also from much more serious errors.

A corporation obviously cannot be subjected to death, corporal punishment, or imprisonment, though it can be fined or made to pay damages as easily as a natural person. Further, it is understood that a corporation is incapable of committing the graver kinds of crime, such as treason, felony, perjury, or offenses against the person (*e*), as well as of being punished for them. There can be no real authority to commit such acts. Any or all of the members or officers of a corporation who should commit acts of this kind (*e. g.*, should levy war against the King) under cover of the corporate name and authority would be individually liable to the ordinary consequences. "Offences, certain offences of commission, are the offences of indi*viduals, not of corporations" (*f*). Nor [119 can a corporation undertake duties which, though it might be strictly possible for a corporation to perform them by its officers or agents, are on the whole of a personal kind (*g*).

As to acts of agents. On the other hand, it is subject to the same liabilities as any other employer for the acts, neglects, and defaults of its agents done in the course of their employment (*h*);[3] and con-

(*e*) *Reg.* v. *G. N. of Eng. Ry. Co.* (1846) 9 Q. B. 315, 326, 16 L. J. M. C. 16; nor, it is said, can it be excommunicated, for it has no soul: 10 Co. Rep. 32 *b;* the ultimate authority for this was a decree of Innocent IV. at the Council of Lyons in 1245; but otherwise as to interdict: Gierke, Deutsche Genossenschaftsrecht, iii. 348–9. So a corporation cannot do homage: Co. Litt. 66 *b*. Nor can it be subject to the jurisdiction of a customary court whose process is exclusively personal: *London Joint Stock Bank* v. *Mayor of London* (1875) 1 C. P. D. 1, 45 L. J. C. P. 213, in C. A. chiefly on other grounds, 5 C. P. Div. 494; affirmed on this point in the House of Lords, 6 App. Ca. 393. [State *v.* Railroad Co., 23 Ind. 362; State *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611.] We are not aware that any English writer has thought it necessary to state in terms that a corporation cannot be married or have any next of kin. The statement is to be found in Savigny, Syst. 3. 239; but is in part not quite so odd as it looks, as in Roman law *patria potestas* and all the family relations arising therefrom might be acquired by adoption.

(*f*) Bramwell L. J. 5 Q. B. D. at p. 313. Cp. *Mayor of Manchester* v. *Williams* [1891] 1 Q. B. 94, 60 L. J. Q. B. 23.

(*g*) *Ex parte Swansea Friendly Society* (1879) 11 Ch. D. 768, 48 L. J. Ch. 577.

(*h*) Difficulties, formal and material, which used to be entertained

[3] "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for

versely it may sue in its corporate capacity for a libel reflecting on the management of its business (*i*). And the same principle is extended to make it generally subject to all liabilities incidental to its corporate existence and acts, though the remedy may be in form *ex delicto* or even criminal.

Indictable in some cases. Although it cannot commit a real crime, "it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large," and may be indicted for a nuisance produced by the execution of its works or conduct of its business in an improper or unauthorized manner, as for obstructing a highway or navigable river (*k*).[4] A corporation may even

on this head are now removed. Even malicious prosecution is not now thought to be an exception; see *Cornford* v. *Carlton Bank* [1900] 1 Q. B. 22, 68 L. J. Q. B. 1020, C. A. In the Middle Ages the possibility of a corporation committing a delict was disputed by the canonists but generally maintained by the civilians: Gierke, *op. cit.* 402.

(*i*) *South Hetton Coal Co.* v. *N. E. News Assoc.* [1894] 1 Q. B. 133, 63 L. J. Q. B. 293, C. A.

(*k*) *Reg.* v. *G. N. of Eng. Ry. Co.* (1846) 9 Q. B. 315, per Cur. p. 326, 16 L. J. M. C. 16.

fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel." Bank *v.* Graham, 100 U. S. 699, 702; Railway Co. *v.* Harris, 122 U. S. 597; Salt Lake City *v.* Hollister, 118 U. S. 256; Railroad Co. *v.* Fifth Baptist Church, 108 U. S. 317, 330; Merchants' Bank *v.* State Bank, 10 Wall. 605, 645; Railroad Co. *v.* Quigley, 21 How. 202; Falk *v.* Curtis Pub. Co., 98 Fed. Rep. 989; Southern Ex. Co. *v.* Platten, 93 Fed. Rep. 936; Jordan *v.* Railroad Co., 74 Ala. 85; Western News Co. *v.* Wilmarth, 33 Kan. 510; Maynard *v.* Insurance Co., 34 Cal. 48; Railroad Co. *v.* Dalby, 19 Ill. 353; Goodspeed *v.* Bank, 22 Conn. 530; Copley *v.* Grover S. M. Co., 2 Woods, 494; Vinar *v.* Insurance Co., 27 La. Ann. 367; Carter *v.* Howe Machine Co., 51 Md. 290; Reed *v.* Bank, 130 Mass. 443; Ramsden *v.* Railroad Co., 104 Mass. 117; Fogg *v.* Boston & Lowell R. Co., 148 Mass. 513; Nims *v.* Mt. Hermon School, 150 Mass. 177; Wachsmuth *v.* Bank, 96 Mich. 426; Williams *v.* Insurance Co., 57 Miss. 759; Boogher *v.* Life Assn. of America, 75 Mo. 319; Ricord *v.* Railroad Co., 15 Nev. 167; Brokaw *v.* Railroad Co., 32 N. J. L. 328; Vance *v.* Railroad Co., 32 N. J. L. 334; McDermott *v.* Evening Journal Assn., 44 N. J. L. 430; Buffalo Oil Co. *v.* Standard Oil Co., 106 N. Y. 669; Wheless *v.* Bank, 1 Baxter, 469; Zinc Carbonate Co. *v.* Bank, 103 Wis. 125. See also Gaslight Co. *v.* Lansden, 172 U. S. 534. A municipal corporation could not be liable for a libel, was held in Howland *v.* Maynard, 159 Mass. 434. But see *contra*, McLay *v.* Bruce Co., 14 Ont. C. P. Div. 398.

Corporations are liable in exemplary damages for malicious or oppressive acts, and acts of wanton recklessness. Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 325; Warner *v.* Southern Pac. R. Co., 113 Cal. 105; Railroad Co. *v.* Rogers, 38 Ind. 116; Wheeler, etc., Co. *v.* Boyce, 36 Kan. 350; Goddard *v.* Railroad Co., 57 Me. 202; Railroad Co. *v.* Blocher, 27 Md. 277; Railroad Co. *v.* Burke, 53 Miss. 200; Caldwell *v.* Steamboat Co., 47 N. Y. 282; Railroad Co. *v.* Dunn, 19 Ohio St. 162; Brigham *v.* Lipman, etc., Co., 40 Oreg. 363; Lake Shore R. Co. *v.* Rosenzweig, 113 Pa. 519; Quinn *v.* South Carolina R. Co., 29 S. C. 381; Hays *v.* Railroad Co., 46 Tex. 272. Cp. Lake Shore R. Co. *v.* Prentice, 147 U. S. 101.

[4] United States *v.* John Kelso Co., 86 Fed. Rep. 304; Railroad Co. *v.* Commonwealth, 80 Ky. 137; Commonwealth *v.* Pulaski Co., 92 Ky. 197; State *v.* Portland, 74 Me. 268; Commonwealth *v.* Railroad Co., 4 Gray, 22; People *v.* White Lead Works, 82 Mich. 471; State *v.* Railroad Co., 3 Zabr. 366;

be liable by prescription, or by having accepted such an obligation in its charter, to repair highways, &c., and may be indictable for not doing it (*l*).[5] A corporation carrying on business may likewise become liable to penalties imposed by any statute regulating that business, if it appears from the language or subject-matter of the statute that corporations were meant to be included (*m*).[6] A steamship company has been *held (on the terms of the particular [120 statute, as it seems) to be not indictable under the Foreign Enlistment Act of Geo. 3, and therefore not entitled to refuse discovery which in the case of a natural person would have exposed him to penalties under the Act (*n*). As to the difficulty of imputing fraudulent intention to a corporation, which has been thought to be peculiarly great, it may be remarked that no one has ever doubted that a corporation may be relieved against fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive, and it is equally necessary for the purpose of doing justice in both cases to impute to the corporation a certain mental condition—of intention to produce a belief in the one case, of belief produced in the other—which in fact can exist only in the individual mind of the member or servant of the corporate body who acts in the transaction (*o*). Lord Langdale found no difficulty in speaking of two

(*l*) See Grant on Corporations, 277, 283; Angell & Ames on Corporations, §§ 394–7; Wms. Saund. 1. 614, 2. 473.

(*m*) *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880) 5 App. Ca. 857; see per Lord Blackburn at p. 869. A corporation cannot sue as a common informer without special statutory authority: *Guardians of St. Leonard's, Shoreditch* v. *Franklin* (1878) 3 C. P. D. 377.

(*n*) *King of Two Sicilies* v. *Wilcox* (1850) 1 Sim N. S. 335, 19 L. J. Ch. 488.

(*o*) See per Lord Blackburn, 3 App. Ca. 1264. A company may "feel aggrieved," Companies Act, 1880, 43 Vict. c. 19, s. 7, sub-s. 5.

State *v.* Passaic Soc., 54 N. J. L. 260; Delaware, etc., Co. *v.* Commonwealth, 60 Pa. 367; Northern Ry. *v.* Commonwealth, 90 Pa. 300; Railroad Co. *v.* State, 3 Head, 523; State *v.* Railroad Co., 27 Vt. 103.

Aliter, where the common law as to crimes and criminal procedure having been abolished, the legislation substituted makes no provision for bringing an indicted party into court by summons, or otherwise than by actual arrest of his person. State *v.* Railroad Co., 23 Ind. 362; State *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611.

5 Railroad Co. *v.* Commonwealth, 80 Ky. 147; Commonwealth *v.* Central Bridge Co., 12 Cush. 242; Railroad Co. *v.* State, 32 N. H. 215; Susquehanna, etc., Co. *v.* People, 15 Wend. 267; People *v.* Railroad Co., 134 N. Y. 671; Railway Co. *v.* Commonwealth, 101 Pa. 192; Commonwealth *v.* Railroad Co., 165 Pa. 162; State *v.* Murfreesboro, 11 Humph. 217; Nashville, etc., Turnpike Co. *v.* State, 96 Tenn. 249. A corporation may be indicted for Sabbath-breaking. State *v.* Railroad Co., 15 W. Va. 362.

6 Stewart *v.* Waterloo Turn Verein, 71 Ia. 226.

railway companies as "guilty of fraud and collusion," though not in an exact sense (*p*).

Is not bound by acts of even all its members when of a non-corporate character. However the members of a corporation cannot even by giving an express authority in the name of the corporation make it responsible, or escape from being individually responsible themselves, for a wrongful act which though not a personal wrong is such that if lawful it could not have been a corporate act (*q*).[7] Such is a trespass in removing an obstruction of an alleged highway. For the right by which the act has to be justified is the personal right to
121] use the highway, and a corporation as such cannot use *a highway. Likewise it is not competent to the governing body or the majority, or even to the whole of the members for the time being, of a corporation constituted by a formal act and having defined purposes, to appropriate any part of the corporate funds to their private use in a manner not distinctly warranted by the constitution; for it is not to be supposed that *all the members* of the corporation are equivalent to *the corporation* so that they can do as they please with corporate property.[8] A corporation does not exist merely for the sake of the members for the time being. Lord Langdale held on this principle that the original members of a society incorporated by charter, who had bought up the shares of the society by agreement among themselves, were bound to account to the society for the full value of them (*r*).[9] The fallacy of the assumption that a corporation

(*p*) 12 Beav. 382.

(*q*) *Mill* v. *Hawker* (1874) L. R. 9 Ex. 309, 318, 44 L. J. Ex. 49; no judgment on this part of the case in Ex. Ch. L. R. 10 Ex. 92. It might be, by statute, the right or duty of a corporation to remove obstructions, and the real question here was whether a highway board had such a power or duty.

(*r*) *Society of Practical Knowledge* v. *Abbott* (1840) 2 Beav. 559, 567, 50 R. R. 288, 294. Cp. Sav. Syst. 3. 283, 335. But it may be otherwise if the corporation has no definite constitution and no rules prescribing the application of its property. Such cases are sometimes met with: *Brown* v. *Dale* (1878) 9 Ch. D. 78.

7 A municipal corporation is not liable for the tortious act of the officers or agents, where the act is wholly *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to the matter under any circumstances. Boyle *v.* Albert Lea, 74 Minn. 230.

8 *Supra*, note 99. Redmond *v.* Dickerson, 1 Stockt. 507, 514, 515. "The directors of a corporation, even with the consent of the stockholders, are not authorized to discontinue the corporate business and to distribute the capital stock among the stockholders, unless they are specially authorized to do so by a legislative act, or by a decree of the Court of Chancery dissolving the corporation in the manner prescribed by the statutes." Ward *v.* Insurance Co., 7 Paige, 294; Grant *v.* Southern Contract Co., 104 Ky. 781.

9 See also London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380; Ashton *v.* Dashaway Assoc., 84 Cal. 61; Railroad Co. *v.* Arnold, 167 N. Y. 368.

has no rights as against its unanimous members is easily exposed by putting the extreme case of the members of a corporation being by accident reduced till there is only one left, who thereupon unanimously appropriates the whole corporate property to his own use (*s*).

Limitation of corporate capacities by positive rules. The powers of a corporation are necessarily limited in some directions by the nature of things. There remains the question whether there are any general rules of law limiting them farther and otherwise. If our law had committed itself to the doctrine that the personality of a corporation is a mere fiction of the sovereign power, it might have been held as a natural consequence that a corporation could in no case have any powers except such as were conferred on it, expressly or by necessary implication, by the same act which created it. But this did not happen, and *the judicial discussion of the subject has been [122 evoked by the rapid growth of incorporated commercial and industrial societies in modern times, and guided by reasons founded not in the nature of a corporation in itself, but in the need for safeguarding the interests partly of the individual members of companies, regarded as substantially partners in a joint undertaking, and partly of outside creditors dealing with companies, and looking to their corporate funds and credit, on the faith of apparently authorized acts and promises of their directors or agents. These two classes of interests are to some extent opposed, and the law has not reached the fairly settled condition in which it now stands without considerable fluctuations of opinion. On these, however, it is no longer needful to dwell at length.

"At common law a corporation created by the King's charter has . . . the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to" (*t*), (subject to the corporate acts being sufficient in form, which we are not considering in this place). This rests on authority which, though it seems at times to have been forgotten, has never been disputed (*u*).

Powers of statutory corporations determined by purposes of incorporation. But when a corporation is created directly by special statute, or indirectly by a statute authorizing the formation of a class of cor-

(*s*) Sav. Syst. 3. 329 *sqq.* §§ 97–99. The illustration in our text is given at p. *350, note, with the remark, "Hier ist gewiss Einstimmigkeit vorhanden."

(*t*) Bowen L. J. in *Baroness Wenlock* v. *River Dee Co.* (1883) 36 Ch. D. 675, 685, *n.*

(*u*) *Sutton's Hospital case*, 10 Co. Rep., where it is said (at p. 30 *b*) that when a corporation is duly created, all other incidents are *tacite* annexed.

porations on specified conditions, for purposes declared by the statute, or which the founders of the corporation are required to declare, then the question is different. As to powers expressly conferred on the corporation, or clearly authorized by general provisions, there can be no doubt; when farther powers are claimed, it must be considered what was the intention of the Legislature, and only such
123] powers can be attributed to the *corporation as are necessary or reasonably incident to the fulfillment of the purposes for which it is established. Members of the company have the right to rely on those purposes not being exceeded; the public can ascertain them, and have not any right to hold the company liable for undertakings outside them. On the whole, "where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited" (x)—prohibited in the sense not that penalties or disabilities follow on such an act if done, but that the attempt to do it can from the first have no kind of validity as a corporate act.

Reasons for the limitation, how derived. The reasons for this rule, as we have hinted, are derived (1) from the law of partnership: (2) from principles of public policy.

1. **From partnership law.** In trading corporations the relation of the members or shareholders to one another is in fact a modified (y) contract of partnership, which in view of courts of equity is governed by the ordinary rules of partnership law so far as they are not excluded by the constitution of the company.

Rights of dissenting partners. Now it is a well-settled principle of partnership law that no majority of the partners can bind a dissenting minority, or even one dissenting partner, to engage the firm in transactions beyond its original scope.[10] In the case, therefore, of a

(x) Lord Blackburn in *A. G.* v. *G. E. Ry. Co.* (1880) 5 App. Ca. 473, 481, stating the effect of *Ashbury Ry. Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ex. 185, a leading case on the Companies Act, 1862, but not confined to the construction of that Act. See *Baroness Wenlock* v. *River Dee Co.* (1885) 10 App. Ca. 354, 360, 54 L. J. Q. B. 577.

(y) Namely by provisions for transfer of shares, limited liability of shareholders, and other things which cannot (at least with convenience or completeness) be made incident to a partnership at common law.

[10] Abbott *v.* Johnson, 32 N. H. 9; Livingston *v.* Lynch, 4 Johns. Ch. 573; McFadden *v.* Leeka, 48 Ohio St. 513; Jennings' Appeal, (Pa.) 16 At. Rep. 19.

corporation whose members are as between themselves partners in the business carried on by the corporation, any *dissenting [124 member is entitled to restrain the governing body or the majority of the company from attempting to involve the company in an undertaking which does not come within its purposes as defined by its original constitution.[11] Courts of equity have been naturally called upon to look at the subject chiefly from this point of view, that is, as giving rise to questions between shareholders and directors, or between minorities and majorities. Such questions do not require the court to decide whether an act which dissentients may prevent the agents of the company from doing in its name might not nevertheless, if so done by them with apparent authority, be binding on the corporate body, or a contract so made be enforceable by the other party who had contracted in good faith. This distinction was not always kept in sight.

Doctrine as to limited agency. But further, according to the law of partnership a partner can bind the firm only as its agent: his authority is *prima facie* an extensive one (*z*), but if it is specially re-

(*z*) James L. J. *Baird's case* (1870) L. R. 5 Ch. 733; Story on Agency, §§ 124, 125, adopted by the Judicial Committee in *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. 152, 195; Partnership Act, 1890, ss. 5—8.

[11] Mowrey *v.* Railroad Co., 4 Biss. 78; Byrne *v.* Schuyler, 65 Conn. 336; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Harding *v.* American Glucose Co., 182 Ill. 551; Chicago *v.* Cameron, 120 Ill. 447; Knottsville Mill Co. *v.* Mattingly, 18 Ky. L. Rep. 246; Stewart *v.* Erie, etc., Transportation Co., 17 Minn. 348; March *v.* Railroad Co., 43 N. H. 515; Rabe *v.* Dunlap, 51 N. J. Eq. 40; Mills *v.* Central Railroad, 41 N. J. Eq. 1; Black *v.* Canal Co., 24 N. J. Eq. 455; Elkins *v.* Railroad Co., 36 N. J. Eq. 5; Zabriskie *v.* Railroad Co., 18 N. J. Eq. 178; Kean *v.* Johnson, 1 Stockt. 401; Wiswall *v.* Plank Road Co., 3 Jones Eq. 183; Carter *v.* Producers' Oil Co., 164 Pa. 463; Stevens *v.* Railroad Co., 29 Vt. 545. But see Waldoborough *v.* Railroad Co., 84 Me. 469.

A subscriber for stock in a corporation is released from his subscription by a subsequent fundamental alteration of the organization or purpose of the corporation. Snook *v.* Georgia Imp. Co., 83 Ga. 61; McCray *v.* Railroad Co., 9 Ind. 358; Banet *v.* Railroad Co., 13 Ill. 504, 511; Katama Land Co. *v.* Jernegan, 126 Mass. 155; Union Lock Co. *v.* Towne, 1 N. H. 44; Railroad Co. *v.* Croswell, 5 Hill, 383; Bank *v.* Charlotte, 85 N. C. 433; Norwich Lock Mfg. Co. *v.* Hockaday, 89 Va. 557. And see Tuttle *v.* Railroad Co., 35 Mich. 247; Marsh *v.* Fulton, 10 Wall. 676; Railroad Co. *v.* Harris, 27 Miss. 517.

Unless at the time of subscription such change was provided for by the charter itself, or the general law of the State. New Buffalo *v.* Iron Co., 105 U. S. 73; Bates County *v.* Winters, 112 U. S. 325; East Lincoln *v.* Davenport, 94 U. S. 801; Nugent *v.* Supervisors, 19 Wall. 241; Bish *v.* Johnson, 21 Ind. 299; Jewett *v.* Railroad Co., 34 Ohio St. 601.

On dissolution of a corporation the majority cannot against the will of the minority insist on selling the assets to a new corporation, requiring the minority to accept shares in a new corporation or their *pro rata* value in money. Mason *v.* Pewabic Mining Co., 133 U. S. 50.

stricted by agreement between the partners, and the restriction is known to the person dealing with him, he cannot bind the firm to anything beyond those special limits.[12]

In public companies limits of directors' authority presumed to be known. Limits of this kind may be imposed on the directors or other officers of a company by its constitution; and if that constitution is embodied in a special Act of Parliament, or in a deed of settlement or articles of association registered in a public office under the provisions of a general Act, it is considered that all persons dealing with the agents of the corporation must be deemed to have notice of the limits thus publicly set to their authority.[13] The corporation is accordingly not bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined. And it is important to remember that in this view the resolutions
125] of meetings however numerous, *and passed by however great a majority, have of themselves no more power than the proceeding of individual agents to bind the partnership against the will of any single member to transactions of a kind to which he did not by the contract of partnership agree that it might be bound.

Irregularities in the conduct of the internal affairs of the body corporate, even the omission of things which as between shareholders and directors are conditions precedent to the exercise of the directors' authority, will not however invalidate acts which on the face of them are regular and authorized: third parties dealing in good faith are entitled to assume that internal regulations (the observance of which

[12] Radcliffe *v.* Varner, 55 Ga. 427; Knox *v.* Buffington, 50 Ia. 320; Cargill *v.* Corby, 15 Mo. 425; cp. Johnson *v.* Bernheim, 86 N. C. 339.

[13] Pearce *v.* Railroad Co., 21 How. 441, 443; Davis *v.* Railroad Co., 131 Mass. 258, 260; Silliman *v.* Railroad Co., 27 Gratt. 119, 130.

In England joint stock companies may be formed by the execution of two documents, a memorandum of association, and articles of association; the former is the charter of the company, the latter define the powers of the directors as agents of the whole body of shareholders. Acts beyond the memorandum are acts *ultra vires* the company; acts of the directors beyond the articles only are but acts of agents in excess of their authority, and always capable of ratification. Ashbury Ry. Car Co. *v.* Riche, L. R. 7 H. L. 653; see 5 Am. L. Rev. 272. In this country, in some States, statutes also allow the formation of joint stock companies which are not strictly corporations, though they have some of the attributes of corporations. Some of the large express companies are associations of this sort. See Hotel Co. *v.* Jones, 177 U. S. 449; Sanford *v.* Gregg, 58 Fed. Rep. 620; Gregg *v.* Sanford, 65 Fed. Rep. 151; Edwards *v.* Gasoline Works, 168 Mass. 564; Edgeworth *v.* Wood, 58 N. J. L. 463.

An English joint stock company having the faculties and powers incident to a corporation will be treated as a corporation in this country, although Acts of Parliament declare that it shall not be held to be a corporation. Insurance Co. *v.* Massachusetts, 10 Wall. 566.

it may be difficult or impossible for them to verify) have in fact been complied with.[14]

Assent of all the members will remove objections on this head. But it is to be observed that in the ordinary law of partnership there is nothing to prevent the members of a firm, if they are all so minded, from extending or changing its business without limit by their unanimous agreement. As a matter of pure corporation law, the unanimity of the members is of little importance: it may supply the want of a formal act of the governing body in some cases (*a*), but it can in no case do more. As a matter of mixed corporation and partnership law this unanimity may be all-important as being a ratification by all the partners of that which if any one of them dissented would not be the act of the firm: for although the corporate body of which they are members is in many respects different from any ordinary partnership, it is treated, and justly treated, as a partnership for

(*a*) Even this is in strictness hardly consistent with the principle that if A, B, C. . . . . &c., are incorporated to them and their successors by the name of X, then A + B + C + . . . &c. are *not* = X.

[14] Where the authority of the officers of a corporation to bind it by their act depends upon the performance of a condition precedent, or the existence of an extrinsic fact, and the question of compliance with the condition, or of the existence of the fact, is required to be determined by them, or rests peculiarly within their knowledge, their representation (which may sometimes consist simply in doing the act) that the condition has been complied with, or that the fact does exist, may be relied on by one acting in good faith, and is conclusive and binding on the corporation. Commissioners *v.* Aspinwall, 21 How. 539; Bissell *v.* Jeffersonville, 24 How. 287; Moran *v.* Commissioners, 2 Black, 722; Merchants' Bank *v.* State Bank, 10 Wall. 604, 644; St. Joseph *v.* Rogers, 16 Wall. 644; Coloma *v.* Eaves, 92 U. S. 484; Commissioners *v.* Bolles, 94 U. S. 104; Commissioners *v.* January, 94 U. S. 202; San Antonio *v.* Mehaffy, 96 U. S. 312; Pana *v.* Bowler, 107 U. S. 529; Sherman County *v.* Simons, 109 U. S. 735; Anderson County *v.* Beal, 113 U. S. 227; Gunnison County Comrs. *v.* Rollins, 173 U. S. 255; Louisville Trust Co. *v.* Railroad Co., 75 Fed. Rep. 433, 468; 174 U. S. 552; Brattleboro Bank *v.* Trustees, 98 Fed. Rep. 524, 532; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 587; Railroad Co. *v.* Norwich, etc., Society, 24 Ind. 457; Commonwealth *v.* Savings Bank, 137 Mass. 431; Madison Co. *v.* Brown, 67 Miss. 684; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Railroad Co. *v.* Schuyler, 34 N. Y. 30, 73; Farnham *v.* Benedict, 107 N. Y. 159; Bank *v.* Blakesley, 42 Ohio St. 645; Board of Supervisors *v.* Randolph, 89 Va. 614; Kickland *v.* Menasha Woodenware Co., 68 Wis. 34. *Contra*, Cagwin *v.* Town of Hancock, 84 N. Y. 532; Craig *v.* Town of Andes, 93 N. Y. 405. Cp. Alvord *v.* Syracuse Svgs. Bk., 98 N. Y. 607.

But a representation of the existence of facts which the corporate officers had no authority to determine, or which are as well ascertainable by the other party as by the corporate agents, or a recital of matters of law, does not bind the corporation. Bank *v.* Porter Township, 110 U. S. 608; Dixon County *v.* Field, 111 U. S. 83; Nesbit *v.* Riverside Dist., 144 U. S. 610; Manhattan Co. *v.* Ironwood, 74 Fed. Rep. 535, 539; Geer *v.* School Dist., 97 Fed. Rep. 732; Bank *v.* Board of Trustees, 98 Fed. Rep. 524, 533; Hopple *v.* Brown Township, 13 Ohio St. 311; Hopple *v.* Hipple, 33 Ohio St. 116; Klamath Falls *v.* Sachs, 35 Oreg. 325.

this purpose. It appears, then, that the unanimous assent of the members will remove all objections founded on the principles of
126] partnership, and will so far *leave the corporation in full possession of its common law powers. There are nevertheless many transactions which even the unanimous will of all the members cannot make binding as corporate acts. For the reasons which determine this we must seek farther.

2. Powers must not be used to defeat special purposes of incorporation. Most corporations established in modern times by special Acts of Parliament have been established expressly for special purposes the fulfilment of which is considered to be for the benefit of the public as well as of the proprietors of the undertaking, and for this reason they are armed with extraordinary powers and privileges. Whatever a corporation may be capable of doing at common law, there is no doubt that unusual powers given by the Legislature for a special purpose must be employed only for that purpose: if Parliament empowers either natural persons or a corporation to take J. S.'s lands for a railway, J. S. is not bound to let them take it for a factory or to let them take an excessive quantity of land on purpose to re-sell it at a profit (*b*). If Parliament confers immunity for the obstruction of a navigable river by building a bridge at a specified place, that will be no excuse for obstructing it in the like manner elsewhere. Moreover we cannot stop here. It is impossible to say that an in-
127] corporation for *special objects and with special powers gives a restricted right of using those powers, but leaves the use of ordinary corporate powers without any restriction. The possession of extraordinary powers puts the corporation for almost all purposes and in almost all transactions in a wholly different position from that which

(*b*) See *Galloway* v. *Mayor of London* (1866) L. R. 1 H. L. at p. 43, 35 L. J. Ch. 477; *Lord Carington* v. *Wycombe Ry. Co.* (1868) L. R. 3 Ch. 377, 381, 37 L. J. Ch. 213. Nor may a company hold regattas or let out pleasure-boats to the inconvenience of the former owner on a piece of water acquired by them under their Act for a reservoir: *Bostock* v. *N. Staffordshire Ry. Co.* (1856) 3 Sm. & G. 283, 292, 25 L. J. Ch. 325; nor alienate land similarly acquired except for purposes authorized by the Act: *Mulliner* v. *Midland Ry. Co.* (1879) 11 Ch. D. 611, 622, 48 L. J. Ch. 258. But a statutory corporation acquiring property takes it with all its rights and incidents as against strangers, subject only to the duty of exercising those rights in good faith with a view to the objects of incorporation: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875) L. R. 7 H. L. 697, 704, 710, 45 L. J. Ch. 638; *Bonner* v. *G. W. Ry. Co.* (1883) 24 Ch. Div. 1; and a corporation cannot bind itself not to use in the future special powers which have presumably been conferred to be used for the public good: *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Ca. 623.

it would have held without them; and apart from the actual exercise of them it may do many things which it was otherwise legally competent to do, but which without their existence it could practically never have done. Any substantial departure from the purposes contemplated by the Legislature, whether involving on the face of it a misapplication of special powers or not, would defeat the expectations and objects with which those powers were given. When Parliament, in the public interest and in consideration of a presumed benefit to the public, confers extraordinary powers, it must be taken in the same interest to forbid the doing of that which will tend to defeat its policy in conferring them; and to forbid in the sense not only of attaching penal consequences to such acts when done, but of making them wholly void if it is attempted to do them. Accordingly contracts of railway companies and corporations of a like public nature which can be seen to import a substantial contravention of the policy of the incorporating Acts are held by the courts to be void, and are often spoken of as *mala prohibita,* and illegal in the same sense that a contract of a natural person to do anything contrary to the provisions of an Act of Parliament is illegal (*c*). Others prefer to say that the Legislature, acting indeed on motives of public policy, has simply disabled the corporation from doing acts of this class; "to regard the case as one of incapacity to contract *rather than [128 of illegality, and the corporation as if it were non-existent for the purpose of such contracts" (*d*).[15] This appears the sounder, and is now the more generally accepted view (*e*).[16]

(*c*) Blackburn J. in *Taylor* v. *Chichester & Midhurst Ry. Co.* (1867) L. R. 2 Ex. at p. 379, 39 L. J. Ex. 217; and (Brett and Grove JJ. concurring) in *Riche* v. *Ashbury Ry. Carriage Co.* (1874) L. R. 9 Ex. at pp. 262, 266, 43 L. J. Ex. 177. Lord Hatherley, s. c. nom. *Ashbury Ry. Carriage Co.* v. *Riche* (1875) L. R. 7 H. L. at p. 689.

(*d*) Archibald J., L. R. 9 Ex. 293; Lord Cairns, L. R. 7 H. L. at p. 672; Lord Selborne, *ib.* 694. And Bramwell L.J. rather strongly disapproved of calling such acts illegal, pointing out that if they were properly so called there would have been some means of restraining them in a court of common law at the instance of the Crown: *A. G.* v. *G. E. Ry. Co.* (1880) 11 Ch. Div. at pp. 501—3.

(*e*) The agreement of a third person to procure a company to do something foreign to its proper purposes is plausibly called illegal: *MacGregor* v. *Dover & Deal Ry. Co.* (1852) 18 Q. B. 618, 22 L. J. Q. B. 69; and see per Erle J. in *Mayor of Norwich* v. *Norfolk Ry. Co.* (1855) 4 E. & B. 397, 24 L. J. Q. B. 105; but it is really void as being the promise of a performance impossible in law (Ch. VIII., below).

15 Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24.

16 Corporations may exercise all such powers as are expressly conferred upon them, and all others which are necessary to the exercise of those expressly conferred; and "necessary" is to be taken not in the sense of "indispensable" but of "reasonably incidental." Atty.-Genl. *v.* Railway Co., 5

Interest of the public as investors. There is another consideration of a somewhat similar kind which applies equally to what may be called public companies in a special sense—*i.e.*, such as are invested with special powers for carrying out defined objects of public interest—and ordinary joint-stock companies which have no such powers. The

App. Ca. 473, 478, 481; Foster *v.* London, etc., Ry. Co., [1895] 1 Q. B. 711; Railroad Co. *v.* Union Steamboat Co., 107 U. S. 98, 100; Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 301; Railway Co. *v.* Hooper, 160 U. S. 514; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564; Colorado Springs Co. *v.* American Pub. Co., 97 Fed. Rep. 843, 849; Schofield *v.* Bank, 97 Fed. Rep. 283; Jewelers' Pub. Co. *v.* Jacobs, 109 Fed. Rep. 509; Galena *v.* Corinth, 48 Ill. 423; People *v.* Pullman Palace Car Co., 175 Ill. 125; Miller *v.* Board, etc., of Dearborn Co., 66 Ind. 162, 167; Thompson *v.* Lambert, 44 Ia. 239; Brown *v.* Winnisimmet Co., 11 Allen, 326; Eureka Iron Works *v.* Bresnahan, 60 Mich. 332; Crawford *v.* Longstreet, 43 N. J. L. 325; Ellerman *v.* Chicago, etc., Co., 49 N. J. Eq. 217; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280; Moss *v.* Rossie Mining Co., 5 Hill, 137; Curtis *v.* Leavitt, 15 N. Y. 965; Larwell *v.* Hanover S. F. Society, 40 Ohio St. 274, 282; Gas & Fuel Co. *v.* Dairy Co., 60 Ohio St. 96; Bank *v.* Jacobs, 6 Humph. 515, 525; Interior Woodwork Co. *v.* Prasser, 108 Wis. 557.

In the United States they can be created only by the Legislature. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 604; Stowe *v.* Flagg, 72 Ill. 397; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Atkinson *v.* Railroad Co., 15 Ohio St. 21, 33.

And as the theory of "general capacity" of corporations is limited by the rule that corporations created by legislative enactment must be taken to be prohibited from doing any acts which amount to a substantial departure from the purpose of their incorporation, it would seem to make but little difference whether the theory of general or special capacities be adopted for the purpose of determining whether a given act is, or is not, *ultra vires* in the case of a given corporation. But for the purpose of determining the effect to be ascribed to the unauthorized engagements of a corporation the distinction between the doctrine which rests upon the want of capacity to do an act, and that which rests upon a prohibition against doing an act, thus impliedly admitting a capacity to do it, is important.

Perhaps the strongest statement of the doctrine of special capacities is to be found in the case of Strauss *v.* Insurance Co., 5 Ohio St. 60, where it was held that a corporation, which was authorized to make and receive negotiable paper in the course of its business, having, in the execution of an unauthorized contract, taken by indorsement from the other party to the contract the promissory note of a third person, could not recover on the note against the maker. The court said: "The contract of indorsement, like every other, must have parties; without two parties competent to contract there can be no agreement by which the one can lose and the other acquire the title to negotiable paper. The powers and capacities of a corporation must be derived from the law of its creation or they do not exist. If a fair construction of its charter does not confer the power it is incompetent to become a party to the contract of indorsement, and without capacity to take or hold the title. As well might a dead man, by the mere act of the indorser, be vested with the legal interest, as a corporation which only lives for the purposes and objects intended by the Legislature. Beyond those limits it has no existence, and its acts are neither more nor less than a nullity." Cp. Ehrman *v.* Insurance Co., 35 Ohio St. 324.

Upon this theory every unauthorized engagement of a corporation, whether executory or wholly executed, must always remain utterly void and inoperative as a contract for want of parties; if it includes an alienation by or to the corporation the title cannot pass for want of a grantor or grantee as the case may be.

But that this metaphysical view of the limits of the capacity of corpora-

provisions for limited liability and for the easy transfer of shares in both sorts of companies must be considered, in their modern form and extent at least, as a statutory privilege. These provisions also invest the companies with a certain public character and interest apart from the nature of their particular objects in each case, but derived from the fact that they do professedly exist for particular objects.

Buyers of shares and creditors have a right to assume that the company's professed objects are adhered to. By far the greater part of their capital represents the money of shareholders who have bought shares in the

tions drawn from their artificial constitution, is founded in error, is shown by the common-law rule as laid down in the case of Sutton's Hospital, 10 Co. Rep. 30, b., *infra*, Appendix, n. D. A statutory and a common-law corporation are equally artificial beings, alike creatures of the law, and any limitations upon their capacity, inherent in their nature as such artificial beings, inhere equally in both; so that if a common-law corporation is not, by reason of its artificial nature, unable to exercise powers not conferred upon it, neither is a statutory corporation. If a corporation has no existence save for the purposes for which it was created, then as no corporation was ever created for that purpose, it cannot any more than a "dead man" commit a tort. That in legal contemplation, as well as in fact, corporations have the capacity to and do acts not only not authorized by their charters, but expressly prohibited, is shown by the fact that the law provides the remedy by *quo warranto* against them for such very abuse and usurpation of power. The other, and, it is believed, the correct theory in regard to corporations is that once created they have the capacity, limited only by natural possibility, of doing any act or making any contract, but that in addition to the express prohibitions mentioned in their charters there is an implied prohibition against any corporation's doing any act or making any contract not fairly incidental to the objects for which it was incorporated. But such prohibited act or contract, when done or executed, is not necessarily always unlawful or void to all intents; the effect of the prohibition here, as with prohibitory statutes, in general (*infra*, pp. 397–404) is a question of construction.

Thus it is held that an alienation of property, made in execution of a contract *ultra vires*, passes title. Smith *v.* Sheeley, 12 Wall. 358; Reynolds *v.* Bank, 112 U. S. 405; Bank *v.* Matthews, 98 U. S. 621, 628; Fritts *v.* Palmer, 132 U. S. 282; St. Louis, etc., Ry. Co. *v.* T. H., etc., Ry. Co., 145 U. S. 393; Lantry *v.* Wallace, 182 U. S. 536; Railroad Co. *v.* Orton, 6 Sawyer, 157; Long *v.* Railway Co., 91 Ala. 519; Edwards *v.* Fairbanks, 27 La. Ann. 449; Bank *v.* Butler, 157 Mass. 548; Crolley *v.* Railway Co., 30 Minn. 541; Shewalter *v.* Pirner, 55 Mo. 218; Thornton *v.* Bank, 71 Mo. 221; Franklin Av. German Sav. Inst. *v.* Board, etc., of Roscoe, 75 Mo. 408; Missouri Valley Land Co. *v.* Bushnell, 11 Neb. 192; Parish *v.* Wheeler, 22 N. Y. 494, 504; Mallet *v.* Simpson, 94 N. C. 37; Walsh *v.* Barton, 24 Ohio St. 28; Ehrman *v.* Insurance Co., 35 Ohio St. 324; Leazure *v.* Hillegas, 7 S. & R. 312; Banks *v.* Poitiaux, 3 Rand. 136; Fayette Land Co. *v.* Railroad, 93 Va. 274, 285; Farmers', etc., Bank *v.* Railroad Co., 17 Wis. 372. But see *contra*, Occum *v.* Sprague Mfg. Co., 34 Conn. 529; Thweatt *v.* Bank, 81 Ky. 1. See also Madison Ave., etc., Church *v.* Bapt. Church in Oliver Street, 73 N. Y. 82.

A prohibition against a corporation's making a particular contract may be accompanied by a specific penalty, such as itself to indicate that the contract if made shall not be held void. Bank *v.* Dearing, 91 U. S. 29; Fritts *v.* Palmer, 132 U. S. 282; Wiley *v.* Starbuck, 44 Ind. 298; Bank *v.* Hobbs, 11 Gray, 250; Bank *v.* Pratt, 115 Mass. 539; Ferguson *v.* Oxford Mercantile Co., 78 Miss. 65; Pratt *v.* Short, 79 N. Y. 437; Ewing *v.* Toledo S. B. & T. Co.,

market without any intention of taking an active part in the management of the concern, but on the faith that they know in what sort of adventure they are investing their money, and that the company's funds are not being and will not be applied to other objects than those set forth in its constitution as declared by the act of incorporation, memorandum of association, or the like. This is not a mere repetition
129] of the objections *grounded on partnership law; the incoming

43 Ohio St. 31; Bank *v.* Garlinghouse, 22 Ohio St. 492; Brown *v.* Bank, 72 Pa. 209.

A corporation forming *ultra vires* a partnership with an individual cannot ignore this, and prove against the firm in bankruptcy as a creditor. Wallerstein *v.* Ervin, 112 Fed. Rep. 124.

A contract which corporations and natural persons are both forbidden to make, as where the charter of a bank forbids its loaning money at more than a certain rate of interest, and by the general law there is a similar prohibition applying to natural persons, will not be void when made by a corporation, when it would not be void if made by an individual. McLean *v.* Bank, 3 McLean, 587, 609; Railroad Co. *v.* Trust Co., 82 Fed. Rep. 124; Bank *v.* Harrison, 57 Mo. 503; Bank *v.* Nolan, 7 How. (Miss.) 508; Bank *v.* Archer, 8 S. & M. 151; Bank *v.* Burchard, 33 Vt. 346; Bank *v.* Sherwood, 10 Wis. 230; *contra*, Orr *v.* Lacey, 2 Doug. (Mich.) 230; Bank *v.* Swayne, 8 Ohio, 257; Kilbreath *v.* Bates, 38 Ohio St. 187; Bank *v.* Owens, 2 Pet. 527; Cf. S. C. *sub. nom.* Bank *v.* Waggoner, 9 Pet. 378. And see Tiffany *v.* Boatman's Institution, 18 Wall. 375; *infra*, p. 400.

The defense of *ultra vires* will generally not be suffered to prevail where the party raising it has actually received the property or money of the other party and is trying to evade payment therefor; the party having received the money or property of the other cannot retain it and object that the corporation had no right to make the contract under which it was received. Bank *v.* Matthews, 98 U. S. 621, 629; Bank *v.* Whitney, 103 U. S. 99; Parkersburg *v.* Brown, 106 U. S. 487; Chapman *v.* County of Douglas, 107 U. S. 348; Fortier *v.* Bank, 112 U. S. 439; Central Transportation Co. *v.* Pullman Co., 139 U. S. 24; 171 U. S. 138; Railroad Co. *v.* Dow, 19 Fed. Rep. 388; American Bank *v.* Wall Paper Co., 77 Fed. Rep. 85; Sioux City Co. *v.* Trust Co., 82 Fed. Rep. 124; Southern B. & L. Assn. *v.* Casa Grande Co., 128 Ala. 624; Argenti *v.* San Francisco, 16 Cal. 255; Darst *v.* Gale, 83 Ill. 136; Bradley *v.* Ballard, 55 Ill. 413; Pocock *v.* Lafayette Bldg. Assn., 71 Ind. 357; Thompson *v.* Lambert, 44 Ia. 239; Opera House Co. *v.* M. B. & L. Assn., 59 Kan. 65; Brunswick Co. *v.* U. S. Gas Fuel Co., 85 Me. 532; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24; Madison Av., etc., Church *v.* Bapt. Church in Oliver Street, 73 N. Y. 82; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Parish *v.* Wheeler, 22 N. Y. 494, 506; De Groff *v.* Amer. L. T. Co., 21 N. Y. 124; Indiana *v.* Woram, 6 Hill, 33; Steam Nav. Co. *v.* Weed, 17 Barb. 378; Hays *v.* Gaslight Co., 29 Ohio St. 330, 340; Larwell *v.* Hanover S. F. Society, 40 Ohio St. 274, 285; Markley *v.* Mineral City, 60 Ohio St. 430; Railroad Co. *v.* Transportation Co., 83 Pa. 160; Wright *v.* Pipe Line Co., 101 Pa. 204; Bigelow *v.* Railway Co., 104 Wis. 109.

But where a corporation has not actually received the money or property of the other party to the contract, it cannot be held liable upon a contract prohibited as being a departure from the purposes for which it was created. Thomas *v.* Railroad Co., 101 U. S. 71; Pearce *v.* Railroad Co., 21 How. 442; Franklin Co. *v.* Lewiston Inst. for Savings, 68 Me. 43; Davis *v.* Railroad Co., 131 Mass. 258; Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155; Nat. Park Bank *v.* German-American Co., 116 N. Y. 281; Jemison *v.* Bank, 122 N. Y. 135; Madison Plk. Rd. Co. *v.* Watertown Plk. Rd. Co., 7 Wis. 59; *contra* to Davis *v.* Railroad Co., *supra*, on a similar state of facts, is State Board *v.* Railroad Co., 47 Ind. 407.

shareholder may protect himself for the future, but the mischief may be done or doing at the time of the purchase: moreover persons other than shareholders deal with the company on the faith of its adhering to its defined objects. They are entitled to "know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose" (*g*). The assent of all those who are shareholders at a given time will bind them individually, but it will not bind others (*h*). If I buy shares in a company which professes to make a railway plant in England I have a right to assume that its funds are not pledged to pay for making a railway in Spain or Belgium, and it is the same if dealing with it as a stranger I lend money or otherwise give credit to it. Accordingly the provisions of the Companies Act, 1862, are to be considered as having been enacted in the interests of "in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind" (*i*). Accordingly it is settled that a company registered under the Companies Act is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association (*k*).[17]

Inability of corporations to make negotiable instruments. It is not within our scope to discuss the particular contracts which particular

(*g*) Lord Hatherley, L. R. 7 H. L. at p. 684.

(*h*) See L. R. 9 Ex. 270, 291.

(*i*) Lord Cairns, L. R. 7 H. L. at p. 667.

(*k*) *Ashbury Ry. Carriage & Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ex. 185. See note D. in Appendix for some further account of the authorities by which the rules were settled in the latter part of the nineteenth century.

[17] In Thomas *v.* Railroad Co., 101 U. S. 71, 83, the court said of Ashbury Ry. Carriage Co. *v.* Riche, *supra*, note (*k*), that it "established the broad doctrine that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action. It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority in this country and in England, and is based upon sound principle." The case is also approved and followed in Pennsylvania Co. *v.* Railroad, 118 U. S. 290; Oregon Ry. Co. *v.* Oregonian R. Co., 130 U. S. 1; Central Transportation Co. *v.* Pullman Co., 139 U. S. 24; 171 U. S. 138; De La Vergne Co. *v.* German Sav. Inst., 175 U. S. 40; Davis *v.* Railroad Co., 131 Mass. 258; Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155; Grand Lodge, etc. *v.* Stepp, S. C. Pa., 17 Rep. 61; Mallory *v.* Oil Co., 86 Tenn. 598.

corporate bodies have been held incapable of making. One class of contracts, however, is in a somewhat peculiar position in this respect, **130]** and *requires a little separate consideration. We mean the contracts expressed in negotiable instruments and governed by the law merchant. As a general rule a corporation cannot bind itself by a negotiable instrument (*l*).[18] This is not because a corporation cannot be presumed to have power to do so, but, in the first place, because of the general rule of form that the contracts of a corporation must be made under its common seal (*m*). It follows from this that a corporation cannot *prima facie* be bound by negotiable instruments in the ordinary form. The only comparatively early authority which is really much to the point was argued and partly decided on this footing (*n*). But the corporate seal may now take the place of

(*l*) A different rule prevails in the United States, where it is held that a corporation not expressly prohibited from so doing may give negotiable promissory notes for any of the legitimate purposes of its incorporation. This appears more convenient at the present day.

(*m*) See more as to this in the following chapter.

(*n*) *Broughton* v. *Manchester Waterworks Co.* (1819) 3 B. & Ald. 1, 22 R. R. 278. The chief point was on the statutes giving the Bank of England exclusive rights of issuing notes, &c., within certain limits. In *Murray* v. *E. India Co.* (1821) 5 B. & Ald. 204, 24 R. R. 325, the statutory authority to issue bills was not disputed; a difficulty was raised as to the proper remedy, but disposed of in the course of argument: 5 B. & Ald. 210; 24 R. R. 330. Other cases at first sight like these relate to the authority of particular agents to bind a corporate—or unincorporated—association irrespective of the theory of corporate liabilities. See note (*q*) next page.

18 In the United States, "no question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated." Moss *v.* Averill, 10 N. Y. 449, 457; Railroad Co. *v.* Howard, 7 Wall. 392, 412; Grommes *v.* Sullivan, 81 Fed. Rep. 45; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Ward *v.* Johnson, 95 Ill. 215; Davis *v.* Building Union, 32 Md. 285; Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280; Railway Co. *v.* Lynde, 55 Ohio St. 23; Bank *v.* Jacobs, 6 Humph. 515.

Where a corporation has power to issue bills and notes under any circumstances, a *bona fide* holder may rely on the presumption that they were rightfully issued. Supervisors *v.* Schenk, 5 Wall. 772, 784; Lexington *v.* Butler, 14 Wall. 282; Todd *v.* Kentucky Land Co., 57 Fed. Rep. 47; Grommes *v.* Sullivan, 81 Fed. Rep. 45; Nat. Loan Co. *v.* Rockland Co., 94 Fed. Rep. 335; Florence R. Co. *v.* Bank, 106 Ala. 364; Railroad Co. *v.* Norwich, etc., Society, 24 Ind. 457; Bank *v.* Globe Works, 101 Mass. 57; American Bank *v.* Gluck, 68 Minn. 129; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291; Bank *v.* Mich. Barge Co., 52 Mich. 438; Bissell *v.* Railroad Co., 22 N. Y. 258, 289; Stoney *v.* Insurance Co., 11 Paige, 635; Banking Assn. *v.* White Lead Co., 35 N. Y. 505; Wright *v.* Pipe Line Co., 101 Pa. 204; County of Macon *v.* Shores, 97 U. S. 272, 278–9. *Supra*, p. *124, n. 14.

signature in bills and notes (*o*),[19] and transferable debentures under a company's seal have been held to be negotiable (*p*). Thus the objection of form does not seem of great importance in modern practice. The question of authority to bind the company in substance is more serious.

Ordinary rules of partnership agency not applicable. It may be asked, why should not the agents who are authorized to contract on behalf of a company in the ordinary course of its business be competent to bind the company by their acceptance or indorsement on its behalf, just as a member of an ordinary trading partnership can bind the firm? There is a twofold answer. First, the extensive implied authority of *an ordinary partner to bind his fellows can- [131 not be applied to the case of a numerous association, whether incorporated or not, whose members are personally unknown to each other, and it has been often decided that the managers of such associations cannot bind the individual members or the corporate body, as the case may be, by giving negotiable instruments in the name of the concern, unless the terms of their particular authority enable them to do so by express words or necessary implication (*q*). In the case of a corporation this authority must be sought in its constitution as set forth in its special Act, articles of association, or the like. Secondly, the power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct of its business. But as was pointed out by a judge who was certainly not disposed to take a narrow view of corporate powers, a negotiable instrument is not merely evidence of a contract, but creates a new contract and a distinct cause

(*o*) Bills of Exchange Act, 1882, s. 91.

(*p*) *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 987.

(*q*) As to unincorporated joint stock companies: *Neale* v. *Turton* (1827) 4 Bing. 149, 29 R. R. 531; *Dickinson* v. *Valpy* (1829) 10 B. & C. 128, 34 R. R. 348; *Bramah* v. *Roberts* (1837) 3 Bing. N. C. 963; *Bult* v. *Morrel* (1840) 12 A. & E. 745; *Brown* v. *Byers* (1847) 16 M. & W. 252, 16 L. J. Ex. 112. As to incorporated companies: *Steele* v. *Harmer* (1845) 14 M. & W. 831 (in Ex. Ch. 4 Ex. 1, not on this point); *Thompson* v. *Universal Salvage Co.* (1848) 1 Ex. 694, 17 L. J. Ex. 118; *Re Peruvian Rys. Co.* (1867) L. R. 2 Ch. 617, 36 L. J. Ch. 864; cp. *Ex parte City Bank* (1868) L. R. 3 Ch. 758, per Selwyn L.J. The two last cases go rather far in the direction of implying such a power from general words.

[19] So in the United States. Mercer County *v.* Hackett, 1 Wall. 83, 95, Ackley School District *v.* Hall, 113 U. S. 135; Lachman *v.* Lehman, 63 Ala. 547; Griffith *v.* Burden, 35 Ia. 138; Strauss *v.* United Telegram Co., 164 Mass. 130; Boyd *v.* Kennedy, 38 N. J. L. 146; Copper *v.* Mayor, 44 N. J. L. 634; Bank *v.* Faurot, 149 N. Y. 532; Kerr *v.* Corry, 105 Pa. 282; Mason *v.* Frick, 105 Pa. 162; Stevens *v.* Philadelphia Ball Club, 142 Pa. 52: American Bank *v.* American Wood Paper Co., 19 R. I. 149; Crawford's Negotiable Instruments' Law, § 25; Green's Brice's *Ultra Vires*, 268, note (*a*).

of action, and "it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad;" and it would be most inconvenient if one had in the case of a corporation to inquire "whether the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated" (*r*).

132] *The result seems to be that in England a corporation can be bound by negotiable instruments only in the following cases:—

1. When the negotiation of bills and notes is itself one of the purposes for which the corporation exists — "within the very scope and object of their incorporation" (*s*) — as with the Bank of England and the East India Company, and (it is presumed) financial companies generally, and perhaps even all companies whose business wholly or chiefly consists in buying and selling (*s*).

2. When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf, either by express words or by necessary implication.

The extent of these exceptions cannot be said to be very precisely defined, and in framing articles of association and similar instruments, it is therefore desirable to insert express and clear provisions on this head.

American decisions. In the United States the Supreme Court has decided that local authorities having the usual powers of administration and local taxation have not any implied power to issue negotiable securities which will be indisputable in the hands of a *bona fide* holder for value (*t*), and has been equally divided on the question whether municipal corporations have such power (*u*).[20] It seems however that in American Courts a power to borrow money is

(*r*) Per Erle C.J. *Bateman* v. *Mid Wales Ry. Co.* (1866) L. R. 1 C. P. 499, 509, 35 L. J. C. P. 205. Railway companies are expressly forbidden to issue negotiable or assignable instruments without statutory authority, on pain of forfeiting the nominal amount of the security: 7 & 8 Vict. c. 85, s. 19.

(*s*) Per Montague Smith J. L. R. 1 C. P. 512; *Ex parte City Bank* (1868) L. R. 3 Ch. 758.

(*t*) *Police Jury* v. *Britton* (1872) 15 Wall. 566, 572.

(*u*) *The Mayor* v. *Ray* (1873) 19 Wall. 466.

[20] The weight of authority is against their having such power. Chisholm *v.* Montgomery, 2 Woods, 584; Gause *v.* Clarksville, 5 Dillon, 165; Hopper *v.* Covington, 8 Fed. Rep. 779; Merrill *v.* Monticello, 14 Fed. Rep. 628; Insurance Co. *v.* Manning, 95 Fed. Rep. 597; Mayor *v.* Wetumka Wharf Co., 63 Ala. 611, 625; Clark *v.* Des Moines, 19 Ia. 199; Dively *v.* Cedar Falls, 21 Ia. 565; Heins *v.* Lincoln, 102 Ia. 71, 78; Hackettstown ads. Swackhammer, 37 N. J. L. 191; Knapp *v.* Mayor, 39 N. J. L. 394; Hubbell *v.* Custer City, 15 S. Dak. 55. *Contra*, Richmond *v.* McGirr, 78 Ind. 192; Commonwealth *v.* Williamstown, 156 Mass. 70; Williamsport *v.* Commonwealth, 84 Pa. St. 487, where previous

held to carry with it as an incident the power of issuing negotiable securities (*x*.)[21]

Estoppel and part performance apply to corporations. The common law doctrine of estoppel (*y*),[22] and the kindred equitable doctrine of part performance (*z*),[23] apply to corpo*rations as well as to natural [133 persons. Even when the corporate seal has been improperly affixed to a document by a person who has the custody of the seal for other purposes, the corporation may be bound by conduct on the part of its governing body which amounts to an estoppel or ratification, but it will not be bound by anything less (*a*).[24] The principles applied in such cases are independent of contract, and therefore no difficulty arises from the want of a contract under the corporate seal, or non-compliance with statutory forms. But it is conceived that no sort of estoppel, part performance, or ratification can bind a corporation to a transaction which the Legislature has in substance forbidden it to undertake, or made it incapable of undertaking.[25]

(*x*) *Police Jury* v. *Britton*, 15 Wall. 566.

(*y*) *Webb* v. *Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

(*z*) *Wilson* v. *West Hartlepool Ry. Co.* (1864–5) 2 D. J. S. 475, 493, per Turner L.J. 34 L. J. Ch. 241; *Crook* v. *Corporation of Seaford* (1871) L. R. 6 Ch. 551; *Melbourne Banking Corporation* v. *Brougham* (1878–9) 4 App. Ca. at p. 169, 48 L. J. C. P. 12. This must be confined however to cases where the corporation is "capable of being bound by the written contract of its directors as an individual is capable of being bound by his own contract in writing:" per Cotton L.J. *Hunt* v. *Wimbledon Local Board* (1878) 4 C. P. Div. at p. 62, 48 L. J. C. P. 207.

(*a*) *Bank of Ireland* v. *Evans' Charities* (1855) 5 H. L. C. 389; *Merchants of the Staple* v. *Bank of England* (1887) 21 Q. B. Div. 160, 57 L. J. Q. B. 418.

authorities in accord with that decision are collected. The opinion of Mr. Justice Bradley, in Mayor *v.* Ray, is approved in Wall *v.* County of Monroe, 103 U. S. 74, and Claiborne County *v.* Brooks, 111 U. S. 400.

In the case last cited the court say, p. 410: "It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." So Loeb *v.* Trustees, 179 U. S. 472, 492; Wilkes Co. *v.* Coler, 180 U. S. 506, 531.

See further Dillon, Municipal Corp., § 117 sqq.

21 *Supra*, p. *129, n. 19.

22 Pendleton County *v.* Amy, 13 Wall. 297; Railroad Co. *v.* Howard, 13 How. 307, 335; New England, etc., Co. *v.* Union, etc., Co., 4 Blatchf. 1; Railroad Co. *v.* Tipton, 5 Ala. 787; Sacramento Co. *v.* Southern Pacific Co., 127 Cal. 217; Railroad Co. *v.* Chatham, 42 Conn. 465; Hale *v.* Insurance Co., 32 N. H. 295; Bank *v.* Flour Co. S. C. Com. Ohio, 13 Wkly. Law Bull. 368; Kneeland *v.* Gibson, 24 Wis. 39.

23 Conant *v.* B. F. Canal Co., 29 Vt. 263.

24 Rector, etc., of St. Bartholomew *v.* Wood, 80 Pa. 219.

25 Central Transportation Co. *v.* Pullman Co., 139 U. S. 24; 171 U. S. 138; Graves *v.* Saline Co., 161 U. S. 359; Kennedy *v.* Bank, 167 U. S. 362, 371; Bank *v.* Hawkins, 174 U. S. 364; Clark *v.* Northampton, 105 Fed. Rep. 312; Sage *v.* Fargo Township, 107 Fed. Rep. 383.

134] *CHAPTER III.

FORM OF CONTRACT.

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I. *Formality in Early English Law.*

Modern principles: form required only for special reasons. The law of contract exists chiefly for the security of men in their daily business, conducted in many different modes from hour to hour, and in whatever mode suits the circumstances, by word of mouth (nowadays including telephone), written agreement, letter, or telegraph. Hardly any limit can be set to the diversity of forms in which men bargain with one another; but business, in the commercial sense, has this common feature in all its branches, that it depends on bargain of some kind. Therefore the Common Law does not, as a general rule, require any particular form in contracts, provided that there is a bargain intended to be binding, though in certain cases evidence in writing is required for special reasons of precaution, or by mercantile custom embodied in the law, and in some cases formalities are imposed for the pro-

tection of the revenue. Transactions of bounty, on the other hand, are not in the ordinary way of business, and if a man wants to bind himself without bargain, or to dispense with proof of a bargain, he must do so with a certain amount of solemnity (reduced, however, to a matter of no great trouble or necessary cost in modern practice) by expressing his promise in a deed. Accordingly agreements made for valuable consideration are subject to conditions of form only by way of exception in particular cases, but solemn form is necessary to make a gratuitous promise binding. In some such words as the foregoing the broad principles of our modern law, and the *rea- [135
sons which make us fairly content with it as it stands, may be stated with tolerable accuracy.

Otherwise in early law. But such a statement would be misleading if taken as implying the assertion that the law came to be what it is by any such logical process. English law started from a groundwork of archaic Germanic ideas not unlike those of the early Roman law, and quite unrelated to the common sense of a modern man of business. Form and ceremony were everything, substance and intention were nothing or almost nothing. Only those transactions were recognized as having legal efficacy which fulfilled certain conditions of form, and could be established by one or other of certain rigidly defined modes of proof. The proof itself was formal and, when once duly made, conclusive. The history of this branch of our law, through the Middle Ages and even later, consists of the transition from the ancient to the modern way of thinking.

No systematic rules of contract. Taking English courts and the remedies they administered as they were about the middle of the thirteenth century (for it is needless to go farther back for our present purpose) (*a*), we find that what we should call elaborate contracts or covenants, and of sufficiently varied kinds, can be annexed to grants of land and interests in land, but there is very little independent law of contract, and, if by a law of contract we mean a law which enforces promises as such, it can hardly be said that there is any at all. Still less is there any theory or system of the law. Those who aim at having one must go to the now rising Continental science of Roman law, and gather crumbs from the tables of the renowned glossators. Bracton, so far as he has a system, copies Azo of Bologna with

(*a*) There was practically no secular law of contract before the Norman Conquest. See Pollock and Maitland, Hist. Eng. Law, i. 57, 2nd ed.; "English Law before the Norman Conquest," by the present writer, L. Q. R. xiv. 291, 303.

variations due partly to misunderstanding and partly to the impossibility of contradicting the actual English practice (*b*). But 136] the *only classification for which the practical English lawyer cares is a classification of forms of action, process, and remedies. Bracton was largely read and used, and was more or less closely followed by the unknown authors of the books called Britton and Fleta, but his Roman or Romanized arrangements of legal topics never acquired any authority, and produced no effect whatever on the registers of writs or on the technical vocabulary of pleaders. English lawyers would not believe—and on the whole were right in not believing—that an English charter had anything to do with the Roman rules about the verbal contract by stipulation, or an appeal of felony with an action under the Lex Aquilia (*c*).

Archaic modes of proof. The only modes of proof known to early Germanic law were oath and ordeal. The archaic oath is not a confirmation of testimony open to discussion, but a one-sided oath of the party and his helpers, which may be preliminary, for the purpose of giving him a standing before the Court, or final and decisive. One regular form of deciding issues on the Continent, but not in England until it was introduced from Normandy, was trial by battle, not material in the history of this part of the law, but still theoretically possible in an action of debt as late as the time of Henry II. (*d*). Ordeal, abolished in the thirteenth century, was confined to criminal matters. Proof by writing is ultimately of Roman origin, but was adopted by the Germanic nations of the Continent at an early time. Duel and writing are the two normal modes of proof in the King's Court in the twelfth century (*e*). The charter or deed of medieval English law was not a continuation of the Anglo-Saxon "book," but a Norman importation, representing the Frankish branch of what we may call Roman conveyancing tradition (*f*). Now the 137] old Roman formal contract, the stipulation by question *and answer, had been practically transformed into a written contract even before the legislation of Justinian (*g*); and *stipulatio* or *adstipulatio*

(*b*) See Prof. F. W. Maitland's "Bracton and Azo," Selden Society, 1895.

(*c*) "Actio legis Aquiliæ de hominibus per feloniam occisis vel vulneratis": Bracton, fo. 103 *b*.

(*d*) Glanv. x. 12.

(*e*) *Ib.* x. 17.

(*f*) The English charter of feoffment and memorandum of livery of seisin are really the *carta* and *notitia* familiar in Continental practice as early as the ninth century.

(*g*) Brunner, Znr Rechtsgesch. der römischen und germanischen Urkunde, 63; Moyle's Justinian, 2nd ed. 498.

had long since, in Continental conveyancing, become a name for the signing or execution of a written instrument (*h*).

Thus the charter came to us with all the historical dignity of the most solemn form of obligation known to Roman law (*i*); and if this was not enough, its authority was completed by the fact that all proof was formal in Germanic law, and was conclusive when once made in due form. "Proof was what satisfied the law, not what satisfied the Court" (*k*). A deed was, and, subject to grounds of exception admitted only at a later time, still is binding, not because it records this or that kind of transaction, but by the form of the record itself. And, when a promise to pay money was recorded in a deed, the action which the promisee could bring was not an action on the promise.

Remedies in thirteenth century — Debt on covenant. The remedy to recover money secured by deed was the action of debt, which retained its essential form and characters through the whole history of common law procedure, so long as the forms of action were preserved at all. This was a writ of right for chattels, an action, not to enforce a promise, but to get something conceived as already belonging to the plaintiff: it was called an action of property as late as the Restoration (*l*), a conception which lingers even in some of Blackstone's language. A promise, where it was operative at all, operated not by way *of obligation, but as a grant of the sum expressed (*m*). [138 It was a good defence that the party's seal had been lost and affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss (*n*): but not if it had been misapplied by a person in whose custody it was; for then, it was said, it was his own fault for not having it in better keeping.

(*h*) Brunner, Röm. u. Germ. Urkunde, 220 *sqq*. For an English example, see Kemble, C. D. No. 623.

(*i*) The summary view of the Roman classification of contracts formerly given in this chapter was written at a time when English textbooks on Roman law were few and trustworthy ones fewer. It is now, perhaps, needless, but is preserved in the Appendix (Note E) in case it may be sometimes useful for immediate reference.

(*k*) Salmond, Essays in Jurisprudence, &c., p. 16.

(*l*) The action of assumpsit was said by Vaughan C.J. to be "much inferior and ignobler than the action of debt, which by the Register is an action of Property": *Edgcomb* v. *Dee*, Vaugh. at p. 101.

(*m*) Harv. Law Rev. vi. 399; "contracts of debt are reciprocal grants," *Edgcomb* v. *Dee*, *last note*.

(*n*) Glanvill (L. 10, c. 12) has not even this: Britton, 1, 164, 166, as in the text. "Pur ceo qe il ad conu le fet estre soen en partie, soit agardé pur le pleyntif et se purveye autre foiz le defendaunt de meillour gardeyn." Cp. Fleta, l. 6, c. 33, § 2; c. 34, § 4. That the practice of publishing formal notice in case of loss really existed is shown by the example given in Blount's Law Dictionary, s. v. *Sigillum*, dated 18 Ric. II. In modern law such questions, when they occur, come under the head of estoppel.

Debt on simple contract, detinue, &c. An action of debt (*o*) might also be brought, without proof by deed, for such things as money lent, or the price of goods sold and delivered, and an action of detinue (which was but a species of debt) for chattels bailed (*p*), the cause of action being still not any promise by the defendant but his possession of the plaintiff's money (so it was conceived) or goods. The first thing needful to found the action of debt was, as it still is in jurisdictions where the old forms of action persist, that a certain sum of money should be payable by the defendant to the plaintiff. In debt and detinue the text-writers could profess to recognize the Roman *contractus innominati* (*do ut des*, &c.) which Bracton, carrying out the medieval notion that a promise to pay or deliver is a grant immediate in execution and only suspended in operation, put under the head, strange to us nowadays, of conditional grants (*q*). **139]** In the course of the next two centuries we *find it quite clear that an action of debt, provided the sum be liquidated, will lie (as we should now say) on any consideration executed, and also that on a contract for the sale of either goods or land an action may be maintained for the price before the goods are delivered or seisin given of the land (*r*). In 1294 debt was brought to recover money paid on a failure of consideration and the action was held good in form (though there was in fact a covenant (*s*), and it was said that money paid as the price of land might be recovered back in debt if the seller would not enfeoff the buyer.

Covenant. Other remedies applicable to contracts were of limited scope and utility. The action of covenant, of which we do not hear before the thirteenth century, was grounded on agreement, *conventio*, both in form and in fact, but it was practically confined to agreements relating to interests in land. Attempts at extending it were

(*o*) For fuller statement see Pollock & Maitland, Hist. Eng. L. ii. 210.

(*p*) For the precise difference in the developed forms of pleading see per Maule J. 15 C. B. 303. The decision of the C. A. in *Bryant* v. *Herbert* (1878) 3 C. P. Div. 389, 47 L. J. C. P. 670, that an action for wrongful detention is "founded on tort" within the meaning of the County Court Acts is, and professes to be, beside the historical question.

(*q*) Bracton 18 *b*, 19 *a*; Fleta l. 2, c. 60, § 23. In Bracton fo. 19 *a*, lines 14, 15 in ed. 1569, *si* (the second), *possunt* and *ut repetere possim* are corrupt. The true readings, conjecturally restored long ago by Güterbock, and in fact given almost identically by the best MSS., are *sed . possum . . . non ut repetere possim.*

(*r*) Y. B. 12 Ed. III. (Rolls ed.) 587 [Ad. 1338]; Mich. 37 H. VI. [A. D. 1459], 8, pl. 18, by Prisot C.J., where it is added that in the case of goods sold, though not of land, the buyer may take the goods: this follows from the theory of "reciprocal grant."

(*s*) Y. B. 21 & 22 Ed. I. 600.

cut short by the establishment, after some vacillation, of the rule that writing under seal was the only admissible proof; so that in the modern common law covenant is the proper name of a promise made by deed. The writ of covenant remained a solitary and barren form of action, without influence on the later development of the law (*t*).

Account. The action of account (*u*) was a remedy of wider application (sometimes exclusively, sometimes concurrently with debt) to enforce claims of the kind which in modern times have been the subject of actions of assumpsit for money had and received or the like. It covered apparently all *sorts of cases where money had [140 been paid on condition or to be dealt with in some way prescribed by the person paying it (*x*). One must not be misled by the statement that "no man shall be charged in account but as guardian in socage, bailiff or receiver" (*y*): for it is also said "a man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver: for if a man receive money for my use I shall have an account against him as receiver; or if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver" (*z*). This action might be brought by one partner against another (*a*). At common law it could not be brought by executors, except, it seems, in the case of merchants, nor against them unless at the suit of the Crown (*b*): but it was made applicable both for and against executors by various statutes to which it is needless to refer particularly (*c*). In modern times this action was obsolete except as between tenants in common (*d*). Like the action of debt, it was in the nature of a writ of right, and founded not on a promise, but on the duty — in this case not of paying a sum certain but of rendering an account — attached by law to the defendant's receipt of the plaintiff's money.

(*t*) See Pollock & Maitland, ii. 216, Harv. Law Rev. vi. 399–401. The Statutum Walliae [A.D. 1284] is the most instructive document. The suggestion in Blackstone, Comm. iii. 158, that Assumpsit is an action on the case analogous to the writ of covenant, is quite unhistorical, though ingenious.

(*u*) 52 Hen. III. (Stat. Marlb.) c. 17, 13 Ed. I. Stat. Westm. 2) c. 23. For more history and details see Mr. Langdell in Harvard Law Rev. ii. 243, 251.

(*x*) See cases in 1 Rol. Abr. 116.

(*y*) 11 Co. Rep. 89, Co. Lit. 172 *a*.

(*z*) F. N. B. 116 Q.

(*a*) *Ib.* 117 D. Mr. Langdell disputes this, but Fitzherbert is clear and express on the point

(*b*) Co. Lit. 90 *b*, and see *Earl of Devonshire's case*, 11 Rep. 89.

(*c*) The action is given against executors by 4 & 5 Ann. c. 3 (Rev. Stat.; 4 Ann. c. 16 in Ruffhead) s. 27.

(*d*) See Lindley on Partnership, 547, note o.

On informal executory agreements there was in general no remedy in the King's Courts (*e*). The Ecclesiastical Courts however enforced them freely in suits *pro laesione fidei,* within (and sometimes, it would seem, not within) (*f*) the limits set by the Constitutions of
141] Clarendon, and defined *later by the ordinance or so-called statute of *Circumspecte agatis.* Executory mercantile contracts were also recognized in the special courts which administered the law merchant. But we cannot here attempt to throw any light on that which Lord Blackburn found to be one of the obscurest passages in the history of the English law (*g*). Also there were exceptions by local custom. "In London a man shall have a writ of covenant without a deed for the covenant broken," and there was a like custom in Bristol (*h*).

II. *The Action of Assumpsit.*

Later introduction of assumpsit. In the later middle ages a general remedy became indispensable; but it was introduced from a different branch of the law, and by a device which at first was thought too bold to succeed. This was a new variety of action on the case, framed, it seems, as often on the writ of deceit (*i*) as on that of trespass, and it ultimately became the familiar action of assumpsit and the ordinary way of enforcing simple contracts. Failure to perform one's agreements did not create a debt (*k*), but it was found to be a wrong in the nature of deceit for which there must be a remedy in damages. The final prevalence of assumpsit over debt, like that of trover over detinue (*l*), was much aided by the defendant not being
142] able to wage his law and by the *greater simplicity and latitude of the pleadings: but the reason of its original introduction was to supply a remedy where no other action would lie. This was not ef-

(*e*) See further Ames, "Parol Contracts prior to Assumpsit," Harv. Law Rev. viii. 252.

(*f*) Harv. Law Rev. vi. 403; Pollock & Maitland, H. E. L. ii. 200. Neither the authority nor the actual text of *Circumspecte agatis* is certain.

(*g*) Blackburn on the Contract of Sale, 207–208. In addition to the quotation there from the Year Book of Ed. IV., see Y. B. 21 & 22 Ed. I., p. 458. And see Master Macdonnell's introduction to Smith's Mercantile Law, 10th ed. 1890; A. T. Carter, The Early History of the Law Merchant in England. L. Q. R. xvii. 232.

(*h*) F. N. B. 146*a*, Liber Albus 191*a*, 14 H. IV. 26*a*, pl. 33, Godb. 49, 336, Sty. 145, 198, 199, 228, Latch. 134, 1 Leo. 2, 4 Leo. 105. Unless indeed we really have here rules of the law merchant which were pleaded as local customs as the only way of getting them recognized by the King's Courts.

(*i*) "The breach of promise is alleged to be mixed with fraud and deceit to the special prejudice of the plaintiff, and for that reason it is called trespass on the case": *Pinchon's case,* 9 Co. Rep. 89*a*.

(*k*) "No man hath property by a breach of promise, but must be repaired in damages": Vaughan C.J. in *Edgcomb* v. *Dee,* Vaughan at p. 101.

(*l*) See per Martin B. *Burroughes* v. *Bayne* (1860) 5 H. & N. at p. 301, 29 L. J. Ex. 188.

fected without dispute and dissent. In the first recorded case (*m*), the action was against a carpenter for having failed to build certain houses as he had contracted to do. The writ ran thus: "Quare cum idem [the defendant] ad quasdam domos ipsius Laurentii [the plaintiff] bene et fideliter infra certum tempus de novo construend' apud Grimesby assumsisset, praedictus tamen T. domos ipsius L. infra tempus praedictum, &c., construere non curavit ad dampnum ipsius Laurentii decem libr', &c." The report proceeds to this effect:—

"*Tirwit.*— Sir, you see well that his count is on a covenant, and he shows no such thing: judgment.

Gascoigne.— Seeing that you answer nothing, we ask judgment and pray for our damages.

Tirwit.— This is covenant or nothing (*ceo est merement un covenant*).

Brenchesley J.— It is so: perhaps it would have been otherwise had it been averred that the work was begun and then by negligence left unfinished.

(*Hankford J.* observed that an action on the Statute of Labourers might meet the case.)

Rickhill J.— For that you have counted on a covenant and show none, take nothing by your writ but be in mercy."

The word *fideliter* in the writ is significant. It seems to denote a deliberate competition with the jurisdiction of the Courts Christian in matters of *fidei laesio*. We will show you, the pleader says in effect, that the King's *judges too know what belongs to good [143 faith, and will not let breach of faith go without a remedy. It may also have been intended to show that there was a bargain and mutual trust (*n*).

This adverse decision was followed by at least one like it (*o*), but early in the reign of Henry VI. an action was brought against one Watkins for failure to build a mill within the time for which he had promised it, and two out of three judges (Babington C.J. and Cockaine J.) were decidedly in favour of the action being maintainable and called on the defendant's counsel to plead over to the

(*m*) Mich. 2 H. IV., 3 *b*, pl. 9. The full and careful historical discussion of the whole subject by Prof. Ames of Harvard in Harv. Law Rev. ii. 1, 53, supersedes all previous researches. Actions of trespass on the case had previously been allowed for malfeasance by the negligent performance of contracts (for which it is still held that there is an alternative remedy in contract and in tort), but an action for mere non-feasance was a novelty.

(*n*) Modern pleading would require, of course, a much more distinct averment of consideration: but the doctrine was not yet formed.

(*o*) Mich. 11 H. IV. 33, pl. 60. And see Bigelow L. C. on Torts, 587.

merits (*p*). Martin J. dissented, insisting that an action of trespass would not lie for a mere non-feasance: a difficulty by no means frivolous in itself. "If this action is to be maintained on this matter," he said, "one shall have an action of trespass on every agreement that is broken in the world." This however was the very thing sought, and so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established. But only in 1596 was it conclusively decided that assumpsit was admissible at the plaintiff's choice where debt would also lie (*q*). The fiction of the action being founded on a tort was abolished by the Common Law Procedure Act.

Meanwhile the relation between the parties which was assumed as the foundation of the duty violated by the defendant, and which involved the plaintiff's having in some way changed his position for the worse on the faith of the defendant's undertaking, was transformed into the modern doctrine of Consideration, coalescing on the **144]** way, *in fact if not in strict theory, with the existing requirements of the actions of debt and account. Of this we shall speak separately.

Rule that deeds may not be written on wood, &c. It is stated in several books of authority (*e.g.* Shepp. Touchst. 54) that a deed must be written on parchment or paper, not on wood, &c. This seems to refer to the then common use of wooden tallies as records of contracts. Fitzherbert in fact says (*r*) that if such a tally is sealed and delivered by the party it will not be a deed; and the Year Books afford evidence of attempts to rely on sealed tallies as equivalent to deeds; and it appears that by the custom of London they were so (*s*). These tallies were no doubt written upon as well as notched, so that nothing could be laid hold of to refuse them the description of deeds but the fact of their being wooden: the writing is expressly mentioned in one case (*t*), and theExchequer tallies used till within recent times were likewise written upon (*u*).

(*p*) Hil. 3 H. VI. 36, pl. 33.

(*q*) *Slade's case*, 4 Co. Rep. 91 *a*, in Ex. Ch. It was still later before it was admitted that the substantial cause of action in assumpsit was the contract. O. W. Holmes, The Common Law, 284–287. For the earlier history see Prof. Ames, Harvard Law Rev. ii. 16.

(*r*) F. N. B. 122 I.

(*s*) "Un taille de dette enseale par usage de la citee est auxi fort come une obligacoun": Liber Albus 191 *a*.

(*t*) Trin. 12 H. IV. 23, pl. 3. The other citations we have been able to verify are Pasch. 25 Ed. III. 83 (wrongly referred to as 40 in the last case and in the margin of Fitzh.), pl. 9, where the reporter notes it is said to be otherwise in London; and Trin. 44 Ed. III. 21, pl. 23.

(*u*) See account of them in Penny Cyclopædia, s. v. Tally; Hall, Antiquities of the Exchequer, 118 *sqq.*

III. *Modern requirements of form.*

Requirements of form now exceptional. We have seen how in the ancient view no contract was good (as indeed no act in the law was) unless it brought *itself within some favoured class by satisfying [145 particular conditions of form, or of evidence, or both. The modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

Contracts of record. Before we say anything of these classes it must be mentioned that contracts under seal are not the only formal contracts known to English law. There are certain so-called "contracts of record" which are of a yet higher nature than contracts by deed. The judgment of a Court of Record is treated for some purposes as a contract:[1] and a recognizance, *i. e.* "a writing obligatory acknowledged before a judge or other officer having authority for that purpose and enrolled in a Court of Record," is strictly and properly a contract entered into with the Crown in its judicial capacity. The statutory forms of security known as statutes merchant, statutes staple, and recognizances in the nature of a statute staple, were likewise of record, but they have long since fallen out of use (*x*).

The French (art. 1333) and Italian (art. 1332) Civil Codes expressly admit tallies as evidence between traders who keep their accounts in this way; nor is the use of them unknown at this day in England. By the courtesy of Mr. J. B. Matthews, of the Middle Temple, formerly of Worcester, I have a specimen of the tallies with which the hop-pickers in Herefordshire still keep account of the quantities picked. They were used in the Kentish hop country within living memory, and in Hampshire not many years ago. I have seen them, in a rougher form, in use in a village baker's shop in Normandy. Specimens of English tallies both ancient and recent may be seen in the medieval room of the British Museum, and at the Record Office. Cp. Col. Yule's note on Marco Polo, ii. 78, 2nd ed.

(*x*) As to Contracts of Record, see Anson, p. 55, 9th ed., and for an account of statutes merchant, &c. 2 Wms. Saund. 216–222.

1 Stuart *v.* Landers, 16 Cal. 372; Gebhard *v.* Garnier, 12 Bush, 321; Morse *v.* Tappan, 3 Gray, 411.

But a judgment is not, properly speaking, a contract. Louisiana *v.* Mayor, 109 U. S. 285; Freeland *v.* Williams, 131 U. S. 405; Morley *v.* Railroad, 146 U. S. 162; Hilton *v.* Guyot, 159 U. S. 113, 201; Wadsworth *v.* Henderson, 16 Fed. Rep. 447, 451; Evans, etc. *v.* McFadden, 105 Fed. Rep. 293; Larrabee *v.* Baldwin, 35 Cal. 155, 168; Rae *v.* Hulbert, 17 Ill. 572, 580; Burnes *v.* Simpson, 9 Kan. 658; Dudley *v.* Lindsey, 9 B. Mon. 486, 489; O'Brien *v.* Young, 95 N. Y. 428; Gutta Percha Co. *v.* Mayor, 108 N. Y. 276; Anglo-American Co. *v.* Davis Co., 169 N. Y. 506, 509; McDonald *v.* Dickson, 87 N. C. 404; *In re* Kennedy, 2 S. C. 216.

Contracts subject to special forms. The kinds of contract subject to restrictions of forms are these:

(1). At common law, the contracts of corporations. The rule that such contracts must in general be under seal is earlier than the time when the modern doctrine of contracts was formed. Of late years great encroachments have been made upon it, which have probably not reached their final limits; the law is still unsettled on some points, and demands careful consideration. Both the historical and the practical reason lead us to give this topic the first place.

146] *(2). Party by the law merchant (now codified in England) and partly by statute, the peculiar contracts expressed in negotiable instruments.

(3). By statute only—

A. The various contracts within the Statute of Frauds. Certain sales and depositions of property are regulated by other statutes, but mostly as transfers of ownership or of rights good against third persons rather than as agreements between the parties.

B. Marine insurances.

C. Transfer of shares in companies (generally).

D. Acknowledgment of debts barred by the Statute of Limitation of James I.

E. Marriage: This, although we do not mean to enter on the subject of the Marriage Acts, must be mentioned here to complete the list.[2]

[2] Under the law prevailing in most of the United States, marriage is not a formal contract. Bishop on Marriage and Divorce, § 279 *et seq.;* Meister *v.* Moore, 96 U. S. 76; Matthewson *v.* Phœnix Iron Foundry, 20 Fed. Rep. 281; Arnold *v.* Chesebrough, 58 Fed. Rep. 833; Davis *v.* Pryor, 112 Fed. Rep. 274; Tartt *v.* Negus, 127 Ala. 301; McCausland's Estate, 52 Cal. 568; Sharon *v.* Sharon, 75 Cal. 1; Port *v.* Port, 70 Ill. 484; Hebblethwaite *v.* Hepworth, 98 Ill. 126; *Re* Maher's Est., 204 Ill. 25; Teter *v.* Teter, 101 Ind. 129; Schuchart *v.* Schuchart, 61 Kan. 597; Hutchins *v.* Kimmell, 31 Mich. 126; Lorimer *v.* Lorimer, 124 Mich. 631; Barker *v.* Valentine, 125 Mich. 336; State *v.* Worthingham, 23 Minn. 528; Carey *v.* Hulett, 66 Minn. 327; Floyd *v.* Calvert, 53 Miss. 37; Dyer *v.* Brannock, 66 Mo. 391; State *v.* Bittick, 103 Mo. 183; Clark *v.* Clark, 52 N. J. Eq. 650; Hynes *v.* McDermott, 82 N. Y. 41, 46; 91 N. Y. 451; Gall *v.* Gall, 114 N. Y. 109; Carmichael *v.* State, 12 Ohio St. 553; Richard *v.* Brehm, 73 Pa. St. 140; Chapman *v.* Chapman, 16 Tex. Civ. App. 382; Stans *v.* Bartley, 9 Wash. 115. *Contra*, Estill *v.* Rogers, 1 Bush, 62; Denison *v.* Denison, 35 Md. 361; Commonwealth *v.* Munson, 127 Mass. 459; Dunbarton *v.* Franklin, 19 N. H. 257; State *v.* Wilson, 121 N. C. 650; Northfield *v.* Plymouth, 20 Vt. 582; Morrill *v.* Palmer, 68 Vt. 1. See 27 Am. L. Reg. 101, 35 id. 221, 223 *seq.*

1. *As to contracts of corporations.*

Old rule: Seal generally required. The doctrine of the common law was that corporations could bind themselves only under their common seal, except in small matters of daily occurrence, as the appointment of household servants and the like (*y*). The principle of these exceptions being, in the words of the Court of Exchequer Chamber, "convenience amounting almost to necessity" (*z*), the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has led to a corresponding increase of the exceptions. Before considering these, however, it is well *to cite an approved judicial statement of the rule, and of [147 the reasons that may be given for it:—

"The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Everyone becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act: and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of a whole body corporate, is a necessity inherent in the very nature of a corporation" (*a*).

It is, no doubt, a matter of "inherent necessity" that when a natural person acts for a corporation, his authority must be shown in some way; and the common seal in the agent's custody, when an act in the law purports to be the act of the corporation itself, or his authority under seal, when it purports to be the act of an agent for the corporation, is in English law the recognized evidence for that purpose.[3] But there is no reason in the nature of things why his

(*y*) 1 Wms. Saund. 615, 616, and see old authorities collected in notes to *Arnold* v. *Mayor of Poole* (1842) 4 M. & Gr. 860, 12 L. J. C. P. 97; and *Fishmongers' Company* v. *Robertson* (1843) 5 M. & Gr. 131, 12 L. J. C. P. 185.

(*z*) *Church* v. *Imperial Gas Light Company* (1838) 6 A. & E. 846, 861, 45 R. R. 638, 643.

(*a*) *Mayor of Ludlow* v. *Charlton* (1840) 6 M. & W. 815, 823, adopted by Pollock B. in *Mayor of Kidderminster* v. *Hardwick* (1873) L. R. 9 Ex. at p. 24, 43 L. J. Ex. 9; and see per Keating J. *Austin* v. *Guardians of Bethnal Green* (1874) L. R. 9 C. P. at p. 95, 43 L. J. C. P. 100.

[3] The signatures of the proper officers being proved, the presence of the corporate seal is *prima facie* evidence that it was affixed by authority.

authority should not be manifested in other ways: nor is the seal of itself conclusive, for an instrument to which it is in fact affixed without authority is not binding on the corporation (*b*).[4] On the other hand, although it is usual and desirable for the deed of a corporation to be sealed with its proper corporate seal, it is laid down **148]** by *high authorities that any seal will do (*c*).[5] A company under the Companies Act, 1862, must have its name engraved in legible characters on its seal, and any director, &c., using as the seal of the company any seal on which the name is not so engraved is subject to a penalty of 50*l.* (ss. 41, 42): but this would not, it is conceived, prevent instruments so executed from binding the company (*d*). The seal of a building society incorporated under the Building So-

(*b*) *Bank of Ireland* v. *Evans' Charities* (1855) 5 H. L. C. 389.

(*c*) 10 Co. Rep. 30 *b*, Shepp. Touchst. 57. Yet the rule is doubted, Grant on Corp. 59, but only on the ground of convenience and without any authority. The like rule as to sealing by an individual is quite clear and at least as old as Bracton: Non multum refert utrum [carta] proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatis recognita et concessa fuerit, fo. 38 *a*. Cp. Britton. 1. 257.

(*d*) Notwithstanding the statutory penalty, there is a reported instance of the private seal of a director being used when the company had been so recently formed that there had been no time to make a proper seal, *Gray* v. *Lewis* (1869) L. R. 8 Eq. at p. 531, The like direction and penalty are contained in the Industrial and Provident Societies Act, 1893, s. 66 (repeating an earlier enactment). As to execution of deeds abroad by companes under the Acts of 1862 and 1867, see the Companies Act, 1862, s. 55, and the Companies Seals Act, 1864 (27 & 28 Vict. c. 19); in Scotland, the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 56.

Mickey *v.* Stratton, 5 Sawy. 475; Andres *v.* Fry, 113 Cal. 124; Union Mining Co. *v.* Bank, 2 Col. 226; Conine *v.* Railroad Co., 3 Houst. 288; Solomon's Lodge *v.* Montmollin, 58 Ga. 547; Railroad Co. *v.* Morgenstern, 103 Ill. 149; Anderson Transfer Co. *v.* Fuller, 174 Ill. 221; Adams *v.* His Creditors, 14 La. 454; Morris *v.* Keil, 20 Minn. 531; Musser *v.* Johnson, 42 Mo. 74; Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548; Evans *v.* Lee, 11 Nev. 194; Flint *v.* Clinton Co., 12 N. H. 430; Lovett *v.* Steam Saw Mill Assn., 6 Paige, 54; Trustees *v.* McKechnie, 90 N. Y. 618; Sheehan *v.* Davis, 17 Ohio St. 571; Parkinson *v.* City of Parker, 85 Pa. 313; Levering *v.* Mayor, 7 Humph. 553; Fidelity Co. *v.* Railroad Co., 32 W. Va. 244; Bullen *v.* Milwaukee Trading Co., 109 Wis. 41.

[4] Koehler *v.* Black River, etc., Co., 2 Black, 715; Bliss *v.* Kaweah Canal, etc., Co., 65 Cal. 502; Leggett *v.* N. J. Mfg., etc., Co., Saxt. Ch. 541; Jackson *v.* Campbell, 5 Wend. 572; Hoyt *v.* Thompson, 5 N. Y. 320, 335; Case of St. Mary's Church, 7 S. & R. 517, 530.

[5] Eureka Co. *v.* Bailey Co., 11 Wall. 488; Bank *v.* Mining Co., 89 Fed. Rep. 439, 447; 95 Fed. Rep. 23; Porter *v.* Railroad Co., 37 Me. 349; Mill Dam Foundry *v.* Hovey, 21 Pick. 417; Tenney *v.* Lumber Co., 43 N. H. 343; South Bapt. Society *v.* Clapp, 18 Barb. 35; St. Philip's Church *v.* Zion Church, 23 S. C. 297; Bank *v.* Railroad Co., 30 Vt. 159. *Infra*, Appendix, n. D. This is true, even of a municipal corporation. District of Columbia *v.* Camden Iron Works, 181 U. S. 453. A scroll seal is sufficient in those States whose laws recognize the validity of such a seal when used by a natural person. Johnston *v.* Crawley, 25 Ga. 316; Reynolds *v.* Trustees, 6 Dana, 37; Western Seminary *v.* Blair, 1 Disney, 370.

cieties Act, 1874 (37 & 38 Vict. c. 42, s. 16, sub-s. 10), "shall in all cases bear the registered name thereof," but no penalty or other consequence is annexed to the non-observance of this direction.

Modern exceptions—Bank of Columbia v. Patterson. We now turn to the exceptions. According to the modern authorities it is now established, though not till after sundry conflicting decisions, that the "principle of convenience amounting almost to necessity" will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists: and that in the case of a trading corporation all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description. The same or even a wider conclusion was much earlier arrived at in the United States. As long ago as 1813 the law was thus stated by the Supreme Court:—

"It would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution all *parole contracts made by its authorized agents are express promises of [149 the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie" (*e*).[6]

Not so wide in England. In England this rule still holds good only for trading corporations, and perhaps also for non-trading corporations established in modern times for special purposes. The former

(*e*) *Bank of Columbia* v. *Patterson* (1813) 7 Cranch, 299, 306. It is also held by the American authorities that the appointment by a corporation of an agent, officer, or attorney need not be under seal.

[6] Railway Co. *v.* Keokuk Bridge Co., 131 U. S. 371; Bank *v.* Mining Co., 89 Fed. Rep. 439, 447; 95 Fed. Rep. 23; Selma *v.* Mullen, 46 Ala. 411; Argenti *v.* San Francisco, 16 Cal. 255; Muscatine Co. *v.* Lumber Co., 85 Ia. 112; Bridge Co. *v.* Frankfort, 18 B. Mon. 41; Elysville, etc., Co. *v.* Okisko Co., 1 Md. Ch. 392; St. Paul Co. *v.* Dayton, 37 Minn. 364; Abbey *v.* Billups, 35 Miss. 618; Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43; Crawford *v.* Longstreet, 43 N. J. L. 325; Trustees *v.* Mulford, 3 Halst. 182; Dunn *v.* St. Andrew's Church, 14 Johns. 118; Peterson *v.* Mayor, 17 N. Y. 449; Kramrath *v.* Albany, 127 N. Y. 575; Calvert *v.* Idaho Stage Co., 25 Oreg. 412; Hamilton *v.* Insurance Co., 5 Pa. St. 339; San Antonio *v.* Lewis, 9 Tex. 69; Sheldon *v.* Fairfax, 21 Vt. 102.

And the appointment by a corporation of an agent, officer, or attorney need not be under seal. Fleckner *v.* Bank, 8 Wheat. 338, 357; Osborn *v.* Bank, 9 Wheat. 738, 829; Crowley *v.* Genesee Mining Co., 55 Cal. 273; Bank *v.* Davis, 8 Conn. 191; Board of Education *v.* Greensbaum, 39 Ill. 609; Hamilton *v.* Railroad Co., 9 Ind. 359; Lathrop *v.* Bank, 8 Dana, 114; Randall *v.* Van Vechten, 19 Johns. 60, 65; Insurance Co. *v.* Oakley, 9 Paige, 496; Buncombe T. Co. *v.* McCarson, 1 Dev. & Bat. L. 306; Wolf *v.* Goddard, 9 Watts, 544.

Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified. Patterson *v.* Robinson, 116 N. Y. 193.

conflict of decisions is much reduced, but there remains the inconvenient distinction of two if not three different rules for corporations of different kinds.

Trading corporations: Contracts in course of business do not want seal. As concerns trading corporations the law may be taken as settled by the unanimous decisions of the Court of Common Pleas and of the Exchequer Chamber in *South of Ireland Colliery Co.* v. *Waddle* (*f*). The action was brought by the company against an engineer for non-delivery of pumping machinery, there being no contract under seal. Bovill C.J. said in the Court below that it was impossible to reconcile all the decisions on the subject: but the exceptions created by the recent cases were too firmly established to be questioned by the earlier decisions, which if inconsistent with them must be held not to be law:—

"These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,— managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts (*g*), they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule [so] are still limited to matters of "frequent occurrence and small importance. The authorities, however, do not sustain the argument."

Cases overruled. The decision was affirmed on appeal without hearing counsel for the plaintiffs, and Cockburn C.J. said the defendant was inviting the Court to reintroduce a relic of barbarous antiquity. It is submitted that the following cases must since this be considered as overruled:—

East London Waterworks v. *Bailey* (1827) 4 Bing. 283. Action for non-delivery of iron pipes ordered for the company's works (*h*). Expressly said in the Court below to be no longer law, per Montague Smith J. See L. R. 3 C. P. 475.

Homersham v. *Wolverhampton Waterworks Co.* (1851) 6 Ex. 137, 20 L. J. Ex. 193. Contract under seal for erection of machinery: price of extra work done with approval of the company's engineer and accepted, but not within the terms of the sealed contract, held not recoverable.

Diggle v. *London & Blackwall Ry. Co.* (1850) 5 Ex. 442, 19 L. J. Ex. 308. Work done on railway in alterations of permanent way, &c.: this case already much doubted in *Henderson* v. *Australian Royal Mail, &c. Co.* 5 E. & B. 409,

(*f*) (1868) L. R. 3 C. P. 463, in Ex. Ch. 4 C. P. 617, 38 L. J. C. P. 338. Most if not all of the previous authorities are there referred to.

(*g*) This qualification is itself subject to the rule established by *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 237, 25 L. J. Q. B. 317, and similar cases, and mentioned at p. 126 above. For details see Note D. in Appendix.

(*h*) The directors were authorized by the incorporating Act of Parliament to make contracts; but it was held that this only meant they might affix the seal without calling a meeting.

24 L. J. Q. B. 322, which is now confirmed in its full extent by the principal case.

Probably *Finlay* v. *Bristol & Exeter Ry. Co.* (1852) 7 Ex. 409, 21 L. J. Ex. 117, where it was held that against a corporation tenancy could in no case be inferred from payment of rent so as to admit of an action for use and occupation without actual occupation.

Also *London Dock Co.* v. *Sinnott* (1857) 8 E. & B. 347, 27 L. J. Q. B. 129, where a contract for scavenging the company's docks for a year was held to require the seal, as not being of a mercantile nature nor with a customer of the company, can now be of little or no authority beyond its own special circumstances: see per Bovill C. J. L. R. 3 C. P. 471.

Even in the House of Lords it has been assumed and said, though fortunately not decided, that a formal contract under seal made with a railway company cannot be subsequently varied by any informal mutual consent: *Midland G. W. Ry. Co. of Ireland* v. *Johnson* (1858) 6 H. L. C. 798, 812.

Cases affirmed. The following cases are affirmed or not contradicted. Some of them were decided at the time on narrower or *more [151 particular grounds, and in one or two the trading character of the corporation seems immaterial:—

Beverley v. *Lincoln Gas Co.* (1837) 6 A. & E. 829; 45 R. R. 626. Action against the company for price of gas meters supplied.

Church v. *Imperial Gas Co.* (1838) 6 A. & E. 846, 45 R. R. 638 in Ex. Ch. Action by the company for breach of contract to accept gas. A supposed distinction between the liability of corporations on executed and on executory contracts was exploded.

Copper Miners of England v. *Fox* (1851) 16 Q. B. 229, 20 L. J. Q. B. 174. Action (in effect) for non-acceptance of *iron* rails ordered from the company. The company had in fact for many years given up copper mining and traded in iron, but this was not within the scope of its incorporation.

Lowe v. *L. & N. W. Ry. Co.* (1852) 18 Q. B. 632, 21 L. J. Q. B. 361. The company was held liable in an action for use and occupation when there had been an actual occupation for corporate purposes, partly on the ground that a parol contract for the occupation was within the statutory powers of the directors and might be presumed: cp. the next case.

Pauling v. *L. & N. W. Ry. Co.* (1853) 8 Ex. 867, 23 L. J. Ex. 105. Sleepers supplied to an order from the engineer's office and accepted: there was no doubt that the contract could under the Companies Clauses Consolidation Act be made by the directors without seal, and it was held that the acceptance and use were evidence of an actual contract.

Henderson v. *Australian Royal Mail Co.* (1855) 5 E. & B. 409, 24 L. J. Q. B. 322. Action on agreement to pay for bringing home one of the company's ships from Sydney. Here it was distinctly laid down that "where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created" such contracts need not be under seal (by Wightman J.): "The question is whether the contract in its nature is directly connected with the purpose of the incorporation" (by Erle J.).

Australian Royal Mail Co. v. *Marzetti* (1855) 11 Ex. 228, 24 L. J. Ex. 273. Action by the company on agreement to supply provisions for its passenger ships.

Reuter v. *Electric Telegraph Co.* (1856) 6 E. & B. 341, 26 L. J. Q. B. 46; where the chief point was as to the ratification by the directors of a contract made originally with the chairman alone, who certainly had no authority to make it.

Ebbw Vale Company's case (1869) L. R. 8 Eq. 14, decides that one who sells to a company goods of the kind used in its business need not ascertain that the company means so to use them, and is not prevented from enforcing the contract even if he had notice of an intention to use them otherwise.

Non-trading corporations — "Necessary and incidental" contracts. As concerns non-trading corporations, the question has never been **152]** decided by a Court of Appeal. But the weight *of authority seems on the whole to warrant the statement that all contracts necessary and incidental to the purposes for which the corporation exists may be made without seal, at least when the corporation has been established for special purposes by a modern statute or charter. On the rule as thus limited the latest case is *Nicholson* v. *Bradfield Union* (*i*), where it was held that a corporation is liable without a contract under seal of goods of a kind which must be from time to time required for corporate purposes, at all events when they have been actually supplied and accepted. Earlier decisions are as follows:—

Sanders v. St. Neots Union (1846) 8 Q. B. 810, 15 L. J. M. C. 104. Iron gates for workhouse supplied to order without seal and acceptance.

Paine v. *Strand Union* (1846) *ib.* 326, 15 L. J. M. C. 89, is really the same way, though at first sight *contra:* the decision being on the ground that making a plan for rating purposes of *one parish* within the union was not incidental to the purposes for which the guardians of the *union* were incorporated: they had nothing to do with either making or collecting rates in the several parishes, nor had they power to act as a corporation in matters confined to any particular parish.

Clarke v. *Cuckfield Union* (1852) 21 L. J. Q. B. 349 (in the Bail Court, by Wightman J.). Builders' work done in the workhouse. The former cases are reviewed.

Haigh v. *North Bierley Union* (1858) E. B. & E. 873, 28 L. J. Q. B. 62. An accountant employed to investigate the accounts of the union was held entitled to recover for his work as "incidental and necessary to the purposes for which the corporation was created," by Erle J., Crompton J. doubting.

In direct opposition to the foregoing we have only one decision, but a considered one, *Lamprell* v. *Billericay Union* (1849) 3 Ex. 283, 18 L. J. Ex. 282. Building contract under seal, providing for extra works on written directions of the architect. Extra work done and accepted, but without such direction. Held, with an expression of regret, that against an individual this might have given a good distinct cause of action on simple contract, but this would not help the plaintiff, as the defendants could be bound only by deed.

Hunt v. *Wimbledon Local Board* (1878) 4 C. P. Div. 48, 48 L. J. C. P. 207. Whether the preparation of plans for new offices for an incorporated local board, which plans were not acted on, is work incidental and necessary to the purposes of the board, *quære*. The actual decision was on the ground that contracts above the value of 50*l.* were imperatively required by statute to be under seal.

153] ***Municipal corporations, etc.— Old rule in force.** With regard to municipal corporations (and it is presumed other corporations not created for definite public purposes) the ancient rule seems to be still in force to a great extent. An action will not lie for work done on local improvements (*k*), or on an agreement for the purchase of

(*i*) (1866) L. R. 1 Q. B. 620, 35 L. J. Q. B. 176.

(*k*) *Mayor of Ludlow* v. *Charlton* (1840) 6 M. & W. 815.

tolls by auction (*l*), or for the grant of a lease of corporate property (*m*), without an agreement under seal. Where a municipal corporation owns a graving dock, a contract to let a ship have the use of it need not be under the corporate seal; but this was said to fall within the ancient exception of convenience resting on the frequency or urgency of the transaction. The admission of a ship into the dock is a matter of frequent and ordinary occurrence and sometimes of urgency (*n*).

Appointments to offices by corporations. There has also been little disposition to relax the rule in the case of appointments to offices, and it seems at present that such an appointment, if the office is of any importance, must be under the corporate seal to give the holder a right of action for his salary or other remuneration. This appears by the following instances:—

Appointment of attorney: *Arnold* v. *Mayor of Poole* (1842) 4 M. & Gr. 860, 12 L. J. C. P. 97. It is true that the Corporation of London appoints an attorney in court without deed, but that is because it is a matter of record: see 4 M. & Gr. pp. 882, 896. But after an attorney has appeared and acted for a corporation the corporation cannot, *as against the other party to the action*, dispute his authority on this ground: *Faviell* v. *E. C. Ry. Co.* (1848) 2 Ex. 344, 17 L. J. Ex. 223, 297. Nor can the other party dispute it after taking steps in the action: *Thames Haven, &c. Co.* v. *Hall* (1843) 5 M. & Gr. 274. Cp. *Reg.* v. *Justices of Cumberland* (1848) 17 L. J. Q. B. 102.

Grant of military pension by the East India Company in its political capacity: *Gibson* v. *E. I. Co.* (1839) 5 Bing. N. C. 262, 50 R. R. 688.

Increase of town clerk's salary in lieu of compensation: *Reg.* v. *Mayor of Stamford* (1844) 6 Q. B. 434.

*Office with profit annexed (coal meter paid by dues) though held at [154 the pleasure of the corporation: *Smith* v. *Cartwright* (1851) 6 Ex. 927, 20 L. J. Ex. 401. (The action was not against the corporation, but against the person by whom the dues were alleged to be payable. The claim was also wrong on another ground.)

Collector of poor rates: *Smart* v. *West Ham Union* (1855) 10 Ex. 867, 24 L. J. Ex. 201; but partly on the ground that the guardians had not undertaken to pay at all, the salary being charged on the rates; and wholly on that ground in Ex. Ch., 11 Ex. 867, 25 L. J. Ex. 210.

Clerk to master of workhouse: *Austin* v. *Guardians of Bethnal Green* (1874) L. R. 9 C. P. 91, 43 L. J. C. P. 100.

Dunston v. *Imperial Gas Light Co.* (1832) 3 B. & Ad. 125, 37 R. R. 352, as to directors' fees voted by a meeting; but chiefly on the ground that the fees were never intended to be more than a gratuity.

Cope v. *Thames Haven, &c. Co.* (1849) 3 Ex. 841, 18 L. J. Ex. 345: agent appointed for a special negotiation with another company not allowed to recover for his work, the contract not being under seal nor in the statutory form, *viz.*, signed by three directors in pursuance of a resolution, although by another section of the special Act the directors had full power to "appoint and displace . . . all such managers, officers, agents . . . as they

(*l*) *Mayor of Kidderminster* v. *Hardwick* (1873) L. R. 9 Ex. 13, 43 L. J. Ex. 9.

(*m*) *Mayor of Oxford* v. *Crow* [1893] 3 Ch. 535, where the corporation sought to enforce the agreement.

(*n*) *Wells* v. *Kingston-upon-Hull* (1875) L. R. 10 C. P. 402, 44 L. J. C. P. 257.

shall think proper." It seems difficult to support the decision; this was not like an appointment to a continuing office; and cp. *Reg.* v. *Justices of Cumberland* (1848) 17 L. J. Q. B. 102, where under very similar enabling words an appointment of an attorney by directors without seal was held good as against third parties.

No equity to enforce informal agreement against corporation. It has been decided (as indeed it is obvious in principle) that inability to enforce an agreement with a corporation at law by reason of its not being under the corporate seal does not create any jurisdiction to enforce it in equity (*o*).

Right of corporations to sue on contracts executed. The rights of corporations to sue upon contracts are somewhat more extensive than their liabilities. When the corporation has performed its own part of the contract so that the other party has had the benefit of it, the corporation may sue on the contract though not originally bound (*p*). **155]** For this reason, if possession is given under a *demise from a corporation which is invalid for want of the corporate seal, and rent paid and accepted, this will constitute a good yearly tenancy (*q*) and will enable the corporation to enforce any term of the agreement which is applicable to such a tenancy (*r*), and a tenant who has occupied and enjoyed corporate lands without any deed may be sued for use and occupation (*s*). Conversely the presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord: "where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made" (*t*). And a person by whose permission a corporation has occupied lands may sue the corporation for use and occu-

(*o*) *Kirk* v. *Bromley Union* (1846) 2 Ph. 640; *Crampton* v. *Varna Ry. Co.* (1872) L. R. 7 Ch. 562, 41 L. J. Ch. 817.

(*p*) *Fishmongers' Co.* v. *Robertson* (1843) 5 M. & Gr. 131, 12 L. J. C. P. 185. The judgment on this point is at pp. 192–6; but the dictum contained in the passage "Even if . . against themselves," pp. 192–3 (extending the right to sue without limit) is now overruled. See *Mayor of Kidderminster* v. *Hardwick* (1873) L. R. 9 Ex. 13, 21, 43 L. J. Ex. 9.

(*q*) *Wood* v. *Tate* (1806) 2 Bos. & P. N. R. 247, 9 R. R. 645.

(*r*) *Eccles. Commrs.* v. *Merral* (1869) L. R. 4 Ex. 162, 38 L. J. Ex. 93. By Kelly C.B. this is correlative to the tenant's right to enforce the agreement in equity on the ground of part performance, *sed qu.*

(*s*) *Mayor of Stafford* v. *Till* (1827) 4 Bing. 75, 29 R. R. 511. The like as to tolls, *Mayor of Carmarthen* v. *Lewis* (1834) 6 C. & P. 608, but see Serj. Manning's note, 2 M. & Gr. 249.

(*t*) *Doe* d. *Pennington* v. *Taniere* (1848) 12 Q. B. 998, 1013, 18 L. J. Q. B. 49.

pation (*u*). In the case of a yearly tenancy the presumption is of an actual contract, but the liability for use and occupation is rather *quasi ex contractu* (*x*).

Corporations liable on quasi-contracts generally. It is settled that in general a cause of action on a quasi-contract is as good against a corporation as against a natural person. Thus a corporation may be sued in an action for money received on the ground of strict necessity; "it cannot be expected that a corporation should put their seal to a *promise to return moneys which they are wrongfully re- [156 ceiving" (*y*). It was held much earlier that trover could be maintained against a corporation—a decision which, as pointed out in the case last cited, was analogous in principle though not in form (*z*). Sometimes it is stated as a general rule that corporations are liable on informal contracts of which they have in fact had the benefit: but the extent and existence of the supposed rule are doubtful (*a*).

Statutory forms of contract. Forms of contracting otherwise than under seal are provided by many special or general Acts of Parliament creating or regulating corporate companies, and contracts duly made in those forms are of course valid. But a statute may, on the other hand, contain restrictive provisions as to the form of corporate contracts, and in that case they must be strictly followed. Enactments requiring contracts of local corporate authorities exceeding a certain value to be in writing and sealed with the corporate seal are held to be imperative, even if the agreement has been executed and the corporation has had the full benefit of it (*b*). The general result seems to stand thus:—

(*u*) *Lowe* v. *L. & N. W. Ry. Co.* (1852) 18 Q. B. 632, 21 L. J. Q. B. 361.

(*x*) The liability existed at common law, and the statute 11 Geo. 2, c. 19, s. 14, made the remedy by action on the case co-extensive with that by action of debt, see *Gibson* v. *Kirk* (1841) 1 Q. B. 850, 10 L. J. Q. B. 297. Since the C. L. P. Act the statute seems in fact superfluous.

(*y*) *Hall* v. *Mayor of Swansea* (1844) 5 Q. B. 526, 549, 13 L. J. Q. B. 107. The like of a *quasi* corporation empowered to sue and be sued by an officer, *Jefferys* v. *Gurr* (1831) 2 B. & Ad. 833, 36 R. R. 769.

(*z*) *Yarborough* v. *Bank of England* (1812) 16 East, 6, 14 R. R. 272. See early cases of trespass against corporations cited by Lord Ellenborough, 16 East, at p. 10, 14 R. R. 275. 276.

(*a*) *Hunt* v. *Wimbledon Local Board* (1878) 4 C. P. Div. at pp. 53, 57, 48 L. J. C. P. 207.

(*b*) *Frend* v. *Bennett* (1858) 4 C. B. N. S. 576, 27 L. J. C. P. 314; *Hunt* v. *Wimbledon Local Board* (1878) 3 C. P. D. 208, in C. A., 4 C. P. Div. 48, 48 L. J. C. P. 207; *Young & Co.* v. *Mayor of Leamington* (1883) 8 App. Ca. 517, 52 L. J. Q. B. 713. In *Eaton* v. *Basker* (1881) 7 Q. B. Div. 529, 50 L. J. Q. B. 444. it was decided that a provision of this kind in the Public Health Act, 1875, applies only to contracts known at the time of making them to exceed the specified "value or amount" of 50*l*.

Summary of results. In the absence of enabling or restrictive statutory provisions, which when they exist must be carefully attended to—

157] A trading corporation may make without seal any con*tract incidental to the ordinary conduct of its business; but it cannot bind itself by negotiable instruments unless the making of such instruments is a substantive part of that business, or is provided for by its constitution (*c*).

A non-trading corporation, if expressly created for special purposes, may make without seal any contract incidental to those purposes; if not so created, cannot (it seems) contract without seal except in cases of immediate necessity, constant recurrence, or trifling importance.

In any case where an agreement has been completely executed on the part of a corporation, it becomes a contract on which the corporation may sue.

The rights and obligations arising from the tenancy or occupation of land without an express contract apply to corporations both as landlords and as tenants or occupiers in the same manner (*d*) and to the same extent as to natural persons.

A corporation is bound by an obligation implied in law whenever under the like circumstances a natural person would be so bound.

It is much to be wished that the whole subject should be reviewed and put on a settled footing by the Court of Appeal, and that those cases which are already virtually overruled should be expressly declared to be no longer of authority (*e*).

2. *Negotiable instruments.*

The peculiar contracts undertaken by the persons who issue or endorse negotiable instruments must by the nature of the case be in writing. Part of the definition of a bill of exchange is that it is

158] an unconditional order in *writing (*f*). The acceptance of a bill of exchange, though it may be verbal as far as the law merchant is concerned, is required by statute to be in writing and signed (*g*).

3. *As to purely statutory forms.*

A. Contracts within the Statute of Frauds.

To write a commentary on the Statute of Frauds would be beyond

(*c*) See pp. *130, *131, *supra.*

(*d*) Assuming *Finlay* v. *Bristol & Exeter Ry. Co.* (1852) 7 Ex. 409, 21 L. J. Ex. 117, not to be now law.

(*e*) See per Lord Blackburn, 8 App. Ca. at p. 523, agreeing with Lindley L.J. 8 Q. B. Div. at p. 585.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3. So of promissory notes, s. 83.

(*g*) *Ib.* s. 17.

the scope of this work. It may be convenient however to state as shortly as possible, so far as contracts are concerned, the contents of the statute and some of the leading points established on the construction of it.

The statute (29 Car. 2, c. 3) enacts that no action shall be brought on any of the contracts specified in the 4th section "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The contracts comprised in this section are—

α. **Promises by executor, &c.** Any special promise by an executor or administrator "to answer damages out of his own estate." No difficulty has arisen on the words of the statute, and the chief observation to be made is the almost self-evident one (which equally applies to the other cases within the statute) that the existence of a written and signed memorandum is made a necessary condition of the agreement being enforceable, but will in no case make an agreement any better than it would have been apart from the statute. A good consideration, a real consent of the parties to the same thing in the same sense, and all other things necessary to make a contract good at common law are still required as much as before (*h*).

β.* **Guaranties. "Any special promise to answer for the debt, [159 default or miscarriages of another person."

On this the principal points are as follows. A promise is not within the statute unless there is a debt, &c. of some other person for which that other is to remain liable (though the liability need not be a present one): for there can be no contract of suretyship of guaranty unless and until there is an actual principal debtor. "Take away the foundation of principal contract, the contract of suretyship would fail" (*i*).[7] Where the liability, present or future, of a third

(*h*) As to these contracts of executors, 1 Wms. Exors. Pt. 2, Bk. 2, c. 2.

(*i*) *Mountstephen* v. *Lakeman* (1871) L. R. 7 Q. B. 196, 202 (in Ex. Ch.), 43 L. J. Q. B. 188, per Willes J.; affd. L. R. 7 H. L. 17. nom. *Lakeman* v. *Mountstephen* (1874).

7 Ledlow *v.* Becton, 36 Ala. 596; Kilbride *v.* Moss, 113 Cal. 432; Jepherson *v.* Hunt, 2 Allen, 417; Sinclair *v.* Bradley, 52 Mo. 180; Moorehouse *v.* Crangle, 36 Ohio St. 130; Mease *v.* Wagner, 1 McCord, 395; Walker *v.* Norton, 29 Vt. 226; Hodges *v.* Hall, 29 Vt. 209.

A promise to pay the debt of another, which provides for a release of that other from the debt, is not within the statute. Thornton *v.* Guice, 73 Ala. 321; Kilbride *r.* Moss, 113 Cal. 432; Packer *v.* Benton, 35 Conn. 343; Harris *r.* Young, 40 Ga. 65; Edenfield *r.* Canady, 60 Ga. 456; Sapp *v.* Faircloth, 70

person is assumed as the foundation of a contract, but does not in fact exist, then, independently of the statute, and on the principle of a class of cases to be explained elsewhere, there is no contract. On the other hand a promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute and need not be in writing. It may be an indemnity, it is not a guaranty (*j*). Whether particular spoken words, not in themselves conclusive, *e. g.* "Go on and do the work and I will see you paid," amount to such a promise or only to a guaranty is a question of fact to be determined by the circumstances of the case (*k*).[8]

Nor is a promise within the statute unless it is made to the principal creditor: "The statute applies only to promises made to the person to whom another is answerable" (*l*)[9] or is to become so.

(*j*) *Guild & Co.* v. *Conrad* [1894] 2 Q. B. 885, 63 L. J. Q. B. 721.

[See Ames's Cas. Suretyship, 53, 54.]

(*k*) *Lakeman* v. *Mountstephen*, *Guild & Co.* v. *Conrad*, *supra*.

(*l*) *Eastwood* v. *Kenyon* (1840) 11 A. & E. 438, 446; concess. *Cripps* v. *Hartnoll* (1863) 4 B. & S. 414, 32 L. J. Q. B. 381 (Ex. Ch.).

Ga. 690; Howell *v.* Field, 70 Ga. 592; Sext *v.* Geise, 80 Ga. 698; Palmer *v.* Blaine, 55 Ind. 11; Day *v.* Cloe, 4 Bush, 563; Daniels *v.* Gibson, 20 Ky. L. Rep. 847; White *v.* Solomonsky, 30 Md. 585; Whittemore *v.* Wentworth, 76 Me. 20; Wood *v.* Corcoran, 1 Allen 405; Eden *v.* Chaffee, 160 Mass. 225; Griffin *v.* Cunningham, 183 Mass. 505; Wilhelm *v.* Voss, 118 Mich. 106; Yale *v.* Edgerton, 14 Minn. 194; Meriden Co. *v.* Zingsen, 48 N. Y. 247; Booth *v.* Eighmie, 60 N. Y. 238; First Bank *v.* Chalmers, 144 N. Y. 432; Corbett *v.* Cochran, 3 Hill (S. C.) 41; Warren *v.* Smith, 24 Tex. 484; Watson *v.* Jacobs, 29 Vt. 169; Hooper *v.* Hooper, 32 W. Va. 526.

[8] Davis *v.* Tift, 70 Ga. 52; Billingsley *v.* Dempelwolf, 11 Ind. 414; Pettit *v.* Braden, 55 Ind. 201; Perkins *v.* Hinsdale, 97 Mass. 157; Walker *v.* Hill, 119 Mass. 249; Barrett *v.* McHugh, 128 Mass. 165; Cowdin *v.* Gottgetreu, 55 N. Y. 650; Warnick *v.* Grosholz, 3 Grant's Cas. 234; Merriman *v.* McManus, 102 Pa. 102; Sinclair *v.* Richardson, 12 Vt. 33; West *v.* O'Hara, 55 Wis. 645. See also Davis *v.* Patrick, 141 U. S. 479; Craft *v.* Kendrick, 39 Fla. 90; Phelps *v.* Stone, 172 Mass. 355; Daniel *v.* Robinson, 66 Mich. 296; Wilhelm *v.* Voss, 118 Mich. 106; Green *v.* Burton, 59 Vt. 423. Cp. Birchell *v.* Neaster, 36 Ohio St. 331, and Crawford *v.* Edison, 45 Ohio St. 239.

[9] Clark *v.* Jones, 85 Ala. 127; Pratt *v.* Humphrey, 22 Conn. 317; Tuttle *v.* Armstead, 53 Conn. 175; Meyer *v.* Hartman, 72 Ill. 442; Neagle *v.* Kelly, 146 Ill. 460; Crim *v.* Fitch, 53 Ind. 214; Bateman *v.* Butler, 124 Ind. 223; Merchant *v.* O'Rourke, 111 Ia. 351; Center *v.* McQuesten, 18 Kan. 476; Williams *v.* Rogers, 14 Bush, 776; North *v.* Robinson, 1 Duv. 71; Hardesty *v.* Jones, 10 G. & J. 404; Alger *v.* Scoville, 1 Gray, 391; Perkins *v.* Littlefield, 5 Allen, 370; Pratt *v.* Bates, 40 Mich. 37; Goetz *v.* Foss, 14 Minn. 265; Ware *v.* Allen, 64 Miss. 545; Brown *v.* Brown, 47 Mo. 130; Green *v.* Estes, 82 Mo. 337; Fisk *v.* McGregory, 34 N. H. 414; Merserean *v.* Lewis, 25 Wend. 243; Smart *v.* Smart, 97 N. Y. 559; Rice *v.* Carter, 11 Ired. L. 298; Little *v.* McCarter, 89 N. C. 233; Randall *v.* Kelsey, 46 Vt. 158.

Where, upon a consideration moving to himself, the holder of a third person's obligation transfers it to another, his guaranty thereof, made simultaneously with the transfer, is not within the statute. Railroad Co. *v.* Jones, 57 [illegible]. 198; Beaty *v.* Grim, 18 Ind. 131; Voris *v.* Star, &c., Assoc., 20 Ind.

A mere promise of indemnity is not within the statute (*m*),[10] though any promise which is in substance within it cannot be taken out of it by being put in the form of an *indemnity (*n*).[11] A [160 promise to bear contingent losses in a transaction in which the promisor has an independent interest is a promise of indemnity and not a guaranty (*o*).

A contract to give a guaranty at a future time is as much within the statute as the guaranty itself (*p*).[12]

(*m*) *Cripps* v. *Hartnoll* (last note); *Wildes* v. *Dudlow* (1874) L. R. 19 Eq. 198, 44 L. J. Ch. 341. So of an indemnity by one partner to his co-partners in respect of a doubtful debt from a third person to the firm: *Re Hoyle* [1893] 1 Ch. 84, 62 L. J. Ch. 182, C. A.

(*n*) *Cripps* v. *Hartnoll*, note (*l*) last * page.

(*o*) *Sutton* v. *Grey* [1894] 1 Q. B. 285, 63 L. J. Q. B. 633.

(*p*) *Mallet* v. *Bateman* (1865) L. R. 1 C. P. 163 (Ex. Ch.), 35 L. J. C. P. 40. See further on this clause, 1 Wms. Saund. 229—235, or 1 Sm.

App. 630 (cp. Hassinger *v.* Newman, 83 Ind. 124); Huntington *v.* Wellington, 12 Mich. 10; Wilson *v.* Hentges, 29 Minn. 102; Barker *v.* Scudder, 56 Mo. 272; Milks *v.* Rich, 80 N. Y. 269; Rowland *v.* Rorke, 4 Jones L. 337; Malone *v.* Keener, 44 Pa. 107; Hall *v.* Rogers, 7 Humph. 536; Eagle, &c., Machine Co. *v.* Shattuck, 53 Wis. 455; Ames, Cas. Suretyship, 62, n. 3; 64, n. 1.

In Dows *v.* Swett, which was three times before the court (134 Mass. 140; 127 Mass. 364; 120 Mass. 322) it was decided, that a debtor's guaranty of the note of a third party, made payable directly to the creditor, and accepted as absolute payment of the debt, is within the statute. But see *contra*, Sheldon *v.* Butler, 24 Minn. 513; Crane *v.* Wheeler, 48 Minn. 207; Eagle, &c., Machine Co. *v.* Shattuck, 53 Wis. 455.

[10] Whether a promise to indemnify one for becoming bail or surety for a third person is, or not, within the statute, is a disputed question in the United States. That the promise is not within the statute, see Godden *v.* Pierson, 42 Ala. 370; Smith *v.* Delaney, 64 Conn. 264 (but see Clement's Appeal, 52 Conn. 464); Jones *v.* Shorter, 1 Kelly (Ga.) 294; Resseter *v.* Waterman, 151 Ill. 169; Horn *v.* Bray, 51 Ind. 555; Keesling *v.* Frazier, 119 Ind. 185; Mills *v.* Brown, 11 Ia. 314; Patton *v.* Mills, 21 Kan. 163; Dunn *v.* West, 5 B. Mon. 376; George *v.* Hoskins, 17 Ky. L. Rep. 63; Smith *v.* Sayward, 5 Me. 504; Aldrich *v.* Ames, 9 Gray, 76; Boyer *v.* Soules, 105 Mich. 31; Fidelity Co. *v.* Lawler, 64 Minn. 144; Esch *v.* White, 76 Minn. 220; Minick *v.* Huff, 41 Neb. 516; Holmes *v.* Knights, 10 N. H. 175; Demeritt *v.* Biekford, 58 N. H. 523; Cortelyou *v.* Hoagland, 40 N. J. Eq. 1; Warren *v.* Abbett, 65 N. J. L. 99; Tighe *v.* Morrison, 116 N. Y. 263; Jones *v.* Baeon, 145 N. Y. 446; Rose *v.* Wollenberg, 31 Oreg. 269; Vogel *v.* Melms, 31 Wis. 306; Barth *v.* Graf, 101 Wis. 27.

This is believed to be the better view. *Contra*, see Martin *v.* Black, 20 Ala. 309; Spear *v.* Bank, 156 Ill. 555; May *v.* Williams, 61 Miss. 125; Bissing *v.* Britton, 59 Mo. 204; Hurt *v.* Ford, 142 Mo. 283; Hartley *v.* Sandford, 66 N. J. L. 627; Brown *v.* Adams, 1 Stew. 51; Draughan *v.* Bunting, 9 Ired. L. 10; Easter *v.* White, 12 Ohio St. 219; Kelsey *v.* Hibbs, 13 Ohio St. 340; Nugent *v.* Wolfe, 111 Pa. 471 (but see Elkin *v.* Timlin, 151 Pa. 491); Simpson *v.* Nance, 1 Speers, 4; Macey *v.* Childress, 2 Tenn. Ch. 438; Wolverton *v.* Davis, 85 Va. 64.

Courts holding the latter view have taken a distinction where the promisor and promisee were both sureties for the third person, and there held the promise of indemnity not within the statute. Barry *v.* Ransom, 12 N. Y. 462; Ferrell *v.* Maxwell, 28 Ohio St. 383.

[11] Cheesman *v.* Wiggins, 122 Ind. 352.

[12] Davis *v.* Patrick, 141 U. S. 479; Dillaby *v.* Wileox, 60 Conn. 71; Dee *v.*

γ. **Agreements upon consideration of marriage.** "Any agreement made upon consideration of marriage." A promise to marry is not within these words, the consideration being not marriage, but the other party's reciprocal promise to marry.[13] For further remarks on the effect of this clause, see Chapter XIII. on Agreements of Imperfect Obligation, *infra*.

In the old books we frequently meet with another sort of difficulty touching agreements of this kind; it was much doubted whether matrimony were not so purely spiritual a matter that all agreements concerning it must be dealt with only by the ecclesiastical courts: the type of these disputed contracts is a promise by A. to B. to pay B. 10*l*. if he will marry A.'s daughter. But this by the way (*q*).

161] **δ.* **Interests in land.** "Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is usually and conveniently considered as belonging to the topic

L. C. 334, note to *Birkmyr* v. *Darnell* (1705). Cp. *Wallace* v. *Gibson* [1895] A. C. 354, on the Mercantile Law (Scotland) Amendment Act.

(*q*) Such promise may be sued on in the King's Court if by deed, 22 Ass. 101, pl. 70; otherwise if he had promised 10*l*. *with his daughter in marriage*, then it should be in the Court Christian, Trin. 45 Ed. III. 24, pl. 30; action good without specialty where the marriage had taken place, Mich. 37 H. VI. 8, pl. 18; *contra* (not without dissent), Trin. 17 Ed. IV. 4, pl. 4. In Bracton's time the exclusive jurisdiction of the spiritual courts appears to have been admitted: "ad forum seculare trahi non debet per id quod minus est et non principale id quod primum et principale est in foro ecclesiastico, ut si ob causam matrimonii pecunia promittatur, licet videatur prima facie quod cognito super catallis et debitis pertineat ad forum seculare, tamen propter id quod maius est et dignius trahitur cognitio pecuniae promissae et debitae ad forum ecclesiasticum, et ubi [? ibi] locum non habet prohibitio, cum debitum sit de testamento vel matrimonio:" folio 175 *a*. It should be remembered that ordinary debts were still indirectly enforced in the spiritual courts by the imposition of penance: 22 Ass. *ubi sup.* The so-called statute of *Circumspecte agatis* appears to have been construed as allowing this if the spiritual court did not directly order payment of the debt.

Downs, 57 Ia. 589; State *v.* Shinn, 42 N. J. L. 138; Warren *v.* Abbett, 65 N. J. L. 99; Carville *v.* Crane, 5 Hill, 483; Rintoul *v.* White, 108 N. Y. 222; Dougherty *v.* Bash, 167 Pa. 429; Taylor *v.* Drake, 4 Strobh. L. 431.

In Leonard *v.* Vredenburgh, 8 Johns. 29, Kent, C. J., classified the cases arising upon provision *β* of the statute; see further, the classification by Comstock, J., in Mallory *v.* Gillett, 21 N. Y. 412; Ames' Cas. Suretyship, chap. I.

[13] Clark *v.* Pendleton, 20 Conn. 495; Blackburn *v.* Mann, 85 Ill. 222; Short *v.* Stotts, 58 Ind. 29; Caylor *v.* Roe, 39 Ind. 1, 5; Withers *v.* Richardson, 5 T. B. Mon. 94; Morgan *v.* Yarborough, 5 La. Ann. 316; Ogden *v.* Ogden, 1 Bland Ch. 284; Wilbur *v.* Johnson, 58 Mo. 600; Derby *v.* Phelps, 2 N. H. 515; Barge *v.* Haslam, 63 Neb. 296.

"An oral agreement to execute an antenuptial contract is within the Statute of Frauds; and if an oral agreement to marry is dependent upon such an agreement, and a part of it, no action can be maintained upon it." Chase *v.* Fitz, 132 Mass. 359. See also Hunt *v.* Hunt, 171 N. Y. 396.

of Vendors and Purchasers of real estate; and the reader is referred to the well-known works which treat of that subject (*r*). Questions have arisen, however, whether sales of growing crops and the like were sales of an interest in lands within the 4th section or of goods within the 17th (*s*).[14] A sale of tenant's fixtures, being a sale only of the

(*r*) As to an agreement *collateral* to a demise of land not being within the statute, see *Morgan* v *Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46; *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Angell* v. *Duke* (1875) L. R. 10 Q. B. 174, 44 L. J. Q. B. 78; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A. [Lewis *v.* Seabury, 74 N. Y. 409. And see Weatherbee *v.* Potter, 99 Mass. 354, 361; Carr *v.* Dooley, 119 Mass. 294; McCormick *v.* Cheevers, 124 Mass. 262; Rackemann *v.* Riverbank Imp. Co. 167 Mass. 1; Remington *v.* Palmer, 62 N. Y. 31; Dodge *v.* Zimmer, 110 N. Y. 43; Johnson *v.* E. C. Land Co. 116 N. C. 926; Hei *v.* Heller, 53 Wis. 415. As to stipulations collateral to the sale of an interest in land, see also Dodder *v.* Snyder, 110 Mich. 69; Chapin *v.* Dobson, 78 N. Y. 74; Tuttle *v.* Burgett, 53 Ohio St. 498; Baker *v.* Flick, 200 Pa. 13. Disapproving Morgan *v.* Griffith, and Erskine *v.* Adeane, see Naumberg *v.* Young, 44 N. J. L. 331.] As to the distinction between a demise and a mere licence or agreement for the use of land without any change of possession, *Wells* v. *Kingston-upon-Hull* (1875) L. R. 10 C. P. 402, 44 L. J. C. P. 257.

(*s*) *Marshall* v. *Green* (1875) 1 C. P. D. 35, 45 L. J. C. P. 153. As to building materials to be severed from the soil, *Lavery* v. *Pursell* (1888) 39 Ch. D. 508, 57 L. J. Ch. 570. [Meyers *v.* Schemp, 67 Ill. 469, is in accord with Lavery *v.* Pursell. Cp. Harris *v.* Powers, 59 Ala. 139; Keyser *v.* District, 35 N. H. 477; Long *v.* White, 42 Ohio St. 59.] And see 1 Wms. Saund. 395.

[14] Crops planted and raised annually by the hand of man are practically withdrawn from the operation of the statute. Marshall *v.* Ferguson, 23 Cal. 65; Davis *v.* McFarlane, 37 Cal. 634; Bull *v.* Griswold, 19 Ill. 631; Meinke *v.* Nelson, 56 Ill. App. 269; Northern *v.* State, 1 Ind. 113; Bricker *v.* Hughes, 4 Ind. 146; Sherry *v.* Picken, 10 Ind. 375; Cutler *v.* Pope, 13 Me. 377; Bryant *v.* Crosby, 40 Me. 9; Purner *v.* Piercy, 40 Md. 212; Whitmarsh *v.* Walker, 1 Met. 313; Smock *v.* Smock, 37 Mo. App. 56; Holt *v.* Holt, 57 Mo. App. 272; Newcomb *v.* Ramer, 2 Johns. 421, note; Bank *v.* Lansingburgh, 1 Barb. 542; Webster *v.* Zielly, 52 Barb. 482; Brittain *v.* McCay, 1 Ired. 265; Walton *v.* Jordan, 65 N. C. 170; Carson *v.* Browder, 2 Lea, 701; Kerr *v.* Hill, 27 W. Va. 276. Cp. Powell *v.* Rich, 41 Ill. 466; Powers *v.* Clarkson, 17 Kan. 218.

In Connecticut, Kentucky, Maine, Maryland, and Massachusetts sales of growing trees to be presently cut and removed by the vendee are held not to be within the operation of the fourth section of the statute. Bostwick *v.* Leach, 3 Day (Conn.), 476; Cain *v.* McGuire, &c., 13 B. Mon. 340; Byassee *v.* Reese, 4 Metc. (Ky.) 372; Prater *v.* Campbell (Ky.), 60 S. W. Rep. 918; Erskine *v.* Plummer, 7 Me. 447; Cutler *v.* Pope, 13 Me. 377; Smith *v.* Bryan, 5 Md. 141; Claflin et al. *v.* Carpenter, 4 Metc. 580; Nettleton *v.* Sikes, 8 Metc. 34.

The courts of most American States that have considered the question, however, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands. Haflin *v.* Bingham, 56 Ala. 574; Coody *v.* Gress Lumber Co., 82 Ga. 793; Hostetter *v.* Auman, 119 Ind. 7; Jackson *v.* Evans, 44 Mich. 510; Harrell *v.* Miller, 35 Miss. 700; Walton *v.* Lowrey, 74 Miss. 484; Lyle *v.* Shinnebarger, 17 Mo. App. 66; Howe *v.* Batchelder, 49 N. H. 204; Westbrook *v.* Eager, 1 Harr. (N. J.) 87; Mizell *v.* Burnett, 4 Jones (N. C.) 249; Clark *v.* Guest, 54 Ohio St. 298; Miller *v.* Zufall, 113 Pa. 317; Knox *v.* Haralson, 2 Tenn. Ch. 232; Buck *v.* Pickwell, 27 Vt. 157

right to sever the fixtures from the freehold during the term, is not within either section (*t*).[15]

Leases. By the 1st and 2nd sections of the statute leases for more than three years, or reserving a rent less than two-thirds of the

(*t*) *Lee* v. *Gaskell* (1876) 1 Q. B. D. 700, 45 L. J. Q. B. 540.

(cp. Sterling *v.* Baldwin, 42 Vt. 306); Fluharty *v.* Mills, 49 W. Va. 446; Seymour *v.* Cushway, 100 Wis. 580.

A sale of bark on standing trees is similar. Thomson *v.* Poor, 57 Hun, 285.

[15] Bostwick *v.* Leach, 3 Day, 476; South Baltimore Co. *v.* Mullbach, 69 Md. 395; Moody *v.* Aiken, 50 Tex. 65. See also Frear *v.* Hardenbergh, 5 Johns. 272; Benedict *v.* Beebee, 11 Johns. 145; Lower *v.* Winters, 7 Cow. 263.

The authority of an agent to make a written contract for the sale of land need not itself be in writing. Heard *v.* Pilley, 4 Ch. App. 548; Rutenberg *v.* Main, 47 Cal. 213; Tibbetts *v.* West & South Ry. Co., 153 Ill. 147; Rottman *v.* Wasson, 5 Kan. 552; Rose *v.* Hayden, 35 Kan. 106; Talbot *v.* Bowen, 1 A. K. Marsh. 436; Brown *v.* Eaton, 21 Minn. 409 (changed by statute, Coursolle *v.* Weyerhauser, 69 Minn. 328, 332); Curtis *v.* Blair, 26 Miss. 309; Lobdell *v.* Mason, 71 Miss. 937; Riley *v.* Minor, 29 Mo. 439; Jackson *v.* Higgins, 70 N. H. 637; Worrall *v.* Munn, 5 N. Y. 229; Newton *v.* Bronson, 13 N. Y. 587; Blass *v.* Terry, 156 N. Y. 122, 135; Abbott *v.* Hunt, 129 N. C. 403; Dodge *v.* Hopkins, 14 Wis. 630; Tufts *v.* Brace, 103 Wis. 341, 344; Brown *v.* Griswold, 109 Wis. 275, 279. Cp. Dunphy *v.* Ryan, 116 U. S. 491.

In some States, however, statutes expressly require the agent's authority to be in writing. See Mechem on Agency, § 89.

Nor need an agreement of partnership be in writing though the purpose of the partnership is to deal in lands. Dale *v.* Hamilton, 5 Hare, 369; *Re* De Nicols, [1900] 2 Ch. 410; McElroy *v.* Swope, 47 Fed. Rep. 386; Bates *v.* Babcock, 95 Cal. 479; Von Trotha *v.* Bamberger, 15 Col. 1; Morrill *v.* Colehour, 82 Ill. 618; Holmes *v.* McCray, 51 Ind. 358; Lewis *v.* Harrison, 81 Ind. 278, 286; Richards *v.* Grinnell, 63 Ia. 44; Dudley *v.* Littlefield, 21 Me. 418, 423; Trowbridge *v.* Wetherbee, 11 Allen, 361; Wetherbee *v.* Potter, 99 Mass. 354; Carr *v.* Leavitt, 54 Mich. 540; Davis *v.* Gerber, 69 Mich. 246; Petrie *v.* Torrent, 88 Mich. 43; Snyder *v.* Wolfred, 33 Minn. 175; Newell *v.* Cochran, 41 Minn. 374; Chester *v.* Dickerson, 54 N. Y. 1; Babcock *v.* Read, 99 N. Y. 209; King *v.* Barnes, 109 N. Y. 267, 285; Flower *v.* Barnekoff, 20 Oreg. 132; Benjamin *v.* Zell, 100 Pa. 33; Meason *v.* Kaine, 63 Pa. 339; Everhart's App., 106 Pa. 349; Howell *v.* Kelly, 149 Pa. 473; Bruce *v.* Hastings, 41 Vt. 380. But see *contra*, Smith *v.* Burnham, 3 Sum. 458; Rowland *v.* Boozer, 10 Ala. 690, 695; Gray *v.* Palmer, 9 Cal. 639; Pecot *v.* Armelian, 21 La. Ann. 667; Bird *v.* Morrison, 12 Wis. 138; McMillen *v.* Pratt, 89 Wis. 612; Smith *v.* Putnam, 107 Wis. 155, 162. Cp. Watters *v.* McGuigan, 72 Wis. 155.

Similarly a contract for the sale of a partnership interest is not within the statute though the partners own land. Vincent *v.* Vieths, 60 Mo. App. 9. Compare Watson *v.* Spratley, 10 Ex. 222.

But an agreement by one party to buy an interest in land jointly for himself and the other party is within the statute. Wallace *v.* Stevens, 64 Me. 225; Hollida *v.* Shoop, 4 Md. 465; Green *v.* Drummond, 31 Md. 71; Bailey *v.* Hemenway, 147 Mass. 326; Brosnan *v.* McKee, 63 Mich. 454. See also McLennan *v.* Boutell, 117 Mich. 544. Cp. Evans *v.* Green, 23 Miss. 294.

A parol agreement between joint owners or tenants in common to partition their land is held in many States not to be within the statute, at least if the agreement has been acted on. Long *v.* Dollarhide, 24 Cal. 218; Tuffree *v.* Polhemus, 108 Cal. 670, 677; Tomlin *v.* Hilyard, 43 Ill. 300; Grimes *v.* Butts, 65 Ill. 347; Shepard *v.* Rinks, 78 Ill. 188; Gage *v.* Bissell, 119 Ill. 298; Lacy *v.* Gard, 60 Ill. App. 72; Foltz *v.* Wert, 103 Ind. 404; Moore *v.* Kerr, 46 Ind. 468; Bruce *v.* Osgood, 113 Ind. 360; Tate *v.* Foshee, 117 Ind. 322; Higginson *v.* Schaneback (Ky.), 66 S. W. Rep. 1040; Johnston *v.* Labat,

improved value, must be in writing and signed by the parties or their agents authorized *in writing,* and now by 8 & 9 Vict. c. 106, s. 3, they must be made by deed. But an informal lease, though void as a lease, may be good as an agreement for a lease (*u*).[16]

ε. **Agreements not to be performed within a year.** "Any agreement that is not to be performed within the space of one year from the making thereof."

(*u*) Dart, V. & P. 1. 198.

26 La. Ann. 159; Wildey *v.* Bonneys, 31 Miss. 644; Pipes *v.* Buckner, 51 Miss. 848; Bompart *v.* Roderman, 24 Mo. 385; Jackson *v.* Harder, 4 Johns. 202; Wood *v.* Fleet, 36 N. Y. 499; Piatt *v.* Hubbell, 5 Ohio, 243; Wolf *v.* Wolf, 158 Pa. 281; Rountree *v.* Lane, 32 S. C. 160; Meacham *v.* Meacham, 91 Tenn. 532; Stuart *v.* Baker, 17 Tex. 417; Smock *v.* Tandy, 28 Tex. 130; Mitchell *v.* Allen, 69 Tex. 70; Aycock *v.* Kimbrough, 71 Tex. 330; Mass *v.* Bromberg (Tex. Civ. App.), 66 S. W. Rep. 468; Whitemore *v.* Cope, 11 Utah, 344; Brazee *v.* Schofield, 2 Wash. Ty. 209. See also Berry *v.* Seawald, 65 Fed. Rep. 742 (C. C. A.). But see *contra,* Johnson *v.* Wilson, Willes, 248; Ireland *v.* Rittle, 1 Atk. 541; Whaley *v.* Dawson, 2 Sch. & L. 367; Bach *v.* Ballard, 13 La. Ann. 487; Duncan *v.* Sylvester, 16 Me. 388; Chenery *v.* Dole, 39 Me. 162; John *v.* Sabattis, 69 Me. 473; Porter *v.* Perkins, 5 Mass. 233; Porter *v.* Hill, 9 Mass. 34; Ballou *v.* Hale, 47 N. H. 347; Woodhull *v.* Longstreet, 3 Har. 405; Lloyd *v.* Conover, 1 Dutch. 47; Medlin *v.* Steele, 75 N. C. 154; Jones *v.* Reeves, 6 Rich. L. 132. See also Duncan *v.* Duncan, 93 Ky. 37.

A similar rule prevails in regard to a parol agreement between adjoining landowners as to a disputed boundary line. Jenkins *v.* Trager, 40 Fed. Rep. 726; Cavanaugh *v.* Jackson, 91 Cal. 580; Watrous *v.* Morrison, 33 Fla. 261; Carstarphen *v.* Holt, 96 Ga. 703; Grim *v.* Murphy, 110 Ill. 271; Duggan *v.* Uppendahl, 197 Ill. 179; Tate *v.* Foshee, 117 Ind. 322; Jamison *v.* Petit, 6 Bush, 669; Jones *v.* Pashby, 67 Mich. 459; Pittsburgh Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109; Archer *v.* Helm, 69 Miss. 730; Blair *v.* Smith, 16 Mo. 273; Turner *v.* Baker, 8 Mo. App. 583, 64 Mo. 218; Atchison *v.* Pease, 96 Mo. 566; Barnes *v.* Allison, 166 Mo. 96; Bartlett *v.* Young, 63 N. H. 265; Hitchcock *v.* Libby, 70 N. H. 399; Vosburgh *v.* Teator, 32 N. Y. 561; Bobo *v.* Richmond, 25 Ohio St. 115; Hagey *v.* Detweiler, 35 Pa. 409; Cooper *v.* Austin, 58 Tex. 494; Harn *v.* Smith, 79 Tex. 310; Levy *v.* Maddox, 81 Tex. 210; Lecomte *v.* Toudouze, 82 Tex. 208; Gwynn *v.* Schwartz, 32 W. Va. 487; Teass *v.* St. Albans, 38 W. Va. 1. But see *contra,* Liverpool Wharf *v.* Prescott, 4 Allen, 22, 7 Allen, 494.

If the true boundary line is known, however, a new one cannot be established by parol. Boyd *v.* Graves, 4 Wheat. 513; Sharp *v.* Blankenship, 67 Cal. 441; Nathan *v.* Dierssen, 134 Cal. 282; Miller *v.* McGlann, 63 Ga. 435; Vosburgh *v.* Teator, 32 N. Y. 561; Harris *v.* Oakley, 130 N. Y. 1, 5; Ambler *v.* Cox, 13 Hun, 295; Lennox *v.* Hendricks, 11 Oreg. 33; Nichol *v.* Lytle, 4 Yerg. 456; Gilchrist *v.* McGee, 9 Yerg. 455; Lewallen *v.* Overton, 9 Humph. 76; Hartung *v.* Witte, 59 Wis. 285. See further, 57 Cent. L. J. 449.

[16] So an instrument inoperative as a deed for want of a seal may satisfy the statute as a memorandum of a contract to convey. Henry *v.* Root, 33 N. Y. 526, 550.

"An instrument of writing in the usual form of a deed of conveyance, but not delivered as such, may nevertheless be delivered as an executory contract, or as partial evidence of a contract to sell and convey the lands therein described; and if signed and so delivered by the vendor, and accepted by the vendee, it is sufficient, in an action thereon, to take the case out of the operation of the Statute of Frauds." Thayer *v.* Luce, 22 Ohio St. 62; Campbell *v.* Thomas, 42 Wis. 437. See also Johnston *v.* Jones, 85 Ala. 286; Wier *v.* Batdorf, 24 Neb. 83. Cp. Kopp *v.* Reiter, 146 Ill. 437; Morrow *v.* Moore, 98 Me. 373; Schneider *v.* Vogler, (Neb.) 97 N. W. Rep. 1018.

"Is not to be," not "is not" or "may not be." This means an agreement that on the face of it cannot be performed within a year. An agreement capable of being performed within a year, and not showing any intention to put off the performance till after a year, **162]** is not within *this clause (*x*).[17] Nor is an agreement within it

(*x*) *Smith v. Neale* (1857) 2 C. B. N. S. 67, 26 L. J. C. P. 143.

[17] It is well settled that an agreement is not within the statute merely because performance may extend over more than a year; but where in all probability performance will extend over more than a year and it is expected by the parties that it will, there has been more question. The leading case is Warner *v.* Texas & Pacific Ry. Co., 164 U. S. 418. In that case the promise of the defendant was to maintain a switch for the plaintiff's benefit for shipping purposes "as long as he needed it." The defendant maintained the switch for thirteen years and then tore it up. The Supreme Court reversing the decision below held that the contract was not within the statute, and the weight of authority sustains the decision. Heflin *v.* Milton, 69 Ala. 354; Sweet *v.* Desha Lumber Co., 56 Ark. 629; Osment *v.* McElrath, 68 Cal. 466; Orland *v.* Finnell, 133 Cal. 475; Clark *v.* Pendleton, 20 Conn. 495; Sarles *v.* Sharlow, 5 Dak. 100; White *v.* Murtland, 71 Ill. 250; Straughan *v.* Indianapolis, &c. R. R. Co., 38 Ind. 185; Sutphen *v.* Sutphen, 30 Kan. 510; Louisville, &c. R. R. Co. *v.* Offutt, 99 Ky. 427; Story *v.* Story (Ky.), 61 S. W. Rep. 279, 62 S. W. Rep. 865; Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Baltimore Breweries Co. *v.* Callahan, 82 Md. 106; Carnig *v.* Carr, 167 Mass. 544; Wiebeler *v.* Milwaukee Ins. Co., 30 Minn. 464; Harrington *v.* Kansas City R. R. Co., 60 Mo. App. 223; Boggs *v.* Pacific Laundry Co., 86 Mo. App. 616; Powder River Co. *v.* Lamb, 38 Neb. 339; Gault *v.* Brown, 48 N. H. 183; Plimpton *v.* Curtiss, 15 Wend. 336; Trustees *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305; Blake *v.* Voight, 134 N. Y. 69; Randall *v.* Turner, 17 Ohio St. 262; Blakeney *v.* Goode, 30 Ohio St. 350; Jones *v.* Pouch, 41 Ohio St. 146; Hodges *v.* Richmond Mfg. Co., 9 R. I. 482; Seddon *v.* Rosenbaum, 85 Va. 928. But see on the other hand Meyer *v.* Roberts, 46 Ark. 80; Wilson *v.* Ray, 13 Ind. 1; Goodrich *v.* Johnson, 66 Ind. 258; Carney *v.* Mosher, 97 Mich. 554; Mallett *v.* Lewis, 61 Miss. 105; Biest *v.* Ver Steeg Shoe Co. (Mo. App.), 70 S. W. Rep. 1081; Shute *v.* Dorr, 5 Wend. 204; Day *v.* New York Central R. R. Co., 51 N. Y. 583, 89 N. Y. 616; Izard *v.* Middleton, 1 Desaus. 116; Jones *v.* McMichael, 12 Rich. L. 176; Deaton *v.* Tennessee Coal Co., 12 Heisk. 650; also Buhl *v.* Stephens, 84 Fed. Rep. 922; Swift *v.* Swift, 46 Cal. 266; Butler *v.* Shehan, 61 Ill. App. 561.

Promises which by their terms extend during the life of the promisor or promisee are not within the statute. Hill *v.* Jamieson, 16 Ind. 125; Bell *v.* Hewitt's Ex., 24 Ind. 280; Harper *v.* Harper, 57 Ind. 547; Welz *v.* Rhodius, 87 Ind. 1; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109; Atchison, &c. R. R. Co. *v.* English, 38 Kan. 110; Howard *v.* Burgen, 4 Dana, 137; Bull *v.* McCrea, 8 B. Mon. 422; Myles *v.* Myles, 6 Bush. 237; Stowers *v.* Hollis, 83 Ky. 544; Hutchinson *v.* Hutchinson, 46 Me. 154; Worthy *v.* Jones, 11 Gray, 168; Carr *v.* McCarthy, 70 Mich. 258; McCormick *v.* Drummett, 9 Neb. 384; Blanding *v.* Sargent, 33 N. H. 239; Dresser *v.* Dresser, 35 Barb. 573; Thorp *v.* Stewart, 44 Hun, 232; Richardson *v.* Pierce, 7 R. I. 330; East Line Co. *v.* Scott, 72 Tex. 70; Blanchard *v.* Weeks, 34 Vt. 589; Thomas *v.* Armstrong, 86 Va. 323; Heath *v.* Heath, 31 Wis. 223. But see *contra*, Vose *v.* Strong, 45 Ill. App. 98; affd., 144 Ill. 108; Deaton *v.* Tennessee Coal Co., 12 Heisk. 650.

Similarly contracts to be performed at the death of a person are not within the statute. Frost *v.* Tarr, 53 Ind. 390; Riddle *v.* Backus, 38 Ia. 81; Sword *v.* Keith, 31 Mich. 247; Updike *v.* Ten Broeck, 3 Vroom, 105; Kent *v.* Kent, 62 N. Y. 560; Jilson *v.* Gilbert, 26 Wis. 637.

which is completely performed by one party within a year (*y*).[18] It appears to be now settled that an agreement depending on the life of a party or of some other person, or otherwise determinable on a contingency which may possibly happen within a year, though this be not expected or desired by the parties, is not within this branch of the statute (*z*).[19]

(*y*) *Cherry* v. *Heming* (1849) 4 Ex. 631, 19 L. J. Ex. 63. See notes to *Peter* v. *Compton*, 1 Sm. L. C. 359.

(*z*) *McGregor* v. *McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 591, overruling *Davey* v. *Shannon* (1879) 4 Ex. D. 81, and (it should seem) *Eley* v. *Positive Assurance Co.* (1876) 1 Ex. D. 20 (in C. A. *ib.* 88, not on this point), 45 L. J. Ex. 451. The English decisions appear to be received in America: see *Warner* v. *Texas and Pacific Ry.* (1896) 164 U. S. 418.

[18] Fernald *v.* Gilman, 123 Fed. Rep. 797; Rake's Admrs. *v.* Pope, 7 Ala. 161; Manning *v.* Pippen, 95 Ala. 537; Fraser *v.* Gates, 118 Ill. 99, 112; Piper *v.* Fosher, 121 Ind. 407; Curtis *v.* Sage, 35 Ill. 22; Haugh *v.* Blythe's Exrs., 20 Ind. 24; Smalley *v.* Greene, 52 Ia. 241; Dant *v.* Head, 90 Ky. 255; Jones *v.* Comer, 25 Ky. L. Rep. 773; Holbrook *v.* Armstrong, 10 Me. 31; Ellicott *v.* Turner, 4 Md. 476; Suggett's Admr. *v.* Cason's Admr., 26 Mo. 221; Self *v.* Cordell, 45 Mo. 345; Bless *v.* Jenkins, 129 Mo. 647; Kendall *v.* Garneau, 55 Neb. 403; Perkins *v.* Clay, 54 N. H. 518; Barry *v.* Doremus, 30 N. J. L. 399; Bennett *v.* Mahler, 90 N. Y. App. Div. 22; Scheuer *v.* Monash, 83 N. Y. Supp. 253; Durfee *v.* O'Brien, 16 R. I. 213; Compton *v.* Martin, 5 Rich. L. 14; Bates *v.* Moore, 2 Bailey, 614; Railway Co. *v.* Wood, 88 Tex. 191; Reed *v.* Gold, 102 Va. 37; McClellan *v.* Sanford, 26 Wis. 595; Grace *v.* Lunch, 80 Wis. 166. But see *contra*, Warner *v.* Texas & Pacific Ry. Co., 54 Fed. Rep. 922 (see s. c. 164 U. S. 418); Jackson Iron Co. *v.* Negaunee Co., 65 Fed. Rep. 298; Patten *v.* Hicks, 43 Cal. 509; Montague *v.* Garnett, 3 Bush, 297; Marcy *v.* Marcy, 9 Allen, 8; Frary *v.* Sterling, 99 Mass. 461; Kelley *v.* Thompson, 175 Mass. 427; Whipple *v.* Parker, 29 Mich. 369; Dietrich *v.* Hoefelmeir, 128 Mich. 145; Buckley *v.* Buckley, 9 Nev. 373; Emery *v.* Smith, 46 N. H. 151; Broadwell *v.* Getman, 2 Denio, 87; Reinheimer *v.* Carter, 31 Ohio St. 579, 587, 58; Pierce *v.* Payne, 28 Vt. 34; Parks *v.* Francis, 50 Vt. 626.

But where a plaintiff who has thus performed, is not allowed to sue on the contract, he can recover on a *quantum meruit*, or *quantum valebat* if the performance of the contract has inured to the defendant's benefit, so that in the absence of an express promise of compensation, one would have been implied. St. Louis Hay Co. *v.* United States, 191 U. S. 159, 164; Bacon *v.* Parker, 137 Mass. 309, 310.

In Sheehy *v.* Adarene, 41 Vt. 541, it was held that a promise to be performed within a year, made in consideration of one not to be performed within a year, is not within the statute.

[19] Scribner *v.* Flagg Mfg. Co., 175 Mass. 536. But see Packet Co. *v.* Sickles, 5 Wall. 580; Buhl *v.* Stephens, 84 Fed. Rep. 922; Insurance Co. *v.* Ireland, 9 Kan. App. 644; Trustees *v.* Insurance Company, 19 N. Y. 305, 28 N. Y. 153.

It has even been held that an agreement to support a minor, until he reaches a specified age is not within the statute. Wooldridge *v.* Stern, 42 Fed. Rep. 311; White *v.* Murtland, 71 Ill. 250; Peters *v.* Westborough, 19 Pick. 364; McKinney *v.* McCloskey, 8 Daly, 368, 76 N. Y. 594; Taylor *v.* Deseve, 81 Tex. 264. See also Wiggins *v.* Keizer, 6 Ind. 252; Hollis *v.* Stowers, 83 Ky. 544; Ellicott *v.* Turner, 4 Md. 476; McLees *v.* Hale, 10 Wend. 426; Shahan *v.* Swan, 48 Ohio St. 25. But see *contra*, Goodrich *v.* Johnson, 66 Ind. 258; Shute *v.* Dorr, 5 Wend. 204; Jones *v.* Hay, 52 Barb. 501.

If such a contract is not within the statute it seems hard to suggest any personal contract that is. The contract fixes a definite term of more

Section 17. The seventeenth section of the statute (sixteenth in the Revised Statutes) (*a*) was exended by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, so as to include all executory sales of goods of the value of 10*l.* and upwards, whether the goods be in existence or not at the time of the contract. In England these enactments are superseded and consolidated by the Sale of Goods Act, 1893 (*b*). We will here only refer very briefly to the question of what is a sufficient memorandum of a contract, as to which the decisions on the Statute of Frauds remain applicable.

The "note or memorandum." There is a curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by s. 4, and the "bargain" of which a note or memorandum was required by s. 17. The "agreement" of s. 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section:[20] but the "bargain" of s. 17 includes the price of the goods
163] as a material term *only where it has been specifically agreed

(*a*) The difference arises from the preamble and the enacting part of s. 13 being separately numbered as 13 and 14 in other editions. The section is commented on in detail in Blackburn on Sale, Benjamin on Sale, and Mr. Chalmers' ed. of the Sale of Goods Act, 1893 (1894). A recent case of some importance on acceptance is *Taylor* v. *Smith*, C. A. [1893] 2 Q. B. 65, 61 L. J. Q. B. 331.

(*b*) 56 & 57 Vict. c. 71, s. 4.

than a year. The reason given for holding the contract not within the statute, that the death of the minor will discharge the obligation, holds equally good of a contract to serve for any fixed period longer than a year, yet such a contract is held to be within the statute. Comes *v.* Lamson, 16 Conn. 246; Kelly *v.* Terrell, 26 Ga. 551; Tuttle *v.* Swett, 31 Me. 555; Hearne *v.* Chadbourne, 65 Me. 302; Bernier *v.* Cabot Mfg. Co., 71 Me. 506; Hill *v.* Hooper, 1 Gray, 131; Freeman *v.* Foss, 145 Mass. 361; Pitcher *v.* Wilson, 5 Mo. 46; Biest *v.* Ver Steeg Shoe Company, (Mo. App.) 70 S. W. Rep. 1081; Kansas City R. R. Co. *v.* Conlee, 43 Neb. 121; McElroy *v.* Ludlum, 32 N. J. Eq. 828; Townsend *v.* Minford, 48 Hun, 617; Hillhouse *v.* Jennings, 60 S. C. 373; Hinckley *v.* Southgate, 11 Vt. 428; Lee's Adm. *v.* Hill, 87 Va. 497; Wilhelm *v.* Hardman, 13 Md. 140. See also Harris *v.* Porter, 2 Harr. 27; Doyle *v.* Dixon, 97 Mass. 208.

As to whether a contract for a year's service to begin the following day is within the statute see Dollar *v.* Parkington, 84 L. T. 470; Billington *v.* Cahill, 51 Hun, 132; also Sprague *v.* Foster, 48 Ill. App. 140; Shipley *v.* Patton, 21 Ind. 169; Aiken *v.* Nogle, 47 Kan. 96; Sanborn *v.* Fireman's Ins. Co., 16 Gray, 448.

An agreement to marry which is by its terms not to be performed within a year has been generally held within the statute. Ullman *v.* Meyer, 10 Fed. Rep. 241; Paris *v.* Strong, 51 Ind. 339; Nichols *v.* Weaver, 7 Kan. 373; Barge *v.* Haslam, 63 Neb. 296; Derby *v.* Phelps, 2 N. H. 515. But see *contra*, Blackburn *v.* Mann, 85 Ill. 222; Lewis *v.* Tapman, 90 Md. 294; Brick *v.* Gannar, 36 Hun, 52.

[20] The rule upon this point differs in the various States. See Browne on Statute of Frauds, § 390 *et seq.* See also Reid *v.* Diamond Glass Co., 85 Fed. Rep. 193; Hayes *v.* Jackson, 159 Mass. 451; Ruziecka *v.* Hotovy, (Neb.) 101 N. W. Rep. 328.

upon (*c*).[21] So far as regards guaranties, however, this construction of s. 4 having been found inconvenient is excluded by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, which makes it no longer necessary that the consideration for a "special promise to answer for the debt default or miscarriage of another person" should appear in writing or by necessary inference from a written document (*d*).[22]

The note or memorandum under the 4th as well as the 17th section (or Sale of Goods Act) must show what is the contract and who are the contracting parties (*e*),[23] but it need be signed only by the party to be charged, whether under the 4th or the 17th section, and indeed it need not be signed in the common meaning of the word, for the party's name inserted by his authority in the body or

(*c*) *Hoadly* v. *McLaine* (1834) 10 Bing. 482, 38 R. R. 510.

(*d*) See also an article by the late Sir James Stephen and the present writer in the Law Quarterly Review, i, 1, and the notes to *Birkmyr* v. *Darnell* (1705) and *Wain* v. *Warlters* (1804) 7 R. R. 645, in 2 Sm. L. C. 266.

(*e*) *Williams* v. *Byrnes* (1863) 1 Moo. P. C. N. S. 154; *Newell* v. *Radford* (1867) L. R. 3 C. P. 52, 37 L. J. C. P. 1; *Williams* v. *Jordan* (1877) 6 Ch. D. 517, 46 L. J. Ch. 681; and as to sufficiency of description otherwise than by name, *Rossiter* v. *Miller* (1878) 3 App. Ca. 1124, 48 L. J. Ch. 10; *Catling* v. *King* (1877) 5 Ch. Div. 660, 46 L. J. Ch. 384; *Jarrett* v. *Hunter* (1886) 34 Ch. D. 182; *Coombs* v. *Wilkes* [1891] 3 Ch. 77, 61 L. J. Ch. 42; *Filby* v. *Hounsell* [1896] 2 Ch. 737, 65 L. J. Ch. 852 (name of agent for undisclosed vendor sufficient); *Carr* v. *Lynch* [1900] 1 Ch. 613, 69 L. J. Ch. 345 (reference to payment made by purchaser without name). As to what is sufficient description of the property sold under s. 4, *Shardlow* v. *Cotterell* (1881) 20 Ch. Div. 90, 51 L. J. Ch. 353; *Plant* v. *Bourne* [1897] 2 Ch. 281, 66 L. J. Ch. 643, C. A.

21 See Browne on the Statute of Frauds, § 376 *b et seq.* Turner *v.* Lorillard Co., 100 Ga. 645; Hanson *v.* Marsh, 40 Minn. 1; Kelly *v.* Thuey, 143 Mo. 435; Hall *v.* Mesenheimer, (N. C.) 49 S. E. Rep. 104.

22 See Browne on the Statute of Frauds, § 386 *et seq.*

23 Grafton *v.* Cummings, 99 U. S. 100; Nichols *v.* Johnson, 10 Conn. 192; Sherburne *v.* Shaw, 1 N. H. 157; Brown *v.* Whipple, 58 N. H. 229; Calkins *v.* Falk, 1 Abb. App. Dec. 291; Mayer *v.* Adrian, 77 N. C. 83. The memorandum must show not only who are the contracting parties, but also which is the promisor and which the promisee. O'Sullivan *v.* Overton, 56 Conn. 102; Oglesby Co. *v.* Williams, 112 Ga. 359; Sanborn *v.* Flagler, 9 Allen, 474, 476; McGovern *v.* Hern, 153 Mass. 308; Lewis *v.* Wood, 153 Mass. 321; Frank *v.* Eltingham, 65 Miss. 281; Bailey *v.* Ogden, 3 Johns. 399; Mentz *v.* Newwitter, 122 N. Y. 491; Ward *v.* Hasbrouck, 169 N. Y. 407. But see Newell *v.* Radford, L. R. 3 C. P. 52; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446. As to sufficiency of description otherwise than by name. Grafton *v.* Cummings, 99 U. S. 100; Ryan *v.* United States, 136 U. S. 68; Haskell *v.* Tukesbury, 92 Me. 551; Gowers *v.* Klaus, 101 Mass. 449; Doherty *v.* Hill, 144 Mass. 465; Ryder *v.* Loomis, 161 Mass. 161; Clampet *v.* Bells, 39 Minn. 272; Champion *v.* Genin, 51 N. J. Eq. 38; Walsh *v.* Barton, 24 Ohio St. 28; Rineer *v.* Collins, 156 Pa. 342; Cunningham *v.* Neeld, 198 Pa. 41, 45; Seymour *v.* Cushway, 100 Wis. 580.

at the head of the memorandum may suffice (*f*).[24] It is no answer to an action on a contract evidenced by the defendant's signature to say that the plaintiff has not signed and therefore could not be sued,[25] and if a written and duly signed proposal is accepted by word of

(*f*) *Evans* v. *Hoare* [1892] 1 Q. B. 593, 61 L. J. Q. B. 470. As to the authority of an auctioneer to sign as agent for a purchaser, and its duration, see *Bell* v. *Balls* [1897] 1 Ch. 663, 66 L. J. Ch. 397.

[24] The signature required by the statute need not be at the end of the memorandum. Lemayne *v.* Stanley, 3 Lev. 1; Knight *v.* Crockford, 1 Esp. 188; Holmes *v.* Mackrell, 3 C. B. N. S. 789; Barry *v.* Coombe, 1 Pet. 650; Nichols *v.* Johnson, 10 Conn. 192; McConnell *v.* Brillhart, 17 Ill. 354; Drury *v.* Young, 58 Md. 546; Penniman *v.* Hartshorn, 13 Mass. 87; Hawkins *v.* Chace, 19 Pick. 502; Traylor *v.* Cabanné, 8 Mo. App. 131; Merritt *v.* Clason, 12 Johns. 102; Tingley *v.* Bellingham Co., 5 Wash. 644.

In John Griffiths Cycle Corp. *v.* Humber & Co., [1899] 2 Q. B. 414, 418, A. L. Smith, L.J., said: "It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying sec. 4 of the statute, though put *alio intuitu* and not in order to attest or verify the contract. Jones *v.* Victoria Dock Co., 2 Q. B. D. 314." Cp. Hucklesby *v.* Hook, 82 L. T. 117. See Boardman *v.* Spooner, 13 Allen, 353, 358.

But under the New York statute as amended requiring the memorandum to be "subscribed," it is held that the signature must be at the end. Davis *v.* Shields, 26 Wend. 341; James *v.* Patten, 6 N. Y. 9; Doughty *v.* Manhattan Brass Co., 101 N. Y. 644. See also Coon *v.* Rigden, 4 Colo. 275.

Nor need the writing have been made for or given to the plaintiff. Moore *v.* Hart, 1 Vern. 110; Ayliffe *v.* Tracy, 2 P. Wms. 65; Gibson *v.* Holland, L. R. 1 C. P. 1; Owen *v.* Thomas, 3 Myl. & K. 353; Moss *v.* Atkinson, 44 Cal. 3; Spangler *v.* Danforth, 65 Ill. 152; Wood *v.* Davis, 82 Ill. 311; Miller *v.* Railroad Co., 58 Kan. 189; Fugate *v.* Hansford's Ex., 3 Litt. 262; Kleeman *v.* Collins, 9 Bush 460; Moore *v.* Mountcastle, 61 Mo. 424; Cunningham *v.* Williams, 43 Mo. App. 629; Cash *v.* Clark, 61 Mo. App. 636; Peabody *v.* Speyers, 56 N. Y. 230; Mizell *v.* Burnett, 4 Jones L. (N. C.) 249; Lee *v.* Cherry, 85 Tenn. 707. But see First Nat. Bank of Plattsburgh *v.* Sowles, 46 Fed. Rep. 731; Morrow *v.* Moore, 98 Me. 373; Kinloch *v.* Savage, Speers Eq. 464; Buck *v.* Pickwell, 27 Vt. 157, 167. See also Rohrer *v.* Muller, 22 Wash. 151.

Nor is the writing insufficient because it is a repudiation of the bargain. Wilkinson *v.* Evans, L. R. 1 C. P. 407; Buxton *v.* Rust, L. R. 7 Ex. 279; Drury *v.* Young, 58 Md. 546; Heideman *v.* Wolfstein, 12 Mo. App. 366; Cash *v.* Clark, 61 Mo. App. 636; Louisville Varnish Co. *v.* Lorick, 29 S. C. 533. See Westmoreland *v.* Carson, 76 Tex. 619.

The statutes in some jurisdictions, however, require the "contract" to be in writing. See Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101; Sowards *v.* Moss, 58 Neb. 119, 59 Neb. 71.

[25] Troy Fertilizer Co. *v.* Logan, 96 Ala. 619; Luckhart *v.* Ogden, 30 Cal. 547; Hodges *v.* Kowing, 58 Conn. 12; Smith *v.* Jones, 60 Ga. 338; First Church *v* Swanson, 100 Ill. App. 39; Newby *v.* Rogers, 40 Ind. 9; Ross *v.* Allen, 45 Kan. 231; Williams *v.* Robinson, 73 Me. 186, 194; Slater *v.* Smith, 117 Mass. 96; Harriman *v.* Tyndale, 184 Mass. 534; Bowers *v.* Whitney, 88 Minn. 168; Marqueze *v.* Caldwell, 48 Miss. 23; Moore *v.* Thompson, 93 Mo. App. 336; Gartrell *v.* Stafford, 12 Neb. 545; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315; Dykers *v.* Townsend, 24 N. Y. 57; Justice *v.* Lang, 42 N. Y. 493, 52 N. Y. 323; Everhart *v.* Dolph, 133 Pa. 628; Thornton *v.* Kelly, 11 R. I. 498; McPherson *v.* Fargo, 10 S. Dak. 611; Lee *v.* Cherry, 85 Tenn. 707; Dyer *v.* Winston, (Tex. Civ. App.) 77 S. W. Rep. 227; Monongah Coal Co. *v.* Fleming, 42 W. Va. 538; Lowber *v.* Connit, 36 Wis. 176.

mouth the contract itself is completed by such acceptance and the writing as a *sufficient memorandum of it (*g*).[26] It has also [164 been decided that an acknowledgment of a signature previously made by way of proposal, the document having been altered in the meantime and the party having assented to the alterations, is equivalent to an actual signature of the document as finally settled and as the record of the concluded contract. The signature contemplated by the statute is not the mere act of writing, but the writing coupled with the party's assent to it as a signature to the contract: and the effect of the parol evidence in such a case is not to alter an agreement made between the parties but to show what the condition of the document was when it became an agreement between them (*h*). Moreover it matters not for what purpose the signature is added, since it is required only as evidence, not as belonging to the substance of the contract. It is enough that the signature attests the document as that which contains the terms of the contract (*i*).[27] Nor need the particulars required to make a complete memorandum be all contained in one document: the signed document may incorporate others by reference, but the reference must appear from the writing itself and not have to be made out by oral evidence: for in that case there would be no record of a contract in writing, but only

(*g*) *Smith* v. *Neale* (1857) 2 C. B. N. S. 67, 26 L. J. C. P. 143; *Reuss* v. *Picksley* (1866) in Ex. Ch. L. R. 1 Ex. 342, 35 L. J. Ex. 218. And where alternative offers are made by a signed writing, parol acceptance of one alternative has been held sufficient: *Lever* v. *Koffler* [1901] 1 Ch. 543, 70 L. J. Ch. 395.

(*h*) *Stewart* v. *Eddowes* (1874) L. R. 9 C. P. 311, 43 L. J. C. P. 204.

(*i*) *Jones* v. *Victoria Graving Dock Co.* (1877) 2 Q. B. Div. 314, 323, 46 L. J. Q. B. 219. It may be doubted whether this view of the statute does not tend to thrust contracts upon parties by surprise and contrary to their real intention.

26 "A written offer accepted by parol is a sufficient memorandum to satisfy the Statute of Frauds." Lydig *v.* Braman, 177 Mass. 212, 218; Hoadly *v.* M'Laine, 10 Bing. 482; Stewart *v.* Eddowes, L. R. 9 C. P. 311; Vassault *v.* Edwards, 43 Cal. 458; Gradle *v.* Warner, 140 Ill. 123; Howe *v.* Watson, 179 Mass. 30; Austrian *v.* Springer, 94 Mich. 343; Kessler *v.* Smith, 42 Minn. 494; Waul *v.* Kirkman, 27 Miss. 823; Peevey *v.* Haughton, 72 Miss. 918; Lash *v.* Parlin, 78 Mo. 391; Argus Co. *v.* Albany, 55 N. Y. 495; Mason *v.* Decker, 72 N. Y. 595; Raubitchek *v.* Blank, 80 N. Y. 478; Durham Co. *v.* Guthrie, 116 N. C. 381; Himrod Co. *v.* Cleveland Co., 22 Ohio St. 451; Thayer *v.* Luce, 22 Ohio St. 62; Case Co. *v.* Smith, 16 Oreg. 381; Lee *v.* Cherry, 85 Tenn. 707; Lowber *v.* Connit, 36 Wis. 176; Hawkinson *v.* Harmon, 69 Wis. 551, *acc.* But see *contra*, Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667; Haw *v.* American Wire Nail Co., 89 Ia. 745; American Oak Leather Co. *v.* Porter, 94 Ia. 117; Newlin *v.* Hoyt, 91 Minn. 409; Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101, 171 N. Y. 659; Atlee *v.* Bartholomew, 69 Wis. 43. In all the cases last cited except Banks *v.* Harris Mfg. Co. the statute under construction required the "contract" to be in writing.

27 See *supra*, p. 184, n. 24.

disjointed parts of a record pieced out with unwritten evidence (*k*).[28] The reference, however, need not be in express terms. It is enough if it appears on the documents that they are parts of the same agree-
165] ment (*l*). One *who is the agent of one party only in the transaction may be also the agent of the other party for the purpose of signature (*m*).[29] The memorandum must exist at the time of action brought (*n*).[30]

Deeds not within the statute. It seems that the Statute of Frauds does not apply to deeds.[31] Signature is unnecessary for the validity of a deed at common law, and it is not likely that the Legislature meant to require signature where the higher solemnity of sealing (as it is in a legal point of view) is already present (*o*). But as in practice deeds are always signed as well as sealed, and distinctive seals are hardly ever used except by corporations, the absence of a signature would nowadays add considerably to the difficulty of supporting a deed impeached on any other ground.

Bills of Sale Acts. The law as to the sale and disposition of personal chattels is affected, in addition to the Statute of Frauds, by the

(*k*) See *Peirce* v. *Corf* (1874) L. R. 9 Q. B. 210, 43 L. J. Q. B. 52; *Kronheim* v. *Johnson* (1877) 7 Ch. D. 60, 47 L. J. Ch. 132; *Leather Cloth Co.* v. *Hieronimus* (1875) L. R. 10 Q. B. 140, 44 L. J. Q. B. 54.

(*l*) *Studds* v. *Watson* (1884) 28 Ch. D. 305; *Wylson* v. *Dunn* (1887) 34 Ch. D. 569; *Oliver* v. *Hunting* (1890) 44 Ch. D. 205, 59 L. J. Ch. 255, where the judgment states that the old rule was different; *Pearce* v. *Gardner* [1897] 1 Q. B. 688, 66 L. J. Q. B. 457, C. A. (envelope and letter proved to have been enclosed in it may be taken as one document to identify addressee).

(*m*) As to this, *Murphy* v. *Boese* (1875) L. R. 10 Ex. 126, 44 L. J. Ex. 40.

(*n*) *Lucas* v. *Dixon* (1889) 22 Q. B. Div. 357, 58 L. J. Q. B. 161 (defendant's affidavit on interlocutory proceedings in the action will not do).

(*o*) *Cherry* v. *Heming* (1849) 4 Ex. 631, 19 L. J. Ex. 63. Blackstone (2. 306, and see note in Stephen's Comm., 1. 510, 6th ed.) assumed signature to be necessary.

[28] Breckinridge *v.* Crocker, 78 Cal. 529; Brewer *v.* Horst-Lachman Co., 127 Cal. 643; Ridgway *v.* Ingram, 50 Ind. 145; Morton *v.* Dean, 13 Met. 385; O'Donnell *v.* Leeman, 43 Me. 158; Frank *v.* Miller, 38 Md. 450; Mayer *v.* Adrian, 77 N. C. 83; Brown *v.* Whipple, 58 N. H. 229; Tice *v.* Freeman, 30 Minn. 389; North *v.* Mendel, 73 Ga. 400; Everman *v.* Herndon, 71 Miss. 823; Thayer *v.* Luce, 22 Ohio St. 62, 74; Johnson *v.* Buck, 35 N. J. L. 338; Darling *v.* Cumming, 92 Va. 521. Cp. Beckwith *v.* Talbott, 95 U. S. 289; Ryan *v.* United States, 136 U. S. 68; Bayne *v.* Wiggins, 139 U. S. 210; White *v.* Breen, 106 Ala. 159; Strouse *v.* Elting, 110 Ala. 132, 140; Lerned *v.* Wannemacher, 9 Allen, 412; Louisville Asphalt Varnish Co. *v.* Lorick, 29 S. C. 533.

[29] Sims *v.* Landray, [1894] 2 Ch. 318; Batturs *v.* Sellers, 5 H. & J. 117. See Browne on the Statute of Frauds, § 368, *et seq.* But see Wilson *v.* Lewiston Mill Co., 150 N. Y. 314.

[30] But see *contra*, Remington *v.* Linthicum, 14 Pet. 84.

[31] Parks *v.* Hazlerigg, 7 Blackf. 536; *contra*, Miller *v.* Ruble, 107 Pa. 395.

Bills of Sale Acts, 1878 and 1882, with minor amending Acts of 1890 and 1891; but the subject is too special to be entered on here.[32]

Transfers of ships and copyright. Transfers of British ships are required by the Merchant Shipping Act, 1894 (s. 24 *sqq.*) to be in the form thereby prescribed.[33] Assignments of copyright are directly or indirectly required by the various statutes on that subject to be in writing (*p*),[34] and in the case of sculpture by deed attested by two witnesses (54 Geo. 3, c. 56, s. 4). But an *executory agreement [166 for an assignment of copyright apparently need not be in writing. And informal executory agreements for the sale or mortgage of ships seem now to be valid as between the parties, though under earlier Acts it was otherwise, and it is doubtful whether at common law a sale without writing would pass the property (*q*).

Sale of horses in market overt. There is "An Act to avoid Horse-stealing" of 31 Eliz. c. 12, which prescribes sundry forms and conditions to be observed on sales of horses at fairs and markets: and "every sale gift exchange or other putting away of any horse mare gelding colt or filly, in fair or market not used in all points according to the true meaning aforesaid shall be void" (*r*). The earlier Act on the same subject, 2 & 3 Phil. & Mary, c. 7, only deprives the buyer of the benefit of the peculiar rule of the common law touching sales in market overt. These Acts are not touched by the Sale of Goods Act, 1893: see s. 22.

B. Marine Insurances.

By 30 Vict. c. 23, s. 7, marine insurances must (with the exception of insurances against owner's liability for certain accidents) be expressed in a policy.

But the words are not so strict as those of the repealed statutes on the same subject, and the preliminary "slip," which in practice though not in law is treated as the real contract, has for many purposes been recognized by the later decisions. These will be spoken

(*p*) *Leyland* v. *Stewart* (1876) 4 Ch. D. 419, 46 L. J. Ch. 103; and as to designs, *Jewitt* v. *Eckhardt* (1878) 8 Ch. D. 404. The confusion of our copyright statutes is still a disgrace to British legislation.

(*q*) Maude and Pollock on Merchant Shipping, 4th ed. pp. 42, 55, 56. And see the Merchant Shipping Act, 1894, s. 57.

(*r*) *Moran* v. *Pitt* (1873) 42 L. J. Q. B. 47.

32 Acts requiring record of chattel mortgages and, in many States, of conditional sales, are in force in this country.

33 See §§ 4170, 4192, U. S. Comp. Stat.

34 As to assignments of copyrights and patents, see respectively § 4955, and § 4898, U. S. Comp. Stat.

of in another place under the head of Agreements of Imperfect Obligation (Chap. XIII.).

C. Transfer of Shares.

There is no general principle or provision applicable to the trans-
167] fer of shares in all companies. But the general *or special Acts of Parliament governing classes of companies or particular companies always or almost always prescribe forms of transfer. An executory contract for the sale of shares need not as a rule be in writing.

D. Acknowledgment of barred debts.

The operation of the Statute of Limitation, 21 Jac. 1, c. 16, in taking away the remedy for a debt may be excluded by a subsequent promise to pay it, or an acknowledgment from which such promise can be implied. The promise or acknowledgment if express must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (19 & 20 Vict. c. 97, s. 13). We say more of this under the head of Agreements of Imperfect Obligation, Chap. XIII. below.

*CHAPTER IV. [167

CONSIDERATION.

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Definition of consideration. The following description of Consideration was given by the Exchequer Chamber in 1875: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (*a*).[1]

The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first.[2] It does not matter whether the party accepting the consideration has any apparent benefit thereby or not: it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value.

An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

A consideration, properly speaking, can be given only for a promise.

(*a*) *Currie* v. *Misa* (1875) L. R. 10 Ex. at p. 162, 44 L. J. Ex. 94; per Cur. referring to Com. Dig. Action on the Case, Assumpsit B. 1—15. Cp. Evans, Appendix to Pothier on Obligations, No. 2; and *Edgware Highway Board* v. *Harrow Gas Co.* (1874) L. R. 10 Q. B 92, 95, 44 L. J. Q. B. 1; and for the historical distinction between debt and assumpsit in this respect, Langdell, Summary, §§ 64, 65.

1 Approved in Rector *v.* Teed, 120 N. Y. 583, 586; Hamer *v.* Sidway, 124 N. Y. 538, 545. See also Robinson *v.* Boyd, 60 Ohio St. 57, 63.

2 Approved in German *v.* Gilbert, 83 Mo. App. 411; Hamer *v.* Sidway, 124 N. Y. 538; Ballard *v.* Burton, 64 Vt. 387.

Where performance on both sides is simultaneous, there may be agree-
169] ment in the wider sense, but *there is no obligation and no contract. It may be amusing and not uninstructive to consider the distinctions to be observed in the legal analysis of such common dealings as being ferried across a river and paying on the other side, buying a newspaper on a railway platform, obtaining a box of matches from an automatic machine. The reader may multiply examples at his pleasure.

A consideration which is itself a promise is said to be *executory*. A consideration which consists in performance is said to be *executed*. It is important to remember that in the former case "it is the counter-promise and not the performance that makes the consideration" (*b*).

Consideration is that which is actually given and accepted in return for the promise. Ulterior motives, purposes, or expectations may be present, but in a legal point of view they are indifferent. The party seeking to enforce a promise has to show the actual legal consideration for it, and he need not show anything beyond (*c*).

Gratuitous promises. An informal promise made without a consideration, however strong may be the motives or even the moral duty on which it is founded, is not enforced by English courts of justice at all. Even a formal promise, that is a promise made by deed, or in the proper technical language a covenant, is deprived, if gratuitous, of some of the most effectual remedies administered by them. A promise to contribute money to charitable purposes is a good example of the class of promises which, though they may be laudable and morally binding, are not contracts (*d*).[3]

(*b*) Hobart in *Lampleigh* v. *Brathwait* (1616) 1 Sm. L. C. 155.

(*c*) *Thomas* v. *Thomas* (1842) 2 Q. B. 851, Finch Sel. Ca. 263 (see correction at p. 281 of a bad clerical slip in the original report). In *Coles* v. *Pilkington* (1874) L. R. 19 Eq. 174, 44 L. J. Ch. 381, this case was strangely overlooked.

(*d*) *Cottage Street Church* v. *Kendall* (1877) 121 Mass. 528; *Re Hudson*, *Creed* v. *Henderson* (1885) 54 L. J. Ch. 811. A contract may arise, however, if the subscriber authorizes a definite expenditure which is incurred in reliance on his making it good: see *Kedar Nath Bhattacharji* v. *Gorie Mahomed* (1886) I. L. R. 14 Cal. 64; *qu.* if right on the facts.

[3] Charitable subscriptions anomalously have been held supported by sufficient consideration on various grounds in this country:—

1. If the work for which the subscription was made has been done, or liability incurred in regard to such work, on the faith of the subscription, consideration is found in that fact. Miller *v.* Ballard, 46 Ill. 377; Trustees *v.* Garvey, 53 Ill. 401; Des Moines Univ. *v.* Livingston, 57 Ia. 307, 65 Ia. 202; McCabe *v.* O'Connor, 69 Ia. 134; First Church *v.* Donnell, 110 Ia. 5; Gittings *v.* Mayhew, 6 Md. 113; Cottage St. Church *v.* Kendall, 121 Mass. 528; Sherwin *v.* Fletcher, 168 Mass. 413; Albert Lea College *v.* Brown,

History of the doctrine. The early history of the law of Consideration is still somewhat obscure, but some acquaintance with it is neces*sary for understanding the fluctuations on certain points [170

88 Minn. 524, 60 L. R. A. 870; Pitt *v.* Gentle, 49 Mo. 74; James *v.* Clough, 25 Mo. App. 147; Ohio, &c. College *v.* Love's Ex., 16 Ohio St. 20; Irwin *v.* Lombard University, 5 Ohio St. 9. Compare Johnson *v.* Otterbein University, 41 Ohio St. 527; Hodges *v.* Nalty, 104 Wis. 464. See also Lasar *v.* Johnson, 125 Cal. 549; Gatt's Ex. *v.* Swain, 9 Gratt. 633.

In Beatty *v.* Western College, 177 Ill. 280, the court enforced the promise, because liabilities had been incurred, but said (p. 292), "The gift will be enforced upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking."

By the reasoning of these cases a subscription is treated as an offer. Therefore until work has been done or liability incurred the subscription may be revoked by death, insanity, or otherwise. Grand Lodge *v.* Farnham, 70 Cal. 158; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First Church, 96 Ill. 177; Davis *v.* Campbell, 93 Ia. 524, 532; Helfenstein's Est., 77 Pa. 328; First Church *v.* Gillis, 17 Pa. Co. Ct. 614. See also Reimensnyder *v.* Gans, 110 Pa. 17.

2. It is held in other jurisdiction that the promise of each subscriber is supported by the promises of the others. Christian College *v.* Hendley, 49 Cal. 347; Higert *v.* Trustees, 53 Ind. 326; Petty *v.* Trustees, 95 Ind. 278; Allen *v.* Duffie, 43 Mich. 1; Congregational Soc. *v.* Perry, 6 N. H. 164; Edinboro Academy *v.* Robinson, 37 Pa. 210. See also First Church *v.* Pungs, 126 Mich. 670; Homan *v.* Steele, 18 Neb. 652.

3. It has been held that the acceptance of the subscription by the beneficiary or its representatives imports a promise to apply the funds properly, and this promise supports the subscribers' promises. Barnett *v.* Franklin College, 10 Ind. App. 103; Collier *v.* Baptist Soc., 8 B. Mon. 68; Trustees *v.* Fleming, 10 Bush, 234; Trustees *v.* Haskell, 73 Me. 140; Helfenstein's Est., 77 Pa. 328, 331; Trustees *v.* Nelson, 24 Vt. 189.

4. The fact that other subscriptions have been induced has been held in a few cases a good consideration. Hanson Trustees *v.* Stetson, 5 Pick. 506; Watkins *v.* Eames, 9 Cush. 537; Ives *v.* Sterling, 6 Met. 310 (but this theory was discredited in Cottage St. Church *v.* Kendall, 121 Mass. 528); Comstock *v.* Howd, 15 Mich. 237 (but see Northern, &c. R. R. *v.* Eslow, 40 Mich. 222); Irwin *v.* Lombard University, 56 Ohio St. 9.

Some support is given to the English view that a charitable subscription is not binding by Culver *v.* Banning, 19 Minn. 303. (But see Albert Lea College *v.* Brown, 88 Minn. 524); Twenty-third St. Church *v.* Cornell, 117 N. Y. 601 (compare Keuka College *v.* Ray, 167 N. Y. 96); Montpelier Seminary *v.* Smith's Estate, 69 Vt. 382 (compare Grand Isle *v.* Kinney, 70 Vt. 381).

In a few cases of charitable subscriptions the special fact shows that the promise was made for clearly good consideration. Rogers *v.* Galloway College, 64 Ark. 627; Lasar *v.* Johnson, 125 Cal. 549; La Fayette Corporation *v.* Ryland, 80 Wis. 29.

Subscriptions for business purposes are common, for instance to induce a manufacturing company to establish its plant in a certain locality, and as the object of the subscriber in such cases is personal gain, consideration is generally contemplated, and when given the subscription is rightly held binding. Richelieu Hotel Co. *v.* International Co., 140 Ill. 248; Fort Wayne Co. *v.* Miller, 131 Ind. 499; Davis *v.* Campbell, 93 Ia. 524; Bryant's Pond Co. *v.* Felt, 87 Me. 234; Hudson Co. *v.* Tower, 156 Mass. 82. 161 Mass. 10; Martin *v.* Meles, 179 Mass. 114; Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164; Gibbons *v.* Bente, 51 Minn. 500; Homan *v.* Steele, 18 Neb. 652; Auburn Works *v.* Shultz, 143 Pa. 256; Gibbons *v.* Grinsel, 79 Wis. 365; Superior Land Co. *v.* Bickford, 93 Wis. 220; Badger Paper Co. *v.* Rose, 95 Wis. 145.

which lasted well into the nineteenth century, and one or two anomalies which have survived.

The name of Consideration appears only about the beginning of the sixteenth century, and we do not know by what steps it became a settled term of art. The word seems to have gone through the following significations: first, contemplation in general; then deliberate decision on a disputed question (hence the old form of judgments in the Common Law Courts, "It is considered") (*e*); then the grounds as well as the act of deliberation; and lastly, in particular, that which induces a grant or promise. If we wish to form a probable opinion as to the origin or origins of this final modification, we must inquire how far anything like the thing signified was to be found in the old action of debt, or was involved in the necessary elements of the new action of assumpsit. We must also remember that the demand was for an extended remedy on business agreements, and, from the pleader's point of view, for an action which would enable him to rescue an increasing and lucrative branch of practice from the monopoly of ecclesiastical jurisdiction in matters of breach of faith (*f*), and at least to compete on equal terms with the Court of Chancery. Nobody wanted merely fanciful or gratuitous promises to be made binding without form, and there was no need for haste in defining exactly where the line should be drawn.

Quid pro quo in action of debt. The action of debt assumed that the defendant had money or chattels (*g*) which belonged to the plain-
171] tiff; *either because the defendant had actually received so much from the plaintiff, or because he had received from him something else which he admitted to be equivalent to the money or goods claimed. As the buyer of goods had acquired property in the goods, so did a sum of his money measured by the agreed price become, in the mediæval view, the property of the seller. There was a change of property by "reciprocal grants" (*h*). Thus the debt could not be established without showing that the debtor had received some equivalent or "recompense." In the fifteenth century this equiva-

(*e*) Altered to "adjudged" by the Judicature Act for no obvious reason, unless it were that the word "adjudge" was equally unknown to the operative forms of common law and equity, though it was current with text-writers from the sixteenth century onwards.

(*f*) It is said that the King's judges had the remedy of prohibition in their hands. No doubt the spiritual courts often might have been prohibited, and sometimes were; but one has only to look at Hale's Precedents and Proceedings, representing a small part of what went on all over the country, to see that in fact they got the business.

(*g*) Harv. Law Rev. viii. 260.

(*h*) *Edgcomb* v. *Dee*, pp. *137, *138, above.

lent was called *Quid pro quo,* a peculiarly English term (*i*). The words bargain and contract, especially the latter, also came to be associated with the action of debt in the fifteenth and sixteenth centuries. In fact contract meant a "real contract," a transaction on which an action of debt might be brought (*k*). Mere one-sided speech could no more pass property in money than in goods.

Detriment to promisee in assumpsit. The action of assumpsit was not to recover anything supposed to be the plaintiff's, or for restitution, but to recover damages for the breach of an active duty towards the plaintiff which had been expressly "assumed" by the defendant, or was attached by law to the exercise of his calling. If the defendant's "assumption" had not induced the plaintiff to incur risk or trouble in some way to his own detriment, there was no wrong done and no ground of action. Here again bare words of promise, as such, would create no duty; nor could mere disappointment be regarded as actionable damage. It was a considerable time before the fact that assumpsit was in substance an action to enforce contracts was in any way formally recognized; but this could not be much delayed when it was settled that the existence of a debt was a *sufficient [172 ground for an action in assumpsit, the defendant not being allowed to admit the existence of a duty to pay the plaintiff and deny that he had undertaken to fulfil it.

Thus we have both in debt and in assumpsit the notion of some kind of value received as an element in the defendant's liability; in the later application of assumpsit concurrently with debt this element is identical with the *quid pro quo* of debt (*l*); in the original assumpsit founded on an actual promise it is distinct.

Causa in Roman law: "consideration" in early common law. Meanwhile the canonists of Europe, in opposition to the more technical views of the civilians, had been generalizing the Roman law of contract and breaking down its formalities. The *causa* which made a pact actionable was no longer one of a limited set of circumstances or "vestments" applicable, according to their nature, to particular and limited classes of transactions; it might be any reason for making a promise which appeared serious enough to be the foundation of a moral duty to fulfil the expectation created. It is possible that English canonists used the word "consideration" to translate this extended sense of

(*i*) It is not otherwise known to Du Cange or his later editors.

(*k*) See H. L. R. viii. 253; the title of Debt in the Abridgments; and even later, Termes de la Ley, *s. v.* Contract.

(*l*) Prof. Ames in Harv. Law Rev. ii. 18.

causa before it was familiar to the common lawyers. At any rate St. German, in his well-known Dialogue, first published in English in 1530 (*m*), puts this word in the mouth not of the Student but of the Doctor. The Student in the laws of England, explaining "what is a nude contract or naked promise in the laws of England, and where an action may lie thereupon, and where not" (*n*), speaks of recompense, of "a nude contract . . . where a man maketh a bargain or a sale of his goods or lands, without any recompense appointed for it," and of "a nude or naked promise . . . . where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is as-
173] signed *for the money, for the building, nor for the service"; in which cases no action lies (*o*). It is the Doctor of Divinity who takes up the distinct question of what promises are binding in conscience, and distinguishes "promises made to a man upon a certain consideration . . . as if A. promise to give B. xx*l.* because he hath made him such a house or hath lent him such a thing"—which is generally binding—from a promise which is "so naked that there is no manner of consideration why it should be made," and does not even create a moral obligation. Here the language is not technical, but is rather a literary explanation addressed to the Student, who is presumed not to know civil or canon law, and would not understand the Romanist term *causa.*

The word "consideration" had already been used in English Courts in discussing the validity not of promises but of uses; there is nothing to show any connexion with the learning, civilian or canonist, of *causa,* but on the contrary "consideration" in this context is rather analogous to the *quid pro quo* of debt, though wider. On the whole the transitional view of the early sixteenth century seems to have been that a use was created by the will of the grantor, but his will could not be known by the Court without sufficient proof of his intent; and such proof might consist in the mutuality of the transaction (including the creation of a tenure as well as actual value received), or in the existence of a natural duty towards the *cestui que*

(*m*) The Latin ed. pr. (1523, reprinted 1528) contained only the first Dialogue; and this also is amplified in the English version.

(*n*) Question put by the Doctor, Dial. 2, c. 23, *ad fin.* The discussion follows in c. 24.

(*o*) It is not manifest whether the author means to allude to the action of assumpsit or not. I think he was more likely to regard it as a remedy for a wrong independent of contract, and not to have it before his mind at all in this place. The action on the case for negligence, which was one origin of assumpsit, is recognized: "if I take [goods to keep safely], and after they be lost or impaired through my negligent keeping, there an action lieth."

use. Either kind of reason was called consideration. It is common learning that the mere solemnity of a deed was never held sufficient for this purpose (*p*). *On the whole the Doctor, who represents [174 the canonist half of St. German's extraordinary learning, appears to use "consideration" as a semi-popular word, which will dispense him from going into technical details, and be sufficiently accurate for his purpose. As the book rapidly became well known for its merits as an exposition of the Common Law, it may well be that this very passage contributed to the current use of the word among the serjeants and apprentices at Westminster, and suggested its application to actions on promises, of which no earlier example has been found.

No probable connexion of causa with the common law doctrine. There is nothing to show that it was so applied by common lawyers with any conscious reference to either the civilian or the canonist interpretation of the Roman *causa;* nor had they any need to call in such notions. The *quid pro quo* which the defendant in debt must have received, and the damage which the plaintiff in assumpsit must have suffered by relying on the defendant's undertaking, were sufficient to form the notion of consideration without any extraneous matter. In fact the Romanist conception could not have been fitted into the English legal categories. In its later canonical form it was too wide for the common lawyer's purposes (*q*), as in its ancient classical form it was too narrow (*r*).

*No one ever argued before an English temporal Court that [175 deliberate bounty or charitable intention will support a formless promise; but such was undoubtedly the canonical view, and is to

(*p*) Y. B. 20 H. VII. 10, pl. 20; Bro. Ab. Feoffements and Uses, pl. 40. (This is dated 1533, a little later than St. German's book, but practically contemporary.) In *Sharington* v. *Strotton* (1565), Plowd. 302, the analogy of *quid pro quo* was relied on in the unsuccessful argument for the plaintiff.

(*q*) Save in the point, unknown to English law, that a plaintiff suing on a promise must show that its performance was of some value to himself: Pothier, Obl. §§ 54, 55, 60, Code Nap. 1119. It is said that a promise by A. to B. to do something useful to Z., but not to B., is binding in conscience only. Z. cannot sue because he is not party to the contract, nor B. because he has no interest in its performance. So the modern civilians interpreted the rule *alteri stipulari nemo potest* and Ulpian's gloss, *ut alii detur nihil interest mea*, D. 45, 1. de v. o. 38, § 17. Bracton seems not to have accepted the Roman doctrine, see Maitland, Bracton and Azo, 154–155. It is far from certain that *causa* was really a current term in the early part of the 16th century among any canonists or civilians from whom Englishmen were likely to borrow.

(*r*) Ulpian in one place, D. 19. 5. de praeser. verbis, 15, goes near to a generalization when he says of the promise of a reward for information of a runaway slave: "Conventio ista non est nuda, ut quis dicat ex pacto actionem non oriri, sed habet in se negotium aliquod."

this day, in theory, the rule of legal systems which have followed the modern Roman law (*s*). There was no room within the common law scheme of actions for turning natural into legal obligation (*t*).

Benefit to promisor not material. We may now trace the characteristic points of the English doctrine. It was understood as early as the third quarter of the fifteenth century, with reference to the *quid pro quo* of Debt, that apparent benefit to the promisor is immaterial. In 1459 we have this case.

Debt in the Common Pleas on an agreement between the plaintiff and defendant that plaintiff should marry one Alice, the defendant's daughter, on which marriage defendant would give plaintiff 100 marks. Averment that the marriage had taken place and the defendant refused to pay. Danvers J. said: "The defendant has *quid pro quo:* for he was charged with the marriage of his daughter and by the espousals he is discharged, so the plaintiff has done what was to be paid for. So if I tell a man, if he will carry twenty quarters of wheat of my master Prisot's to G., he shall have 40*s.*, and there-
176] upon he *carry them, he shall have his action of debt against me for the 40*s.; and yet the thing is not done for me, but only by my command:* so here he shows that he has performed the espousals, and so a good cause of action has accrued to him: otherwise if he had not performed them" (*u*). Moyle J.: "If I tell a surgeon, if he will go to one J. who is ill, and give him medicine and make him safe and sound, he shall have 100*s.;* there if the surgeon does cure J. he shall have a good action of debt against me for the 100*s.*, although

(*s*) Pothier, Obl. § 42; Sirey and Gilbert on Code Nap. 1131; Demolombe, Cours du Code Nap. XXIV. 329 *sqq.;* Langdell, Sel. Ca. Cont. 169; so in Germany from the 17th century onwards, with only theoretical differences as to the reason of the rule: Seuffert, Zur Gesch. der obligatorischen Verträge, 130 *sqq.*

(*t*) The view here given is substantially that of Prof. Ames of Harvard (The History of Assumpsit, Harv. Law Rev. ii. 1, 53), who has put the whole subject on a new footing. Chief Justice Holmes's ingenious attempt to make the *quid pro quo* of debt cover the whole ground, and connect it with the functions of the *secta* in Anglo-Norman procedure, does not seem acceptable: see Pollock and Maitland, Hist. Eng. Law, ii. 214. As to civilian influence, it is impossible to prove that there was none, but for the reasons in the text I think very little of it reached the minds of practising common lawyers. Mr. Salmond's learned argument (Essays in Jurisprudence and Legal History, No. iv.) fails to reconvert me to my own former opinion. One may almost say that, if there had been any real borrowing, there must have been more misunderstanding. The repetition of the one phrase *Ex nudo pacto non oritur actio*, caught up from the civilians, was, on the whole, harmless. As late as 1842 a desperate attempt was made by the late E. V. Williams J., when at the bar, to mix up the civilian *causa* with the doctrine of consideration: *Thomas* v. *Thomas*, p. *169, above.

(*u*) M. 37 H. VI. 8, pl. 18.

the thing was done for another and not for the defendant himself; if there is not *quid pro quo,* there is what comes to the same" (*u*). Prisot C.J. and Danby J. thought such an action not maintainable except on a specialty (though Prisot was impressed by Danvers's and Moyle's instances), and an objection was also taken to the jurisdiction on the ground of marriage being a spiritual matter: the case was adjourned and the result is not stated. But the point is quite clearly taken that what a man chooses to bargain for must be conclusively taken to be of some value to him.

Adequacy of consideration not inquired into. It is really by a deduction from this that our Courts have in modern times laid it down as an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" (*x*).[4] The idea is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give" (*y*). And the legal rule is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (*z*). "A. is possessed of Blackacre, to *which B. has no [177 manner of right, and A. desires B. to release him all his right to Blackacre, and promises him in consideration thereof to pay him so much money; surely this is a good consideration and a good promise, for its puts B. to the trouble of making a release" (*a*).[5] The following are modern examples. If a man who owns two boilers allows

(*x*) *Westlake* v. *Adams* (1858) 5 C. B. N. S. 248, 265, 27 L. J. C. P. 271, per Byles, J.

(*y*) Leviathan, pt. 1, c. 15.

(*z*) *Sturlyn* v. *Albany,* Cro. Eliz. 67, and see Cro. Car. 70, and marginal references there.

(*a*) Holt C.J. 12 Mod. 459.

4 Lawrence *v.* McCalmont, 2 How. 426, 452; Clark's App., 57 Conn. 565; Wolford *v.* Powers, 85 Ind. 294; Colt *v.* McConnell, 116 Ind. 249; Mullen *v.* Hawkins, 141 Ind. 363; Daily *v.* Minnick, 117 Ia. 563; Train *v.* Gold, 5 Pick. 380, 384; Wilton *v.* Eaton, 127 Mass. 174; Whitney *v.* Clary, 145 Mass. 156; Williams *v.* Jensen, 75 Mo. 681; Perkins *v.* Clay, 54 N. H. 518; Traphagen's Ex. *v.* Voorhees, 44 N. J. Eq. 21; Brooks *v.* Ball, 18 Johns. 237; Worth *v.* Case, 42 N. Y. 362; Earl *v.* Peck, 64 N. Y. 569; Cowee *v.* Cornell, 75 N. Y. 91; Hopkins *v.* Ensign, 122 N. Y. 144, 153; Judy *v.* Louderman, 48 Ohio, 562; Hind *v.* Holdship, 2 Watts, 104; Cumming's Appeal, 67 Pa. 404; Goree *v.* Wilson, 1 Bailey, 597; Giddings *v.* Giddings' Adm., 51 Vt. 227; Churchill *v.* Bradley, 58 Vt. 403. See also *infra,* n. 8.

But it is otherwise where the consideration is the payment of a fixed sum of money. Schnell *v.* Nell, 17 Ind. 29; Wolford *v.* Powers, 85 Ind. 294, 301; Shepard *v.* Rhodes, 7 R. I. 470. See further, *post,* p. *184, n. 15.

5 *Acc.* Mullen *v.* Hawkins, 141 Ind. 363; Kerr *v.* Lucas, 1 Allen, 279.

another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant," said Lord Denman, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive" (*b*). So parting with the possession of a document, though it had not the value the parties supposed it to have (*c*),[6] and the execution of a deed (*d*), though invalid for want of statutory requisites (*e*), have been held good considerations. In like manner a licence by a patentee to use the patented invention is a good consideration though the patent should turn out to be invalid (*f*).[7] In the Supreme Court of the United States a release of a supposed right of dower, which the parties thought necessary to confirm a title, has been held a good consideration for a promissory note (*g*). The modern theory of the obligation incurred by a bailee who has no reward is that the bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely. The bailor parts with the present legal control of the goods; and this is so far a detri-

(*b*) *Bainbridge* v. *Firmstone* (1838) 8 A. & E. 743, 53 R. R. 234.

(*c*) *Haigh* v. *Brooks* (1839–40) (Q. B. and Ex. Ch.), 10 A. & E. 309, 320, 334, 50 R. R. 399, 407, 417. Or letting the promisor retain possession of a document to which the promisee is entitled: *Hart* v. *Miles* (1858) 4 C. B. N. S. 371, 27 L. J. C. P. 218.

(*d*) Cp. *Jones* v. *Waite* (1842) 9 Cl. & F. 101.

(*e*) See note (*x*), last page. The defendant had in fact had the full benefit of the consideration, the deed having been acted on.

(*f*) *Lawes* v. *Purser* (1856) 6 E. & B. 930, 26 L. J. Q. B. 25.

(*g*) *Sykes* v. *Chadwick* (1873) 18 Wallace, 141.

[6] Wilton *v.* Eaton, 127 Mass. 174; Judy *v.* Louderman, 48 Ohio St. 562; Churchill *v.* Bradley, 58 Vt. 403. But see McCollum *v.* Edmonds, 109 Ala. 322.

The distinction must be carefully observed, however, between a bargain for the paper and a bargain for a title, right, or obligation which the paper was supposed to give.

[7] Where the patent is apparently valid and in force, the party using it, receiving the benefit of its supposed validity, is liable for license fees agreed to be paid, and cannot set up as a defense the actual invalidity of the patent. Kinsman *v.* Parkhurst, 18 How. 289; Wilder *v.* Adams, 2 Woodb. & M. 329; McKay *v.* Jackman, 17 Fed. Rep. 641; Milligan *v.* Lallance, &c. Mfg. Co., 21 Fed. Rep. 570; Covell *v.* Bostwick, 39 Fed. Rep. 421; Bartlett *v.* Holbrook, 1 Gray, 114; Marston *v.* Swett, 66 N. Y. 206; Skinner *v.* Wood Co., 140 N. Y. 217; Hyatt *v.* Dale Mfg. Co., 106 N. Y. 651; Davis *v.* Gray, 17 Ohio St. 331. But he is not liable where he has not enjoyed a monopoly conferred by reason of the supposed validity of the patent. White *v.* Lee, 14 Fed. Rep. 789; Harlow *v.* Putnam, 124 Mass. 553; Marston *v.* Swett, 82 N. Y. 527; Angier *v.* Eaton, C. & B. Co., 98 Pa. St. 594. And royalties paid after the patent has expired may be recovered. Stanley Co. *v.* Bailey, 45 Conn. 464.

The law in regard to a license under a supposed copyright is the same as that applicable to a supposed patent. Saltus *v.* Belford Co., 133 N. Y. 499.

ment to him, though it may be no benefit to the bailee, and the bailee's taking the *goods is for the bailor's use and convenience (*h*). [178 The determination of a legally indifferent option in a particular way, as voting for a particular candidate for a charity where there is not any duty of voting for the candidate judged fittest, is legal "detriment" enough to be a good consideration (*i*).

The same rule is in force in equity. It has been held in equity, to the same effect, that a transfer of railway shares on which nothing has been paid is a good consideration (*k*); and that if a person indebted to a testator's estate pays the probate and legacy duty on the amount of the debt, this is a good consideration for a release of the debt by the residuary legatees (*l*): a strong case, for this view was an afterthought to support a transaction which was in origin and intention certainly gratuitous, and in substance an incomplete voluntary release; the payment was simply by way of indemnity, it being thought not right that the debtor should both take his debt out of the estate and leave the estate to pay duty on it. The consent of liquidators in a voluntary winding-up to a transfer of shares is a good consideration for a guaranty by the transferor for the payment of the calls to become due from the transferee (*m*). An agreement to continue—*i. e.*, not to determine immediately—an existing service terminable at will, is likewise a good consideration (*n*). The principle of all these cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for. The law will be satisfied that there was a real and lawful bargain, but it leaves *parties to [179 measure their bargains for themselves.[8] There has been another

(*h*) O. W. Holmes, The Common Law, 291, *sqq.* Historically, the explanation is that the action sounded in tort until quite modern times, *ib.* 196. The bailor parts with very little, for, if the bailment is at will, he as well as the bailee can sue a trespasser. The real difficulty, however, is that in such cases, for the most part, the bailor does not deliver possession at the bailee's request, but requests the bailee to take it. One of the necessary elements is therefore fictitious. Cp. Langdell, § 68.

(*i*) *Bolton* v. *Madden* (1873) L. R. 9 Q. B. 55.

(*k*) *Cheale* v. *Kenward* (1858) 3 De G. & J. 27, 27 L. J. Ch. 784.

(*l*) *Taylor* v. *Manners* (1865) L. R. 1 Ch. 48, 35 L. J. Ch. 128, by Turner L. J. *dub.* Knight Bruce L.J.

(*m*) *Cleve* v. *Financial Corporation* (1873) L. R. 16 Eq. 363, 375, 43 L. J. Ch. 54.

(*n*) *Gravely* v. *Barnard* (1874) L. R. 18 Eq. 518, 43 L. J. Ch. 659.

[8] Illustrations from recent American cases are: Naming a child after the promisor, Wolford *v.* Powers, 85 Ind. 294; Diffenderfer *v.* Scott, 5 Ind. App. 243; Daily *v.* Minnick, 117 Ia. 563; Eaton *v.* Libbey, 165 Mass. 218; forbearing or agreeing to forbear from some bad habit, Talbott *v.* Stemmons' Ex., 89 Ky.

rather peculiar case in equity which was to this effect. An agreement is made between a creditor, principal debtor, and surety under a continuing guaranty, by which no new undertaking is imposed on the surety, but additional remedies are given to the creditor, which he is to enforce if requested to do so by the surety. Held that if by his own negligence the creditor deprives himself of the benefit of these remedies, the surety is discharged. The real meaning of what is there said about consideration seems to be that, as between the creditor and the surety, it is not material (*o*).

Contingent consideration. It has been suggested that on a similar principle the consideration for a promise may be contingent, that is, it may consist in the future doing of something by the promisee which he need not do unless he chooses, but which being done by him, the contract is complete and the promise binding.[9] But this cannot be. A consideration must be either a present act or forbearance or a promise. If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, this is not a promise, but an offer. He cannot sue the customer for not ordering any goods, but if, while the offer stands, the customer does order any, the condition of the offer is fulfilled, and the offer being thus accepted, there is a complete contract which the seller is bound to perform (*p*).[10]

(*o*) *Watson* v. *Allcock* (1853) 4 D. M. G. 242, 22 L. J. Ch. 858. The guaranty was determinable by notice from the surety, and it was suggested by way of supplying a new consideration that on the faith of the creditor's increased remedy the surety might in fact have abstained from determining it. But surely this will not do: the true ground is the creditor's original duty to the surety, which covers subsequently acquired rights and remedies.

(*p*) *G. N. Ry. Co.* v. *Witham* (1873) L. R. 9 C. P. 16, 43 L. J. C. P. 13. Cp. *Chicago & G. E. Ry. Co.* v. *Dane* (1873) 43 N. Y. (4 Hand) 240, where it was rightly held that a general assent to an offer of this kind (not undertaking to order, or as in the particular case tender to be carried, any definite quantity of goods) did not of itself constitute a contract. Cp. *R.* v. *Demers* [1900] A. C. 103, 69 L. J. P. C. 5; under French Canadian law, but no difference in principle is suggested. This seems to have been overlooked in *Ford* v. *Newth* [1901] 1 K. B. 683, 70 L. J. K. B. 459.

222; Lindell *r.* Rokes, 60 Mo. 249; Hamer *v.* Sidway, 124 N. Y. 548; Dunton *r.* Dunton, 18 Vict. L. R. 114; taking a trip for the promisee's health, Devecmon *r.* Shaw, 69 Md. 199; buying a factory for the promisee's own benefit, Steele *r.* Steele, 75 Md. 477. See further, *supra*, n. 4.

9 See Wilson *r.* Clonbrock Co., 105 Fed. Rep. 846, 848.

10 In G. N. Ry. Co. *r.* Witham, the defendant in answer to an advertisement for tenders for the supply of stores for a period of twelve months, wrote to the plaintiff as follows: "I, the undersigned hereby undertake to supply the G. N. Ry. Co. for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification, as the company's storekeeper may order,

*** Inadequacy as evidence of fraud, etc.** Great inadequacy of consideration may, however, be material as a cumulative element in cases [180

from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side. (Signed) Samuel Witham." The plaintiff's officer replied: "Mr. S. Witham — Sir: I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company, at Doncaster station, any quantity they may order during the period ending 31st of October, 1872, of the description of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting acknowledgment of the receipt of this letter. (Signed) S. Fitch, Assistant Secretary." The defendant replied, acknowledging receipt. The acceptance here seems a clear example of what Mr. Pollock, *supra*, p. *46, calls an illusory promise. It is impossible to see to what it binds the railway company so as to furnish a consideration for the defendant's promise. If the plaintiff had agreed to take of the defendant all such articles named in the specification as they might require for their road during the period named, this would have connoted a promise by the plaintiff during that time not to purchase any such articles from any one but the defendant, which would have been a good consideration. Hartley *v.* Cummings, 5 C. B. 247; Church *v.* Proctor, 66 Fed. Rep. 240 (C. C. A.); Loudenback *v.* Tennessee Co., 121 Fed. Rep. 298 (C. C. A.); National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427; Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85; Warden Coal Washing Co. *v.* Myer, 98 Ill. App. 640; Smith *v.* Morse, 20 La. Ann. 220; Burgess Fibre Co. *v.* Broomfield, 62 N. E. Rep. 367 (Mass.); Cooper *v.* Lansing Wheel Co., 94 Mich. 272; Hickey *v.* O'Brien, 123 Mich. 611; E. C. Dailey Co. *v.* Clark Can Co., 87 N. W. Rep. 761 (Mich.); Ames-Brooks Co. *v.* Ætna Ins. Co., 83 Minn. 346; East *v.* Cayuga Lake Ice Co., 21 N. Y. Supp. 887; Miller *v.* Leo, 35 N. Y. App. Div. 589, 165 N. Y. 619. Cp. Berk *v.* International Explosives Co., 7 Comm. Cas. 20.

Even such an agreement has been, but, it is submitted, erroneously held to be without consideration. Bailey *v.* Austrian, 19 Minn. 535; Cool *v.* Cunningham, 25 S. C. 136; Woodward *v.* Smith, 109 Wis. 607. See also Burton *v.* Great Northern Ry. Co., 9 Ex. 507; American Cotton Oil Co. *v.* Kirk, 68 Fed. 791; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. Rep. 302; Crane *v.* C. Crane & Co., 105 Fed. Rep. 869 (C. C. A.); Cold Blast Co. *v.* Kansas City Co., 114 Fed. Rep. 77 (C. C. A); Morrow *v.* Southern Ex. Co., 101 Ga. 810; Savannah Ice Co. *v.* American Refrigerator Co., 110 Ga. 142; Vogel *v.* Pekoc, 157 Ill. 339; W. H. Purcell Co. *v.* Sage, 90 Ill. App. 160, 189 Ill. 79; American Refrigerator Co. *v.* Chilton, 94 Ill. App. 6; Jordan *v.* Indianapolis Co., 61 N. E. Rep. 12 (Ind. App.); Benjamin *v.* Bruce, 87 Md. 240; Michigan Bolt Works *v.* Steel, 111 Mich. 153; Tarbox *v.* Gotzian, 20 Minn. 139; Beyerstedt *v.* Winona Mill Co., 49 Minn. 1; Rafolovitz *v.* American Tobacco Co., 29 Abb. N. C. 406; Gulf, &c. Ry. Co. *v.* Winton, 7 Tex. Civ. App. 57; Hoffman *v.* Maffioli, 104 Wis. 630; Teipel *v.* Meyer, 106 Wis. 41.

The letter of acceptance in G. N. Ry. Co. *v.* Witham could not give rise to a unilateral contract, as suggested by Brett, J., at p. 19, for the reason, in addition to the fact that the acceptance was only illusory, that the consideration of a unilateral contract must always have been executed on the part of the promisee before the promise becomes binding on the promisor; a unilateral contract executory on both sides is a contradiction in terms; before performance by the promisee, there is no unilateral contract, but only an offer by the promisor; see *supra*, p. 22, n. 21. Defendant's tender was simply a continuing offer during the period named, subject to revocation at any time, but while unrevoked converted into a distinct contract by each order of goods from time to time. Keller *v.* Ybarra, 3 Cal. 147; Brewing Assoc. *v.* Nipp, 6 Kan. App. 730; Thayer *v.* Burchard, 99 Mass. 508. Cp. Campbell *v.* Lambert, 36 La. Ann. 35; Railroad Co. *v.* Dane, 43 N. Y. 240; Railroad Co. *v.* Mitchell, 38 Tex. 85.

of fraud and the like, though it will not alone be sufficient. This will be dealt with hereafter.

Pillans v. Van Mierop. In the interesting eighteenth-century case of *Pillans* v. *Van Mierop* (*q*) the actual decision was on the principle that "any damage to another or suspension or forbearance of his right is a foundation for his undertaking, and will make it binding, though no actual benefit accrues to the party undertaking" (*r*). But Lord Mansfield threw out the revolutionary suggestion (which Wilmot J. showed himself inclined to follow, though not wholly committing himself to it) that there is no reason why agreements *in writing,* at all events in commercial affairs, should not be good without any consideration. "A *nudum pactum* does not exist in the usage and law of merchants. I take it that the ancient notion about the want of consideration was for the sake of evidence only . . . . in commercial cases amongst merchants the want of consideration is not an objection" (*s*). The anomalous character of this dictum was rightly seen at the time, and it has never been followed (*t*). It was too late to set up a new class of Formal Contracts, which was really the effect of Lord Mansfield's proposal. But if it had occurred a century or two earlier to a judge of anything like Lord Mansfield's authority, the whole course of the English law of contract might have been changed, and its principles might have been substantially assimilated to those of the modern civil law as adopted by the law of Scotland.

181] * Promises founded on moral duty. Another doctrine made current by Lord Mansfield and some of his colleagues with more success (*u*) was that the existence of a previous moral obligation constituted such a relation between the parties as would support an express promise. The Exchequer Chamber finally decided as late as 1840, that "a mere moral

(*q*) (1765) 3 Burr. 1664, and Finch Sel. Ca. 269.

(*r*) Per Yates J. at p. 1674.

(*s*) 3 Burr. 1669–70.

(*t*) In 1778 it was distinctly contradicted by the opinion of the judges delivered to the House of Lords in *Rann* v. *Hughes* (1778) 7 T. R. 350, n.: "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing." Prof. Langdell ingeniously argues (Summary, §§ 49, 59), that contracts governed by the law merchant need on principle no consideration; in short, that a negotiable instrument is a specialty. It might have been better so. In this country one can only say *dis aliter visum.*

(*u*) See the note to *Wennall* v. *Adney*, 3 B. & P. 252, 6 R. R. 782, and in Finch Sel. Ca. at p. 358, which is approved by Parke B. in *Earle* v. *Oliver* (1848) 2 Ex. 71, at p. 90, and has long been regarded as classical on the whole question of past consideration.

obligation arising from a past benefit not conferred at the request of the defendant" is not a good consideration (*x*).[11]

Past consideration ineffectual. It is still not quite settled whether a past benefit is in any case a good consideration for a subsequent promise. On our modern principles it should not be (*y*), and it is admitted that it generally is not (*z*).[12] For the past service was either

(*x*) *Eastwood* v. *Kenyon* (1840) 11 A. & E. 438, 446, 52 R. R. 400.
(*y*) Cp. Langdell, op. cit. § 91.
(*z*) *Roscorla* v. *Thomas* (1842) 3 Q. B. 324, Finch Sel. Ca. 340.

[11] In most jurisdictions a moral obligation is now held insufficient consideration, and the distinction suggested in the note to Wennall *v.* Adney is invoked to support such promises as the ratification of an infant's promise or a promise to pay a debt barred by bankruptcy or the Statute of Limitations. Morris *v.* Norton, 75 Fed. Rep. 912; Cook *v.* Bradley, 7 Conn. 57; Wiggins *v.* Keizer, 6 Ind. 252; Mills *v.* Wyman, 3 Pick. 207; Dodge *v.* Adams, 19 Pick. 429; Dearborn *v.* Bowman, 3 Met. 155; Hendricks *v.* Robinson, 56 Miss. 694; Updike *v.* True, 2 Beasl. 151. See further, 53 L. R. A. 353, n. In a few jurisdictions, however, the doctrine that moral obligation may support a promise is still in force. Gen. Code, § 2741; McElven *v.* Sloan, 56 Ga. 108, 109; Gray *v.* Hamil, 82 Ga. 375; Brown *v.* Latham, 92 Ga. 280 (but see Davis *v.* Morgan, 117 Ga. 504); Spear *v.* Griffith, 86 Ill. 552; Lawrence *v.* Oglesby, 178 Ill. 122 (but see Hobbs *v.* Greifenhagen, 91 Ill. App. 400); Pierce *v.* Walton, 20 Ind. App. 66; Robinson *v.* Hurst, 78 Md. 59; Edwards *v.* Nelson, 51 Mich. 121; Hemphill *v.* McClimans, 24 Pa. 367; Landis *v.* Royer, 59 Pa. 95; Stebbins *v.* Crawford, 92 Pa. 289; Holden *v.* Banes, 140 Pa. 63; Sutch's Estate, 201 Pa. 305; State *v.* Butler, 11 Lea, 418. See also Ferguson *v.* Harris, 39 S. C. 323, and an article by Professor Joseph P. McKeehan on Moral Consideration in Pennsylvania, 9 Dickinson Law School Forum, 1.

A past consideration will not support an express promise. McNaught *v.* Fisher, 96 Fed. Rep. 168; Bulkley *v.* Landon, 2 Conn. 404; Shealy *v.* Toole, 56 Ga. 210; Summers *v.* Vaughn, 35 Ind. 323; Chamberlin *v.* Whitford, 102 Mass. 448; Johnson *v.* Johnson's Adm., 31 Pa. 450; Rudolph *v.* Hewitt, 11 S. Dak. 646; Barlow *v.* Smith, 4 Vt. 139; Hopkins *v.* Richardson, 9 Gratt. 485. But see Viley *v.* Pettit, 96 Ky. 576; Koenigsberg *v.* Lennig, 161 Pa. 171.

When a part of the consideration is past, and a part is not, it is enough to sustain a promise. Irwin *v.* Locke, 20 Col. 148; Wiggins *v.* Keizer, 6 Ind. 252; Loomis *v.* Newhall, 15 Pick. 159; Graham *v.* Stanton, 177 Mass. 321; Roberts *v.* Griswold, 35 Vt. 496.

[12] A promise to pay a debt which the creditor has by his own act effectually discharged, whether by release, accord, and satisfaction, or assenting to a composition, is without consideration. *Ex parte* Hall, 1 Deacon, 171; Samuel *v.* Fairgrieve, 21 Ont. App. 418; Rasmussen *v.* State Bank, 11 Col. 301; Lewis *v.* Simons, 1 Handy, 82; Warren *v.* Whitney, 24 Me. 561; Phelps *v.* Dennett, 57 Me. 491; Ingersoll *v.* Martin, 58 Md. 67; Hall *v.* Rice, 124 Mass. 292; Mason *v.* Campbell, 27 Minn. 54; Grant *v.* Porter, 63 N. H. 229; Zoebisch *v.* Von Minden, 47 Hun, 213; Snevily *v.* Read, 9 Watts, 396; Callahan *v.* Ackley, 9 Phila. 99; Shepard *v.* Rhodes, 7 R. I. 470; Stafford *v.* Bacon, 1 Hill, 532; S. C. 2 Hill, 353 (showing the opinion in 25 Wend. 384, to have been published by mistake); Evans *v.* Bell, 15 Lea, 569. But see Jamison *v.* Ludlow, 3 La. Ann. 492; Willing *v.* Peters, 12 S. & R. 177, *contra*. Compare *Re* Merriman, 44 Conn. 587; Higgins *v.* Dale, 28 Minn. 126.

A promise made by a woman when discovert, to perform a promise previously made by her while married, is not binding without a new consideration. Watson *v.* Dunlap, 2 Cranch C. C. 14; Ezell *v.* King, 93 Ala. 470; Thompson *v.* Hudgins, 116 Ala. 93; Waters *v.* Bean, 15 Ga. 358; Maher *v.* Martin, 43 Ind. 314; Putnam *v.* Tennyson, 50 Ind. 456; Long *v.* Brown, 66 Ind. 160; Austin *v.* Davis, 128 Ind. 472; Holloway's Assignee *v.* Rudy, 60

rendered without the promisor's consent at the time, or with his consent but without any intention of claiming a reward as of right, in neither of which cases is there any foundation for a contract (*a*); or it was rendered with the promisor's consent and with an expectation known to him of reward as justly due, in which case there were at once all the elements of an agreement for reasonable reward.

Supposed exceptions: Lampleigh v. Brathwait. It is said, however, that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth (*b*).[13]

(*a*) "It is not reasonable that one man should do another a kindness, and then charge him with a recompense." 1 Wms. Saund. 356.

(*b*) *Lampleigh* v. *Brathwait* (1616) Hob. 105, and 1 Sm. L. C.; see per Erle C.J. 13 C. B. N. S. at p. 740. The Irish case of *Bradford* v. *Roulston* (1858) 8 Ir. C. L. Rep. 468, will, for English lawyers at least, hardly outweigh this dictum; and the doctrine would seem to be open to examination in the C. A., see per Bowen L.J. *Stewart* v. *Casey* [1892] 1 Ch. at p. 115, 61 L. J. Ch. 61. See Anson, pp. 102–110, and cp. Clark Hare on Contracts, 246–249. At an earlier time it was held that a past consideration would not support an action of debt, but was enough for assumpsit, *Marsh* v. *Rainsford* (1588) 2 Leon. 111; *Sidenham* v. *Worlington* (1595) *ib.* 224; Finch Sel. Ca. 337; O. W. Holmes, The Common Law. 286, 297. The theory was still that the breach of promise was an actionable wrong because of an existing relation between the parties which created a special duty, not that an executory contract, as such, created an obligation; and on that theory there was no reason why the promise and the consideration should be simultaneous. But Lord Mansfield cannot be supposed to have known anything of this.

S. W. Rep. 650 (Ky.); Musick *v.* Dodson, 76 Mo. 624; Bragg *v.* Israel, 86 Mo. App. 338; Kent *v.* Rand, 64 N. H. 45; Porterfield *v.* Butler, 47 Miss. 165; Condon *v.* Barr, 49 N. J. L. 53; Long *v.* Rankin, 108 N. C. 333; Wilcox *v.* Arnold, 116 N. C. 708; Hayward *v.* Barker, 52 Vt. 429; Valentine *v.* Bell, 66 Vt. 280; Dixie *v.* Worthy, 11 U. C. Q. B. 328. See also Parker *v.* Cowan, 1 Heisk. 518. But see *contra*, Lafitte *v.* Selogny, 33 La. Ann. 659; Brownson *v.* Weeks, 47 La. Ann. 1042; Wilson *v.* Burr, 25 Wend. 386; Goulding *v.* Davidson, 26 N. Y. 604; Hemphill *v.* McClimans, 24 Pa. 367; Leonard *v.* Duffin, 94 Pa. 218; Brooks *v.* Merchants' Bank, 125 Pa. 394; Holden *v.* Banes, 140 Pa. 63.

But when the original promise was an engagement binding her separate estate, the subsequent promise has been sustained. Viser *v.* Bertrand, 14 Ark. 267; Hubbard *v.* Bugbee, 55 Vt. 506; Sherwin *v.* Sanders, 59 Vt. 499.

[13] In some States this doctrine is still law. Montgomery *v.* Downey, 116 Ia. 632; **Daily *v.* Minnick, 117 Ia. 563**; Pool *v.* Horner, 64 Md. 131; Stuht *v.* Sweesy, 48 Neb. 767; Landis *v.* Royer, 59 Pa. 95; Sutch's Estate, 201 Pa. 305; Silverthorn *v.* Wiley, 96 Wis. 69; Raife *v.* Gorell, 105 Wis. 636.

In Moore *v.* Elmer, 180 Mass. 15, however, Holmes, C. J., said: "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked

Performance of another's legal duty. It is *also said that the [182 voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense. But the authority for this proposition is likewise found to be unsatisfactory. Not only is it scanty in quantity, but the decisions, so far as they did not proceed on the now exploded ground that moral obligation is a sufficient consideration, appear to rest on facts establishing an actual tacit contract independent of any subsequent promise.

Acknowledgment of barred debts. Another exceptional or apparently exceptional case which certainly exists is that of a debt barred by the Statute of Limitation, on which the remedy may be restored by a new promise on the debtor's part. It is said that the legal remedy is lost but the debt is not destroyed, and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it. This is not logically satisfying, and in fact it belongs to the now discredited view of past consideration. There is no real equivalent for the new promise, and the only motive that can generally be assigned for it is the feeling that it would be morally wrong not to pay. It seems better at this day to say that the law of limitation does not belong to substantive law at all, but is a special rule of procedure made in favour of the debtor, who may waive its protection if he deliberately chooses to do so (*c*).

Mutual promises. The most characteristic rule in our law of consideration, and the most important for the business of life, is that mutual promises are sufficient consideration for one another.[14] When

(*c*) See more on this point in Ch. XIII.

for. See Langdell, Contracts, § 92 *et seq.;* Chamberlin *v.* Whitford, 102 Mass. 448, 450; Dearborn *v.* Bowman, 3 Met. 155, 158; Johnson *v.* Kimball, 172 Mass. 398, 400." See also Walker *v.* Brown, 104 Ga. 357; Holloway *v.* Rudy, (Ky.) 60 S. W. Rep. 650; Stoneburner *v.* Motley, 95 Va. 784.

[14] There has been much difference of opinion on the elementary question of the essential element of consideration in bilateral contracts. The learned author finds this element in the legal detriment imposed by a binding promise, and any new and distinct mutual promises made by capable parties, and not illegal, he regards as necessarily binding. This is also Prof. Langdell's view. Summary, § 84; XIV. Harv. L. Rev. 496. Prof. Ames finds in the mere making, on request, a promise, *animo contrahendi*, a sufficient consideration. XIII. Harv. L. Rev. 29. This view leads even more absolutely to the result that any promise whatever not in violation of public policy may be sufficient consideration to support a counter-promise. To the late Professor Wald, as well as the present editor, it has seemed that under the authorities, no promise could be good consideration for a counter-promise, unless the performance of the promise would or might impose a legal detriment upon the promisor. Doubtless, if for any reason, for instance, lack of capacity on the part of the promisor, a promise is void in law, it cannot serve as consideration

the subject was still novel it would not have been difficult, one would **183]** think, to frame plausible *arguments to the contrary. However, there is very little trace of opposition to it in our books. As early as 1555, the validity of reciprocal promises passed without question in a case reported on another point (*d*). In 1615 it was disputed (we are not told on what grounds), and finally affirmed (*e*). The promises must be exchanged for one another at the same time (*e*), and each of them must be binding on the face of it, that is, must not be unenforceable for any intrinsic reason. A promise which purports to be merely honorary, or which is invalidated by any rule of general policy or special provision of positive law, is no consideration (*f*). It is true that the promise itself, not the obligation thereby created, is the consideration (*g*) ; still, the value of a promise does not consist in the act of promising, any more than the value of a negotiable instrument consists in a piece of paper with writing on it, but in the assurance of the performance to which the promisor obliges himself, or, at worst, of damages for his default. A promise may be incapable of being sued on (*gg*), and therefore incapable of being a consideration

(*d*) *Pecke* v. *Redman*, Dyer, 113.

(*e*) *Nichols* v. *Raynbred*, Hobart, 88, Finch Sel. Ca. 336. "Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will be both *nuda pacta*." See intermediate cases collected by Prof. Ames in Harv. Law Rev. xiii. 32, n.

(*f*) *Harrison* v. *Cage*, 5 Mod. 411; Langdell, "Mutual Promises as a Consideration for each other," Harv. Law Rev. xiv. 496, 504.

(*g*) Ames, "Two Theories of Consideration," Harv. Law Rev. xiii, 29, 32. But when Prof. Ames suggests, at p. 34, that a promise which is and is known to be merely honorary may be a good consideration, he seems to overlook the undisputed authority of *Harrison* v. *Cage* (last note). Certainly some men's honorary promises are in fact worth more than some men's legal promises, but the law does not estimate or regard this. Chief Justice O. W. Holmes, on the other hand, suggests that every legal promise is really in the alternative to perform or to pay damages: which can only be regarded as a brilliant paradox. It is inconsistent not only with the existence of equitable remedies, but with the modern common law doctrine that premature refusal to perform may be treated at once as a breach. See 163 U. S. at p. 600; Harriman, § 552.

(*gg*) In many cases a promise may be actionable though not capable, in fact or in law, of performance.

for a counter-promise, but the law makes also the same requirement of detriment in regard to performance which is promised that it makes in regard to the consideration in unilateral contracts. See VIII. Harv. L. Rev. 27. The cases testing the correctness of this view are promises to forbear a groundless claim against a third person in jurisdictions where forbearance of such a claim against the promisee himself is not a good consideration, promises to forbear to commit a tort against a third person, and especially the case subsequently discussed of promises to perform a contractual duty to a third person.

for a *counter-promise, for various reasons which we have exam- [184
ined or shall examine under their proper heads. Such reasons do not form part of the doctrine of Consideration, as is shown by the fact that the same or similar reasons exist and are applied in the modern Roman law and national bodies of law derived from it, where the Common Law rules of Consideration are unknown (*h*). In many cases a promisor has the option of avoiding his contract for some cause existing at the date of the promise. But in all such cases the contract is valid until rescinded, and the right to rescind it may be lost by events beyond the promisor's control; so there is no difficulty in treating his promise as a good consideration.

Certainty required. Since a promise which is to be a good consideration for a reciprocal promise must be such as can be enforced, it must be not only lawful but reasonably definite. Thus a promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced (*i*). And upon a conveyance of real estate without any pecuniary consideration a covenant by the grantee to build on the land granted such a dwelling-house as he or his heirs shall think proper is too vague to save the conveyance from being voluntary within 27 Eliz. c. 4 (*k*).

Promises of a thing one is already bound generally or to the promisee to do. Similarly, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party (*l*). It seems obvious that an express promise by *A. to B. to do something which B. can already call [185
on him to do can in contemplation of law produce no fresh advantage to B. or detriment to A. (*m*).[15] But the doing or undertaking of

(*h*) Thus the question of the performance being possible is irrelevant here. In any case the language of 2 Wms. Saund. 430 and of the dicta there relied on is much too wide.

(*i*) *White* v. *Bluett* (1853) 23 L. J. Ex. 36; this seems the *ratio decidendi*, though so expressed only by Parke B., who asked in the course of argument, "Is an agreement by a father in consideration that his son will not bore him a binding contract?"

(*k*) *Rosher* v. *Williams* (1875) L. R. 20 Eq. 210, 44 L. J. Ch. 419.

(*l*) See Leake, 538; and besides authorities there given, *Deacon* v. *Gridley* (1854) 15 C. B. 295, 24 L. J. C. P. 17; and the judgment on the 7th plea in *Mallalieu* v. *Hodgson* (1851) 16 Q. B. 689, 20 L. J. Q. B. 339.

(*m*) Some American courts, however, hold otherwise: Harriman on Contracts, § 117.

15 And yet, if the promise were binding the Statute of Limitations would begin to run anew, a legal detriment to one party and benefit to the other.

anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. A promise of reward to a constable for rendering services beyond his ordinary

The result supported by the learned author and by the weight of authority, therefore, does not square with his test of consideration. It is submitted that the new agreement is not good consideration not because the promise is not itself a detriment, but because the performance promised is not. That the consideration is not good is the prevailing doctrine. Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Camp. 317; Fraser *v.* Hatton, 2 C. B. N. S. 517; Jackson *v.* Cobbin, 8 M. & W. 790; Mallalieu *v.* Hodgson, 16 Q. B. 689; Harris *v.* Carter, 3 E. & B. 559; Alaska Packers' Assoc. *v.* Domenico, 117 Fed. Rep. 99 (C. C. A.); Main Street Co. *v.* Los Angeles Co., 129 Cal. 301; Bush *v.* Rawlins, 89 Ga. 117; Davis *v.* Morgan, 117 Ga. 504 (cp. Poland Paper Co. *v.* Foote, 118 Ga. 458); Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333; Goldsborough *v.* Gable, 140 Ill. 269; Moran *v.* Peace, 72 Ill. App. 135, 139; Allen *v.* Rouse, 78 Ill. App. 69; Mader *v.* Cool, 14 Ind. App. 299; Ayres *v.* Chicago, &c. R. R. Co., 52 Ia. 478; McCarty *v.* Hampton Building Assoc., 61 Ia. 287; Westcott *v.* Mitchell, 95 Me. 377; Storck *v.* Mesker, 55 Mo. App. 26; Esterly Co. *v.* Pringle, 41 Neb. 265; Voorhees *v.* Combs, 33 N. J. L. 494; Bartlett *v.* Wyman, 14 Johns. 260; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Carpenter *v.* Taylor, 164 N. Y. 171; Schneider *v.* Hensehenheimer, 55 N. Y. Supp. 630; Festerman *v.* Parker, 10 Ired. 474; Gaar *v.* Green, 6 N. Dak. 48; Erb *v.* Brown, 69 Pa. 216; Jones *v.* Risley, 91 Tex. 1; Tolmie *v.* Dean, 1 Wash. Ter. 46; Magoon *v.* Marks, 11 Hawaii, 764. See also Hartley *v.* Ponsonby, 7 E. & B. 872; Eastman *v.* Miller, 113 Ia. 404; Proctor *v.* Keith, 12 B. Mon. 252; Eblin *v.* Miller's Exec., 78 Ky. 371; Endriss *v.* Belle Isle Ice Co., 49 Mich. 279; Conover *v.* Stillwell, 34 N. J. L. 54, 57.

In a few jurisdictions the contrary view is taken on the ground that the subsequent bargain includes a rescission of the earlier. Stondenmeier *v.* Williamson, 29 Ala. 558; Bishop *v.* Busse, 69 Ill. 403; Cooke *v.* Murphy, 70 Ill. 96; Coyner *v.* Lynde, 10 Ind. 282; Holmes *v.* Doane, 9 Cush. 135; Rollins *v.* Marsh, 128 Mass. 116; Rogers *v.* Rogers, 139 Mass. 440; Thomas *v.* Barnes, 156 Mass. 581, 584; Brigham *v.* Herrick, 173 Mass. 460, 467; Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489; Conkling *v.* Tuttle, 52 Mich. 130; Osborne *v.* O'Reilly, 42 N. J. Eq. 467; Lattimore *v.* Harsen, 14 Johns. 330; Stewart *v.* Ketcltas, 36 N. Y. 388. See also Peck *v.* Requa, 13 Gray, 407; King *v.* Duluth Ry. Co., 61 Minn. 482; Hansen *v.* Gaar, 63 Minn. 94; Gaar *v.* Green, 6 N. Dak. 48; Dreifus *v.* Columbian Co., 194 Pa. 475.

Any promise made in consideration of the payment, in whole or in part, of a debt already due, therefore, is not binding. Railway Co. *v.* Clark, 92 Fed. Rep. 968; Skinner *v.* Gold Min. Co., 96 Fed. Rep. 735; Barron *v.* Vandvert, 13 Ala. 232; Hughes *v.* So. Warehouse Co., 94 Ala. 613; Thompson *v.* Robinson, 34 Ark. 44; Liening *v.* Gould, 13 Cal. 598; Solary *v.* Stultz, 22 Fla. 263; Carlton *v.* Western, etc., R. Co., 81 Ga. 531; Smith *v.* Tyler, 51 Ind. 512; State *v.* Davenport, 12 Ia. 335; Adams County *v.* Hunter, 78 Ia. 283; Pemberton *v.* Hoosier, 1 Kan. 108; Ingalls *v.* Sutliff, 36 Kan. 444; Jenness *v.* Lane, 26 Me. 475; Smith *v.* Bartholomew, 1 Met. 276; Warren *v.* Hodge, 121 Mass. 106; Ness *v.* Minn. & Col. Co., 87 Minn. 413; Price *v.* Cannon, 3 Mo. 453; Wolz *v.* Parker, 134 Mo. 458; Watts *v.* French, 19 N. J. Eq. 407; Parmalee *v.* Thompson, 45 N. Y. 58; Arend *v.* Smith, 151 N. Y. 502; Roberts *v.* Bank, 8 N. Dak. 474; Jenkins *v.* Clarkson, 7 Ohio 72; Trumbull *v.* Brock, 31 Ohio St. 649; Church *v.* Church, 57 Ohio St. 561; Hanks *v.* Barron, 95 Tenn. 275; Pomeroy *v.* Slade, 16 Vt. 220; Valentine *v.* Bell, 66 Vt. 281; Smith *v.* Phillips, 77 Va. 548.

See *post*, n. 17, 20, 21.

duty in the discovery of an offender is binding (*n*) :[16] so is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles (*o*). So, it is conceived, would be a promise in consideration of the promisee doing at a particular time, or in a particular way, something which otherwise he must do, but has the choice of doing in more than one way, or at any time within certain limits. Again, there will be consideration enough for the promise if an existing right is altered or increased remedies given. Thus an agreement to give a debtor time in consideration of his paying the same interest that the debt already carries is inoperative, but an agreement to give time or accept reduced interest in consideration of having some new security would be good and binding. The common proviso in mortgages for reduction of interest on punctual payment —*i. e.,* payment at the very time at which the mortgagor has covenanted to pay it—seems to be without any consideration, and it is conceived that if not under seal such a proviso could not be enforced (*p*).[17] Again, the rule does not apply if the promise is in the

(*n*) *England* v. *Davidson* (1840) 11 A. & E. 856, 52 R. R. 522.

(*o*) *Hartley* v. *Ponsonby* (1857) 7 E. & B. 872, 26 L. J. Q. B. 322.

(*p*) This could be at once provided against, however, if so desired, by fixing the times for "punctual payment" a single day earlier than those named in the mortgagor's covenant.

[16] Morrell *v.* Quarles, 35 Ala. 544; Hayden *v.* Souger, 56 Ind. 42; Bronnenberg *v.* Coburn, 110 Ind. 169; Trundle *v.* Riley, 17 B. Mon. 396; Pilie *v.* New Orleans, 19 La. Ann. 274; Studley *v.* Ballard, 169 Mass. 295; Gregg *v.* Pierce, 53 Barb. 387; McCandless *v.* Alleghany, &c. Co., 152 Pa. 139; Texas Cotton-Press Co. *v.* Mechanics' Co., 54 Tex. 319; Kasling *v.* Morris, 71 Tex. 584; Davis *v.* Munson, 43 Vt. 576; Reif *v.* Page, 55 Wis. 496. See also Long *v.* Neville, 36 Cal. 455; Marsh *v.* Gold, 2 Pick. 289; Commonwealth *v.* Vandyke, 57 Pa. 34.

But if no more is done than the legal duty requires there is not sufficient consideration. Witty *v.* Southern Pacific Co., 76 Fed. Rep. 217; Morrell *v.* Quarles, 35 Ala. 544, 548; Grafton *v.* St. Louis, &c. Ry. Co., 51 Ark. 504; Lees *v.* Colgan, 120 Cal. 262; Matter of Russell's Application, 51 Conn. 577; Stacy *v.* State Bank, 5 Ill. 91; Hogan *v.* Stophlet, 179 Ill. 150; Hayden *v.* Souger, 56 Ind. 42, 48; Marking *v.* Needy, 8 Bush, 22; Pool *v.* Boston, 5 Cush. 219; Davies *v.* Burns, 5 Allen, 349; Brophy *v.* Marble, 118 Mass. 548; Studley *v.* Ballard, 169 Mass. 295; Foley *v.* Platt, 105 Mich. 635; Warner *v.* Grace, 14 Minn. 487; Day *v.* Putnam Ins. Co., 16 Minn. 408; *Ex parte* J. W. Gore, 57 Miss. 251; Kirk *v.* Merry, 23 Mo. 72; Thornton *v.* Missouri, &c. Ry. Co., 42 Mo. App. 58; Hatch *v.* Mann, 15 Wend. 44; Gilmore *v.* Lewis, 12 Ohio, 281; Smith *v.* Whildin, 10 Pa. 39; Stamper *v.* Temple, 6 Humph. 113; Brown *v.* Godfrey, 33 Vt. 120.

[17] McCann *v.* Lewis, 9 Cal. 246; Crossman *v.* Wohlleben, 90 Ill. 537; Abel *v.* Alexander, 45 Ind. 523; Hume *v.* Mazelin, 84 Ind. 574; Hunt *v.* Postlewait, 28 Ia. 427; Wilson *v.* Powers, 130 Mass. 127; Hale *v.* Forbis, 3 Mont. 395; Kellogg *v.* Olmsted, 25 N. Y. 189.

But it has been held, and it is submitted correctly held, that a promise by a debtor to pay, until a fixed date, the same interest which the debt

nature of a compromise, that is, if a reasonable doubt exists at the
186] time whether the thing *promised be already otherwise due or not, though it should be afterwards ascertained that it was so. We shall return to this when we speak of forbearance as a consideration.

Performance of subsisting obligation to third person. Difficult questions arise when we have a promise made in consideration of the promisee doing or promising to do something which a subsisting contract with a third person has already bound him to do. Such cases are not frequent, and there has not yet been any full or satisfying judicial discussion of them. It would seem that, being infrequent and of no great importance in current affairs, they should be disposed of by the strict application of settled principles, and that, even if such application should lead to apparently fine distinctions, the principles ought not to be tampered with merely to avoid that result. From this point of view, Andrew's performance of his binding promise to Peter does not appear capable of being a consideration for a new promise by John to Andrew; not because it cannot be beneficial to John, for this it may very well be, but because in contemplation of law the performance is no new detriment to Andrew, but on

already bears, is a good consideration for a promise to give him time until that date; for by such agreement the debtor deprives himself of the right to pay the debt and stop the interest before that date, and the creditor gets the benefit of an interest-bearing investment for a fixed period instead of a period determinable at will. Pierce *v.* Goldsberry, 31 Ind. 52; Royal *v.* Lindsay, 15 Kan. 591; Shepherd *v.* Thompson, 98 Ky. 668; Chute *v.* Pattee, 37 Me. 102; Simpson *v.* Evans, 44 Minn. 419; Keirn *v.* Andrews, 59 Miss. 39; Moore *v.* Redding, 69 Miss. 841; Fowler *v.* Brooks, 13 N. H. 240; McComb *v.* Kittredge, 14 Ohio, 348; Fawcett *v.* Freshwater, 31 Ohio St. 637; Benson *v.* Phipps, 87 Tex. 578.

There are, however, a number of decisions to the contrary. Abel *v.* Alexander, 45 Ind. 523; Hume *v.* Mazelin, 84 Ind. 574; Holmes *v.* Boyd, 90 Ind. 332; Davis *v.* Stout, 126 Ind. 12; Wilson *v.* Powers, 130 Mass. 127; Hale *v.* Forbis, 3 Mont. 395; Grover *v.* Hoppock, 2 Dutch. 191; Kellogg *v.* Olmsted, 25 N. Y. 189; Parmalee *v.* Thompson, 45 N. Y. 58; Olmstead *v.* Latimer, 158 N. Y. 313. See also Hopkins *v.* Logan, 5 M. & W. 241; Vercycken *v.* Vandenbrooks, 102 Mich. 119; Stryker *v.* Vanderbilt, 3 Dutch. 68; Toplitz *v.* Bauer, 161 N. Y. 58; McNish *v.* Reynolds, 95 Pa. 483; Gibson *v.* Daniel, 17 Tex. 173; McIntyre *v.* Ajax Mining Co., 20 Utah, 323, 336; Flanders *v.* Fay, 40 Vt. 316; Stickler *v.* Giles, 9 Wash. 147; Price *v.* Mitchell, 23 Wash. 742.

A promise by a creditor to forbear until a fixed date in return for the debtor's promise to pay the debt with interest, at the same rate as the debt legally bears by that date, is not, however, a valid contract, as the debtor does not agree to refrain from any legal right. He may pay the debt and stop the interest at any time. McManus *v.* Bark, L. R. 5 Ex. 65; Austin Co. *v.* Bahn, 87 Tex. 582.

Where there was a *bona fide* dispute as to the medium of payment required by an obligation, satisfaction in one medium was held to extinguish the debt though less in amount than the debt. San Juan *v.* St. Johns Gas Co., 195 U. S. 510. Cp. Saunders *v.* Whitcomb, 177 Mass. 457. See further, *post*, n. 20, 21.

the contrary is beneficial to him, inasmuch as it discharges him of an existing obligation. Therefore the necessary element of detriment to the promisee is wanting (*q*). It seems therefore that if a promise is given in exchange merely for the performance of the promisee's duty under an existing contract with a third person, it is not binding. Authority, however, is the other way so far as it goes. Performance of this kind has been held a sufficient consideration in at least three English reported cases (*r*), one from the early seventeenth and two from the middle part *of the nineteenth century. In the first of [187 these (*s*) the plaintiff and defendant were jointly liable as sureties on a bond, long before the modern equitable doctrine of contribution between co-sureties was established. In consideration of the plaintiff paying the whole debt, the defendant promised to repay him half. The promise was held binding, but the real difficulty does not appear to have been dealt with (*t*). In the second case (*u*) the plaintiff, being engaged to be married, did (on the facts as assumed) proceed with the marriage on the faith of a promise by his uncle, the defendant's testator, to pay him an annuity during the promisor's life. The plaintiff succeeded in an action for arrears of the annuity. To the majority of the Court it appeared sufficient to say that the marriage took place at the testator's request. But this (whether rightly said or not) does not answer the question whether the simple fulfilment of a promise of marriage already binding on him could be any legal detriment to the promisee. The third case (*x*), in an entirely different subject-matter, also goes on the ground of the performance being, in point of fact, both a benefit to the promisor and a detriment to the promisee. Here the defendant's promise was to unload a cargo of

(*q*) In point of fact there may be some, for it may be that he might have omitted the performance with impunity. But this is like the case of a merely honorary promise. The law is made to fit the normal conditions of men's affairs. If every man's word were as good as his bond, or nobody cared to enforce his rights, there would be no place for any law of contract at all.

(*r*) The point might perhaps have been considered in *Jones* v. *Waite* (1839, 1842) 5 Bing. N. C. 341, 9 Cl. & F. 88, 50 R. R. 705, 717, but the argument and decision were on other grounds.

(*s*) *Bagge* v. *Slade* (1616) 3 Bulst. 162. This decision was apparently forgotten until Prof. Ames lately called attention to it.

(*t*) It is certainly not touched by the statement, perfectly correct in itself, of Dodderidge J.: "If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise."

(*u*) *Shadwell* v. *Shadwell* (1860) 9 C. B. N. S. 159, 30 L. J. C. P. 145, Byles J. *diss.* chiefly on the ground that there was really no *animus contrahendi*, but only an act of bounty, cp. Langdell, § 68. If there were any *animus contrahendi*, an acceleration of the marriage at the testator's request would no doubt have made a good consideration, but that was not averred.

(*x*) *Scotson* v. *Pegg* (1861) 6 H. & N. 295, 30 L. J. Ex. 225.

coal at a certain rate in consideration of the plaintiff delivering the coal to him, which the plaintiff was already bound to do under a prior contract with the shippers of the coal, from whom the defendant had bought it. There is a suggestion in the course of the argument that **188]** the performance requested by *the defendant may have added new terms, as to time and manner of delivery, to that which the plaintiff was already bound to do, and it may be that the plaintiff was entitled to succeed on that point, if properly raised. But there is nothing of the kind in the judgment. It seems to be assumed that the rule must be the same whether the consideration relied upon is a performance already due to a third party or a new promise thereof to the defendant. And so the Supreme Court of Massachusetts has thought only a few years ago (*y*). The validity of this assumption must, however, be examined.

Promise to perform obligation to third person under subsisting contract. Let us now take the case of a promise by John to Peter to do something which he has already promised William to do. Such a promise may obviously create a moral obligation; for Peter may in many ways have a just and reasonable interest in being assured that John will perform his contract with William. Then is there any reason why it should not create a legal obligation, if supported by a sufficient consideration on Peter's part? The promise is a new and distinct promise, creating, on the face of it, a new and distinct duty to a new party. Duties to several parties to perform the same thing are simultaneously created in many quite common forms of covenants. Why should they not be created by successive and independent acts? Will any one deny that John's promise to Peter will be binding if given in exchange for a performance—say immediate payment of money—by Peter? If it is not, this must be the result of some special rule of legal policy, for no other objection seems possible. But of any such rule of policy there is no trace. If then the promise is binding when given for a performance, why should it be less binding when it is given in exchange for Peter's promise? There is no reason in the nature of the case for making any difference.[18] If there were

(*y*) *Abbott* v. *Doane* (1895) 163 Mass. 433.

[18] The difference is this: John's promise to Peter, when given in exchange for a payment of money by Peter, is binding because the payment of money is a good consideration. Whether the promise of John in this case could be good consideration is immaterial for the payment of money needs no consideration. The promise is not illegal and the parties acted under no mistake. If, however, Peter gives a promise instead of money, there must be good consideration on both sides. Not only must Peter's promise be of the sort which the law regards as sufficient, but John's also must be, or neither is enforceable, and the disputed question is whether John's promise is sufficient consideration to support Peter's promise.

a positive rule of law, founded on reasons of policy, for not allowing John's promise to Peter to perform his contract with *William [189 to be good, then John's promise would be no consideration; but only because, even though supported by sufficient consideration on the other side and satisfying all ordinary requisites, it was deprived of validity by the positive rule, and therefore made incapable of having any value in contemplation of law. But again, no such positive rule can be produced. It has been said that John's promise is a good consideration only if it is binding, and we have no right to assume that it is binding. The answer to this objection is that, if John's promise can be binding, it is made so by the counter-promise, and it is for the objector to show that it cannot be. The objection, in truth, if good for anything, is equally good to prevent mutual promises from ever being a consideration for each other; for in every such case neither promise, taken by itself, is of any legal force or value (*z*).

There is no objection, in any case, to a promise by John to Peter not to rescind a subsisting contract with William, or not to accept a waiver or release of it; and a promise in that form would certainty be a good consideration.

No direct decision has been made in England on the validity of a promise to perform an existing contract with a third person. A negative solution could not be given, it is apprehended, without overruling the cases in which performance has been held sufficient; while a positive one, if the argument above submitted be sound, might be given for independent reasons. Not that I am at all desirous of upholding the authority of the cases in question. I venture to submit, on the contrary, that they were wrongly decided, or at any rate not on right grounds. What is *here maintained is that a [190 promise made for valuable consideration, and otherwise good as between the parties, is not the less valid because the performance will operate in discharge of an independent liability of the promisor to a third person under an independent contract already existing.[19]

(*z*) Prof. Williston, upholding the objection originally raised by Sir W. Anson (now at p. 98 of his 9th ed.), perceived this, and proposed to meet the difficulty by constructing an entirely new theory of mutual promises: Harv. Law Rev. viii. 27. Mr. Langdell has dealt with the objection, and the theory founded on it, in a masterly reply: Harv. Law Rev. xiv. 496. Prof. Ames (Harv. Law Rev. xii. 515, xiii. 29, 35) holds, on the contrary, that both promise and performance are good consideration in cases of this class; but this involves the proposition that any detriment *in fact* to the promisee will do, which I cannot accept. Prof. Harriman (on Contracts, p. 67) appears to agree with Prof. Ames.

[19] The weight of authority in this country is to the effect that neither performance nor promise of performance of an act by a party who was under legal obligation to a third person to perform that act will serve as considera-

Rules as to consideration extended to the discharge of contracts. The doctrine of Consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts. For example, where there is a contract of hiring with a stipulation that the wages due shall be forfeited in the event of the servant being drunk, a promise not under seal to pay the wages notwithstanding a forfeiture is not binding without a new consideration (*a*). It is the rule of English law (now referred to the same reason, though really older) (*b*) that a debt of 100*l.* may be perfectly well discharged by the creditor's acceptance of a beaver hat or a peppercorn, or of a negotiable instrument for a less sum (*c*), at the same time and place at which the 100*l.* are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of 99*l.* in

(*a*) *Monkman* v. *Shepherdson* (1840) 11 A. & E. 411, 52 R. R. 390.

(*b*) See Harv. Law Rev. xii. 521.

(*c*) *Goddard* v. *O'Brien* (1882) 9 Q. B. D. 37; *Bidder* v. *Bridges* (1887) 37 Ch. Div. 406, 57 L. J. Ch. 300.

tion. Johnson's Adm. *v.* Sellier's Adm., 33 Ala. 265; Havana Press Drill Co. *v.* Ashurst, 158 Ill. 115; Peelman *v.* Peelman, 4 Ind. 612; Ford *v.* Garner, 15 Ind. 298; Reynolds *v.* Nugent, 25 Ind. 328; Ritenour *v.* Mathews, 42 Ind. 7; Harris *v.* Cassady, 107 Ind. 156; Brownlee *v.* Love, 117 Ind. 420; Newton *v.* Chicago, &c. Ry. Co., 66 Ia. 422; Schuler *v.* Myton, 8 Kan. 282; Ford *v.* Crenshaw, 1 Litt. (Ky.) 68; Holloway's Assignee *v.* Rudy, 60 S. W. Rep. 650 (Ky.); Putnam *v.* Woodbury, 68 Me. 58; Northwestern Bank *v.* Great Falls Opera House, 23 Mont. 1, 11; Gordon *v.* Gordon, 56 N. H. 170; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Seybolt *v.* New York, &c. R. R. Co., 95 N. Y. 562; Robinson *v.* Jewett, 116 N. Y. 40; Arend *v.* Smith, 151 N. Y. 502; Allen *v.* Turck, 8 N. Y. App. Div. 50; Sherwin *v.* Brigham, 39 Ohio St. 137; Wimar *v.* Overseers, 104 Pa. 317; Hanks *v.* Barron, 95 Tenn. 275; Kenigsberger *v.* Wingate, 31 Tex. 42; Davenport *v.* Congregational Soc., 33 Wis. 387. This view is supported also by Anson (9th ed.) 98, and Prof. Huffcutt's note; Clark, (2d ed.) 129; VIII Harv. L. Rev. 32. But see *contra*, Champlain Co. *v.* O'Brien, 117 Fed. Rep. 271; Humes *v.* Decatur Co., 98 Ala. 461, 473; Merrick *v.* Giddings, 1 Mack. (D. C.) 394; Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234; Donnelly *v.* Newbold, 94 Md. 220; Abbott *v.* Doane, 163 Mass. 433; Day *v.* Gardner, 42 N. J. Eq. 199, 203; Bradley *v.* Glenmary Co., 53 Atl. Rep. 49 (N. J. Eq.). See also Green *v.* Kelley, 64 Vt. 309, and articles by Professor Ames, 12 Harv. L. Rev. 515; 13 ibid. 29, also Harriman, (2nd ed.).

The view suggested by the learned author distinguishing between performance and promise of performance, though supported both by Prof. Langdell, Summ. § 84, XIV. Harv. L. Rev. 496, and Prof. Beale, XVII. Harv. L. Rev. 71, has been adopted in one decision only, and in that case by a dictum, Merrick *v.* Giddings, 1 Mack. (D. C.) 394. From a practical standpoint it seems an odd distinction. The assurance of future performance given by a promise may be an excellent thing, but to hold that it is a better consideration than actual present performance seems extreme.

Similarly performance of a statutory or public duty will not support a promise by an individual. Voorhees *v.* Reed, 17 Ill. App. 21; Shortle *v.* Terre Haute, &c. R. R. Co., 131 Ind. 338; Grant *v.* Green, 41 Ia. 88; Newton *v.* Chicago, &c. Ry. Co., 66 Ia. 422; Kansas City, &c. R. R. Co. *v.* Morley, 45 Mo. App. 304; Withers *v.* Ewing, 40 Ohio St. 400.

money at the same time and place a good discharge (*d*):[20] although modern decisions have confined this absurdity within the narrowest possible limits (*e*).[21] A judgment creditor agreed in writing with

(*d*) *Pinnel's case* (1602) 5 Co. Rep. 117, confirmed with reluctance by the House of Lords in *Foakes* v. *Beer* (1884) 9 App. Ca. 605, 54 L. J. Q. B. 130, Lord Blackburn all but dissenting. The Indian Contract Act (s. 63, illust. *b*.) is accordingly careful to express the contrary. The rule in *Pinnel's case*, it may be noted, though paradoxical, is not anomalous. Its numerical logic may be archaic, but it is strictly logical. The Court does not know judicially what a beaver hat may be worth, but it must know that 10*l*. are not worth 20*l*.

(*e*) See the notes to *Cumber* v. *Lane* (1719) in 1 Sm. L. C.

[20] The doctrine of Foakes *v*. Beer is criticised by Professor Ames in 12 Harv. L. Rev. 522 *seq*., both on the authority of early authorities not cited by the court and on principle. He quotes a number of judicial criticisms of the doctrine. It has, however, been followed in this country so widely that except where changed by statute it may be regarded as established. The authorities are fully collected in 20 L. R. A. 785, n; 57 Cent. L. J. 244. A few recent decisions are Fire Ins. Association *v*. Wickham, 141 U. S. 564, 578; Reynolds *v*. Reynolds, 55 Ark. 369; Davidson *v*. Burke. 143 Ill. 139; Beaver *v*. Fulp, 136 Ind. 595; Mannakee *v*. McCloskey, 23 Ky. L. Rep. 515; Specialty Glass Co. *v*. Daley, 172 Mass. 460; Saunders *v*. Whitcomb, 177 Mass. 457; Leeson *v*. Anderson, 99 Mich. 247; Murphy *v*. Kastner, 50 N. J. Eq. 214; Rettinghouse *v*. Ashland, 106 Wis. 595. Cf., Ennis *v*. Pullman, 165 Ill. 161; Jordan *v*. Great Northern Ry. Co. 80 Minn. 405.

[21] "The law has been changed by statute in India, Indian Contract Act, § 63, and in at least ten of our States: Ala. Code, § 2774; Cal. Civ. Code, § 1524; Dak. Comp. Laws, § 3486; Ga. Code, § 3735; Maine Rev. St., c. 82, § 45; No. Car. Code, § 574; N. Dak. Rev. Code, § 3827; Hill, Ann. Laws of Oregon, § 755; Tenn. Code (1884), § 4539; Va. Code (1897), § 2858. In one State, Mississippi, the rule was abolished by the court without the aid of a statute. Clayton *v*. Clark, 74 Miss. 499. See also to the same effect, Smith *v*. Wyatt, 2 Cincin. Sup. Ct. 12. By decision, too, in some States a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment. Green *v*. Langdon, 28 Mich. 221; Lamprey *v*. Lamprey, 29 Minn. 151 (*semble*); Gray *v*. Barton, 55 N. Y. 68; Ferry *v*. Stephens, 66 N. Y. 321; [*acc*. Holmes *v*. Holmes, 129 Mich. 412; *contra*, Warren *v*. Skinner. 20 Conn. 559; Bingham *v*. Browning, 197 Ill. 122. See also Randall *v*. Brodhead, 60 N. Y. App. Div. 567]. In others, partial payment is a satisfaction if the debtor is insolvent. Wescott *v*. Waller, 47 Ala. 492, 498 (*semble*); Shelton *v*. Jackson, 20 Tex. Civ. App. 443 [*acc*. Engbretson *v*. Seiberling, 122 Ia. 522; *contra*, Pearson *v*. Thomason. 15 Ala. 700; Beaver *v*. Fulp, 136 Ind. 595], or even if he is honestly believed to be insolvent. Rice *v*. London Co., 70 Minn. 77." Professor Ames, 12 Harv. L. Rev. 525.

An unliquidated or disputed claim is not within the scope of the rule. As to what comes under this heading, see Chicago, &c. Ry. Co. *v*. Clark, 178 U. S. 353, 367; Ostrander *v*. Scott, 161 Ill. 339; Bingham *v*. Browning, 197 Ill. 122; Tanner *v*. Merrill, 108 Mich. 58; Pollman Coal Co. *v*. St. Louis, 145 Mo. 651; Fuller *v*. Kemp, 138 N. Y. 231; Nassoiy *v*. Tomlinson, 148 N. Y. 326; Riggs *v*. Protection Assoc., 61 S. C. 448. Cp. Miller *v*. Coates, 66 N. Y. 609.

Nor does the rule apply to payment by a third party. Marshall *v*. Bullard, 114 Ia. 462.

A note or promise of one joint debtor to pay the whole or part of the debt may discharge the debt. Thompson *v*. Percival, 5 B. & Ad. 925; Lyth *v*. Ault, 7 Ex. 669; Morris Co. *v*. Van Vorst, 1 Zab. 100, 119; Ludington *v*. Bell, 77 N. Y. 138; Allison *v*. Abendroth, 108 N. Y. 470; Jaffray *v*. Davis, 124 N. Y. 164, 173. See, however, *contra*, Early *v*. Burt, 68 Ia. 716. In Bendix *v*. Ayers, 21 N. Y. App. Div. 570, it was held that payment of part of a firm

the debtor to take no proceedings on the judgment in consideration of immediate payment of part of the debt and payment of the residue by certain instalments; here there was no legal consideration for the **191]** creditor's promise, and he was entitled *to claim interest on the debt though the whole of the principal was paid according to the agreement (*f*). This rule does not touch the ordinary case of a composition between a debtor and several creditors; for every creditor undertakes to accept the composition in consideration of the like undertaking of the other creditors as well as of the debtor's promise to pay it (*g*).

The consideration for variation of contracts. If it is agreed between creditor and debtor that the duty shall be performed in some particular way different from that originally intended, this may well be binding: for the debtor's undertaking to do something different though only in detail from what he at first undertook to do, or even relinquishing an option of doing it in more ways than one, would be consideration enough, and the Court could not go into the question whether it gave any actual advantage to the creditor. But if the new agreement amounts to saying that the debtor shall at his own option perform the duty as at first agreed upon or in some other way, it cannot be binding without a new consideration: as where an entire sum is due, and there is an agreement to accept payment by instalments, this would be good, it seems, if the debtor undertook not to tender the whole sum; but in the absence of anything to show such an undertaking, the agreement is a mere voluntary indulgence, and the creditor remains no less at liberty to demand the whole sum than the debtor is to pay it (*h*).

Loss or forbearance of rights as consideration. The loss or abandonment of any right, or the forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually

(*f*) *Foakes* v. *Beer* (1884) 9 App. Ca. 605, 44 L. J Q. B. 130, foll. in *Underwood* v. *Underwood* [1894] P. 204, 63 L. J. P. 109. But where the solicitor of a defendant entitled to taxed costs accepted from the plaintiff's solicitor a cheque for the amount of costs (nothing being said about interest), this was held to be an accord and satisfaction for everything due, and the defendant was not allowed to issue execution for the interest: *Bidder* v. *Bridges* (1887) 37 Ch. Div. 406, 57 L. J. Ch. 300. [But see 20 L. R. A. 791.]

(*g*) *Good* v. *Cheesman* (1831) 2 B. & Ad. 328, Finch Sel. Ca. 343, 36 R. R. 574.

(*h*) *McManus* v. *Bark* (1870) L. R. 5 Ex. 65, 39 L. J. Ex. 65. Cp. *Foakes* v. *Beer*, note (*d*), last page.

debt by retiring partners was sufficient consideration to support a promise to discharge those partners from further liability. But this is opposed to Deering *v.* Moore, 86 Me. 181; Weber *v.* Couch, 134 Mass. 26; Line *v.* Nelson, 38 N. J. L. 358; Harrison *v.* Wilcox, 2 Johns. 448; Martin *v.* Frantz, 127 Pa. 389.

doing something. In *Mather* v. *Lord Maidstone* (*i*) the loss of *collateral rights by the promisee supported a promise notwith- [192 standing that the main part of the consideration failed. The action was on a bill of exchange. This bill was given and endorsed to the plaintiff as in renewal of another bill purporting to be accepted by the defendant and endorsed to the plaintiff. The plaintiff gave up this first bill to the defendant; thirty days afterwards it was discovered that it was not really signed by the defendant: yet it was held that he was liable on the second bill, for the plaintiff had lost his remedy against the other parties to the first bill during the time for which he had parted with the possession of it, and that was consideration enough.

Forbearance to sue; must be for definite or ascertainable time. As to forbearance, the commonest case of this kind of consideration is forbearing to sue. Forbearance for a reasonable time is enough, on the principle of *certum reddi potest:* and terms in themselves vague, such as "forbearing to press for immediate payment," may be construed by help of the circumstances and context as meaning forbearance for a reasonable time. A promise to guarantee a debt if the creditor will give time to the principal debtor is in the first instance an offer; it becomes a binding promise when the condition of giving the specified time, or a reasonable time, has been performed. It is a question of fact what is reasonable time in a given case (*k*).[22]

(*i*) (1856) 18 C. B. 273, 25 L. J. C. P. 310.

(*k*) *Oldershaw* v. *King* (1857) (Ex. Ch.) 2 H. & N. 517, 27 L. J. Ex. 120, and see 1 Wms. Saund. 225. In *Alliance Bank* v. *Broom* (1864) 2 Dr. & Sm. 289, 34 L. J. Ch. 956, actual forbearance at the defendant's request, though not for any specified time, was held sufficient. Cp. *Wilby* v. *Elgee* (1875) L. R. C. P. 497. In *Crears* v. *Hunter* (1887) 19 Q. B. Div. 341, 56 L. J. Q. B. 518, which has been criticized as ambiguous, L. Q. R. iii. 484, it must be taken, with the head-note, that the consideration was actual forbearance. The promise being in the form of a promissory note, *i. e.*, essentially unconditional, certainly makes a difficulty, for it would seem there was a complete promise before the consideration, viz. forbearing to sue for a reasonable time, was or could be executed. On the principle see per Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (1885–6) 32 Ch. Div. at p. 289.

[22] Actual forbearance is as good consideration as a promise to forbear. No reason can be suggested why unilateral contracts of this sort are invalid. Edgerton *v.* Weaver, 105 Ill. 43; Newton *v.* Carson, 80 Ky. 309; Home Ins. Co. *v.* Watson, 59 N. Y. 390; Strong *v.* Sheffield, 144 N. Y. 392.

There are contrary decisions: Mecorney *v.* Stanley, 8 Cush. 85; Manter *v.* Churchill, 127 Mass. 31; Shupe *v.* Galbraith, 32 Pa. 10. See also Shadburne *v.* Daly, 76 Cal. 355; Lambert *v.* Clewley, 80 Me. 480. The reasoning is unsatisfactory in these cases. The assumption seems to be made that because the promisee is free to forbear or not, as he chooses, there can be no valid

There must be an actual or bona fide disputed right. That which is forborne must also be the exercise or enforcement of some legal or equitable right which is honestly believed to exist. This is simply the converse of a rule already given. As a promise by A. to B. is **193]** naught *if it is only a promise to do something A. is already bound, either absolutely or as against B., to do, so it is equally worthless if it is a promise not to do something which B can already, as a matter either of public or of private right, forbid A. to do.

Why compromises are binding. So far we assume the existing rights of the parties to be known: but as in practice they often are not known, but depend on questions of law or of fact, or both, which could not be settled without considerable trouble, common sense and convenience require that compromises of doubtful rights should be recognized as binding, and they constantly are so recognized. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value" (*l*); and such forbearance is good consideration for a promise even though the claim is not well founded, provided it is honestly believed in and the promisee does not conceal from the promisor any fact which to his knowledge would affect its validity (*m*).[23]

(*l*) *Miles* v. *New Zealand Alford Estate Co.* (1885–6) 32 Ch. Div. 266, Bowen L.J. at p. 291, reviewing previous cases and dicta.

(*m*) Cotton L.J. *ib.* at p. 284.

contract. But the situation is the same as in any unilateral contract. Until the act is done both parties are free. Then a binding contract arises. If, by the terms of the offer, the forbearance is to be perpetual, there cannot, therefore, be a unilateral contract, but this is the only qualification to be made.

Where the promise is to forbear without naming a time it is generally assumed that a reasonable time is intended. Moore *v.* McKenney, 83 Me. 80; Haskell *v.* Tukesbury, 92 Me. 551; Howe *v.* Taggart, 133 Mass. 284; Glasscock *v.* Glasscock, 66 Mo. 627; Hockenbury *ads.* Meyers, 34 N. J. L. 346; Elting *v.* Vanderlyn, 4 Johns. 237; Traders' Nat. Bank *v.* Parker, 130 N. Y. 415; Citizens' Bank *v.* Babbitt, 71 Vt. 182.

But a promise to forbear generally has in some cases been construed to mean perpetual forbearance. Haymaker *v.* Eberly, 2 Binn. 506; Clark *v.* Russell, 3 Watts, 213. It would seem a question of construction in each case what the parties in fact meant.

[23] In America some courts have shown a disposition to follow the doctrine of the late English decisions. Union Bank *v.* Geary, 5 Pet. 99; Baldwin *v.* Central Bank, 17 Col. App. 7; Morris *v.* Munroe, 30 Ga. 630; Hayes *v.* Massachusetts Co., 125 Ill. 625, 639; Ostrander *v.* Scott, 161 Ill. 339; Murphy *v.* Murphy, 84 Ill. App. 292 (compare Herbert *v.* Mueller, 83 Ill. App. 391); Melcher *v.* Insurance Co., 97 Me. 512; Prout *v.* Pittsfield Fire District, 154 Mass. 450; Dunbar *v.* Dunbar, 180 Mass. 170; Dailey *v.* King, 79 Mich. 568; Lesson *v.* Anderson, 99 Mich. 247; Demars *v.* Musser-Santry Co., 37 Minn.

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (*n*). The same rule applies in the case where the claim given up is on a disputed promise of marriage (*o*). A partial compromise in which the undertaking is not simply to stay or not to commence legal proceedings, but to conduct them in some particular manner or limit them to some particular object, may well be good: but here again the forbearance must relate to something within the proper scope of such proceedings. A promise to conduct proceedings in bankruptcy so as to injure the debtor's *credit as little as possible is no consideration, for it is [194 in truth merely a promise not to abuse the process of the court (*p*).[24]

(*n*) *Trigge* v. *Lavallée* (1864) 15 Moo. P. C. 271, 292 (a case from Lower Canada, then under old Fr. law). *Wilby* v. *Elgee* (1875) L. R. 10 C. P. 497, 44 L. J. C. P. 254.

(*o*) *Keenan* v. *Handley* (1864) 2 D. J. S. 283.

(*p*) *Bracewell* v. *Williams* (1866) L. R. 2 C. P. 196.

418; Hansen *v.* Gaar, 63 Minn. 94; Grandin *v.* Grandin, 49 N. J. L. 508; Wahl *v.* Barnum, 116 N. Y. 87; Zoebisch *v.* Von Minden, 120 N. Y. 406; Sears *v.* Grand Lodge, 163 N. Y. 374, 379; Di Iorio *v.* Di Brasio, 21 R. I. 208; Bellows *v.* Sowles, 55 Vt. 391; Citizens' Bank *v.* Babbitt, 71 Vt. 182; Hewett *v.* Currier, 63 Wis. 386.

The definition given by other courts seems to require the claim forborne to be at least reasonably doubtful in fact or law in order to make the forbearance or promise to forbear a good consideration. Stewart *v.* Bradford, 26 Ala. 410; Ware *v.* Morgan, 67 Ala. 461; Richardson *v.* Comstock, 21 Ark. 69; Russell *v.* Daniels, 5 Col. App. 224; Mulholland *v.* Bartlett, 74 Ill. 58; Bates *v.* Sandy, 27 Ill. App. 552 (see later Illinois cases, *supra*); U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24; Sweitzer *v.* Heasly, 13 Ind. App. 567 (compare Moon *v.* Martin, 122 Ind. 211); Tucker *v.* Ronk, 42 Ia. 80; Peterson *v.* Breitag, 88 Ia. 418; Potts *v.* Polk Co., 80 Ia. 401 (see Richardson Co. *v.* Hampton, 70 Ia. 573); Price *v.* First Nat. Bank, 62 Kan. 743; Cline *v.* Templeton, 78 Ky. 550; Mills *v.* O'Daniel, 62 S. W. Rep. 1123 (Ky.) (compare Waller's Adm. *v.* Marks, 100 Ky. 541); Schroeder *v.* Fink, 60 Md. 436; Emmittsburg *v.* Donoghue, 67 Md. 383; Palfrey *v.* Portland, &c. R. R. Co., 4 Allen, 55 (see later Massachusetts cases, *supra*); Taylor *v.* Weeks, 129 Mich. 233; Foster *v.* Metts, 55 Miss. 77; Gunning *v.* Royal, 59 Miss. 45; Long *v.* Towl, 42 Mo. 545; Corbyn *v.* Brokmeyer, 84 Mo. App. 649; Kidder *v.* Blake, 45 N. H. 530 (see Pitkin *v.* Noyes, 48 N. H. 294); O. & C. R. R. Co. *v.* Potter, 5 Oreg. 228; Fleming *v.* Ramsey, 46 Pa. 252; Sutton *v.* Dudley, 193 Pa. 194; Warren *v.* Williamson, 8 Baxter, 427; Davisson *v.* Ford, 23 W. Va. 617 (see Billingsley *v.* Clelland, 41 W. Va. 234).

[24] A distinction not brought out by the English decisions and not referred to by the author is that between consideration and condition. If A. says to B., I will give you $100 if you break your leg, it is not probable that A. means to request B. to break his leg, as the exchange or equivalent for the promise. The breaking of the leg is merely the event upon the happening of which A. will give a gratuity. In theory any act whatever may be stated either as the condition or the consideration of a promise. See Langdell Summ. Cont., § 66; Holmes Common Law, p. 292; but the courts favor the construction of consideration. In Kirksey *v.* Kirksey, 8 Ala. 131, the de-

Reaction of the general doctrine of Consideration on contracts under seal. The main end and use of the doctrine of Consideration in our modern law is to furnish us with a comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter. Formal contracts remain, strictly speaking, outside the scope of these rules, which were not made for them, and for whose help they had no need. But it was impossible that so general and so useful a legal conception as that of Consideration should not make its way into the treatment of formal contracts, though with a different aspect. The ancient validity of formal contracts could not be amplified, but it might be restrained: and in fact both the case-law and the legislation of modern times show a marked tendency to cut short if not to abolish their distinctive privileges, and to extend to them as much as possible the free and rational treatment of legal questions which has been developed in modern times by the full recognition of informal transactions.

Most conspicuous in Equity. This result is mainly due to the action of the Court of Chancery. A merely gratuitous contract under seal is enforceable at common law (with some peculiar exceptions) unless it can be shown that behind the apparently gratuitous obligation

fendant wrote to his brother's widow: "If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation and that of your family, I feel like I want you and the children to do well." The widow came as requested, but it was held no contract was created thereby.

The decision was followed in Forward *v.* Armstead, 12 Ala. 124; Bibb *v.* Freeman, 59 Ala. 612. In the latter case the court said: "It is often a matter of great difficulty to discern the line which separates promises creating legal obligations from mere gratuitous agreements. Each case depends so much on its own peculiar facts and circumstances that it affords but little aid in determining other cases of differing facts. The promise or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee a benefit from affection and generosity, the agreement is gratuitous. If the purpose is to obtain a *quid pro quo* — if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation."

See also in accord, Boord *v.* Boord, Pelham (So. Aust.), 58. But there are other decisions where promises were enforced though it seemed pretty clear that the so-called consideration was not in fact requested in return for the promise. Shirley *v.* Harris, 3 McLean, 330; Berry *v.* Graddy, 1 Metc. (Ky.) 553; Bigelow *v.* Bigelow, 95 Me. 17; Devecmon *v.* Shaw, 69 Md. 199; Steele *v.* Steele, 75 Md. 477; Adams *v.* Honness, 62 Barb. 326; Richardson *v.* Gosser, 26 Pa. 335. The most noticeable illustration of the tendency of the courts to treat as consideration a detriment which was intended merely as a condition is afforded by cases of charitable subscriptions. See *supra*, p. *169, n. 3.

In regard to the enforcement by courts of equity of gratuitous promises relating to land in order to prevent a fraud, see Pomeroy on Eq. Jur., § 1294; Ames, Cas. on Eq. Jur. 306–309.

there is in fact an unlawful or immoral consideration.[25] Courts of equity did not, in the absence of any special ground of invalidity, interfere with the legal effect of formal instruments: but they would not extend their special protection and their special remedies to agreements, however formal, made without consideration. A voluntary covenant, though under seal, "in equity, where at least the covenantor is living (*q*), or where *specific performance of such a [195 covenant is sought, . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed" (*r*).[26]

(*q*) We shall see under the head of undue influence that a system of presumptions has been established which makes it difficult in many cases for persons claiming under a voluntary deed to uphold its validity if the donor, or even his representatives, choose within any reasonable time afterwards to dispute it.

(*r*) Per Knight Bruce L.J. *Kekewich* v. *Manning* (1851) 1 D. M. G. 176, 188.

[25] Krell *v.* Codman, 154 Mass. 454; Aller *v.* Aller, 40 N. J. L. 446; Harrell *v.* Watson, 63 N. C. 454; Ducker *v.* Whitson, 112 N. C. 114; Burkholder's Ex. *v.* Plank, 69 Pa. 225; Harris *v.* Harris, 23 Gratt. 737.

In many States the distinction between sealed and unsealed written contracts is abolished. Alaska, Code Civ. Proc., § 1041; Arizona, Civ. Code (1901), § 4054; California, Civ. Code, § 1932; Idaho, Rev. Stat. (1887), § 3227; Iowa, Code (1897), § 3068; Kentucky, Comp. Stat. (1894), § 472; Mississippi, Code (1892), §§ 4079, 4081; Missouri, Rev. Stat. (1899), § 893; Montana, Civ. Code (1895), §§ 2190, 2191; Nebraska, Comp. Stat. (1899), § 4951; Nevada, Gen. Stat. (1885), § 2667; North Dakota, Rev. Code (1895), § 3892; Ohio, Bates' Annot. Stat. (1900), § 4; Oklahoma, Stat. (1893), § 826; South Dakota, Annot. Stat. (1901), § 4738; Tennessee, Code (1884), § 2478; Texas, Rev. Stat. (1895), Art. 4862.. See also Alaska, Code Civ. Proc., § 1041; Indiana, Code Civ. Proc., § 450.

In most of these States it is also enacted that any written contract shall be presumed to have been made for sufficient consideration; but if lack of consideration is affirmatively proved the contract is invalid. Arizona, Civ. Code (1904), § 4055; California, Civ. Code, § 1963 (39); Idaho, Rev. Stat. (1887), § 3222; Iowa, Code (1897), § 3069; Kentucky, Comp. Stat. (1894), § 471; Mississippi, Code (1892), §§ 4080, 4082; Missouri, Rev. Stat. (1899), § 894; Montana, Civ. Code (1895), § 2169; North Dakota, Rev. Code (1895), § 3880; South Dakota, Annot. Stat. (1901), § 4727 (2); Tennessee, Code (1884), § 2479; Texas, Rev. Stat. (1895), Art. 4863. See also Rhode Island Gen. Laws (1896), c. 202, § 4.

In other States it is enacted only that sealed contracts shall be presumed in the absence of contrary evidence to have been made for sufficient consideration, and in such States sealed contracts differ from ordinary written contracts to this extent. Alabama, Code (1896), § 3288; Michigan, Comp. Laws (1897), §§ 10185, 10186; New Jersey, Gen. Stat. (1895), p. 1413, § 72; New York, Birdseye's Rev. Stat. (1896), p. 1099, § 14; Oregon, Hill's Annot. Laws (1892), § 753; Wisconsin, Annot. Stat. (1889), § 4195.

[26] Barrett *v.* Geisinger, 179 Ill. 240, 249; Crandall *v.* Willig, 166 Ill. 233; Selby *v.* Case, (Md. App.) 39 Atl. 1041; Black *v.* Cord, 2 H. & G. 100; Lamprey *v.* Lamprey, 29 Minn. 151; Vosser *v.* Vosser, 23 Miss. 378, 382; Tunison *v.* Bradford, 49 N. J. Eq. 210; Hays *v.* Kershaw, 1 Sandf. Ch. 258, 261; Short *v.* Price, 17 Tex. 397; Graybill *v.* Brugh, 89 Va. 855. That the plaintiff in equity need not allege consideration, but the defendant must allege and prove the contrary, was held in Mills *v.* Larrance, 186 Ill. 635; Borel *v.* Mead, 3 N. Mex. 84. See also Carey *v.* Dyer, 97 Wis. 554. See, however, to the contrary, the criticism in 14 Harv. L. Rev. 387 and Mayger *v.* Cruse, 5 Mont. 485.

And this restriction is not affected by the union of legal and equitable jurisdiction in the High Court of Justice.

No specific performance of voluntary agreement though by deed. The rule that a court of equity will not grant specific performance of a gratuitous contract is so well settled that it is needless to cite further authorities for it: and it is not to be overlooked that whereas the other rules that limit the application of this peculiar remedy are of a more or less discretionary kind, and founded on motives of convenience and the practical requirements of procedure rather than on legal principle, this is an absolute and unqualified rule which must be considered as part of the substantive law.

But existence of consideration may be shown aliunde. It is the practice of equity, however, at all events when the want of consideration is actively put forward as an objection (and the practice must be the same, it is conceived, when the objection is made by way of defence in an action for specific performance), to admit evidence of an agreement under seal being in fact founded on good consideration, where the deed expresses a nominal consideration (*s*) or no consideration at all (*t*), though (save in a case of fraud or illegality) a consideration actually inconsistent with that expressed in the deed could probably not be shown (*s*).

Equity will not give effect to imperfect gifts. Closely connected with this in principle is the rule of equity that, although no consideration is required for the validity of a complete declaration of trust (*u*), or a complete transfer of any legal or equitable interest in property, yet 196] an incomplete voluntary gift creates no right which can be *enforced.[27] Thus a voluntary parol gift of an equitable mortgagee's security is not enforceable; and, since his interest in the deeds deposited with him, where the mortgage is by deposit, is merely incidental to his security, delivery of such deeds by the mortgagee to his donee makes no difference, and does not entitle the donee to retain them against the mortgagee's representatives (*x*). Certain modern

(*s*) *Leifchild's case* (1865) L. R. 1 Eq. 231.

(*t*) *Llanelly Ry. and Dock Co.* v. *L. & N. W. Ry. Co.* (1873) L. R. 8 Ch. 942.

(*u*) *Qu.* whether this was originally right on principle.

(*x*) *Shillito* v. *Hobson* (1885) 30 Ch. Div. 396, 55 L. J. Ch. 741. The delivery over seems to be a trespass against the depositor.

27 Dorsey *v.* Packwood, 12 How. 126, 137; Estate of Webb, 49 Cal. 541; Wadhams *v.* Gay, 73 Ill. 415; Baltimore Retort Co. *v.* Mali, 65 Md. 93; Stone *v.* Hackett, 12 Gray, 227; Young *v.* Young, 80 N. Y. 422; Perry on Trusts, § 96 *et seq.*; Crooks *v.* Crooks, 34 Ohio St. 610, 615; Carhart's Appeal, 78 Pa. 100, 119.

decisions have indeed shown a tendency to infringe on this rule by construing the circumstances of an incomplete act of bounty into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all his interest (*y*). But these have been disapproved in still later judgments which seem entitled to more weight (*z*).[28]

(*y*) *Richardson* v. *Richardson* (1867) L. R. 3 Eq. 686, 36 L. J. Ch. 653; *Morgan* v. *Malleson* (1870) L. R. 10 Eq. 475, 39 L. J. Ch. 680.

(*z*) *Warriner* v. *Rogers* (1873) L. R. 16 Eq. 340, 42 L. J. Ch. 581; *Richards* v. *Delbridge* (1874) L. R. 18 Eq. 11, 43 L. J. Ch. 459; *Moore* v. *Moore* (1874) L. R. 18 Eq. 474, 43 L. J. Ch. 617; *Heartley* v. *Nicholson* (1874) L. R. 19 Eq. 233, 44 L. J. Ch. 277. Cp. *Breton* v. *Woollven* (1881) 17 Ch. D. at p. 420, 50 L. J. Ch. 369.

[28] Barnum *v.* Read, 136 Ill. 388; Bennett *v.* Littlefield, 177 Mass. 294; Young *v.* Young, 80 N. Y. 422, 439; Beaver *v.* Beaver, 117 N. Y. 421, 137 N. Y. 59; Sullivan *v.* Sullivan, 161 N. Y. 554; Flanders *v.* Blandy, 45 Ohio St. 108.

197] *CHAPTER V.

PERSONS AFFECTED BY CONTRACT.

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General Rules as to Parties.

Original type of contract. The original and simplest type of contract is an agreement creating an obligation between certain persons. The persons are ascertained by their description as individuals, and not by their satisfying any general class description: or, more shortly, they are denoted by proper names and not by class names (*a*). And the persons who become parties in the obligation created by the agreement are the persons who actually conclude the agreement in the first

(*a*) Savigny, Obl. § 53 (2. 16), cp. on the subject of this chapter generally, *ib.* §§ 53–70, pp. 17–186.

instance, and those only. The object of this chapter will be to point out the extent to which modern developments of the law of contract have altered this primary type either by modifications co-extensive with the whole range of contract or by special classes of exceptions.

The fundamental notion from which we must take our departure is one that our own system of law has in common with the Roman system and the modern law of other civilized countries derived therefrom. A wide statement of it may be given in the shape of a maxim thus:

Legal effects confined to contracting parties. The legal effects of a contract are confined to the contracting parties.

This, like most, if not all, legal maxims, is a generalization which can be useful only as a compendious symbol of *the particulars [198 from which it is generalized, and cannot be understood except by reference to those particulars. The first step towards the necessary development may be given in a series of more definite but still very general rules, which we shall now endeavour to state, embodying at the same time those qualifications, whether of recent introduction or not, which admit of being stated in an equally general form.

Definitions. It will be convenient to use certain terms in extended or special senses. A contract creates an obligation between the contracting parties, consisting of duties on the one part and the right to demand the performance of them on the other.

"Creditor" and "debtor." Any party to a contract, so far as he becomes entitled to have anything performed under the contract, is called the creditor. So far as he becomes bound to perform anything under the contract he is called the debtor.

"Representation." *Representation, representatives,* mean respectively succession and the person or persons succeeding to the general rights and liabilities of any person in respect of contracts, whether by reason of the death of that person or otherwise.

"Third person." A *third person* means any person other than one of the parties to the contract or his representatives (*b*).

Rules.

1. Parties. The original parties to a contract must be persons ascertained at the time when the contract is made.

(*b*) Contracts for the sale of land are enforceable in equity by and against the heirs or devisees of the parties. But here the obligation is treated as attached to the particular property.

2. **Third persons not bound.** The creditor can demand performance from the debtor or his representatives. He cannot demand nor can the debtor require him to accept performance from any third person; but the debtor or his representatives may perform the duty by an agent.

199] *3. **Third person not entitled.** A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract.

This is subject to an *exception* as to provisions contained in a settlement made upon and in consideration of marriage for the benefit of children to be born of the marriage (*c*).

4. **Assignment.** Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

Explanation 1. **Notice to debtor.** Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

Explanation 2. **Equities.** The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor to the benefit of any defence which he might have had against the creditor himself.

The following exceptions given here in order to complete the general statement are connected in principle with the cases of a contract for personal services or the exercise of personal skill becoming impossible of performance by inevitable accident, of which we speak in Chapter VIII. below.

Exception 1. **Strictly personal duties.** If it appears to have been the intention of the parties that the debtor should perform any duty in person, he cannot perform it by an agent, nor can performance of it be required from his representatives. Such an intention is presumed in the case of any duty which involves personal confidence between the parties, or the exercise of the debtor's personal skill.

200] **Exception* 2. **Strictly personal rights.** If it appears to have been the intention of the parties that only the creditor in person should be entitled to have any duty performed, no one can become entitled by representation or assignment to demand the performance of it, nor can such performance be required from the debtor's representatives.

(*c*) See p. *210, below.

Such an intention is presumed if the nature of the transaction involves personal confidence between the parties, or is otherwise such that "personal considerations" are of the foundation of the contract (*d*).

Exception 3. The representatives of a deceased person cannot sue for a breach of contract in a case where the breach of contract was in itself a merely personal injury, unless special damage to the estate which they represent has resulted from the breach of contract. But where such damage has resulted the representatives may recover compensation for it, notwithstanding that the person whose estate they represent might in his lifetime have brought an action of tort for the personal injury resulting from the same act (*e*).

These propositions are subject to several special qualifications and exceptions. Most of the exceptions are of *modern origin, and [201 we shall see that since their establishment many attempts have been made to extend them. Such attempts have in some departments been successful, while in others exceptions which for some time were admitted have been more recently disallowed.

We shall now go through the rules thus stated in order, pointing out under each the limits within which exceptions are admitted in the present state of the law. The decisions which limit the exceptions are (as commonly happens in our books) for the most part the chief authorities to show the existence of the rules.

Rule 1. *Parties must be ascertained.*

Our first rule is that *the original parties to a contract must be persons ascertained at the time when the conract is made.* It is

(*d*) Cp. Indian Contract Act, ss. 37, 40. See *Stevens* v. *Benning* (1854) 1 K. & J. 168, 24 L. J. Ch. 153; *Farrow* v. *Wilson* (1869) L. R. 4 C. P. 744, 746, 38 L. J. C. P. 326; *Robinson* v. *Davison* (1871) L. R. 6 Ex. 269, 40 L. J. Ex. 172; *Finlay* v. *Chirney* (1888) 20 Q. B. Div. 494, 57 L. J. Q. B. 247; *Robson* v. *Drummond* (1831) 2 B. & Ad. 303, 36 R. R. 569; but this case goes very far: *British Waggon Co.* v. *Lea & Co.* (1880) 5 Q. B. D. 149, 152, 49 L. J. Q. B. 321, and will not be extended: *Phillips* v. *Hull Alhambra Palace Co.* [1901] 1 Q. B. 59, 70 L. J. Q. B. 26. An assignment which would impose a novel burden on the debtor is not binding on him: *Tolhurst* v. *Associated Portland Cement Manufacturers* [1901] 2 K. B. 811, 70 L. J. K. B. 1036. If in any of these cases the transaction is continued by mutual consent, it is a new contract, *e. g.*, if a servant continues his service with a deceased master's family, or if a painter's executor, being also a painter, were to complete an unfinished portrait on the original terms at the sitter's request.

(*e*) See 1 Wms. Exors. 709, 9th ed., and *Bradshaw* v. *Lancashire & Yorkshire Ry. Co.* (1875) L. R. 10 C. P. 189. 44 L. J. C. P. 148 (since questioned in *Leggott* v. *G. N. Ry. Co.* (1876) 1 Q. B. D. 599, 45 L. J. Q. B. 557).

obvious that there cannot be a contract without at least one ascertained party to make it in the first instance; and it is also an elementary principle of law that a contracting party cannot bind himself by a floating obligation to a person unascertained. The rule has been thus expressed: "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made" (*f*). It is theoretically possible to find exceptions to this rule in such cases as those of promises or undertakings addressed to the public at large by advertisements or the like, and sales by auction. But we have shown in Chap. I. that this view is unnecessary and untenable, and that in every such case where a contract is formed it is formed between two ascertained persons by one of them accepting a proposal made to him by the other, though possibly made to him in common with all other persons to whose knowledge it may come.

Effects of Contract as to Third Persons.

The affirmative part of our second rule, namely: *The creditor* **202]** *can demand performance from the debtor or his *representatives,* is now and long has been, though it was not always elementary (*g*).

Rule 2. No liability imposed on third persons.

The negative part of it states that *the creditor cannot demand, nor can the debtor require him to accept, performance from any third person.* This is subject to the explanation that the debtor or

(*f*) *Squire* v. *Whitton* (1848) 1 H. L. C. 333, 358.

(*g*) As to the liability of personal representatives on the contracts of the testator or intestate see 1 Wms. Saund. 241–2. The old rule that an action of *debt* on simple contract would not lie against executors where the testator could have waged his law (though it is said the objection could be taken only by demurrer) seems to have been in truth an innovation. See the form of writ for or against executors, Fleta l. 2, c. 62, § 9; and cp. F. N. B. 119 M, 121 O (the latter passage is curious: if a man has entered into religion his executors shall be sued for his debt, not the abbot who accepted him into religion: see p. 83, n. (*z*), *supra*, and Y. B. 30 Ed. I. p. 238. It is said, however, that "Quia executores non possunt facere legem pro defuncto, petens probabit talliam suam, vel si habeat sectam secta debet examinari; et hoc est verum sive sit mercator sive non": Y. B. 22 Ed. I. p. 456). For the conflict of opinion as to the remedy by assumpsit, see Reeves 3. 403, Y. B. Mich. 2 H. VIII. 11, pl. 3, the strange dictum *contra* of Fitzherbert, Trin. 27 H. VIII. 23 pl. 21, who said there was no remedy at all (apparently on the ground that a cause of action in assumpsit was for a tort, and therefore died with the defendant's person), and *Norwood* v. *Read* (1557–8) in B. R., Plow. 180. In *Pinchon's case* (1612) in Ex. Ch. 9 Co. Rep. 86 *b*, this dictum was overruled, authorities reviewed and explained, and the common law settled in substance as it now is.

his representatives may perform the duty by an agent, which again is modified by the exception of strictly personal contracts as mentioned at the end of the rules. On this we need not dwell at present.

Its foundation in principle. It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent.

Every person not subject to any legal incapacity may dispose freely of his actions and property within the limits allowed by the general law. Liability on a contract consists in a further limitation of this disposing power by a voluntary act of the party which places some definite portion of that power at the command of the other party to the contract. So much of the debtor's individual freedom *is [203 taken from him and made over to the creditor (*h*). When there is an obligation independent of contract, a similar result is produced without regard to the will of the party; the liability is annexed by law to some wrongful act or default in the case of tort, and in the case of contracts "implied in law" to another class of events which may be roughly described as involving the accession of benefit through the involuntary loss of another person; but when an obligation is founded upon a real contract, the assent of a person to be bound is at the root of the matter and is indispensable (*i*).

Agency: the exception only apparent. The ordinary doctrines of agency form no real exception to this. For a contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification; and that authority or ratification is nothing else than the assent of the principal to be bound, and the contract which binds him is his own contract. Under certain conditions there may be a contract binding on the agent also, as we have seen in Chap. II., but with that we are not here concerned.

When companies held in equity to promoters' agreements; not ex contractu. Another less simple apparent exception occurs in the cases in which

(*h*) Cp. Savigny, Obl. § 2.

(*i*) *Lumley* v. *Gye* (1853) 2 E. & B. 216, 22 L. J. Q. B. 463, and *Bowen* v. *Hall* (1881) 6 Q. B. Div. 333, 50 L. J. Q. B. 305, show (see now *Quinn* v. *Leathem* [1901] A. C. 495, 510, 535, 70 L. J. P. C. 76, removing the doubts raised in *Allen* v. *Flood* [1898] A. C. 1, 67 L. J. Q. B. 119) that a stranger may be liable in tort for procuring the breach of a contract. [See for many authorities in this country and comment thereon 8 Harv. L. Rev. 1; 11 *ib.* 449; 12 *ib.* 335; 43 Cent. L. J. 302; 48 *ib.* 112; 54 *ib.* 426; Reports of Am. Bar Assoc. 1898, 352.] But this is not an obligation under the contract, any more than when A. sells his land to B. the duty of all men to respect the rights of B. instead of A., as owner of that land, is a duty under the contract of sale or the conveyance.

companies have been held bound by agreements or representations (*k*) made by their promoters before the companies had any legal existence. These cases, however, proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation (*l*), partly on a
204] ground independent of con*tract and analogous to estoppel, namely, that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms. The doctrine as now established probably goes as far as this, but certainly no farther (*m*).[1]

Stranger held bound by award in equity. In one case of a suit in equity for specific performance of an award a third person interested in the subject-matter was made a party, and was held to be bound by the award, though he had not been a party to the reference and had in no way assented to it, but simply knew of it and remained passive (*n*). But it has been held by higher authority (*o*) that in a suit for the specific performance of a contract third persons claiming an interest in the subject-matter are not even proper parties: and even without this it seems obvious that A. and B. have no business to submit C.'s rights to the arbitration of D. It is apprehended accordingly that this exception may be treated as non-existent.

(*k*) *Re Metrop. Coal Consumers' Association, Karberg's case* [1892] 3 Ch. 1, 61 L. J. Ch. 741, C. A.

(*l*) Lindley on Companies, 146, 149.

(*m*) Lindley on Companies, 152. As to ratification by companies, see p. *110, above.

(*n*) *Govett* v. *Richmond* (1834) 7 Sim. 1, 40 R. R. 56, doubted in *Martin* v. *L. C. & D. Ry. Co.* (1866) L. R. 1 Ch. 501, 507, 35 L. J. Ch. 795. In *Taylor* v. *Parry* (1840) 1 Man. & Gr. 604, the Court relied on positive acts of the parties as showing that they adopted the reference and were substantially parties to it.

(*o*) *Tasker* v. *Small* (1837) 3 My. & Cr. 63, 45 R. R. 212, followed in *De Hoghton* v. *Money* (1866) L. R. 2 Ch. 164.

[1] Marysville Co. *v.* Johnson, 93 Cal. 538; Freeman Imp. Co. *v.* Osborn, 14 Col. App. 488; Chicago Bg. Co. *v.* Creamery Co., 106 Ga. 84; Davis *v.* Dexter Co., 52 Kan. 693; Oldham *v.* Mt. Sterling Imp. Co., 20 Ky. L. Rep. 207; Abbott *v.* Hapgood, 150 Mass. 248; Bradford *v.* Metcalf, 185 Mass. 205, 207; St. John's Mfg. Co. *v.* Munger, 106 Mich. 90; Bottelle *v.* Northwestern Co., 37 Minn. 89; McArthur *v.* Times Printing Co., 48 Minn. 319; Hill *v.* Gould, 129 Mo. 106; Low *v.* Railroad Co., 45 N. H. 370; Van Schaick *v.* Railroad Co., 38 N. Y. 346; Bonner *v.* American Mfg. Co., 81 N. Y. 468; Munson *v.* Railroad Co., 103 N. Y. 58; Oakes *v.* Cattaraugus Co., 143 N. Y. 430; Dayton *v.* Turnpike Co., 13 Ohio St. 84; Schreyer *v.* Turner Mills Co., 29 Oreg. 1; Tift *v.* Quaker City Bank, 141 Pa. 550; Huron Printing Co. *v.* Kittleson, 4 S. Dak. 520; Chase *v.* Redfield Creamery Co., 12 S. Dak. 529; Lancaster, &c. Co. *v.* Murray, &c. Co., 19 Tex. Civ. App. 110; Wall *v.* Mining Co., 20 Utah, 474; Pratt *v.* Oshkosh Match Co., 89 Wis. 406. See also an article by Austin Abbott, 1 A. & E. Corp. Cas., new series, i.

Novation. Another branch of the same general doctrine is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. A contract cannot be made except with the person with whom one intends to contract (*p*). When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. *Whether there has been a novation in any particular case is a [205 question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request (*q*). Such questions are especially important in ascertaining who is liable for the partnership debts of a firm when there has been a change in the members of the firm, or on contracts made in a business which has been handed over by one firm (whether carried on by a single person, a partnership, or a company) to another. A series of cases which were, or were supposed to be, of this kind arose about 1875 out of successive amalgamations of life insurance companies (*r*).

The question may be resolved into two parts: Did the new firm assume the debts and liabilities of the old? and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor (*s*)? It would be beyond our scope to enter at large on this subject (*t*).[2]

Real exceptions to come under Rule 4. There exist, however, exceptions to the general rule. In certain cases a new liability may without novation be created in substitution for or in addition to an existing liability, but where the possibility exists of such an exceptional transfer of liabilities it is bound up with the correlated possibility of an exceptional transfer of rights, and cannot be considered alone. For this reason the exceptions in question will come naturally to our notice under Rule 4, when we deal with the peculiar modes in which rights arising out of certain classes of contracts are transferred.

*Apart from novation in the proper sense, the creditor may [206

(*p*) *Robson* v. *Drummond* (1831) 2 B. & Ad. 303, 36 R. R. 569, see note (*d*), p. *200, above. Other cases bearing on the same point are considered for another purpose in Ch. IX. below.

(*q*) *Conquest's case* (1875) 1 Ch. Div. 334, 341, 45 L. J. Ch. 336.

(*r*) It is doubtful whether some of these were really cases of novation: see *Hort's case* and *Grain's case* (1875) 1 Ch. D. 307, 322, 45 L. J. Ch. 321.

(*s*) See *Rolfe* v. *Flower* (1865) L. R. 1 P. C. 27, 44, 35 L. J. P. C. 13.

(*t*) See Lindley on Partnership, 246 *sqq.*, and as to the general principle of novation, see *Wilson* v. *Lloyd* (1873) L. R. 16 Eq. 60, 74, 42 L. J. Ch. 559; for a later instance of true novation, *Miller's case* (1876) 3 Ch. Div. 391.

2 See an article by Prof. Ames, 6 Harv. L. Rev. 184, and Am. & Eng. Encyc. of Law.

bind himself once for all by the original contract to accept a substituted liability at the debtor's option. Such an arrangement is in the nature of things unlikely to occur in the ordinary dealings of private persons among themselves. But it was decided in the winding-up of the European Assurance Society that where the deed of settlement of an insurance company contained a power to transfer the business and liabilities to another company, a transfer made under this power was binding on the policy-holders and they had no claim against the original company (*u*). In the case of a policy-holder there is indeed no subsisting debt (*u*), but he is a creditor in the wider sense above defined (p. *198).

Rule 3. *A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract.*

No rights conferred on third persons. Before we consider the possibility of creating arbitrary exceptions to this rule in any particular cases, there are some extensive classes of contracts and transactions analogous to contract which call for attention as offering real or apparent anomalies.

A. **Exceptions. Agency: apparent only.** Contracts made by agents. Here the exception is only apparent. The principal acquires rights under a contract which he did not make in person. But the agent is only his instrument to make the contract within the limits of the authority given to him, however extensive that authority may be: and from the beginning to the end of the transaction the real contracting party is the principle.

207] ***Degrees of agency.** Consider the following series of steps from mere service to full discretionary powers:

1. A messenger is charged to convey a proposal, or the acceptance or refusal of one, to a specified person.

2. He is authorized to vary the terms of the proposal, or to endeavour to obtain a variation on the other party's proposal (*i. e.*, to make the best bargain he can with the particular person), within certain limits.

3. He is not confined to one person, but is authorized to conclude the contract with any one of several specified persons, or generally with any one from whom he can get the best terms.

(*u*) *Hort's case* and *Grain's case* (1875) 1 Ch. D. 307. 45 L. J. Ch. 321; *Harman's case* (1875) 1 Ch. Div. 326, 45 L. J. Ch. 332; *Cocker's case* (1876) 3 Ch. Div. 1, 45 L. J. Ch. 882.

4. He is not confined to one particular contract, but is authorized generally to make such contracts in a specified line of business or for specified purposes as he may judge best for the principal's interest (*x*).

Agent contracting personally. The fact that in many cases an agent contracts for himself as well as for his principal, and the modifications which are introduced into the relations between the principal and the other party according as the agent is or is not known to be an agent at the time when the contract is made, do not prevent the acts of the agent within his authority from being for the purposes of the contract the acts of the principal, or the principal from being the real contracting party. Again when the agent is also a contracting party there are two alternative contracts with the agent and with the principal respectively.

Ratification. As for the subsequent ratification of unauthorized acts, there is no difference for our present purpose between a contract made with authority and one made without authority and subsequently ratified. The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction.

B. **Other relations: principal and surety.** There are certain relations created by contract, of which that of creditor, principal debtor, and surety may *be taken as the type, in which the rights or duties [208 of one party may be varied by a new contract between others. But when a surety is discharged by dealings between the creditor and the principal debtor, this is the result of a condition annexed by law to the surety's original contract. There is accordingly no real anomaly, though there is an apparent exception to the vague maxim that the legal effects of a contract are confined to the contracting parties: and there is not even any verbal inconsistency with any of the more definite rules we have stated. These cases are mentioned only because they have been considered as real exceptions by writers of recognized authority (*y*).

Anomalous effects of bankruptcy and insolvency. Insolvency and bankruptcy, again, have various consequences which affect the rights of parties to contracts, but which the general principles of contract are inadequate to explain. We allude to them in this place only to observe that it is best to regard them not as derived from or incidental to contract, but as results of an overriding necessity and be-

(*x*) Cp. Savigny, Obl. 2. 57–60. (*y*) See Pothier, Obl. § 89.

yond the region of contract altogether (*z*). Even those transactions in bankruptcy and insolvency which have some resemblance to contracts, such as statutory compositions with creditors, are really of a judicial or quasi-judicial character. It is obvious that if these transactions were merely contracts no dissenting creditor could be bound.

C. **Trusts: a real exception, if trust a contract between author of trust and trustee.** The case of trusts presents a real and important exception, if a trust is regarded as in its origin a contract between the author of the trust and the trustee. It is quite possible, and may for some purposes be useful so to regard it. The Scottish institutional writers (who follow the Roman arrangement in the learning of Obligations as elsewhere) consider trust as a species of real
209] contract *coming under the head of deposition (*a*). Conversely deposits, bailments, and the contract implied by law which is the foundation of the action for money received, are spoken of in English books as analogous to trusts (*b*). A chapter on the duties of trustees forms part of the best known American text-books on contracts, though no attempt is made, so far as we have ascertained, to explain the logical connection of this with the rest of the subject.

General analogy to contract. By the creation of a trust duties are imposed on and undertaken by the trustee which persons not parties to the transaction, or even not in existence at its date, may afterwards enforce. And the relation of a trustee to his *cestui que trust* is closely analogous to that of a debtor to his creditor, in so far as it has the nature of a personal obligation and is governed by the general rules derived from the personal character of obligations. Thus the transfer of equitable rights of any kind is subject, as regards the perfection of the transferee's title, to precisely the same conditions as the transfer of rights under a contract. And the true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of a contract with the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for

(*z*) A striking instance is furnished by the rule in *Waring's case* (1815) 19 Ves. 345, 13 R. R. 217; see per Lord Cairns, *Banner* v. *Johnston* (1871) L. R. 5 H. L. at p. 174, 40 L. J. Ch. 730.

(*a*) *Sic*, though no such abstract term is known in Roman law. See Erskine, Inst. Bk. 3, tit. 1. s. 32.

(*b*) Blackstone, Comm. iii. 432.

the sale of land) cannot be enforced completely, except in a court of equity (*c*).

However, although every trust may be said to include a contract, it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract, but from *all other contracts as a genus. The complex relations [210 involved in a trust cannot be reduced to the ordinary elements of contract.[3]

D. **Exception of certain provisions for children.** Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children. This exception has already been noted in stating the general rule (*d*). In the ordinary case of a marriage settlement the children of the contemplated marriage itself are said to be " within the consideration of marriage " (*e*) and may enforce any covenant for their benefit contained in the settlement.[4] Where a settlement made on the marriage of a widow provides for her children by a former marriage, such children, though in the technical language of equity *volunteers,* or persons having no part in the consideration, have been held entitled to enforce the provisions for their benefit;[5] but this extension has been doubted in the Court of Appeal (*f*).

The question how far limitations in a marriage settlement to persons other than children can be supported by the consideration of marriage, so as not to be defeasible under 27 Eliz. c. 4, against subsequent purchasers, is a distinct and wider one, not falling within the scope of the present work (*g*).

(*c*) See per Lord Westbury, *Knox* v. *Gye* (1871–2) L. R. 5 H. L. at p. 675, 42 L. J. Ch. 234; *Shaw* v. *Foster* (1872) L. R. 5 H. L. at p. 338 (Lord Cairns) and at p. 356 (Lord Hatherley); 42 L. J. Ch. 49.

(*d*) P. 199, above; cp. per Cotton L.J. 15 Ch. D. at p. 242.

(*e*) It is even said that consideration moves, or is assumed to move, from them. But it must not be inferred from this that equity regards " la peine de naître " as a legal detriment.

(*f*) *Gale* v. *Gale* (1877) 6 Ch. D. 144, 152, 46 L. J. Ch. 809, criticized per Lindley L.J. *A.-G.* v. *Jacobs Smith* [1895] 2 Q. B. 341, 349; and see *Re Cameron and Wells* (1887) 37 Ch. D. 32, 57 L. J. Ch. 69.

(*g*) The references in *Gale* v. *Gale* (last note) will guide the reader, if desired, to the authorities, including the full discussion in May on Voluntary and Fraudulent Conveyances.

[3] Arnold *v.* Alden, 173 Ill. 229.

[4] Imlay *v.* Huntington, 20 Conn. 146, 166; Vason *v.* Bell, 53 Ga. 416; Nowack *v.* Berger, 133 Mo. 24; Piper *v.* Hoard, 107 N. Y. 73.

[5] Michael *v.* Morey, 26 Md. 339; Burkholder's Appeal, 105 Pa. 31. See further, Neves *v.* Scott, 9 How. 196; Burge *v.* Burge, 45 Ga. 301.

E. Statutory exceptions. There is also a class of statutory exceptions (though of decreasing importance) in cases where companies
211] and *public bodies, though not incorporated, are empowered to sue and be sued by their public officers or trustees.

The trustees of Friendly Societies and Trade Unions are likewise empowered to sue, and may be sued, in their own names, in cases concerning the property of the society or union (*h*).

Covenants relating to real property. By 8 & 9 Vict. c. 106, s. 5, a person who is not a party to an indenture may nevertheless take the benefit of a covenant in it relating to real property. This enactment has not, so far as we know, been the subject of any reported decision (*i*).

General application of rule. Having disposed of these special exceptions, we may now proceed to examine the rule in its ordinary application, which may be expressed thus:—The agreement of contracting parties cannot confer on a third person any right to enforce the contract.

There are two different classes of cases in which it may seem desirable, and in which accordingly it has been attempted to effect this: (1) where the object of the contract is the benefit of a third person: (2) where the parties are numerous and the persons really interested are liable to be changed from time to time.

Contract for benefit of third person. It was for a long time not clear
212] whether a contract *between A. and B. that one of them should do something for the benefit of C. did or did not give C. a right of action on the contract (*k*). And there was positive authority that at all events a contract made for the benefit of a person nearly related

(*h*) Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 21; Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9. It is the same with building societies formed before the Act of 1874 and not incorporated under it. A statute enabling a local authority to recover expenses, and not specifying any remedy, has been held to make the local authority a quasi-corporation for the purpose of suing: *Mills* v. *Scott* (1873) L. R. 8 Q. B. 496, 42 L. J. Q. B. 234. And the grant of a right by the Crown to a class of persons may have the effect of incorporating them to enable them to exercise the right: *Willingale* v. *Maitland* (1866) L. R. 3 Eq. 103, 36 L. J. Ch. 64, explained by Jessel M.R. in *Chilton* v. *Corporation of London* (1878) 7 Ch. D. at p. 741, 47 L. J. Ch. 433.

(*i*) For an example of the inconvenience provided against by it, see *Lord Southampton* v. *Brown* (1827) 6 B. & C. 718, 30 R. R. 511, where the person who was really interested in the payment of rent on a demise made by trustees and with whom jointly with the trustees the covenant for payment of rent was expressed to be made, was held incapable of joining in an action on the covenant.

(*k*) See Viner, Abr. Assumpsit, Z. (1. 333–7); per Eyre C.J. *Co. of Feltmakers* v. *Davis* (1797) 1 Bos. & P. 98; note to *Pigott* v. *Thompson* (1802) 3 Bos. & P. 149.

to one or both of the contracting parties might be enforced by that person (*l*).

Third person cannot sue at law. However, the rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may, and also that near relationship makes no difference as regards any common law right of action. The final decision was in *Tweddle* v. *Atkinson* (*m*). The following written agreement had been entered into:

"Memorandum of an agreement made this day between William Guy," &c., "of the one part, and John Tweddle of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle his son-in-law, railway inspector, residing in Thornton, in the county of Fife in Scotland, and the said John Tweddle father to the aforesaid William Tweddle shall and will pay the sum of £100 to the said William Tweddle each and severally the said sums on or before the 21st day of August, 1855; and it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified."

William Tweddle, the son of John Tweddle, brought an action against the executor of William Guy on this agreement, the declaration averring his relationship to the parties, and their intention to carry out a verbal agreement made before the plaintiff's marriage to provide a marriage portion. The action was held not to be maintainable. The Court did not in terms overrule the older *cases [213 to the contrary, considering that their authority was already sufficiently disposed of by the effect of modern decisions and practice (*n*).

Authorities in equity against right of third person. The doctrines of equity are at first sight not so free from doubt. There is clear and distinct authority for these propositions: When two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—

(i) That person cannot enforce the contract against either of the contracting parties, at all events if not nearly and legitimately re-

(*l*) *Dutton* v. *Poole* (1677) (Ex. Ch.) 2 Lev. 213, Vent. 318, 322. Approved by Lord Mansfield, Cowp. 443. There appears to have been much difference of opinion at the time.

(*m*) (1861) 1 B. & S. 393, 30 L. J. Q. B. 265.

(*n*) See also *Price* v. *Easton* (1833) 4 B. & Ad. 433. Much less suffered damage by the non-performance of it sue the defaulting party can a stranger to a contract who has as on the contract: *Playford* v. *United Kingdom Electric Telegraph Co.* (1869) L. R. 4 Q. B. 706, 38 L. J. Q. B. 249; *Dickson* v. *Reuter's Telegram Co.* (1877) 2 C. P. D. 62, in C. A. 3 C. P. Div. 1, 47 L. J. C. P. 1. It is a distinct question whether these decisions rightly denied that there was any cause of action at all. See the present writer's book on the Law of Torts, 6th ed. 532–536.

lated to one of them (*o*). Probably the only exception is that mentioned above, pp. *199, *210, in favour of children provided for by marriage settlements.

(ii) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration (*p*).

Apparent exceptions. On the other hand the case of *Gregory* v. *Williams* (*q*) shows that a third person for whose benefit a contract is made may sometimes join as co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being completely carried out. The facts of that case, so far as now material, may be stated as follows: Parker was indebted to Williams and also to Gregory; Williams, being informed by Parker that the debt to Gregory was about 900*l.*, and that there were no other debts, under-
214] took to satisfy the debt to Gregory on having *an assignment of certain property of Parker's. Gregory was not a party to this arrangement, nor was it communicated to him at the time. The property having been assigned to Williams accordingly, the Court held that Gregory, suing jointly with Parker, was entitled to call upon Williams to satisfy his debt to the extent of 900*l.* (but not farther, although the debt was in fact greater) out of the proceeds of the property. It was not at all suggested that he could have sued alone in equity any more than at law (*r*), and the true view of the case appears to be that the transactions between Williams and Parker amounted to a declaration of trust of the property assigned for the satisfaction of Gregory's claim to the specified extent (*s*).

Provision for widow in partnership articles. Another apparent exception is the case of *Page* v. *Cox* (*t*), where it was held that a provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow. But the decision was carefully put on the ground that the provision in the articles created a valid trust of the partnership property in the hands of the surviving partner. The result is that there is no real and

(*o*) *Colyear* v. *Mulgrave* (1836) 2 Kee. 81, 44 R. R. 191.

(*p*) *Davenport* v. *Bishopp* (1843) 2 Y. & C. 451, 460, 1 Ph. 698, 704.

(*q*) (1817) 3 Mer. 582, 17 R. R. 136.

(*r*) For an attempt of a third person to sue at law under very similar circumstances, see *Price* v. *Easton* (1833) 4 B. & Ad. 433, showing clearly that A. cannot sue on a promise by B. to C. to pay C.'s debt to A.

(*s*) *Empress Engineering Co.* (1880) 16 Ch. Div. 125, 129, 130, by Jessel M.R. and James L.J.

(*t*) (1851) 10 Ha. 163, cp. *Murray* v. *Flavell* (1883) 25 Ch. Div. 89, 53 L. J. Ch. 185.

allowed authority for holding that rights can in general be acquired by third parties under a contract, unless by the creation of a trust.

The general principle has been re-affirmed of late years. "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to an agreement the next day releasing the old one" (*u*).

*"An agreement between A. and B. that B. shall pay C. gives [215
C. no right of action against B." (*x*).

It is proper to mention that a different rule is prevalent in America, but there does not seem to be any general agreement as to its reason or its precise extent (*y*).

Third person empowered to sue for convenience of parties. We now come to the class of cases in which contracting parties have attempted for their own convenience to vest the right of enforcing the contract in a third person. Except within the domain of the stricter rules applicable to parties to actions on deeds and negotiable instruments, there appears to be no objection to several contracting parties agreeing that one of them shall have power to sue for the benefit of all except the party sued. Thus where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation, they may empower one partner alone to sue for the penalty (*z*). The application of the doctrines of agency may also lead to similar results (*a*). It seems doubtful whether a promise to several persons to make a payment to one of them will of itself enable that one to sue alone (*b*).

(*u*) Jessel M. R. *Empress Engineering Co.*, 16 Ch. Div. 125, 129.

(*x*) Lindley L.J. *Re Rotherham Alum and Chemical Co.* (1883) 25 Ch. Div. at p. 111. These statements overrule what is said in *Touche* v. *Metrop. Railway Warehousing Co.* (1871) L. R. 6 Ch. 671, 677, 40 L. J. Ch. 496 (the decision may be supported on the ground of trust, Lindley on Companies, 148). Compare further *Eley* v. *Positive, &c. Life Assurance Co.* (1876) 1 Ex. Div. 88, 45 L. J. Ex. 451 (a provision in articles of association that A. shall be solicitor to the company and transact all its legal business is as regards A. *res inter alios acta* and gives him no right against the company); *Melhado* v. *Porto Alegre Ry. Co.* (1874) L. R. 9 C. P. 503, 43 L. J. C. P. 253.

(*y*) See Harriman on Contracts (Boston, U. S., 2nd ed. 1901) pp. 212—226.

(*z*) *Rawenhurst* v. *Bates* (1826) 3 Bing. 463, 470, 28 R. R. 659. Of course they must take care to make the penalty payable not to the whole firm, but to the members of the firm *minus* the offending partner. Whether under the present Rules of Court the other partners could use the name of the firm to sue for the penalty, *quære*.

(*a*) *Spurr* v. *Cass* (1870) L. R. 5 Q. B. 656, 39 L. J. Q. B. 249.

(*b*) *Chanter* v. *Leese* (1839) 4 M. & W. 295, in Ex. Ch. 5 M. & W. 698, 51 R. R. 584, where both courts inclined to think not, but gave no decision. In *Jones* v. *Robinson* (1847) 1 Ex. 454, 17 L. J. Ex. 36, an action was brought by one of two late part-

216] * **Attempts by unincorporated companies to appoint a nominal plaintiff.** But it is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract on a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights, but have always failed when attention was called to them. This has happened in the case of actions brought by the chairman for the time being of the directors of a company (*c*), by the directors for the time being of a company (*d*), by the purser for the time being of a cost-book company (*e*), and by the managers of a mutual marine insurance society (*f*). It will not be necessary to dwell on any instance other than the last. In *Gray* v. *Pearson* the reasons against allowing the right of action are well given in the judgment of Willes J.:—

Judgment of Willes, J., in Gray v. Pearson.

"I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members; and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share and contributions to losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to show that the action cannot be maintained.

"It is in effect an attempt to substitute a person as a nominal plaintiff in lieu of the persons whose rights have been violated."

Notes and bills payable to holder of office. At common law the payee of a negotiable instrument must, on the same principle, be a person **217]** who can be *ascertained at the time of accepting the bill or making the note. But by the Bills of Exchange Act, 1882, s. 7, a bill

ners against the purchaser of the business on a promise to pay the plaintiff what was due to him from the firm for advances. This was declared on as a separate promise in addition to a general promise to the two partners to pay the partnership debts, and the only question was whether there was any separate consideration for the promise sued on.

(*c*) *Hall* v. *Bainbridge* (1840) 1 Man. & Gr. 42.

(*d*) *Phelps* v. *Lyle* (1839) 10 A. & E. 113, 50 R. R. 353.

(*e*) *Hybart* v. *Parker* (1858) 4 C. B. N. S. 209, 27 L. J. C. P. 120; where Willes J. suggested that it was trenching on the prerogatives of the Crown to make a new species of corporation sole for the purpose of bringing actions.

(*f*) *Gray* v. *Pearson* (1870) L. R. 5 C. P. 568; in the earlier case of *Gray* v. *Gibson* (1866) L. R. 2 C. P. 120, 36 L. J. C. P. 99, a similar action succeeded, the question of the manager's right to sue not being raised.

(and it seems by ss. 73 and 89 also a cheque or a promissory note) may be made payable to the holder of an office for the time being (*g*).[6]

Contracts for the benefit of a third person in the United States.

Discussion of principles necessary. The English law upon this question is so different from that of the United States, that it seems desirable to insert a fuller discussion of the law of the United States than was possible in a note, and some preliminary discussion of principles involved is also essential, for the first step towards a clear understanding of contracts for the benefit of third persons is to differentiate several legally distinct states of fact in which third persons are interested.

Property rights distinguished from contract rights. Rights of property may arise simultaneously with the making of a contract, and may be enforced by the owner though he was not a party to the contract. His right of action is not based on the law of contracts, but on the law of property. Such a right may be legal or equitable. When a seller ships goods in fulfilment of an order, for instance, the legal title to the goods ordinarily passes to the consignee at the time of shipment, which is the time when the carrier contracts with the consignor to deliver the goods to the consignee. If the carrier losses or misdelivers the goods the consignee can sue the carrier or indeed any one else who may have dealt with the goods wrongfully, not by virtue of the contract which the carrier has made, but because of the rights of property which arose when that contract was made. If, indeed, the liability of the carrier depends wholly on a promise in the bill of lading, then the question must arise, who can sue on the contract contained in the bill of lading.[7] The case of the carrier is typical. Whenever property other than negotiable paper or money is delivered, in accordance with a contract of sale, to a third person for the purchaser, the title will ordinarily pass to the purchaser at that time, and he will acquire a right of action though not a party to the contract made between the seller and bailee. The right of property transferred in many cases, however, is equitable. Whenever property is delivered to one person under such circumstances that the legal title

(*g*) On the former law see *Holmes* v. *Jacques* (1866) L. R. 1 Q. B. 376, 35 L. J. Q. B. 130.

[6] So the American Negotiable Instrument Act, Crawford Neg. Inst. Law, § 27, par. 6.

[7] See Elliott on Railroads, § 1692.

passes to him, but he undertakes to deliver that specific property or its proceeds to a third person or use the property for his benefit, the relation of trustee and *cestui que trust* arises. When money or negotiable paper payable to bearer or indorsed in blank is delivered to another the legal title will generally if not necessarily pass, and the right of the person for whose benefit the delivery is made will be equitable, though in the case of money the appropriate remedy of the *cestui que trust* is ordinarily money had and received.[8] The fact that the remedy in such cases is in assumpsit has often blinded courts to the fact that the right of action is not based on principles of contract.[9]

Such rights of property are not generally hard to distinguish from contract rights, though in many cases courts have confused the two. The inquiry whether a specific fund or *res* is to be transferred to the beneficiary furnishes a ready test.

Property rights distinguished from revocable agencies. More difficult than the distinction between contract rights and property rights is the distinction between cases involving the latter and cases of revocable agency. Unquestionably a man can create a trust for the benefit of another so absolute that the settlor cannot regain the property forming the subject of the trust. On the other hand, one may give money or property to an agent with instructions to give it to a third person, and before the mandate is executed it may be revoked. Where is the line which divides the first from the second case. No other test can be found than that furnished by the intention of the settlor or principal as indicated by his words and conduct, when he enters into the transaction. If his expressed intention read in connection with all the circumstances of the case indicates that the de-

8 "Whenever one person has in possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances." Roberts *v.* Ely, 113 N. Y. 128, 131. See also McKee *v.* Lamon, 159 U. S. 317, 322; Nebraska Bank *v.* Nebraska Hydraulic Co., 14 Fed. Rep. 763; Nash *v.* Commonwealth, 174 Mass. 335, 337.

9 The mistakes are twofold. Cases of trust are treated as involving merely questions of contract. Allen *v.* Thomas, 3 Metc. (Ky.) 198; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142; Price *v.* Trusdell, 28 N. J. Eq. 200, 202; Bennett *v.* Merchantville Building Assoc., 44 N. J. Eq. 116; Del. & Hudson Canal Co. *v.* Westchester Bank, 4 Denio, 97. Cases of mere contract rights are called trusts. Follansbee *v.* Johnson, 28 Minn. 311; Rogers *v.* Gosnell, 51 Mo. 469. The true distinction is well presented by the facts and is explained in the opinions in Fay *v.* Sanderson, 48 Mich. 259; Hidden *v.* Chappel, 48 Mich. 527. See also McDonald *v.* American Bank, 25 Mont. 456; Belknap *v.* Bender, 75 N. Y. 446; Roberts *v.* Ely, 113 N. Y. 128.

livery was to be a finality, that the money or property was to be from that moment dedicated to the third person, the law will give effect to the intention and give the latter a property right from that time. It is true that this cannot be done against his will, but if there is no duty or obligation required from him in return for the property he is to receive, no expression of assent is required.[10] Assent may be implied or it may be said perhaps more accurately that the property right vests without assent subject to the possibility of rejection. On the other hand, if the use of the money or property was intended to be subject to the directions of the person delivering it, if the holding was for his benefit and under his orders, the relation is that of principal and agent and the third person can acquire no rights until the agency has been executed either by actual transfer to the third person or by some express or implied attornment to him by the agent. Mere notice to the third person that an agency has been created cannot make it irrevocable, nor can even acceptance or change of position by the third person, unless either the principal or the agent with authority from the principal has made an offer that the holding shall be for the benefit of the third party if he so elects.

Application of foregoing principles. The statement of these principles is easier than the application of them to concrete facts. One of the commonest cases involving the distinction is that of a general assignment by a debtor for the benefit of his creditors. The English courts hold that the delivery of such an assignment vests no rights in the creditors.[11] Yet it gives rise to something more than a mere agency, for when the creditors assent, the assignment cannot be revoked.[12] It is in effect, therefore, under the English view, an offer to the creditors of a trust for their benefit. Until the offer is accepted, but no longer, the assignee is agent or trustee for the assignor. In the United States such assignments are held, with better reason, to create irrevocable trusts from the moment the deed is executed.[13]

Further illustration. Another illustration is furnished by the facts of a New York case.[14] Money was deposited in a bank by a corporation which owed coupon bonds to meet a series of coupons about to fall due. The bank agreed to apply the money to the payment of the coupons. Before the coupons had actually been paid a creditor of the

10 Ames, Cas. Trusts, 2d ed., 232, note; Perry on Trusts, 5th ed., § 105.
11 Garrard *v.* Lauderdale, 3 Sim. 1; Smith *v.* Keating, 6 C. B. 136.
12 Ibid.
13 Burrill on Assignments, 6th ed., § 257 *seq.*
14 Rogers Locomotive Works *v.* Kelley, 88 N. Y. 234. Compare Mayer *v.* Chattahoochee Bank, 51 Ga. 325.

corporation sued it, and garnisheed the bank. It was held that the bank had become a trustee for the coupon holders, and that the corporation had no right which could be attached. But where goods were put into A.'s hands, to sell as the owner should direct and distribute the proceeds among certain creditors, it was held that only a revocable agency was created.[15] So where an agent who received money from his principal to pay over to a creditor subsequently used the money otherwise for his principal's benefit, and the principal assented, it was held that the creditor had acquired no rights.[16]

Agency and contracts for the benefit of a third person. In another respect the law of agency touches the borderland of contracts for the benefit of a third person. It is familiar law that if a contracting party either is or assumes to be the agent of another, the latter may sue upon the contract. The right of a third person benefited by a contract to sue upon it has sometimes been defended on the ground that the promisee was the agent of the third person. But the existence of an agency is a question of fact. It cannot be assumed as a convenient piece of machinery when in fact there was no agency.

Novations. Novations and offers of novation must also be distinguished from the other legal relations with which this chapter deals. The aim of the novation is to substitute for an existing obligation another right. To work a novation, it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made out by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.[17]

[15] Comley *v.* Dazian, 114 N. Y. 161. See also Keithley *v.* Pitman, 40 Mo. App. 596; Kelly *v.* Babcock, 49 N. Y. 318.

[16] Dixon *v.* Pace, 63 N. C. 603. See also Halliburton *v.* Nance, 40 Ark. 161; Center *v.* McQuesten, 18 Kan. 476; McDonald *v.* American Bank, 25 Mont. 456; Beers *v.* Spooner, 9 Leigh, 153.

[17] See an article on Novation by Professor Ames, 6 Harv. L. Rev. 184, and the article on Novation in the Am. & Eng. Encyc. of Law (2d ed.). Also Cuxon *v.* Chadley, 3 B. & C. 591; Knisely *v.* Brown, 95 Ill. App. 516; Hamlin *v.* Drummond, 91 Me. 175; Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 15 N. H. 129; Smart *v.* Tetherly, 58 N. H. 310.

Promises to one who did not furnish the consideration. Promises for the benefit of a third party must also be distinguished from promises to one who has not given the consideration for the promise. It is laid down in the books that consideration must move from the promisee, and it is sometimes supposed that infringement of this rule is the basis of the objection to allowing an action by a third person upon a promise made for his benefit. This is not the case. In such promises the consideration does move from the promisee, but the beneficiary who seeks to maintain an action on the promise is not the promisee. The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason why A. should not be able for a consideration received from B. to make an effective promise to C. Unquestionably he may in the form of a promissory note,[18] and the same result is generally reached in this country in the case of an ordinary simple contract.[19]

When cestui que trust can sue on contract for his benefit. One more preliminary distinction must be made. A trustee can make a contract for the benefit of his *cestui que trust,* and if the contract is not performed may sue and recover full damages. A contract by which A. engages to pay B. money as trustee for C. is unquestionably valid.[20] And if B. refuses to enforce the contract, C. may bring a bill in equity against A. and B., the primary equity of which is to compel the trustee to do his duty, but to avoid multiplicity of actions a court of equity will decree that A. pay the money.[21] It is only in case the

[18] Fanning *v.* Russell, 94 Ill. 386; McIntyre *v.* Yates, 104 Ill. 491; Hall *v.* Jones, 78 Ind. 466; Mize *v.* Barnes, 78 Ky. 506; Eaton *v.* Libbey, 165 Mass. 218; Horn *v.* Fuller, 6 N. H. 511; Farley *v.* Cleveland, 4 Cow. 432, 9 Cow. 739.

[19] Pigott *v.* Thompson, 3 B. & P. 149, by Lord Alvanley; Bell *v.* Sappington, 111 Ga. 391; sec. 2747, Ga. Code; Schmucker *v.* Sibert, 18 Kan. 104, 111; Williamson *v.* Yager, 91 Ky. 282; Cabot *v.* Haskins, 3 Pick. 83; Palmer Bank *v.* Insurance Co., 166 Mass. 189, 195, 196; Van Eman *v.* Stanchfield, 10 Minn. 255; Gold *v.* Phillips, 10 Johns. 412; Lawrence *v.* Fox, 20 N. Y. 268, 270, 271, 276, 277; Rector *v.* Teed, 120 N. Y. 583.

[20] Such contracts are illustrated in Cope *v.* Parry, 2 J. & W. 538; Treat *v.* Stanton, 14 Conn. 445; Mass. Mut. L. I. Co. *v.* Robinson, 98 Ill. 324.

[21] Gandy *v.* Gandy, 30 Ch. D. 57. In this case a promise by a husband to pay trustees money for the support of the promisor's wife and for the education of their children was held enforceable by the wife when the trustees refused to sue. It was said that the trustees merely intervened because husband and wife could not contract. The reasoning and distinctions in this case are not clear. The promise was to pay the trustees, who were contracting parties, but the court did not clearly distinguish the case from that of a promise to pay a beneficiary directly. Cotton, L. J., suggested as an exception to the general rule forbidding one not a party to a contract to sue that "if the contract though in form it is with A. is intended to secure a benefit to B. so that B. is entitled to say he has a beneficial right as *cestuis que trust*

trustee, who is the promisee, refuses to act, that the beneficiary has a right to sue in this way.[22]

Two types of cases involving benefit of third persons. There are two quite distinct types of cases which pass current under the name of promises for the benefit of a third person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay this creditor. These two classes are frequently treated as if their correct solution depended upon the same principles, but there are important distinctions.

Contracts for the sole benefit of a third person should be enforceable. The first class is properly called a contract for the benefit of a third person, and the phrase "sole beneficiary" should be reserved for this class. As the promisee has no pecuniary interest in the performance of the promise, he can have, generally speaking, no other intention than to benefit the third person, to give him a right. A typical illustration is a contract of life insurance payable to some one other than the insured. Whatever may be the apparent technical difficulties, it is obvious that justice requires some remedy to be given the beneficiary. The original bargain was convenient and proper, and the law should find a means to enforce it according to its terms. The technical difficulty is twofold. The beneficiary is not a party to the contract, and apart from some special principle governing this class of cases cannot maintain an action. The promisee, though entitled to sue on the promise on ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, cannot recover substantial damages;[23] and if it be granted that the wrong of the defendant, not the injury to the plaintiff, furnishes the measure of damages, the beneficiary gains nothing thereby; for it is no easier to find a principle requiring the promisee to hold what he recovers as a trustee for the beneficiary than to find a prin-

under that contract, then B. would, in a court of equity, be allowed to insist upon and enforce the contract." In the same case it was held that the children could not sue.

22 Flynn *v.* Mass. Ben. Assoc., 152 Mass. 288.

23 West *v.* Houghton, 4 C. P. D. 197 (but see Lloyds *v.* Harper, 16 Ch. D. 290; *Re* Flavell, 25 Ch. D. 89, 97); Peel *v.* Peel, 17 W. R. 586, per James, V. C.; Burbank *v.* Gould, 15 Me. 118; Watson *v.* Kendall, 20 Wend. 201; Adams *v.* Union R. R. Co., 21 R. I. 134, 137. See also Axtel *v.* Chase, 77 Ind. 74.

ciple allowing a direct recovery by the beneficiary against the promisor.[24]

A court of equity is the appropriate forum. There is no satisfactory solution of these difficulties in the procedure of a court administering legal remedies only. But one of the functions of equity is to provide a remedy where the common law procedure is not sufficiently elastic, and no opportunity can be found for the exercise of this function more appropriate than the sort of case under consideration. Much of the difficulty of the situation arises from the fact that three parties are interested in the contract. Common law procedure contemplates but two sides to a case, and cannot well deal with more. Equity can deal successfully with any number of conflicting interests in one case, since defendants in equity need have no community of interest.

Grounds for equitable jurisdiction. In the case under consideration the only satisfactory relief is something in the nature of specific performance. The basis for equity jurisdiction is the same as in other cases of specific performance. There is a valid contract, and the remedy at law for its enforcement is inadequate. As the promisee and the beneficiary have both an interest in the performance of the promise, either should be allowed to bring suit joining the other as co-defendant with the promisor. In this way all parties have a chance to be heard. There may always be a possible question as to the respective rights of the promisee and the beneficiary, and this question should not be determined in any litigation to which either is not a party.[25]

English law. The right of the beneficiary in such a contract to maintain an action was suggested in a number of early English cases, but judicial opinion was almost invariably against it.[26]

[24] Cleaver *v.* Mut. Reserve Fund Life Assoc., [1892] 1 Q. B. 147, 152.

[25] In Peel *v.* Peel, 17 W. R. 586, James, V. C., decreed specific performance at the suit of a beneficiary on the ground that the party who had the legal right had suffered no damage.

[26] See Viner's Abr. I. 333–337. For the modern English law, see *supra*, and especially Tweddle *v.* Atkinson, 1 B. & S. 393; *Re* Rotherham Alum & Chemical Co., 25 Ch. D. 103, 111; Cleaver *v.* Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147. In the case last cited, Lord Esher said that apart from statute a policy of insurance on A.'s life payable to his wife gave her no rights. It would be payable to A.'s executors, and they would not hold as trustees. See also Eley *v.* Positive, etc., Life Assurance Co., 1 Ex. D. 88; Melhado *v.* Porto Alegre Ry. Co., L. R. 9 C. P. 503; *Re* Empress Engineering Co., 15 Ch. D. 125; Gandy *v.* Gandy, 30 Ch. D. 57. The remarks in Touche *v.* Metropolitan Ry. Warehousing Co., L. R. 6 Ch. 671, must be regarded as overruled.

So in Ireland, McCoubray *v.* Thomson, 11 Ir. Rep. C. L. 226; Clitheroe *v.* Simpson, L. R. 4 Ir. 59; and Canada, Faulkner *v.* Faulkner, 23 Ont. 252.

The denial of relief to a beneficiary is so obviously unsatisfactory in the case of life insurance policies that by the Married Women's Property Act in England a wife or husband or children, named as beneficiary in a policy, are entitled to the proceeds of the policy though not to sue for them directly.[27] But the same reasons which demand that relief shall be given in the case of an insurance policy apply to other contracts where the intention of the promisee was to stipulate for a benefit to a third person. Such bargains are unquestionably valid contracts and the law should have sufficient adaptability to enforce them according to their terms.

The case of *Tweddle* v. *Atkinson*,[28] for instance, is open to as serious criticism as the life insurance case.

Were it not for strained decisions on the law of trusts, the English courts would be obliged to make more unfortunate decisions than they do. In *Moore* v. *Darton*,[29] money was lent to Moore for which he gave this receipt: "Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye £100, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton." The court held that a trust for Ann Dye had been created; but the provision as to interest is clear evidence that the transaction was a loan, which Moore promised to repay to a beneficiary instead of to the lender.

Contract to discharge a debt of the promisee. The second type of case to which reference has been made—a contract to discharge an obligation of the promisee—has been held in England enforceable only by the promisee.[30] This rule does not operate as unjustly as the rule in the other type of cases, for here both the promisee and the

The Irish case of Drimmie *v.* Davies, [1899] 1 Ir. R. 176, however, was a clear case of a promise for the benefit of a third person, and the promise was enforced.

A possible exception to the general rule in England arises where a devise is made subject to the condition that the devisee shall pay a sum of money to another. The acceptance of the devise was held by Lord Holt to create a personal liability to the beneficiary. Ewer *v.* Jones, 2 Ld. Raym. 937, 2 Salk. 415, 6 Mod. 26. This was followed in Webb *v.* Jiggs, 4 M. & S. 119, and not denied in Braithwaite *v.* Skinner, 5 M. & W. 313, but it was suggested that the value of the devise limited the liability of the devisee. For American cases holding the devisee liable see *post*, p. 252, n. 74.

27 45 & 46 Vict., c. 75, § 11.

28 See *supra*, p. *211.

29 4 De G. & S. 517; Ames, Cas. Trusts (2d ed.), 39. See also M'Fadden *v.* Jenkyns, 1 Phillips 153; Ames, Cas. Trusts, 47.

30 Crow *v.* Rogers, 1 Strange, 592; Price *v.* Easton, 4 B. & Ad. 433; *Re* Empress Engineering Co., 16 Ch. D. 125, 129; Bonner *v.* Tottenham Society, [1899] 1 Q. B. 161. But see Gregory *v.* Williams, 3 Mer. 582.

So in Canada, Henderson *v.* Killey, 17 Ont. App. 456; s. c. *sub nom.* Osborne *v.* Henderson, 18 Can. S. C. 698; Robertson *v.* Lonsdale, 21 Ont. 600.

third party have an adequate remedy. The object of such a contract must always be primarily and generally solely to secure an advantage to the promisee. He wishes to be relieved from liability, and he exacts a promise to pay the third person only because that is a way of relieving himself. If the promisor breaks his promise the promisee suffers material damage, namely the amount of the liability which should have been discharged and which in fact still exists, and according to ordinary rules of contract the promisee is liable for this damage.[31] The third person, moreover, can sue his original debtor. He has the right for which he bargained, and if he is given also a direct right against the promisor, the latter is subjected to a double right of action on a single promise, and the creditor is allowed to take advantage of a promise for which he did not furnish the consideration and in which the contracting parties had their own advantage, not his, in mind.

Creditor's interest in such a promise. Yet the creditor is not wholly without interest in the promise to pay his claim. That promise is a valuable right belonging to his debtor. If a solvent promisor has agreed to purchase a debt of the promisee to the amount of a thousand dollars, it is as real an increase of the assets of the promisee as a promise to pay the latter directly that sum, or indeed as the actual payment thereof. It should make no difference what form a debtor's assets take. The law should be able to reach them in whatever shape they may be, and compel their application to the payment of debts. Obviously a promise to pay a debt due a third person cannot be taken on an execution against the debtor, nor is it the subject of garnishment; for the promisor, if he is willing to perform his promise, cannot be compelled to do anything else, and as the promise is not to pay the promisee, the promisor cannot be charged as garnishee or trustee for him.[32] The aid of equity is, therefore, necessary in order to compel the application of such property to the creditor's claim, and acting as it does by personal decree, equity can readily give the required relief. In a bill against the indebted promisee and the promisor, the court can order the promisor to perform his promise by paying the plaintiff. As the promisee is a party to the litigation,

[31] See *post*, p. 270, n. 44.

[32] Creditors other than those specified in the promise were not allowed to garnishee the promisor in Coleman *v.* Hatcher, 77 Ala. 217; Clinton Bank *v.* Studemann, 74 Ia. 104; Rickman *v.* Miller, 39 Kan. 362; Edgett *v.* Tucker, 40 Mo. 523; Baker *v.* Eglin, 11 Oreg. 333; Vincent *v.* Watson, 18 Pa. 96; Putney *v.* Farnham, 27 Wis. 187. See also Pounds *v.* Chatham, 96 Ind. 342. *Compare* Mayer *v.* Chattahoochee Bank, 51 Ga. 325; Center *v.* McQuesten, 18 Kan. 476.

his rights will be concluded by such a decree, and the promisor will not be subjected to the hardship of the possibility of two actions against him by virtue of a single promise.[33] As in the case of garnishment, the payment to the plaintiff will discharge the obligation to the promisee. Indeed the statutes permitting garnishment might readily be extended so as to cover this kind of transaction.[34]

Right not available for every creditor. One peculiarity is to be noticed in regard to the application of such a promise to the debt of the promisee. It is a right that not every creditor can take advantage of. As to most property the creditor who first attaches or files a bill acquires whatever rights his debtor has; but a promise to pay A.'s debt to B. cannot be made available by any creditor except B., since the promisor cannot be required to do anything other than what he promised. The only right other creditors than B. could have would arise if B. collected his claim out of A.'s general assets. The liability which would then arise on the part of the promisor to A. could be made available by any creditor.

Creditor's right derivative. If this reasoning is sound the claim of the creditor is a derivative one. His only interest in the promise is the interest which he has in any property belonging to his debtor. This view has considerable support in the decisions in many jurisdictions in regard to promises to assume mortgages.[35] A promise to assume and pay a mortgage for which the promisee is liable can hardly differ in principle from a promise to pay any other debt of the promisee, but the mortgage cases are frequently treated as a class by themselves. A few cases also of promises to pay unsecured debts are based on substantially this theory.[36]

Statutes. The law in this country has not been much affected by statute. Such statutes as exist are generally of limited application. Many states make a policy of a life insurance for the benefit of a wife or a wife and children good against creditors,[37] but these statutes are silent as to the respective rights of the beneficiary and promisee. In Massachusetts, however, the beneficiary of a life insurance policy

33 The writer is indebted to Professor Ames for this analysis.

34 In Vermont garnishment by the creditor specified in the promise is allowed. Corey *v.* Powers, 18 Vt. 587; Chapman *v.* Mears, 56 Vt. 386. See also Henry *v.* Murphy, 54 Ala. 246.

35 See *infra*, pp. 262, 263.

36 Jesup *v.* Illinois Central R. R. Co., 43 Fed. Rep. 483, 493; Mercantile Trust Co. *v.* Baltimore, etc., R. R. Co., 94 Fed. Rep. 722; Congregational Soc. *v.* Flagg, 72 Vt. 248; Vanmeters' Ex. *v.* Vanmeters, 3 Gratt. 148.

37 3 Am. & Eng. Cyc. (2d ed.), 981.

is given a right of action.[38] California,[39] North[40] and South Dakota,[41] Montana,[42] and Idaho,[43] have the same provision that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." The Louisiana Code[44] allows suit by the beneficiary of a contract, and Virginia[45] and West Virginia[46] have the same provision that "if a covenant or promise be made for the sole benefit of a person with whom it is made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The Georgia Code provides[47] that "if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action though a stranger to the consideration."

Code provisions as to real party in interest. The common provision in the so-called code states,[48] that actions shall be brought in the name of the real party in interest, is sometimes referred to as controlling the question,[49] but it seems to have little bearing upon it. The difficult question is whether the third person is the real party in interest. It is a question of substantive law as to the existence of rights rather than of the procedure appropriate for their enforcement. If, as matter of common law, the third person is held entitled to sue in the name of the promisee or to treat the promisee as a trustee for him, the provision would enable the third person to sue directly in his own name. The English common law, certainly, does not admit the indirect right any more than the direct. The provision has served in some states to add another element of confusion.

Massachusetts law. In no jurisdiction in this country is the law as strict as it is in England. But there is no uniformity in the law of the several states. That of Massachusetts probably most nearly approaches the English rigor. Early decisions which followed what was

38 Stat. 1894, c. 225.
39 Civ. Code, § 1559.
40 Civ. Code, § 3840.
41 Civ. Code § 4688.
42 Civ. Code, § 2103. But this seems to be very narrowly construed. McDonald *v.* American Nat. Bank, 25 Mont. 456.
43 Rev. Stat., § 3221.
44 Art. 1890; Code of Practice, Art. 35.
45 Code, § 2415.
46 Code, c. 71, § 2.
47 Code, § 2747.
48 These statutes are collected in Hepburn, Cases on Code Pleading, 188.
49 Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340; Smith *v.* Smith, 5 Bush, 625, 632; Ellis *v.* Harrison, 104 Mo. 270, 277.

then supposed to be the English law, and gave a direct right to the sole beneficiary of a contract and to a creditor against one who had promised to pay his debt, have been overruled.[50] But by statute, if not otherwise, the beneficiary of a life insurance policy is entitled to the proceeds of the policy as against the personal representatives of the insured,[51] and by a later statute[52] may sue the insurance company in his own name. Further, the Massachusetts court has recently held that a policy of fire insurance insuring the premises of a mortgagor and taken out and paid for by him, if made payable to the mortgagee, may be sued upon by the latter in his own name.[53] The mortgagee's interest in such a policy is essentially the same as any creditor's interest in a promise made to his debtor to pay the debt. It is true the promise of the insurance company is conditional and is not to pay the debt as such, but any payment made by the insurer operates as payment of the debt *pro tanto,* and, if all the parties are solvent it is the mortgagor not the mortgagee who derives benefit from the payment. The only distinction that seems possible to except this case from the general rule in regard to promises to pay a debt to a third person is to regard a policy of insurance as a mercantile instrument, the effect of which is largely determined by business custom,[54] and which may be sued on like negotiable paper by the party to whom it is made payable without regard to who furnished the consideration or negotiated the contract. This distinction seems sound. There are also decisions in Massachusetts, not overruled, which hold a devisee who has accepted a devise made conditional on payment to another personally liable to the beneficiary.[55]

50 Terry *v.* Brightman, 132 Mass. 318; Marston *v.* Bigelow, 150 Mass. 45; Nims *v.* Ford, 159 Mass. 575; Wright *v.* Vermont Life Ins. Co., 160 Mass. 175; Clare *v.* Hatch, 180 Mass. 194 (overruling Felton *v.* Dickinson, 10 Mass. 287); Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray, 376, 382. Cp. Nash *v.* Commonwealth, 174 Mass. 335.

51 Stat. 1887, c. 214, sec. 73.

52 By statute of 1894, c. 225, a beneficiary may sue in his own name upon all policies of life insurance issued since that date. A decision in regard to this statute is Wright *v.* Vermont Life Ins. Co., 160 Mass. 170.

53 Palmer Savings Bank *v.* Insurance Co., 166 Mass. 189, following previous practice, which had not before been disputed. The Massachusetts court relies on the fact that most courts in the country allow the mortgagee to sue. This is true. See 11 Am. Encyc. of Pl. and Pr. 394. But such courts also allow any creditor to sue on a promise to pay him made to another.

54 In Michigan, where as in Massachusetts a creditor cannot sue upon a promise to pay his debt, a mortgagee cannot sue upon insurance of the mortgagor made payable to the mortgagee. Hartford Fire Ins. Co. *v.* Davenport, 37 Mich. 609; Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236. *Conf.* Hopkins Mfg. Co. *v.* Aurora F. & M. Ins. Co., 48 Mich. 148.

See Langdell, Summary Contracts, §§ 49, 51.

55 Felch *v.* Taylor, 13 Pick. 133; Adams *v.* Adams, 14 Allen, 65. In Prentice *v.* Brimhall, 123 Mass. 291, 293; Gray, C. J., explained these decisions by

Law of other states. A large majority of the states allow the sole beneficiary to sue at law;[56] but—besides Massachusetts—the Federal

the lack of equity powers in the court when the first decision was made. As no equitable charge on the property could have been enforced, the defendant would have escaped altogether if not held personally liable.

(Insurance cases are not included in this note.)

[56] Arkansas. Rogers *v.* Galloway Female College, 64 Ark. 627.

Georgia. Wilson *v.* First Presbyterian Church, 56 Ga. 554. See also Code, § 3664.

Illinois. Lawrence *v.* Oglesby, 178 Ill. 122.

Indiana. Allen *v.* Davison, 16 Ind. 416; Beals *v.* Beals, 20 Ind. 163; Marlett *v.* Wilson, 30 Ind. 240; Miller *v.* Billingsly, 41 Ind. 489; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Stevens *v.* Flannagan, 131 Ind. 122; Ferris *v.* American Brewing Co., 155 Ind. 539. Except for the Code the plaintiff would have to sue in equity.

Kansas. Strong *v.* Marcy, 33 Kan. 109.

Kentucky. Clarke *v.* McFarland's Exec., 5 Dana, 45; Smith *v.* Smith, 5 Bush, 625; Benge *v.* Hiatt's Adm., 82 Ky. 666; Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340. See also McGuire *v.* McGuire, 11 Bush. 142; Mercer *v.* Mercer's Adm., 87 Ky. 30. Except for the Code plaintiff would have to sue in equity.

Louisiana. Civil Code, Arts. 1884, 1896.

Maryland. Owings *v.* Owings, 1 H. & G. 484, 491.

Massachusetts. Felton *v.* Dickinson, 10 Mass. 287 (overruled by Terry *v.* Brightman, 132 Mass. 318; Marston *v.* Bigelow, 150 Mass. 45). See also Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray, 376, 382; Prentice *v.* Brimball, 123 Mass. 291.

Missouri. St. Louis *v.* Von Phul, 133 Mo. 561; Devers *v.* Howard, 144 Mo. 671; Crone *v.* Stinde, 156 Mo. 262; Weinreich *v.* Weinreich, 18 Mo. App. 364; Markel *v.* W. U. Tel. Co., 19 Mo. App. 80; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163. But see Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; State *v.* Loomis, 88 Mo. App. 500.

Montana. Civ. Code, § 2103. But see McDonald *v.* American Bank, 25 Mont. 456.

Nebraska. Hale *v.* Ripp, 32 Neb. 259; Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794; Doll *v.* Crume, 41 Neb. 655; Korsmeyer Co. *v.* McClay, 43 Neb. 649; Chicago, etc., R. R. Co. *v.* Bell, 44 Neb. 44; Kaufmann *v.* Cooper, 46 Neb. 644; Hickman *v.* Layne, 47 Neb. 177, 180; Fitzgerald *v.* McClay, 47 Neb. 816; King *v.* Murphy, 49 Neb. 670; Rohman *v.* Gaiser, 53 Neb. 474; Pickle Marble Co. *v.* McClay, 54 Neb. 661. But see Eaton *v.* Fairbury Water Works Co., 37 Neb. 546.

Nevada. See Ferris *v.* Carson Water Co., 16 Nev. 44.

New Jersey. Rue *v.* Meirs, 43 N. J. Eq. 377, 384; Whitehead *v.* Burgess, 61 N. J. L. 75.

New York. Schermerhorn *v.* Vanderheyden, 1 Johns. 139, 140; Glen *v.* Hope Mutual L. I. Co., 56 N. Y. 379; Little *v.* Banks, 85 N. Y. 281; Todd *v.* Weber, 95 N. Y. 181; Rector *v.* Teed, 44 Hun, 349, 120 N. Y. 583; Buchanan *v.* Tilden, 158 N. Y. 109; Roberts *v.* Cobb, 31 Hun, 150; Knowles *v.* Erwin, 43 Hun, 150; affd., 124 N. Y. 633; Whitcomb *v.* Whitcomb, 92 Hun, 443; Babcock *v.* Chase, 92 Hun, 264; Luce *v.* Gray, 92 Hun, 599. But see *contra*, Lorillard *v.* Clyde, 122 N. Y. 498; Townsend *v.* Rackham, 143 N. Y. 576; Sullivan *v.* Sullivan, 161 N. Y. 554; Wainwright *v.* Queen's County Water Co., 78 Hun, 146; Coleman *v.* Hiler, 85 Hun, 547; Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74; affd., 156 N. Y. 702, reargument denied, 157 N. Y. 703; Glens Falls Gas Light Co. *v.* Van Vranken, 11 N. Y. App. Div. 420.

North Carolina. Gorrell *v.* Greensboro Water Co., 124 N. C. 328.

Ohio. Flickinger *v.* Saum, 40 Ohio St. 591, 601; Irwin *v.* Lombard Univ., 56 Ohio St. 9, 20.

Pennsylvania. Strohecker *v.* Grant, 16 S. & R. 237, 241, *semble;* Ayer's

Courts,[57] Connecticut,[58] Michigan,[59] Minnesota,[60] New Hampshire,[61] Vermont,[62] Virginia,[63] and to some degree Pennsylvania,[64] do not allow an action. In the Federal Courts, Connecticut, Michigan, Vermont, and Virginia, however, it seems that a suit in equity might be maintained.[65] The law of New York is in rather dubious condition. It has been laid down in some cases that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty;[66] but from recent cases it seems that a moral duty is

Appeal, 28 Pa. 179; Hostetter *v.* Hollinger, 117 Pa. 606. But see *contra*, Edmundson *v.* Penny, 1 Barr, 334; Guthrie *v.* Kerr, 85 Pa. 303.

RHODE ISLAND. Adams *v.* Union R. R. Co., 21 R. I. 134. But see *contra*, Wilbur *v.* Wilbur, 17 R. I. 295.

SOUTH CAROLINA. Thompson *v.* Gordon, 3 Strobh. 196.

UTAH. See Montgomery *v.* Rief, 15 Utah, 495.

VERMONT. Hodges *v.* Phelps, 65 Vt. 303. But see *contra*, Crampton *v.* Ballard, 10 Vt. 251; Hall *v.* Huntoon, 17 Vt. 244; Fugure *v.* Mut. Soc. of St. Joseph, 46 Vt. 362.

VIRGINIA. Taliaferro *v.* Day, 82 Va. 79; Code of 1887, § 2415. But see *contra*, Ross *v.* Milne, 12 Leigh, 204; also Newberry Land Co. *v.* Newberry, 95 Va. 111.

WEST VIRGINIA. Johnson *v.* McClung, 26 W. Va. 659, 670.

WISCONSIN. Grant *v.* Diebold Safe Co., 77 Wis. 72; Tweeddale *v.* Tweeddale, 116 Wis. 517.

UNITED STATES. Nat. Bank *v.* Grand Lodge, 98 U. S. 123. *Conf.* Constable *v.* National Steamship Co., 154 U. S. 51; Sayward *v.* Dexter, 72 Fed. Rep. 758; U. S. *v.* National Surety Co., 92 Fed. Rep. 549; Brown & Haywood Co. *v.* Ligon, 92 Fed. Rep. 851; Goodyear Shoe Machinery Co. *v.* Dancel, 119 Fed. Rep. 692 (C. C. A.).

57 Goodyear Shoe Machinery Co. *v.* Dancel, 119 Fed. Rep. 692 (C. C. A.). And see *infra*, p. 259, n. 91.

58 Baxter *v.* Camp, 71 Conn. 245. The court leaves the question open whether a suit in equity in which the representatives of the promises were joined could be maintained.

59 Wheeler *v.* Stewart, 94 Mich. 445; Linneman *v.* Moross, 98 Mich. 178. The court left open the question whether there was an equitable right.

60 Jefferson *v.* Asch, 53 Minn. 446; Union Ry. Storage Co. *v.* McDermott, 53 Minn. 407. In the first of these cases the court says: "Where there is nothing but the promise, no consideration from such stranger and no duty or obligation to him on the part of the promisee, he cannot sue upon it."

61 Curry *v.* Rogers, 21 N. H. 247.

62 Crampton *v.* Ballard, 10 Vt. 251; Hall *v.* Huntoon, 17 Vt. 244; Fugure *v.* Mut. Soc. of St. Joseph, 46 Vt. 362. But in Hodges *v.* Phelps, 65 Vt. 303, it was held that a devise subject to the payment of a legacy imposed a personal liability on the devisee, if he accepted the devise.

63 Ross *v.* Milne, 12 Leigh, 204. But see Code of 1887, § 2415, construed in Newberry Land Co. *v.* Newberry, 95 Va. 111. In Taliaferro *v.* Day, 82 Va. 79, an accepted devise subject to a legacy was held to impose a personal liability.

64 Edmundson *v.* Penny, 1 Barr, 334; Guthrie *v.* Kerr, 85 Pa. 303. See, however, Ayer's Appeal, 28 Pa. 179; Merriman *v.* Moore, 90 Pa. 78, 81; Hostetter *v.* Hollinger, 117 Pa. 606. If the promisor receives property as the consideration for a promise to make a payment, though the promisor is under no obligation to use the property received or its proceeds for the purpose, the Pennsylvania court apparently by an unwarranted extension of the law of trusts holds the promisor liable.

65 See cases in preceding notes.

66 Vrooman *v.* Turner, 69 N. Y. 280, 283; Beveridge *v.* N. Y. Elevated R. R., 112 N. Y. 1, 26; Lorillard *v.* Clyde, 122 N. Y. 498; Townsend *v.* Raekham, 143

enough, and this gives the court considerable latitude.[67] Minnesota has adopted the same distinction.[68] Missouri also has held some duty necessary and a moral duty sufficient,[69] but a late decision inconsistently dispenses with the requirement.[70] A suggestion of the sort is occasionally found in other states.[71] The supposed necessity results from a confusion of the two distinct types of cases. The early New York cases bearing on the right of a creditor to sue one who promises the debtor to pay the debt recognized that the creditor's right was derivative and that it was by virtue of his claim against the debtor that he acquired a right to sue upon the promise to the debtor. But the requirement of a debt or duty is wholly inapplicable to contracts for the sole benefit of a third person. It might equally well be settled that a gift should be invalid unless the donor was under a duty to make it. Moreover, whenever such a requirement is proper a moral obligation cannot suffice. When an obligation is of such a character that the obligee cannot enforce it directly against the obligor, it can no more furnish the basis for a right against one who has promised the obligor to pay the debt, than it could for the garnishment of a debt due to the obligor. In the first case cited as illustrating the New York rule it was true not only that the promisee was under no duty to the plaintiff, but also that the plaintiff was not intended by the promisee as the beneficiary of the contract. The benefit expected to result to the plaintiff was merely incidental to the general object of the contract. This was sufficient ground for the decision; but in the later cases where the doctrine was applied the result was needlessly to defeat an intended gift.

Life insurance cases. There are several recurring situations which illustrate the contract for the sole benefit of a third person. The commonest is the case already referred to of a life insurance policy for the benefit of another. This case may well be regarded as depending upon the nature of a policy of insurance as a mercantile instrument. At

N. Y. 516; Sullivan *v.* Sullivan, 161 N. Y. 554; Coleman *v.* Hiler, 85 Hun, 547. See also Glens Falls Gas Light Co. *v.* Van Vranken, 11 N. Y. App. Div. 420; Opper *v.* Hirsch, 68 N. Y. Supp. 879. Compare the cases of Little *v.* Banks, 85 N. Y. 281, and Todd *v.* Weber, 95 N. Y. 181.

67 Buchanan *v.* Tilden, 158 N. Y. 109; Knowles *v.* Erwin, 43 Hun, 150; affd., 124 N. Y. 633; Whitcomb *v.* Whitcomb, 92 Hun, 443; Babcock *v.* Chase, 92 Hun, 264; Luce *v.* Gray, 92 Hun, 599. In all these cases the promise was to pay money to a dependent relative.

68 See *supra*, n. 60.

69 Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; St. Louis *v.* Von Phul, 133 Mo. 561; Devers *v.* Howard, 144 Mo. 671; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163.

70 Crone *v.* Stinde, 156 Mo. 262.

71 Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794.

all events the insurance decisions form a class by themselves, and but little reference is made in them to the general law of contracts. Presumably everywhere the beneficiary is given a right to enforce such a policy, and generally by a direct action. This result has been reached in England and Massachusetts by statute, but in most states without the aid of statute.[72]

Receipt of property as consideration for a promise to make a payment. Another common illustration arises on these or similar facts: A parent gives property to a son, who upon receiving it promises to make specified payments to daughters or others either at once or upon the death of the donor. There is properly no trust or even equitable charge, because it is contemplated that the son shall deal as he sees fit with the property transferred to him and pay the beneficiaries from any source he chooses. Courts are rightly almost universally unwilling to deny the beneficiaries a remedy in such a case.[73] Even in England there are cases that have never been overruled, in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary. If the devisee accepts the gift he is personally liable to perform the duty which he thereby assumes, and his liability is not restricted to the value of the property he has received.[74] So far as this question of personal liability is concerned these cases present quite as much difficulty in principle as the cases where the gift is made *inter vivos*.

[72] 45 & 46 Vict. c. 75, § 11; Mass. Stats. 1887, c. 214, § 73; 1894, c. 225. (See Cleaver *v.* Mut. Reserve Fund Life Assoc., [1892] 1 Q. B. 147; Grant *v.* Bradstreet, 87 Me. 583; Nims *v.* Ford, 159 Mass. 575; Wright *v.* Vermont Life Ins. Co., 160 Mass. 170.) Numerous authorities in other jurisdictions are collected in 3 Am. & Eng. Cyc. 980.

[73] Beals *v.* Beals, 20 Ind. 163; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Stevens *v.* Flannagan, 131 Ind. 122; Weinreich *v.* Weinreich, 18 Mo. App. 364; Knowles *v.* Erwin, 43 Hun, 150, 124 N. Y. 633; Luce *v.* Gray, 92 Hun, 599; Thompson *v.* Gordon, 3 Strobh. 196. See also Lawrence *v.* Oglesby, 178 Ill. 122.

Contra are Townsend *v.* Rackham, 143 N. Y. 516; Coleman *v.* Hiler, 85 Hun, 547 (the promisee in these cases was under no moral duty to the beneficiaries); Guthrie *v.* Kerr, 85 Pa. 303 (*conf.* Hostetter *v.* Hollinger, 117 Pa. 606). Relief in an action at law was also denied in Baxter *v.* Camp, 71 Conn. 245, and Linneman *v.* Moross, 98 Mich. 178; but it was suggested that the plaintiff might have a remedy in equity.

[74] Ewer *v.* Jones, 2 Ld. Ray. 937, 2 Salk. 415, 6 Mod. 26; Webb *v.* Jiggs, 4 M. & S. 119; Braithwaite *v.* Skinner, 5 M. & W. 313. In the last case it was said by some of the judges that the plaintiff's recovery would be restricted to the value of the land.

In this country the devisee is personally liable without restriction. Harland *v.* Person, 93 Ala. 273; Williams *v.* Nichol, 47 Ark. 254; Millington *v.* Hill, 47 Ark. 301; Lord *v.* Lord, 22 Conn. 595; Olmstead *v.* Brush, 27 Conn. 530; Zimmer *v.* Sennott, 134 Ill. 505; Porter *v.* Jackson, 95 Ind. 210; Owing's Case.

No distinction if promise based on other valid consideration. In most jurisdictions no distinction is made when the promise is based on valid consideration other than a transfer of property; for instance, services or forbearance of a claim.[75]

Building contract cases. It is a common stipulation in a building contract that the contractor will pay all bills for labor and materials. In most cases the fulfilment of this promise by the contractor operates to discharge a liability of the owner of the building, whose building would be liable to satisfy the liens given by the law to workmen and materialmen. It cannot, therefore, be inferred that the promisee requires the promise in order to benefit such creditors of the contractor. The natural inference is that his object is to protect himself or his building. When, however, the owner of the building is a municipality, or county, or state, such an inference cannot so readily be justified, for the laws give no liens against the buildings of such owners. In such cases if the stipulation can be regarded as the result of more than the accidental insertion of a provision common in building contracts without reflection as to its necessity, it must be supposed that the object was to benefit creditors of the contractor. This supposition becomes a certainty when the legislature in view of litigation in the courts in regard to the matter enacts that all building contracts made by towns or counties shall contain such a stipulation. Creditors have in some states been allowed not only to take advantage of the promise but to sue the contractor and his sureties upon a bond given by him to secure the performance of his contract.[76]

1 Bland, 370; Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray, 376, 382; Adams *v.* Adams, 14 Allen, 65; Prentice *v.* Brimhall, 123 Mass. 291, 293; Smith *v.* Jewett, 40 N. H. 530, 535; Wiggin *v.* Wiggin, 43 N. H. 561; Glen *v.* Fisher, 6 Johns. Ch. 33; Gridley *v.* Gridley, 24 N. Y. 130; Loder *v.* Hatfield, 71 N. Y. 92; Brown *v.* Knapp, 79 N. Y. 136; Yearly *v.* Long, 40 Ohio St. 27; Flickinger *v.* Saum, 40 Ohio St. 591; Hoover *v.* Hoover, 5 Pa. 351; Etter *v.* Greenwalt, 98 Pa. 422; Dreer *v.* Pennsylvania Co., 108 Pa. 26; Jordan *v.* Donahue, 12 R. I. 199; Hodges *v.* Phelps, 65 Vt. 303; Taliaferro *v.* Day, 82 Va. 79.

[75] Allen *v.* Davison, 16 Ind. 416; Marcett *v.* Wilson, 30 Ind. 240; Strong *v.* Marcy, 33 Kan. 109; Clarke *v.* McFarland's Exec., 5 Dana, 45; Benge *v.* Hiatt's Adm., 82 Ky. 666; Felton *v.* Dickinson, 10 Mass. 287 (overruled by Marston *v.* Bigelow, 150 Mass. 45); Todd *v.* Weber, 95 N. Y. 181; Buchanan *v.* Tilden, 158 N. Y. 109; Whitcomb *v.* Whitcomb, 92 Hun, 443; Babcock *v.* Chase, 92 Hun, 264.

See also Lawrence *v.* Oglesby, 178 Ill. 122.

But in Pennsylvania, though the promise is perhaps enforceable by the beneficiary when the consideration is the transfer of property, it is not if the consideration is anything else. Edmundson *v.* Penny, 1 Barr, 334. See also Washburn *v.* Interstate Investment Co., 26 Oreg. 436.

[76] King *v.* Downey, 24 Ind. App. 262; Baker *v.* Bryan, 64 Ia. 561 (but see Hunt *v.* King, 97 Ia. 88); St. Louis *v.* Von Phul, 133 Mo. 561 (overruling Kansas City Sewer Pipe Co. *v.* Thompson, 120 Mo. 218); Devers *v.* Howard, 144 Mo. 671; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163 (*cf.* State *v.* Loomis,

Water company cases. A somewhat similar case arises where a water company contracts to furnish water sufficient to supply the hydrants of a town or district, and the failure of the water company to keep its promise to the town results in the destruction of a building by a fire which might have been extinguished but for the lack of water. The owner of the house is not generally allowed to sue on such a promise. Though the town or district which is the promisee, not being itself liable for the lack of water or for the destruction of the building, has no pecuniary interest in the performance of the promise, yet it may be doubted whether the stipulation was exacted for the benefit of such people as might have their buildings destroyed from lack of water. It is a more reasonable construction that the object of the promise is to benefit the community as a whole. Whatever may be the reason, the plaintiff is not usually allowed to recover in such cases.[77]

Telegraph company cases. A telegraph company's contract made with the sender of a telegram to deliver it to the person addressed is sometimes treated as a contract made for the sole benefit of the latter, who is allowed to sue for this reason.[78] In some cases this construction

88 Mo. App. 500); Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794; Doll *v.* Crume, 41 Neb. 655; Korsmeyer Co. *v.* McClay, 43 Neb. 649; Kaufmann *v.* Cooper, 46 Neb. 644; Hickman *v.* Layne, 47 Neb. 177; King *v.* Murphy, 49 Neb. 670; Rohman *v.* Gaiser, 53 Neb. 474; Pickle Marble Co. *v.* McClay, 54 Neb. 661; Gastonia *v.* McEntee-Peterson Co., 131 N. C. 363. *Contra*, Jefferson *v.* Asch, 53 Minn. 446; Union Ry. Storage Co. *v.* McDermott, 53 Minn. 407; Buffalo Cement Co. *v.* McNaughton, 90 Hun, 74, 156 N. Y. 702. 157 N. Y. 703; Parker *v.* Jeffery, 26 Oreg. 186; Brower Lumber Co. *v.* Miller, 28 Oreg. 565; Lancaster *v.* Frescoln, 203 Pa. 640. See also Styles *v.* Long Co., 67 N. J. L. 413; Montgomery *v.* Rief, 15 Utah, 495.

An action on the bond presents the difficulty that the plaintiffs not only are not the promisees, but are not the payees. The promise is to pay the penalty of the bond, not to the creditors, but to the town or county. This difficulty is not much alluded to in the cases. See, however, Jefferson *v.* Asch, and Buffalo Cement Co. *v.* McNaughton, *supra*.

77 Boston Safe Deposit Co. *v.* Salem Water Co., 94 Fed. Rep. 240; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24; Fowler *v.* Water Co., 83 Ga. 219; Davis *v.* Water Works, 54 Ia. 59; Becker *v.* Keokuk Water Works, 79 Ia. 419; Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; Eaton *v.* Fairbury Water Works, 37 Neb. 546; Ferris *v.* Carson Water Co., 16 Nev. 44; Wainwright *v.* Queens County Water Co., 78 Hun, 146; Foster *v.* Lookout Water Co., 3 Lea, 42. *Contra*, Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340; Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328. As to liability in tort, see Pittsfield Cottonwear Co. *v.* Pittsfield Shoe Co., 53 Atl. Rep. 807 (N. H.); 16 Harv. L. Rev. 456.

78 Western Union Tel. Co. *v.* Hope, 11 Ill. App. 291 (but see Western Union Tel. Co. *v.* Dubois, 128 Ill. 248); Western Union Tel. Co. *v.* Fenton, 52 Ind. 3 (statutory); Markel *v.* Western Union Tel. Co., 19 Mo. App. 80 (statutory); Aiken *v.* Western Union Tel. Co., 5 S. C. 371; Western Union Tel. Co. *v.* Jones, 81 Tex. 271. The cases allowing a right of action, based on various reasons, are collected in Joyce on Electric Law, § 1008.

is fair enough, but senders of telegrams perhaps more frequently are seeking objects of their own rather than the benefit of another.

Charitable subscriptions. One of the numerous ways of making out a fictitious consideration for charitable subscriptions is to regard the promises of the subscribers as mutual promises to pay the beneficiary, who is then allowed to sue as on a contract made for its benefit.[79] In fact, in such subscriptions the promise, on a fair construction, almost always runs directly to the beneficiary or to trustees representing it.

Other illustrations. In a recent New Jersey case[80] the beneficiary was undetermined when the contract was made. The defendant contracted to pay $750 to the owner of the foal by the defendant's stallion that first trotted a mile in 2.30. The plaintiff who answered the description was allowed to sue on the contract though not a party to it.

A decision in Indiana[81] presents the rather unsual case of the enforcement by injunction of a promise for the benefit of a third person. The defendant as lessee of certain premises had covenanted with the lessor to sell on the premises no beer except that manufactured by the plaintiff company. The lessor was a relative of stockholders in the company, but had no pecuniary interest in the matter. The company was granted an injunction to enforce the covenant.[82]

Confusion in regard to contracts to discharge a debt. It is in regard to contracts to discharge a debt of the promisee that the greatest confusion prevails. In the first place the intrinsic difficulty of the case is greater than where the third person is the sole beneficiary of the contract. Trust, agency, novation, must here be carefully distinguished, and the facts may not clearly indicate in which class a particular case belongs, since the parties may not have sufficiently expressed any intention. Further, it is in this class of cases that the reasoning of the courts is most artificial. New York by the decision

79 Rogers *v.* Galloway Female College, 64 Ark. 627; Wilson *v.* First Presbyterian Church, 56 Ga. 554; Irwin *v.* Lombard University, 56 Ohio St. 9, 20. See also Hale *v.* Ripp, 32 Neb. 259; Roberts *v.* Cobb, 31 Hun, 150; Parsons, Contracts, 8th ed., 468 *seq.* *Contra* is Curry *v.* Rogers, 21 N. H. 247. A curious case where the promises actually were by the subscribers to each other is New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338. A number of hatters agreed to close their shops on Sunday. For any breach it was agreed that the offender should pay the plaintiff $100. The plaintiff was not allowed to recover because its benefit was not the object of the contract.

80 Whitehead *v.* Burgess, 61 N. J. L. 75.

81 Ferris *v.* American Brewing Co., 155 Ind. 539.

82 And in Chicago, etc., R. R. *v.* Bell, 44 Neb. 44, an agreement not to sue a third person was effectively used as a bar to an action against the latter. See also Ayer's Appeal, 28 Pa. 179.

of *Lawrence* v. *Fox*[83] has done more than any other jurisdictions to spread and strengthen the the theory that a third person can sue on such a contract. In a later case[84] the New York court said:—

"It is not every promise made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

This language or similar language is adopted in other cases.[85] Do the courts which use it really believe that the intent of the promisee in such a case as *Lawrence* v. *Fox* is to benefit the third party? When a grantor of premises subject to a mortgage requires the grantee to assume and agree to pay the mortgage, is it the welfare of the mortgagee that the grantor is considering, or is it his own?

Most jurisdictions allow the creditor an action at law. Whatever may be the answer to these questions, the jurisdictions are few which do not allow the creditor a direct action at law against the promisor.[86] Con-

83 20 N. Y. 268.

84 Simson *v.* Brown, 68 N. Y. 355, 361.

85 Central Trust Co. *v.* Berwind-White Co., 95 Fed. Rep. 391; Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Hall *v.* Alford, 49 S. W. Rep. 444 (Ky.); Jefferson *v.* Asch, 53 Minn. 446; State *v.* St. Louis, etc., R. R., 125 Mo. 596, 617; Garnsey *v.* Rogers, 47 N. Y. 233; Vrooman *v.* Turner, 69 N. Y. 280, 283; Beveridge *v.* N. Y. Elevated R. R., 112 N. Y. 1, 26; Parker *v.* Jeffery, 26 Oreg. 186, 188.

86 Action at law allowed against one who promises to pay the debt of another (mortgage cases are not included).

Alabama. Huckabee *v.* May, 14 Ala. 263; Hoyt *v.* Murphy, 18 Ala. 316; Mason *v.* Hall, 30 Ala. 599; Henry *v.* Murphy, 54 Ala. 246; Young *v.* Hawkins, 74 Ala. 370; Dimmick *v.* Register, 92 Ala. 458; North Ala. Development Co. *v.* Short, 101 Ala. 333; Potts *v.* First Nat. Bank, 102 Ala. 286.

Arkansas. Chamblee *v.* McKenzie, 31 Ark. 155; Talbot *v.* Wilkins, 31 Ark. 411; Hecht *v.* Caughron, 46 Ark. 132; Ringo *v.* Wing, 49 Ark. 457, 464; Benjamin *v.* Birmingham, 50 Ark. 433. But see *contra*, Hicks *v.* Wyatt, 23 Ark. 55, and *conf.* Thomas Mfg. Co. *v.* Prather, 65 Ark. 27.

California. Lewis *v.* Covelland, 21 Cal. 189; Morgan *v.* Cverman Co., 37 Cal. 534; Malone *v.* Crescent Co., 77 Cal. 38; Smith *v.* Los Angeles, etc., Ry. Co., 98 Cal. 210; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Whitney *v.* Am. Ins. Co., 127 Cal. 464 (overruling McLaren *v.* Hutchinson, 18 Cal. 80, *contra*).

Colorado. Lehow *v.* Simonton, 3 Col. 346; Green *v.* Morrison, 5 Col. 18; Starbird *v.* Cranston, 24 Col. 20; Wilson *v.* Lunt, 11 Col. App. 56.

Florida. Hunter *v.* Wilson, 21 Fla. 250; Wright *v.* Terry, 23 Fla. 160.

Georgia. Ford *v.* Finney, 35 Ga. 258, 261 (*semble*). See also Code, § 3664.

Illinois. Eddy *v.* Roberts, 17 Ill. 505; Brown *v.* Strait, 19 Ill. 88; Briston *v.* Lane, 21 Ill. 194; Rabberman *v.* Niskamp, 54 Ill. 179; Wilson *v.* Bevans, 58 Ill. 232; Beasley *v.* Webster, 64 Ill. 458; Steele *v.* Clark, 77 Ill. 471; Snell *v.* Ives, 85 Ill. 279; Shober Co. *v.* Kerting, 107 Ill. 344; Schmidt *v.* Glade, 126 Ill. 485; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Mathers *v.* Carter, 7 Ill. App. 225; Struble *v.* Hake, 14 Ill. App. 546; Boals *v.* Nixon, 26 Ill. App. 517; Williamson-Stewart Co. *v.* Seaman, 29 Ill. App. 68; McCasland *v.* Doorley, 47 Ill.

App. 513; Rothermel *v.* Bell & Zoller Co., 79 Ill. App. 667; Kee *v.* Cahill, 86 Ill. App. 561; Am. Splane Co. *v.* Barber, 91 Ill. App. 359.

INDIANA. Cross *v.* Truesdale, 28 Ind. 44; Davis *v.* Calloway, 30 Ind. 112; Haggerty *v.* Johnston, 48 Ind. 41; Campbell *v.* Patterson, 58 Ind. 66; Loeb *v.* Weis, 64 Ind. 285; South Side Planing Mill Assoc. *v.* Cutler, etc., Co., 64 Ind. 560; Rhodes *v.* Matthews, 67 Ind. 131; Fisher *v.* Wilmoth, 68 Ind. 449; Clodfelter *v.* Hulett, 72 Ind. 137; Medsker *v.* Richardson, 72 Ind. 323; Hendricks *v.* Frank, 86 Ind. 278; Harrison *v.* Wright, 100 Ind. 515, 533; Warren *v.* Farmer, 100 Ind. 593; Wolke *v.* Fleming, 103 Ind. 105; Redelsheimer *v.* Miller, 107 Ind. 485; Leake *v.* Ball, 116 Ind. 214; Boruff *v.* Hudson, 138 Ind. 280. The early Indiana cases before the enactment of the Code allowed relief only in equity. Salmon *v.* Brown, 6 Blackf. 347; Farlow *v.* Kemp, 7 Blackf. 544; Britzell *v.* Fryberger, 2 Ind. 176; Conklin *v.* Smith, 2 Ind. 107, 109; Bird *v.* Lanius, 7 Ind. 615, 618.

IOWA. Johnson *v.* Knapp, 36 Ia. 616; Blair Co. *v.* Walker, 39 Ia. 406; Gilbert *v.* Sanderson, 56 Ia. 349; Poole *v.* Hintrager, 60 Ia. 180; Clinton Nat. Bank *v.* Studemann, 74 Ia. 104; Knott *v.* Dubuque, etc., Ry. Co., 84 Ia. 462; First Nat. Bank *v.* Pipestone, 92 Ia. 530; Hawley *v.* Exchange Bank, 97 Ia. 187.

KANSAS. Harrison *v.* Simpson, 17 Kan. 508; Kansas Pac. Ry. Co. *v.* Hopkins, 18 Kan. 494; Floyd *v.* Ort, 20 Kan. 162; Alliance Mut. L. Assn. Soc. *v.* Welch, 26 Kan. 632, 641; Brenner *v.* Luth, 28 Kan. 581; West *v.* W. U. Tel. Co., 39 Kan. 93; Manufacturing Co. *v.* Burrows, 40 Kan. 361; Mumper *v.* Kelley, 43 Kan. 256; Howell *v.* Hough, 46 Kan. 152; Hardesty *v.* Cox, 53 Kan. 618.

KENTUCKY. Garvin *v.* Mobley, 1 Bush, 548; Dodge's Adm'r *v.* Moss, 82 Ky. 441. But see Hall *v.* Alford, 49 S. W. Rep. 444.

LOUISIANA. Mayor *v.* Bailey, 5 Mart. 321; Marigny *v.* Remy, 3 Mart. (N. S.) 607; Cucullu *v.* Walker, 16 La. Ann. 198. See also Civil Code, arts. 1884, 1896.

MAINE. Burbank *v.* Gould, 15 Me. 118; Hinkley *v.* Fowler, 15 Me. 285; Bohanan *v.* Pope, 42 Me. 93; Coffin *v.* Bradbury, 89 Me. 476; Baldwin *v.* Emery, 89 Me. 496, 498.

MARYLAND. Small *v.* Schaefer, 24 Md. 143; Seigman *v.* Hoffacker, 57 Md. 321, 325. But see *contra*, Hand *v.* Evans Marble Co., 88 Md. 226.

MASSACHUSETTS. Arnold *v.* Lyman, 17 Mass. 400; Carnegie *v.* Morrison, 2 Met. 381; Fitch *v.* Chandler, 4 Cush. 254; Brewer *v.* Dyer, 7 Cush. 337; Putnam *v.* Field, 103 Mass. 556, overruled by later decisions *contra;* Flint *v.* Pierce, 99 Mass. 68; Exchange Bank *v.* Rice, 107 Mass. 37; Rogers *v.* Union Stone Co., 130 Mass. 581; Aigen *v.* Boston & Me. R. R., 132 Mass. 423; Morrill *v.* Allen, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410; White *v.* Mt. Pleasant Mills, 172 Mass. 462.

MINNESOTA. Sanders *v.* Clason, 13 Minn. 379; Hawley *v.* Wilkinson, 18 Minn. 527; Jordan *v.* White, 20 Minn. 91; Sullivan *v.* Murphy, 23 Minn. 6; Maxfield *v.* Schwartz, 43 Minn. 221; Lovejoy *v.* Howe, 55 Minn. 353; Sonstiby *v.* Keeley, 7 Fed. Rep. 447. But see Bell *v.* Mendenhall, 71 Minn. 331.

MISSISSIPPI. Sweatman *v.* Parker, 49 Miss. 19, 30.

MISSOURI. Bank of Mo. *v.* Benoist, 10 Mo. 519; Robbins *v.* Ayres, 10 Mo. 538; Carl *v.* Riggs, 12 Mo. 430; Meyer *v.* Lowell, 44 Mo. 328; Flanagan *v.* Hutchinson, 47 Mo. 237; Rogers *v.* Gosnell, 51 Mo. 466; 58 Mo. 589; Schuster *v.* Kas. City, etc., Ry. Co., 60 Mo. 290; Mosman *v.* Bender, 80 Mo. 579; Green *v.* Estes, 82 Mo. 337; Ellis *v.* Harrison, 104 Mo. 270; Winn *v.* Lippincott Investment Co., 125 Mo. 528; State *v.* St. Louis & S. F. Ry. Co., 125 Mo. 596, 615; Porter *v.* Woods, 138 Mo. 540; Beardslee *v.* Morgner, 4 Mo. App. 139; Harvey Lumber Co. *v.* Herriman Lumber Co., 39 Mo. App. 214; Nelson Distilling Co. *v.* Loe, 47 Mo. App. 31; Tennent-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196; Street *v.* Goodale, 77 Mo. App. 318; Rothwell *v.* Skinker, 84 Mo. App. 169. Two early cases *contra* are overruled. Manny *v.* Frasier, 27 Mo. 419; Page *v.* Becker, 31 Mo. 466.

NEBRASKA. Shamp *v.* Meyer, 20 Neb. 223; Meyer *v.* Shamp, 26 Neb. 730, 51 Neb. 424; Fonner *v.* Smith, 31 Neb. 107; Kaufman *v.* U. S. Nat. Bank, 31 Neb. 661; Barnett *v.* Pratt, 37 Neb. 349; Union Pac. Ry. Co. *v.* Metcalf, 50 Neb. 452, 461; Tecumseh Nat. Bank *v.* Best, 50 Neb. 518.

NEVADA. Alcalda *v.* Morales, 3 Nev. 132; Bishop *v.* Stewart, 13 Nev. 25; Jones *v.* Pacific Wood Co., 13 Nev. 359, 375; Miliani *v.* Tognini, 19 Nev. 133.

NEW JERSEY. Berry *v.* Doremus, 30 N. J. L. 399; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141. See also Price *v.* Trusdell, 28 N. J. Eq. 200, 202; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 550; Bennett *v.* Merchantville Building Assoc., 44 N. J. Eq. 116, 118; Cocks *v.* Varney, 45 N. J. Eq. 72, 77.

NEW YORK. Gold *v.* Phillips, 10 Johns. 142; Farley *v.* Cleveland, 4 Cow. 432; 9 Cow. 639; Ellwood *v.* Monk, 5 Wend. 235; Barker *v.* Bucklin, 2 Denio, 45; Del. & Hudson Canal Co. *v.* Westchester County Bank, 4 Denio, 97; Lawrence *v.* Fox, 20 N. Y. 268; Judson *v.* Gray, 17 How. Pr. 289; Dingeldein *v.* Third Ave. R. R. Co., 37 N. Y. 575; Barker *v.* Bradley, 42 N. Y. 316; Coster *v.* Mayor of Albany, 43 N. Y. 399; Secor *v.* Lord, 3 Keyes, 525; Hutchings *v.* Miner, 46 N. Y. 456, 460; Claflin *v.* Ostrom, 54 N. Y. 581; Barlow *v.* Myers, 64 N. Y. 41; Arnold *v.* Nichols, 64 N. Y. 117; Litchfield *v.* Flint, 104 N. Y. 543; Hallenbeck *v.* Kindred, 109 N. Y. 620; Warren *v.* Wilder, 114 N. Y. 209; Hannigan *v.* Allen, 127 N. Y. 639; Clark *v.* Howard, 150 N. Y. 232; Seaman *v.* Hasbrouck, 35 Barb. 151; Adams *v.* Wadhams, 40 Barb. 225; Brown *v.* Curran, 14 Hun, 260; Cock *v.* Moore, 18 Hun, 31; Kingsbury *v.* Earle, 27 Hun, 141; Schmid *v.* N. Y., etc., Railway, 32 Hun, 335; affd., 98 N. Y. 634; Edick *v.* Green, 38 Hun, 202; Pulver *v.* Skinner, 42 Hun, 322; Reynolds *v.* Lawton, 62 Hun, 596; Bogardus *v.* Young, 64 Hun, 398; Cook *v.* Berrott, 66 Hun, 633; Beemer *v.* Packard, 92 Hun, 546. But see Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Merrill *v.* Green, 55 N. Y. 270; Wheat *v.* Rice, 97 N. Y. 296; Serviss *v.* McDonnell, 107 N. Y. 260; Corner *v.* Mackey, 147 N. Y. 574, 582; Fairchild *v.* Feltman, 32 Hun, 398; Metropolitan Trust Co. *v.* New York, etc., Ry. Co., 45 Hun, 84; Clark *v.* Howard, 74 Hun, 228; Feist *v.* Schiffer, 79 Hun, 275.

OHIO. Crumbaugh *v.* Kugler, 3 Ohio St. 544, 549; Bagaley *v.* Waters, 7 Ohio St. 359; Dodge *v.* Nat. Exchange Bank, 30 Ohio St. 1; Emmitt *v.* Brophy, 42 Ohio St. 82.

OREGON. Baker *v.* Eglin, 11 Oreg. 333; Hughes *v.* Oregon Co., 11 Oreg. 437; Schneider *v.* White, 12 Oreg. 503; Strong *v.* Kamm, 13 Oreg. 172; Feldman *v.* McGuire, 34 Oreg. 310. But see *contra*, Washburn *v.* Interstate Invest. Co., 26 Oreg. 436.

PENNSYLVANIA. Strohecker *v.* Grant, 16 S. & R. 237, 241; Hind *v.* Holdship, 2 Watts, 104; Commercial Bank *v.* Wood, 7 W. & S. 89; Beers *v.* Robinson, 9 Barr, 229; Bellas *v.* Fagely, 19 Pa. 273; Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens, 106 Pa. 173; Delp *v.* Brewing Co., 123 Pa. 42. But see *contra*, Blymire *v.* Boistle, 6 Watts, 182 Ramsdale *v.* Horton, 3 Barr, 330; Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470; Kountz *v.* Holthouse, 85 Pa. 235, 237; Adams *v.* Knehn, 119 Pa. 76; Freeman *v.* Pa. R. R. Co., 173 Pa. 274. See also Brown *v.* German-American Title & Trust Co., 174 Pa. 443, 455.

RHODE ISLAND. Merriman *v.* Social Mfg. Co., 12 R. I. 175; Wood *v.* Moriarty, 15 R. I. 518; Kehoe *v.* Patton, 50 Atl. Rep. 655.

SOUTH CAROLINA. See McBride *v.* Floyd, 2 Bailey, 209; Brown *v.* O'Brien, 1 Rich. 268; Redfearn *v.* Craig, 57 S. C. 534.

TENNESSEE. Moore *v.* Stovall, 2 Lea, 543; Lookout Mountain R. R. Co. *v.* Honston, 1 Pickle, 224; O'Conner *v.* O'Conner, 88 Tenn. 76, 82. But see Campbell *v.* Findley, 3 Humph. 330.

TEXAS. Spann *v.* Cochran, 63 Tex. 240; Bennett *v.* Rosenthal, 3 Wilson Civ. Cas. 196; Bartley *v.* Conn, 4 Tex. Civ. App. 299, 33 S. W. Rep. 604.

UTAH. Brown *v.* Markland, 16 Utah, 360.

VERMONT. See Arlington *v.* Hinds, 1 D. Chip. 430; Pangborn *v.* Saxton, 11 Vt. 79, *semble;* Corey *v.* Powers, 18 Vt. 587; Rutland R. R. Co. *v.* Cole, 24 Vt. 33; Chapman *v.* Mears, 56 Vt. 389; Congregational Soc. *v.* Flagg, 72 Vt. 248.

VIRGINIA. Vanmeters' Ex. *v.* Vanmeters, 3 Gratt. 148 (in equity); Jones *v.* Thomas, 21 Gratt. 96, *semble*. See also Code, § 2415. *Contra* is Stewart *v.* James River & Kanawha Co., 24 Gratt. 294.

WASHINGTON. Don Yook *v.* Washington Mill Co., 16 Wash. 459.

WEST VIRGINIA. Hooper *v.* Hooper, 32 W. Va. 526; Bensimer *v.* Fell, 35

necticut,[87] Massachusetts,[88] Michigan,[89] and North Carolina[90] are absolutely committed against the doctrine. The United States Supreme Court,[91] Maryland,[92] New Hampshire,[93] Pennsylvania,[94] and

W. Va. 15, 29; Code 1887, c. 71, § 2. But see *contra*, Johnson *v.* McClung, 26 W. Va. 659.

Wisconsin. Kimball *v.* Noyes, 17 Wis. 695; Putney *v.* Farnham, 27 Wis. 187; McDowell *v.* Laev, 35 Wis. 171; Bassett *v.* Hughes, 43 Wis. 319; Hoile *v.* Bailey, 58 Wis. 434; Winninghoff *v.* Witting, 64 Wis. 180; Johannes *v.* Phenix Ins. Co., 66 Wis. 50; Jones *v.* Foster, 67 Wis. 296, 309; Ingram *v.* Osborn, 70 Wis. 184, 193; Nix *v.* Wiswell, 84 Wis. 334; Fulmer *v.* Wightman, 87 Wis. 573; New York Life Ins. Co. *v.* Hamlin, 98 Wis. 17, 23; Long *v.* Chicago, etc., Ry. Co., 111 Wis. 198.

87 Morgan *v.* Randolph-Clowes Co., 73 Conn. 396. See also Baxter *v.* Camp, 71 Conn. 245. These cases overrule earlier decisions, *e. g.*, Crocker *v.* Higgins, 7 Conn. 342; Steene *v.* Aylesworth, 18 Conn. 244, 252.

88 Mellen *v.* Whipple, 1 Gray, 317; Flint *v.* Pierce, 99 Mass. 68; Exchange Bank *v.* Rice, 107 Mass. 37; Rogers *v.* Union Stone Co., 130 Mass. 581; Aigen *v.* Boston & Maine R. R., 132 Mass. 423; Morrill *v.* Allen, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410; White *v.* Mt. Pleasant Mills, 172 Mass. 462. See also cases of mortgage, *post*, p. 260, n. 1.

89 Pipp *v.* Reynolds, 20 Mich. 88; Turner *v.* McCarty, 22 Mich. 265; Halsted *v.* Francis, 31 Mich. 113; Hartford Fire Ins. Co. *v.* Davenport, 37 Mich. 609; Hicks *v.* McGarry, 38 Mich. 667; Hunt *v.* Strew, 39 Mich. 368, 371; Booth *v.* Conn. Mut. Life Ins. Co., 43 Mich. 299; Ayres *v.* Gallup, 44 Mich. 13; Edwards *v.* Clements, 81 Mich. 513; Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236; Bliss *v.* Plummer's Ex., 103 Mich. 181.

90 Morehead *v.* Wriston, 73 N. C. 398; Peacock *v.* Williams, 98 N. C. 324; Woodcock *v.* Bostic, 118 N. C. 822.

91 National Bank *v.* Grand Lodge, 98 U. S. 123. See also Constable *v.* National S. S. Co., 154 U. S. 51; Johns *v.* Wilson, 180 U. S. 440; Nebraska Bank *v.* Nebraska Hydraulic Co., 14 Fed. Rep. 763; Jesup *v.* Illinois Central Co., 43 Fed. Rep. 483, 493; Hennessy *v.* Bond, 77 Fed. Rep. 405; Mercantile Trust Co. *v.* Baltimore & Ohio Co., 94 Fed. Rep. 722; Goodyear Shoe Machinery Co. *v.* Dancel, 119 Fed. Rep. 692 (C. C. A.).

92 Hand *v.* Evans Marble Co., 88 Md. 226. But see Small *v.* Schaefer, 24 Md. 143; Seigman *v.* Hoffacker, 57 Md. 321.

93 Warren *v.* Batchelder, 15 N. H. 133. *Conf.* Warren *v.* Batchelder, 16 N. H. 580; Lang *v.* Henry, 54 N. H. 57; Hunt *v.* New Hampshire Fire Assoc., 68 N. H. 305, 308. In the case last cited the court say, "The debt is in equity his debt." "If for technical reasons the law is powerless to enforce the duty, equity is subject to no such weakness."

94 Blymire *v.* Boistle, 6 Watts, 182; Ramsdale *v.* Horton, 3 Barr, 330; Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470; Kountz *v.* Holthouse, 85 Pa. 235, 237; Adams *v.* Kuehn, 119 Pa. 76; Freeman *v.* Pennsylvania R. R. Co., 173 Pa. 274. But see Strohecker *v.* Grant, 16 S. & R. 237, 241; Hind *v.* Holdship, 2 Watts, 104; Commercial Bank *v.* Wood, 7 W. & S. 89; Vincent *v.* Watson, 18 Pa. 96; Bellas *v.* Fagely, 19 Pa. 273; Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens, 106 Pa. 173; Delp *v.* Brewing Co., 123 Pa. 42. See also mortgage cases, *post*, p. 260, n. 6.

The rule in Pennsylvania seems to be that in general the creditor cannot sue, but "among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor." Adams *v.* Kuehn, 119 Pa. 76, 86. The first exception thus stated is that of a trust, but in its application of the rule the Pennsylvania court has gone beyond trusts properly so called.

Wyoming,[95] at least, do not accept it unequivocally. A few other jurisdictions apart from local statutes or codes of procedure would hold the creditors' only right to be derivative and in equity.[96]

Assumption of mortgage. The most universal illustration of the right of the creditor to sue is where the grantee of premises subject to a mortgage assumes and agrees to pay the mortgage. In England,[97] Ireland,[98] and Canada[99] this gives the mortgagee no right. But the only state in this country where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts.[1] Of the other jurisdictions which do not accept the doctrine of *Lawrence* v. *Fox,* Connecticut[2] and Michigan[3] have statutes which cover the case; the United States Supreme Court[4] and North Carolina[5] give equitable relief on substantially the principles herein advocated; and if the attitude of the Maryland and Pennsylvania courts towards this class of cases is inconsistent with their general rule, they are not deterred on that account from giving the mortgagee relief.[6] It is a

95 McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

96 The early Indiana law allowed a remedy in equity only. Bird *v.* Lanius, 7 Ind. 615; and since the Code has made legal and equitable procedure the same, it has still been recognized that the creditor's right is equitable. Davis *v.* Calloway, 30 Ind. 112; Hendricks *v.* Frank, 86 Ind. 278, 284. Aside from statute it is probable that in Virginia and West Virginia the creditor would be allowed only an equitable right. See also McDonald *v.* American Bank, 25 Mont. 456, 495.

97 Tweddell *v.* Tweddell, 2 Bro. Ch. 152; Oxford *v.* Rodney, 14 Ves. 417; Barham *v.* Thanet, 3 M. & R. 607; *Re* Errington, [1894] 1 Q. B. 11; Bonner *v.* Tottenham Society, [1899] 1 Q. B. 161.

98 Barry *v.* Harding, 1 Jones & Lat. 475, 485.

99 Aldous *v.* Hicks, 21 Ont. 95; Frontenac Loan Co. *v.* Hysop, 21 Ont. 577. See also Williams *v.* Balfour, 18 Can. S. C. 472. *Re* Crozier, 24 Grant, 537, *contra*, is overruled.

1 Mellen *v.* Whipple, 1 Gray, 317; Pettee *v.* Peppard, 120 Mass. 522, 523; Prentice *v.* Brimhall, 123 Mass. 291; Coffin *v.* Adams, 131 Mass. 133; Rice *v.* Sanders, 152 Mass. 108; Creesy *v.* Willis, 159 Mass. 249. No attempt seems to have been made in Massachusetts to enforce the mortgagee's claim by a bill in equity against the mortgagor and his grantee. Apparently it is assumed that no relief would be granted. In Rice *v.* Sanders it is said that the grantee's promise "gave no additional rights to the mortgagee."

2 Gen. Stat., § 983; Morgan *v.* Randolph-Clowes Co., 73 Conn. 396, 398.

3 Comp. Laws 1897, § 519; Crawford *v.* Edwards, 33 Mich. 354; Miller *v.* Thompson, 34 Mich. 10; Taylor *v.* Whitmore, 35 Mich. 97; Carley *v.* Fox, 38 Mich. 387; Winans *v.* Wilkie, 41 Mich. 264; Unger *v.* Smith, 44 Mich. 22; Corning *v.* Burton, 102 Mich. 86; Jehle *v.* Brooks, 112 Mich. 131; Terry *v.* Durand Land Co., 112 Mich. 665. It is essential that the grantee and the mortgaged land be within the jurisdiction. Booth *v.* Connecticut Mut. Life Ins. Co., 43 Mich. 299.

4 See *infra*, p. 263, n. 19.

5 Woodcock *v.* Bostic, 118 N. C. 822.

6 A mortgagee may sue at law a grantee of the mortgagor who assumes the mortgage.

ALABAMA. Orman *v.* North Alabama Co., 53 Fed. Rep. 469; 55 Fed. Rep. 18.

ARIZONA. Johns *v.* Wilson, 180 U. S. 446.

curious circumstance that though a promise by a third person to pay a mortgage debt cannot be distinguished in principle from a promise to pay any other debt, the question has been to some extent separately dealt with. Perhaps, because the subject of mortgages fell within the scope of equity jurisdiction, the attempt was early made by mort-

ARKANSAS. Patton *v.* Adkins, 42 Ark. 197; Benjamin *v.* Birmingham, 50 Ark. 433.

CALIFORNIA. Wormouth *v.* Hatch, 33 Cal. 121; Biddel *v.* Brizzolara, 64 Cal. 354; Williams *v.* Naftzger, 103 Cal. 438; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Tulare County Bank *v.* Madden, 109 Cal. 312; Hopkins *v.* Warner, 109 Cal. 133; Roberts *v.* Fitzallen, 120 Cal. 482; Daniels *v.* Johnson, 129 Cal. 415.

COLORADO. Green *v.* Morrison, 5 Col. 18; Stuyvesant *v.* Western Mtge. Co., 22 Col. 28; Skinner *v.* Harker, 23 Col. 333; Starbird *v.* Cranston, 24 Col. 20; Cobb *v.* Fishel, 62 Pac. Rep. 625.

CONNECTICUT. See Bassett *v.* Bradley, 48 Conn. 224; Lynch *v.* Moser, 72 Conn. 714. *Conf.* Meech *v.* Ensign, 49 Conn. 191. General Stat., § 983.

GEORGIA. See Ford *v.* Finney, 35 Ga. 258.

ILLINOIS. Rogers *v.* Herron, 92 Ill. 583; Thompson *v.* Dearborn, 107 Ill. 87; Bay *v.* Williams, 112 Ill. 91; Hazle *v.* Bondy, 173 Ill. 302; Webster *v.* Fleming, 178 Ill. 140; Cotes *v.* Bennett, 183 Ill. 82; Harts *v.* Emery, 84 Ill. App. 317; 184 Ill. 560; Baer *v.* Knewitz, 39 Ill. App. 470; Ingram *v.* Ingram, 71 Ill. App. 497; 172 Ill. 287; Robinson *v.* Holmes, 75 Ill. App. 203; Boisot *v.* Chandler, 82 Ill. App. 261; Eggleston *v.* Morrison, 84 Ill. App. 625; Murray *v.* Emery, 85 Ill. App. 348; 58 N. E. Rep. 327.

INDIANA. Day *v.* Patterson, 18 Ind. 114; McDill *v.* Gunn, 43 Ind. 315; Smith *v.* Ostermeyer, 68 Ind. 432; Rick *v.* Hoffman, 69 Ind. 137; Carnahan *v.* Tousey, 93 Ind. 561; Stanton *v.* Kenrick, 135 Ind. 382; Berkshire L. I. Co. *v.* Hutchings, 100 Ind. 496; Lowe *v.* Hamilton, 132 Ind. 406.

IOWA. Corbett *v.* Waterman, 11 Ia. 86; Moses *v.* Clerk, 12 Ia. 139; Thompson *v.* Bertram, 14 Ia. 476; Scott's Adm'r *v.* Gill, 19 Ia. 187; Bowen *v.* Kurtz, 37 Ia. 239; Ross *v.* Kennison, 38 Ia. 396; Lamb *v.* Tucker, 42 Ia. 118; Luney *v.* Mead, 60 Ia. 469; Beeson *v.* Green, 103 Ia. 406.

KANSAS. Anthony *v.* Herman, 14 Kan. 494; Schmucker *v.* Sibert, 18 Kan. 104; Rickman *v.* Miller, 39 Kan. 362; Searing *v.* Benton, 41 Kan. 758; Anthony *v.* Mott, 61 Pac. Rep. 509.

LOUISIANA. Ferguson's Succession, 17 La. Ann. 255; Vinet *v.* Bres, 48 La. Ann. 1254.

MINNESOTA. Jordan *v.* White, 20 Minn. 91; Follansbee *v.* Johnson, 28 Minn. 311; Lahmers *v.* Schmidt, 35 Minn. 434; Scanlan *v.* Grimmer, 71 Minn. 351.

MISSISSIPI. Vigniau *v.* Ruffins, 1 Miss. 312; Lee *v.* Newman, 55 Miss. 365.

MISSOURI. Belt *v.* McLaughlin, 12 Mo. 433; Cress *v.* Blodgett, 64 Mo. 449; Heim *v.* Vogel, 69 Mo. 529; Fitzgerald *v.* Barker, 4 Mo. App. 105; 70 Mo. 685; 13 Mo. App. 192; 85 Mo. 13; 96 Mo. 661; Nelson *v.* Brown, 140 Mo. 580; Pratt *v.* Conway, 148 Mo. 291; Saunders *v.* McClintock, 46 Mo. App. 216; Commercial Bank *v.* Wood, 56 Mo. App. 214; Wayman *v.* Jones, 58 Mo. App. 313; Am. Nat. Bank *v.* Klock, 58 Mo. App. 335. Page *v.* Becker, 31 Mo. 466, *contra*, is overruled.

NEBRASKA. Cooper *v.* Foss, 15 Neb. 515; Bond *v.* Dolby, 17 Neb. 49; Rockwell *v.* Blair Bank, 31 Neb. 128; Hare *v.* Murphy, 45 Neb. 809.

NEVADA. Ruhling *v.* Hackett, 1 Nev. 360.

NEW YORK. Burr *v.* Beers, 24 N. Y. 178; Ricard *v.* Sanderson, 41 N. Y. 179; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Campbell *v.* Smith, 71 N. Y. 26; Parkinson *v.* Sherman, 74 N. Y. 88; Thayer *v.* Marsh, 75 N. Y. 340; Ayers *v.* Dixon, 78 N. Y. 318, 323; Judson *v.* Dada, 79 N. Y. 373; Hand *v.* Kennedy, 83 N. Y. 149; Root *v.* Wright, 84 N. Y. 72; Gifford *v.* Corrigan, 117 N. Y. 257; New York L. I. Co. *v.* Aitkin, 125 N. Y. 660; Wager *v.* Link, 134 N. Y.

gagees to sue in equity those who had assumed an obligation to pay the mortgage, while no such attempt was made with other debts. The earlier cases were in New York, and the result of them is thus summarized in a later decision which first extended the mortgagee's right to a direct action at law.

"If the plaintiff had sought to foreclose the mortgages in question and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects." [7]

The earlier New York doctrine has had considerable following in other jurisdictions. Alabama,[8] California,[9] Connecticut,[10] Indiana,[11]

122; 150 N. Y. 549; Blass *v.* Terry, 156 N. Y. 122; Hyde *v.* Miller, 168 N. Y. 590; Howard *v.* Robbins, 67 N. Y. App. Div. 245; 170 N. Y. 498; Rush *v.* Dilks, 43 Hun, 282. But see cases cited *infra*, n. 7.

North Dakota. See Moore *v.* Booker, 4 N. D. 543.

Ohio. Thompson *v.* Thompson, 4 Ohio St. 333, 353; Brewer *v.* Maurer, 38 Ohio St. 543; Society of Friends *v.* Haines, 47 Ohio St. 423; Pendery *v.* Allen, 50 Ohio St. 121.

Oregon. Windle *v.* Hughes, 40 Oreg. 1.

Pennsylvania. Hoff's App., 24 Pa. 200; Lenning's Est., 52 Pa. 135, 139; Merriman *v.* Moore, 90 Pa. 78; Blood *v.* Crew Levick Co., 177 Pa. 606; Wunderlich *v.* Sadler, 189 Pa. 469, 470.

Rhode Island. Urquhart *v.* Brayton, 12 R. I. 169; Mechanics' Savings Bank *v.* Goff, 13 R. I. 569.

South Dakota. Granger *v.* Roll, 6 S. D. 611; Miller *v.* Kennedy, 12 S. D. 478, 481; Hull *v.* Hayward, 13 S. D. 291, 295; Connor *v.* Jones, 72 N. W. Rep. 463.

Tennessee. Moore *v.* Stovall, 2 Lea, 543.

Texas. McCown *v.* Schrimpf, 21 Tex. 22; Huffman *v.* Western Mortgage Co., 13 Tex. Civ. App. 169.

Utah. Clark *v.* Fisk, 9 Utah, 94; Thompson *v.* Cheesman, 15 Utah, 43; McKay *v.* Ward, 20 Utah, 149.

Washington. Ordway *v.* Downey, 18 Wash. 412; Ver Planck *v.* Lee, 19 Wash. 492.

Wisconsin. Bishop *v.* Douglas, 25 Wis. 696; Kollock *v.* Parcher, 52 Wis. 393; Palmeter *v.* Carey, 63 Wis. 426; Enos *v.* Sanger, 96 Wis. 150; Morgan *v.* South Milwaukee Co., 97 Wis. 275; Stites *v.* Thompson, 98 Wis. 329.

[7] Burr *v.* Beers, 24 N. Y. 178, *per* Denio, J., citing Curtis *v.* Tyler, 9 Paige, 432; Halsey *v.* Reed, 9 Paige, 446; March *v.* Pike, 10 Paige, 595; King *v.* Whitely, 10 Paige, 465; Blyer *v.* Monholland, 2 Sandf. Ch. 478; Vail *v.* Foster, 4 N. Y. 312; Trotter *v.* Hughes, 12 N. Y. 74; Belmont *v.* Coman, 22 N. Y. 438. See also Wager *v.* Link, 150 N. Y. 549.

[8] Young *v.* Hawkins, 74 Ala. 370.

[9] Williams *v.* Naftzger, 103 Cal. 438; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Tulare County Bank *v.* Madden, 109 Cal. 312; Hopkins *v.* Warner, 109 Cal. 133. In California by statute an independent action cannot be maintained even against the mortgagor on a debt secured by mortgage. Code Civ. Proc., § 720. The mortgaged property must first be exhausted. Stockton Saving & Loan Soc. *v.* Harrold, 127 Cal. 612, 617.

[10] Bassett *v.* Bradley, 48 Conn. 224. See also Gen. Stat., § 983; Morgan *v.* Randolph-Clowes Co., 73 Conn. 396, 398.

[11] See cases cited *supra*, n. 6.

Maryland,[12] Michigan,[13] New Jersey,[14] North Carolina,[15] North Dakota,[16] Vermont,[17] Virginia,[18] and the United States Supreme Court[19] have adopted it. The phrase commonly used is that the mortgagee is "subrogated" to the rights of the mortgagor, who is the promisee. The use of the word "subrogation" is not wholly fortunate. It suggests analogies which do not exist, with the position of a surety who has paid the debt. In fact, it is merely the application by a court of equity of property of a debtor, the mortgagor, to the payment of the debt; and whatever terminology is used there is no doubt that this is substantially the meaning of the courts which have followed the early New York decisions.

Mortgagor should be party to the suit. Even courts which derive the right of the mortgagee to sue the grantee from his right to enforce the mortgagor's rights, too frequently allow the suit to be maintained without joinder of the mortgagor. The essential reason why the proceeding should be in equity is because the mortgagor ought to be joined, since it is his property—that is, a promise to him—of which the plaintiff is seeking to avail himself, and that property should not be taken without giving the owner his day in court. Moreover, it is unfair to the grantee to charge him at the suit of the mortgagee unless at the same time all claim against him on the part of the mortgagor is extinguished. This cannot be judicially determined unless the mortgagor is joined.[20]

[12] George *v.* Andrews, 60 Md. 26; Chilton *v.* Brooks, 72 Md. 554; Stokes *v.* Detrick, 75 Md. 256.

[13] Crawford *v.* Edwards, 33 Mich. 354; Miller *v.* Thompson, 34 Mich. 10. And see *supra*, p. 260, n. 3.

[14] Klapworth *v.* Dressler, 13 N. J. Eq. 62; Pruden *v.* Williams, 26 N. J. Eq. 210; Crowell *v.* Currier, 27 N. J. Eq. 152, 650; Wise *v.* Fuller, 29 N. J. Eq. 257; Green *v.* Stone, 54 N. J. Eq. 387; Whittaker *v.* Belvidere Co., 55 N. J. Eq. 674, 688.

[15] Woodcock *v.* Bostic, 118 N. C. 822.

[16] Moore *v.* Booker, 4 N. Dak. 543.

[17] Davis *v.* Hulett, 58 Vt. 90; Hodges *v.* Phelps, 65 Vt. 303.

[18] Willard *v.* Worsham, 76 Va. 392; Osborne *v.* Cabell, 77 Va. 462; Francisco *v.* Shelton, 85 Va. 779; Fisher *v.* White, 94 Va. 370; Ellett *v.* McGhee, 94 Va. 377.

[19] Keller *v.* Ashford, 133 U. S. 610; Willard *v.* Wood, 135 U. S. 309, 314. See also Winters *v.* Hub Mining Co., 57 Fed. Rep. 287. But in a case arising under the Arizona Code, which assimilates legal and equitable procedure, a direct action was allowed against the grantee in Johns *v.* Wilson, 180 U. S. 440.

[20] In Keller *v.* Ashford, 133 U. S. 610, 626, the court noticed the question and disposed of it thus: "Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief." See also Miller *v.* Thompson, 34 Mich. 10; Pruden *v.* Williams, 26 N. J. Eq. 210.

Successive purchases of mortgaged property. It frequently happens that several grantees successively buy the premises and assume payment of the mortgage. It is rightly held that the last grantee can be charged as well as the immediate grantee of the mortgagor. The same reasoning which justifies charging the first grantee through his obligation to the mortgagee's debtor requires the application of the obligation of the second grantee to the first grantee in order to satisfy the obligation of the latter to the mortgagor, and so on.[21]

Moreover, all who have assumed the mortgage may be charged though they have parted with the premises.[22] They have made a valid contract to pay the mortgage, which they cannot abrogate by selling the premises, though they may get such protection as the promise of their grantee to assume the mortgage can give. As between the grantor and grantee, the latter becomes principal debtor and the former a surety. Accordingly, if the mortgagee gives time to the grantee, he forfeits his right to assert a claim against the grantor.[23] The doctrine would be more exactly expressed if it were said that the mortgagee forfeited his right to collect his claim against the mortgagor out of any property other than the promise of the grantee.

[21] See *e. g.*, Flint *v.* Cadenasso, 64 Cal. 83; Ingram *v.* Ingram, 71 Ill. App. 497, 172 Ill. 287; Rick *v.* Hoffman, 69 Ind. 137; Carnahan *v.* Tousey, 93 Ind. 561; Corning *v.* Burton, 102 Mich. 86; Gifford *v.* Corrigan, 117 N. Y. 257.

[22] Ingram *v.* Ingram, 71 Ill. App. 497, 172 Ill. 287; Carnahan *v.* Tousey, 93 Ind. 561; Corning *v.* Burton, 102 Mich. 86; Hyde *v.* Miller, 168 N. Y. 590.

[23] Union Life Ins. Co. *v.* Hanford, 143 U. S. 187; Union Stove Works *v.* Caswell, 48 Kan. 689; George *v.* Andrews, 60 Md. 26; Chilton *v.* Brooks, 72 Md. 554; Metz *v.* Todd, 36 Mich. 473; Dedrick *v.* Blyker, 85 Mich. 475; Commercial Bank *v.* Wood, 56 Mo. App. 214; Wayman *v.* Jones, 58 Mo. App. 313; Nelson *v.* Brown, 140 Mo. 580; Merriam *v.* Miles, 54 Neb. 566; Calvo *v.* Davies, 73 N. Y. 211; Paine *v.* Jones, 14 Hun, 577; Jester *v.* Sterling, 25 Hun, 344; Fish *v.* Hayward, 28 Hun, 456; Dillaway *v.* Peterson, 11 S. Dak. 210; Miller *v.* Kennedy, 12 S. Dak. 478; Hull *v.* Hayward, 13 S. Dak. 291; Schroeder *v.* Kinney, 15 Utah, 462. See also Hodges *v.* Elyton Co., 109 Ala. 617; Home Nat. Bank *v.* Waterman's Est., 134 Ill. 461. *Contra*, Shepherd *v.* May, 115 U. S. 505; Keller *v.* Ashford, 133 U. S. 610, 625 (but see Union Ins. Co. *v.* Hanford, 143 U. S. 187); Corbett *v.* Waterman, 11 Ia. 86; James *v.* Day, 37 Ia. 164; Connecticut Mut. Life Ins. Co. *v.* Mayer, 8 Mo. App. 18 (overruled). See also Ridgely *v.* Robertson, 67 Mo. App. 45; Aldous *v.* Hicks, 21 Ont. 95. Similarly if a grantee who takes subject to a mortgage, but does not assume payment of it, is given time, the mortgagor is discharged to the extent of the value of the mortgaged property which is the principal debtor. Travers *v.* Dorr, 60 Minn. 173; Murray *v.* Marshall, 94 N. Y. 611; Antisdel *v.* Williamson, 165 N. Y. 372, 375; Bunnell *v.* Carter, 14 Utah, 100. But see *contra*, Chilton *v.* Brooks, 72 Md. 554; and the decisions cited above which hold that the mortgagor is not discharged even where the grantee has assumed payment of the mortgage.

In Keller *v.* Lee, 66 N. Y. App. Div. 184, it was held that a grantor who on default in the payment of the mortgage had paid and discharged it, and then sued the grantee who had assumed the payment of it, no recovery could

A curious situation arises when a mortgagor transfers the premises to one who, though taking them subject to the mortgage, does not agree to pay it, and this grantee thereafter transfers the premises to another who by the deed assumes and agrees to pay the mortgage. The promisee has no interest in the performance of this promise, since he is not personally liable for the debt, and he is no longer the owner of the premises. The only intelligent object that can be suggested for requiring the promise from the grantee is a wish to benefit the mortgagee. In that view the case would fall within the first type of promises for the benefit of a third person and the mortgagee would be the sole beneficiary. But it is hard to suppose that the promisee had any such intention. The object in fact of such a stipulation, if its insertion is not altogether a mistake, is doubtless to guard against a supposed or possible liability on the part of the promisee. The decisions which generally deny the mortgagee a right to recover in such a case, therefore, seem sound.[24]

Assumption of mortgage by second mortgagee. Another peculiar situation arises where a mortgagor makes a second mortgage and the second mortgagee agrees to pay off the first mortgage. Subsequently the first mortgagee endeavors to take advantage of this promise. He is denied the right and justly. In the ordinary case where a purchaser assumes and agrees to pay a mortgage he has received a *quid pro quo* for the amount of the mortgage. He owes the amount of the mortgage to some one. In the case under consideration, however, the second mortgagee does not owe the amount of the first mortgage. He has agreed virtually to lend the amount of it to the mortgagor by paying the first mortgagee. A promise to lend a debtor money, though on technically good consideration, is not one which a court

be had because the land was the primary fund and the grantee merely a surety as compared with the land.

[24] Ward *v.* De Oca, 120 Cal. 102; Morris *v.* Mix, 4 Kan. App. 654; Brown *v.* Stillman, 43 Minn. 126; Nelson *v.* Rogers, 47 Minn. 103; Crone *v.* Stinde, 68 Mo. App. 122 (reversed); Hicks *v.* Hamilton, 144 Mo. 495 (overruled); Harberg *v.* Arnold, 78 Mo. App. 237 (overruled); Wise *v.* Fuller, 29 N. J. Eq. 257, 266; Norwood *v.* De Hart, 30 N. J. Eq. 412; Mount *v.* Van Ness, 33 N. J. Eq. 262, 265; Eakin *v.* Shultz, 47 Atl. Rep. 274 (N. J. Eq.); King *v.* Whitely 10 Paige, 465; Trotter *v.* Hughes, 12 N. Y. 74; Vrooman *v.* Turner, 69 N. Y. 280; Smith *v.* Cross, 16 Hun, 487; Young Men's Assoc. *v.* Croft, 34 Oreg. 106; Portland Trust Co. *v.* Nunn, 34 Oreg. 166; Osborne *v.* Cabell, 77 Va. 462, *semble.*

Recovery was allowed in Cobb *v.* Fishel, 62 Pac. Rep. 625 (Col. App.); Dean *v.* Walker. 107 Ill. 541; Marble Bank *v.* Mesarvey, 101 Ia. 285; Heim *v.* Vogel, 69 Mo. 529; Crone *v.* Stinde, 156 Mo. 262: Hare *v.* Murphy, 45 Neb. 809; Brewer *v.* Maurer, 38 Ohio St. 543; Merriman *v.* Moore, 90 Pa. 78; McKay *v.* Ward, 20 Utah, 149; Enos *v.* Sanger, 96 Wis. 150.

of equity should enforce for the benefit of a creditor. Nor can breach of the promise by the second mortgagee be ground for substantial damages. The only consequence of the breach is that the debtor continues liable to the first mortgagee instead of to the second mortgagee for the amount of the first mortgage. As the rights of the first mortgagee against the promisor cannot exceed the rights of the promisee there is no asset of value applicable to the mortgage. As the court said in the first case that presented these facts, "if the action were allowed, any one who promised to advance money to another to pay his debts would be liable to an action by the creditor."[25]

Assumption of liabilities of outgoing partner. Another class of promises to satisfy a debtor's liability deserves particular mention—the promise of an individual or firm to pay the liabilities of an outgoing partner. It is in this kind of case that the greatest difficulty arises in determining whether there is a novation. On principle it is clear that to work a novation the promisor must make an agreement with the creditor to become directly liable to him in consideration that the creditor will accept him as debtor in place of the original debtor. It is not enough, therefore, for the creditor to learn of the promise to the original debtor and express assent to that arrangement. Such assent does not necessarily include an agreement to give up the claim against the original debtor. Moreover, the promisor must assent to enter into a contractual relation directly with the creditor. By a curious freak the law of New York[26] does not allow the creditor a remedy on a promise made to his debtor in this class of cases. The law of Pennsylvania,[27] on the other hand, though not generally adopting the doctrine of *Lawrence* v. *Fox,* makes an exception here in favor

[25] Garnsey *v.* Rogers, 47 N. Y. 233. The further distinction suggested by the court that the promise was not made for the benefit of the mortgagee amounts to nothing. It is true, but it is also true in any case where a grantee agrees to pay a mortgage.

The case has been followed several times, and it has been held imaterial that the deed creating the second mortgage is on its face absolute. Pardee *v.* Treat, 82 N. Y. 385; Roe *v.* Barker, 82 N. Y. 431; Root *v.* Wright, 84 N. Y. 72; Cole *v.* Cole, 110 N. Y. 630; Smith *v.* Cross, 16 Hun, 487.

A similar principle was applied in favor of a grantee who was a bare trustee in Gifford *v.* Corrigan, 105 N. Y. 223.

[26] Merrill *v.* Green, 55 N. Y. 270; Wheat *v.* Rice, 97 N. Y. 296; Serviss *v.* McDonnell, 107 N. Y. 260; Corner *v.* Mackey, 147 N. Y. 574; Edick *v.* Green, 38 Hun, 202. But see Claflin *v.* Ostrom, 54 N. Y. 581; Arnold *v.* Nichols, 64 N. Y. 117; Hannigan *v.* Allen, 127 N. Y. 639.

[27] Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens 106 Pa. 173; Adams *v.* Kuehn, 119 Pa. 76, 86; Delp *v.* Brewing Co., 123 Pa. 142. But it seems to be essential that property shall have been transferred when the promise is made. Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470.

of the creditor. In fact, there is no reason for discriminating for or against the creditor, and so the matter is generally treated.[28]

Right of holder of check against bank. On the same principle the holder of a check has sometimes been given a right against the bank on which the check was drawn.[29] The common argument in favor of such a right is that a check is an equitable assignment of part of the fund in the bank.[30] If it be granted that this is unsound, that a check is in its nature an order, not an assignment, the further argument remains that the bank has promised its depositor to pay the latter's checks and that the holder of a check may sue upon this promise. There seems no valid distinction between such a case and *Lawrence* v. *Fox*. The bank in effect promises to pay such debtors of the depositor as the latter indicates, upon presentation of a check in proper form. No distinction can be made because the creditor to be paid is indefinite at the time the promise was made. Such is the fact in many cases, and it is rightly regarded as immaterial.[31]

Statute of Limitations. The nature of a creditor's right against one who has promised the debtor to pay the debt is involved in determining when the statute of limitations bars the creditor's action. On principle the creditor must have a claim that has not been barred against the original debtor, and the latter must also have such a claim against the promisor. But courts which allow a direct right to the creditor against the promisor hold that though the creditor's original claim is barred he may nevertheless enforce a claim against the promisor if the statutory period has not run since the debt was assumed.[32]

[28] See *e. g.*, allowing the action, Maxfield *v.* Schwartz, 43 Minn. 221; Lovejoy *v.* Howe, 55 Minn. 353; Ellis *v.* Harrison, 104 Mo. 270; Shamp *v.* Meyer, 20 Neb. 223; Merriman *v.* Social Mfg. Co., 12 R. I. 175; Spann *v.* Cochran, 63 Tex. 240; denying the action, Morgan *v.* Randolph-Clowes Co., 73 Conn. 396; Ayres *v.* Gallup, 44 Mich. 13.

[29] Harrison *v.* Wright, 100 Ind. 515, 533; Hawley *v.* Exchange Bank, 97 Ia. 187; Harrison *v.* Simpson, 17 Kan. 508; Chanute Bank *v.* Crowell, 6 Kan. App. 533; Fonner *v.* Smith, 31 Neb. 107. *Conf.* Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82. See Daniel on Negotiable Instruments, 4th ed., § 1637 *et seq.*

[30] Ibid.

[31] Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Morgan *v.* Overman Co., 37 Cal. 534; Whitney *v.* Am. Ins. Co., 127 Cal. 464; Williamson Stewart Co. *v.* Seaman, 29 Ill. App. 68; Brenner *v.* Luth, 28 Kan. 581; Bell *v.* Mendenhall, 71 Minn. 330; State *v.* St. Louis & S. F. Ry. Co., 125 Mo. 596, 615; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 56; Lenz *v.* Chicago, etc., Ry. Co., 111 Wis. 198. Many other decisions might be added. Dow *v.* Clark, 7 Gray, 198, decided when the Massachusetts court was disposed to restrict the creditor's right of action, is the only contrary decision.

[32] Daniels *v.* Johnson, 129 Cal. 415; Kuhl *v.* Chicago & N. W. R. R., 101

Rights of the promisee. It is when the rights of the promisee are considered that the difficulties in the American law become apparent. It seems obviously unfair to subject the promisor to suits both by the creditor and the promisee, and on the other hand the doctrine that a promisee in a contract made upon good consideration furnished by him cannot sue upon it is hard to reconcile with principle. In cases where the third person is the sole beneficiary the injury to the promisee in depriving him of a right of action is purely technical, because breach of the promise causes him no pecuniary damage; but in the case of a promise to pay a debt the promisee is vitally interested in the performance of the promise. The results reached by the courts are various. In Alabama, in a case of the latter type, the court said: "The promise enured to the benefit of the creditors and *prima facie* they alone can claim payment or sue for the breach of the agreement," [33] and in Maine, it was said in an early case, "the promisee can recover only nominal damages since the defendant may be liable to the beneficiary;" [34] but this case has recently been overruled.[35] In Nebraska the consignor cannot sue on a bill of lading, though the contract is with him, in the absence of proof that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.[36] In Nevada, also, it was held that a promisee without pecuniary interest in the performance of a promise could not sue upon it.[37] In Rhode Island the rule is the same.[38] In New York if the third person can sue, it seems the promisee cannot. A more complete somersault than the New York court has made on this subject when dealing with mortgages cannot be imagined. In the days before *Lawrence* v. *Fox* was decided it had been held that the mortgagee, though not entitled to sue directly a grantee who had assumed the mortgage, might be "subrogated" to the right of the mortgagor—the promisee. Now the court holds that the promisee cannot sue, but upon paying the mortgage debt he is entitled to be

Wis. 42. See also Roberts *v.* Fitzallen, 120 Cal. 482; Robertson *v.* Stuhlmiller, 93 Ia. 326.

33 Dimmick *v.* Register, 92 Ala. 458, 460; North Alabama Development Co. *v.* Short, 101 Ala. 333.

34 Burbank *v.* Gould, 15 Me. 118.

35 Baldwin *v.* Emery, 89 Me. 496. In Martin *v.* Ætna Ins. Co., 73 Me. 25, 28, it was held in a case of the sole beneficiary type that the promisee might sue as trustee for the beneficiary.

36 Union Pacific Ry. Co. *v.* Metcalf, 50 Neb. 452. See *contra*, Snider *v.* Adams Express Co., 77 Mo. 523, where consignor was allowed to recover as trustee for consignee. See 4 Elliott on Railroads, § 1692.

37 Ferris *v.* Carson Water Co., 16 Nev. 44.

38 Adams *v.* Union R. R. Co., 21 R. I. 134.

subrogated to the right of the mortgagee to sue upon this promise.[39] Ohio has recently reached the same conclusion,[40] though it is in conflict with an earlier Ohio decision which was not cited.[41]

Ground for denying recovery by the promisee. The idea behind the cases which deny the promisee a right of action is that by the assent of the third person a novation is created;[42] but as has been already shown, a contract with a debtor to pay his debt, even though the creditor assents, does not amount to a novation.

Recovery by the promisee generally allowed. Whatever the hardship upon the promisor may be in being liable to two persons when he promised but one, most courts have found it the simpler alternative, a recovery by either party being a bar to an action by the other.[43] In mortgage cases especially the promisor may thus find himself in a difficult position between the mortgagee and the promisee, the

[39] Miller *v.* Winchell, 70 N. Y. 437, 439; Ayers *v.* Dixon, 78 N. Y. 318. See also Keller *v.* Lee, 66 N. Y. App. Div. 184. For the earlier New York decisions, see *ante*, p. 262, n. 7. In Claflin *v.* Ostrom, 54 N. Y. 581, 584, it was held that the promisee or his assignee might sue upon a promise to assume the debts of a firm, and in Ward *v.* Cowdrey, 51 Hun, 641; affd., 119 N. Y. 614, it was held that a promisee might sue in the absence of proof that the third person knew of or acquiesced in the arrangement. The beneficiary in these cases could not have sued.

[40] Poe *v.* Dixon, 60 Ohio St. 124. Compare Blood *v.* Crew Levick Co., 171 Pa. 334, 337. The court there said: "As to the amount still due and unpaid on the mortgages . . . the plaintiff cannot recover to her own use until she has been compelled to make payment and then only to the extent of payments actually made. An action might be maintained by the holder of the mortgage in the name of the covenantee for his use upon the express covenant to pay contained in the deed; and I see no reason why an action might not be brought by a covenantee to recover damages sustained by reason of the breach."

[41] Wilson *v.* Stilwell, 9 Ohio St. 467. A retiring partner, who had received a promise from the remaining partner that the latter would pay the firm debts, was held entitled to sue upon the promise without having first paid the debts himself.

[42] See also Brewer *v.* Dyer, 7 Cush. 337, 341. The promisee "might likewise have a remedy on the contract in case the plaintiff should not elect to adopt it."

[43] Union Mut. L. I. Co. *v.* Hanford, 143 U. S. 187; Steene *v.* Aylesworth, 18 Conn. 244, 252; Tinkler *v.* Swaynie, 71 Ind. 562; Rodenbarger *v.* Bramblett, 78 Ind. 213; Foster *v.* Marsh, 25 Ia. 300; Smith *v.* Smith, 5 Bush, 625, 632; Baldwin *v.* Emery, 89 Me. 496; Rogers *v.* Gosnell, 51 Mo. 466, 469; Snider *v.* Adams Express Co., 77 Mo. 523; Beardslee *v.* Morgner, 4 Mo. App. 139, 143; Megher *v.* Stewart, 6 Mo. App. 139, 143; Weinreich *v.* Weinreich, 18 Mo. App. 364, 372; Anthony *v.* German Am. Ins. Co., 48 Mo. App. 65; Am. Nat. Bank *v.* Klock, 58 Mo. App. 335; Gunnell *v.* Emerson, 73 Mo. App. 291 (*conf.* Bethany *v.* Howard, 149 Mo. 504); Strong *v.* Kamm, 13 Oreg. 172; Edmundson *v.* Penny, 1 Barr, 334; Hoff's Appeal, 24 Pa. 200; Blood *v.* Crew Levick Co., 171 Pa. 334; Callender *v.* Edmison, 8 S. Dak. 81; Hull *v.* Hayward, 13 S. Dak. 291; Snyder *v.* Summers, 1 Lea, 534; Jones *v.* Thomas, 21 Gratt. 96. See also authorities in next note.

grantor of the premises. If the promisor fails to keep his promise to pay the debt, he is liable to the promisee to the full amount of the debt;[44] and unless the promise can bear the construction of a promise to indemnify against loss, this seems sound. But the recovery of the promisee cannot affect the mortgagee's rights against the property, and if he forecloses the mortgage, the promisor loses the property and is obliged to pay the debt also. The proper relief for the promisor is an application to equity when he is sued by the promisee, for an injunction against the action on terms of payment of the debt to the mortgagee. Equity should grant such an injunction, for it does not injure the promisee, since the terms imposed amount to a decree of specific performance of the promise.[45] It seems also that if the mortgage has been foreclosed and the mortgagee thereby paid and the promisee freed from liability as mortgagor, the promisor should be entitled to an injunction against the collection of any judgment of the promisee against him, or if a judgment has already been collected, to an action on principles of *quasi* contract to recover back the amount collected less costs and any payment or remaining liability of the promisee to the mortgagee.

Creditor's right to sue both debtor and new promisor. Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue

[44] Meyer *v.* Hartman, 72 Ill. 442; Stout *v.* Folger, 34 Ia. 71; Furnas *v.* Durgin, 119 Mass. 500; Locke *v.* Homer, 131 Mass. 93; Walton *v.* Ruggles, 180 Mass. 24; Strohauer *v.* Voltez, 42 Mich. 444; Dorrington *v.* Minnick, 15 Neb. 397; Rawson *v.* Copeland, 2 Sandf. Ch. 251; Rector *v.* Higgins, 48 N. Y 532; Sage *v.* Truslow, 88 N. Y. 240; Wilson *v.* Stilwell, 9 Ohio St. 468; Callender *v.* Edmison, 8 S. Dak. 81; Sedgwick on Damages, § 789; Sutherland on Damages, § 765. And it makes no difference that the promisor has sold the land again. Reed *v.* Paul, 131 Mass. 129. But if the mortgagee has been paid from sale of the land the promisee can recover only nominal damages. Muhlig *v.* Fiske, 131 Mass. 110; Williams *v.* Fowler, 132 Mass. 385. See also Wilson *v.* Bryant, 134 Mass. 291; Keller *v.* Lee, 66 N. Y. App. Div. 184.

[45] Compare Ford *v.* Bell, 35 Ga. 258. In that case the mortgagee sued the mortgagor. The latter having sold the premises to a third party, who had agreed to pay the mortgage, brought a bill in equity joining both the mortgagee and the purchaser, praying that the latter be compelled to pay the debt. The bill was sustained. See also Wilson *v.* Stilwell, 9 Ohio St. 467.

the new promisor.[46] The more common doctrine, however, allows the creditor a right both against the original debtor and the new promisor.[47]

Defenses good against the promisee good against the creditor. Another question concerns the admissibility of certain defences by the promisor. When sued by the third person, the promisor may rely on facts showing that the promisee could not enforce the contract. Is the third person barred because the promisee would be? It is necessary to observe some distinctions here. The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract no rights can arise in favor of any one. Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise. If that is in terms conditional, no one can acquire any rights under it unless the condition happens.[48] Further, if there is a contract valid at law, but subject

[46] Henry *v.* Murphy, 54 Ala. 246; Hall *v.* Alford, 49 S. W. Rep. 444 (Ky.); Floyd *v.* Ort, 20 Kan. 162; Searing *v.* Benton, 41 Kan. 758 (compare Kansas Pac. Ry. Co. *v.* Hopkins, 18 Kan. 499, and Plano Mfg. Co. *v.* Burrows, 40 Kan. 361. In the latter case the court held that "no one has the right to take the objection that the old debt is not extinguished, but the old debtor, and probably even he would not have such right"); Bohanan *v.* Pope, 42 Me. 93; Brewer *v.* Dyer, 7 Cush. 339; Warren *v.* Batchelder, 16 N. H. 580; Wood *v.* Moriarty, 15 R. I. 518, 522; Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556.

In no case, however, has a court held that a mortgagee by seeking to recover against one who had assumed a mortgage released the mortgagor; and in Rouse *v.* Bartholomew, 51 Kan. 425, the Kansas court held the mortgagor was not released though the decision is inconsistent in principle with the previous decisions of the court as to other debts.

In Young *v.* Hawkins, 74 Ala. 370, it was held that recovering judgment against the original debtor in ignorance that a new promisor had agreed to pay the debt did not bar a subsequent recovery against the latter. To make a binding election it was said knowledge of the facts is essential.

[47] Hopkinson *v.* Warner, 109 Cal. 133; South Side Assoc. *v.* Cutler Co., 64 Ind. 560; Davis *v.* Hardy, 76 Ind. 272; Rodenbarger *v.* Bramblett, 78 Ind. 213; Stanton *v.* Kenrick, 135 Ind. 382, 389; Rothermel *v.* Bell & Zoller Co., 79 Ill. App. 667; Wickham *v.* Hyde Park Assoc., 80 Ill. App. 523; Rouse *v.* Bartholomew, 51 Kan. 425; Davis *v.* Nat. Bank of Commerce, 45 Neb. 589; Fischer *v.* Hope Mut. Life Ins. Co., 69 N. Y. 161; Poe *v.* Dixon, 60 Ohio St. 124, 129; Feldman *v.* McGuire, 34 Oreg. 309, 313.

[48] Russell *v.* Western Union Tel. Co., 57 Kan. 230; Fenn *v.* Union Co., 48 La. Ann. 541; Gill *v.* Weller, 52 Md. 8. But see Orman *v.* North Alabama Co., 53 Fed. Rep. 469, 55 Fed. Rep. 18; East *v.* New Orleans Ins. Assoc., 76 Miss. 697; Oakland Ins. Co. *v.* Bank of Commerce, 47 Neb. 717. In the first case the person to whom a telegram was sent, who was treated as the beneficiary of the contract with the telegraph company, was held subject to the requirement in that contract that the claim must be presented within sixty days. In the last two cases a mortgagee was allowed to sue on policies of insurance taken out by the mortgagor "loss payable to mortgagee" though the mortgagor had acted in such a way as would avoid the policy as to him.

to some equitable defence—as fraud,[49] mistake,[50] or failure of consideration[51]—the defence may be set up against the third person. If the case is a promise to pay a debt or discharge a duty of the promisee, the rights of the third person can only be derived through the promisee, and whatever defence affects the latter affects the creditor. In the case of a promise for the sole benefit of a third person, the beneficiary may indeed be regarded as having a direct right, but he is in the position of a donee. It is no more equitable for a sole beneficiary, though himself innocent to try to enforce a promise procured by the fraud of another, than for the donee of trust property to insist on his legal title as against the *cestui que trust.*

Non-performance by promisee a good defence. A more difficult case arises where the defence does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter-promise made by him, or discharge by the promisee by release or rescission. The defence of non-performance should be available against the third person whether he is a sole beneficiary or a creditor of the promisee. The defence is frequently called failure of consideration. This is technically inaccurate, since the consideration for the promise was the counter-promise, and that has not failed; but as the substantial matter the parties had

[49] Green *v.* Turner, 80 Fed. Rep. 41, 86 Fed. Rep. 837; Benedict *v.* Hunt, 32 Ia. 27; Maxfield *v.* Schwartz, 45 Minn. 150; Ellis *v.* Harrison, 104 Me. 270, 278; Saunders *v.* McClintock, 46 Mo. App. 216; American Nat. Bank *v.* Klock, 58 Mo. App. 335; Wise *v.* Fuller, 29 N. J. Eq. 257; Arnold *v.* Nichols, 64 N. Y. 117; Moore *v.* Ryder, 65 N. Y. 438; Trimble *v.* Strother, 25 Ohio St. 378; Osborne *v.* Cabell, 77 Va. 462. Fitzgerald *v.* Barker, 96 Mo. 661, and Klein *v.* Isaacs, 8 Mo. App. 568, to the contrary must be regarded either as overruled or distinguished on the ground that the plaintiff bought the note, payment of which was assumed, on the faith of the defendant's promise to pay it.

[50] Episcopal Mission *v.* Brown, 158 U. S. 222; Jones *v.* Higgins, 80 Ky. 409; Bogart *v.* Phillips, 112 Mich. 697; Rogers *v.* Castle, 51 Minn. 428; Gold *v.* Ogden, 61 Minn. 88; Bull *v.* Titsworth, 29 N. J. Eq. 73; Stevens Inst. *v.* Sheridan, 30 N. J. Eq. 23; O'Neill *v.* Clark, 33 N. J. Eq. 444; Green *v.* Stone, 54 N. J. Eq. 387; Crow *v.* Lewis, 95 N. Y. 423; Wheat *v.* Rice, 97 N. Y. 296.

[51] Clay *v.* Woodrum, 45 Kan. 116; Amonett *v.* Montague, 75 Mo. 43; Judson *v.* Dada, 79 N. Y. 373, 379; Osborne *v.* Cabell, 77 Va. 462.

Several decisions present the case of a purchaser with warranty of land subject to a mortgage, who has been evicted from the premises and is thereafter sued by the holder of the mortgage. The defense was held good in Dunning *v.* Leavitt, 85 N. Y. 30; Crow *v.* Lewis, 95 N. Y. 423; Gifford *v.* Father Matthew Society, 104 N. Y. 139. But see *contra*, Blood *v.* Crew Levick Co., 177 Pa. 606; Hayden *v.* Snow, 9 Biss. 511, 14 Fed. Rep. 70; s. c. *sub nom.* Hayden *v.* Devery, 3 Fed. Rep. 782. In the last case the decision was based on the fact that the plaintiff was a purchaser for value of the mortgage note after the defendant had assumed the mortgage. See also Knapp *v.* Connecticut Mut. L. I. Co., 85 Fed. Rep. 329; Connecticut Mut. L. I. Co. *v.* Knapp, 62 Minn. 405.

in mind was the performance of the promises the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had.[52]

Rescission or release. The commonest defence, that of discharge by rescission or release, is different. In the case of a sole beneficiary it is like the attempted revocation of a gift. The promisor for good consideration has given the beneficiary a right. Later he seeks to take it away by procuring the extinction of the promise. If it be admitted that the beneficiary has a direct right of his own, it ought not to be extinguished without his consent. The only question can be, when does the beneficiary's right arise—when the promise for his benefit was made or when he was notified of it or assented to it? for unless a right has vested in the beneficiary before the rescission or release he cannot object. The question is analogous to that arising upon a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee there seems no reason why his assent should not be presumed, unless and until he expresses dissent.[53] According to this view the sole beneficiary acquires a right immediately upon the making of the contract and any subsequent rescission is ineffectual. There is weighty authority in support of this view;[54] but in most jurisdictions the distinction has

[52] Episcopal Mission *v.* Brown, 158 U. S. 222; Pugh *v.* Barnes, 108 Ala. 167; Stuyvesant *v.* Western Mortgage Co., 22 Col. 28, 33; Miller *v.* Hughes, 95 Ia. 223. See also Willard *v.* Wood, 164 U. S. 502, 521; Loeb *v.* Willis, 100 N. Y. 231. But see apparently *contra*, Cress *v.* Blodgett, 64 Mo. 449; Commercial Bank *v.* Wood, 7 W. & S. 89; Fulmer *v.* Wightman, 87 Wis. 573. In Missouri and Nebraska it has been held that a surety for the promise of a contractor to a district or municipality to pay for his labor and materials is liable to workmen and materialmen in spite of the fact that the promisee, the district, or municipality has paid the contractor during the progress of the work to an amount not allowed by the contract. The Missouri decision relies on the fact that the plaintiffs had become creditors on the faith of the defendant's suretyship before the promisee had committed any breach of duty. The Nebraska decisions make no such distinction. School District *v.* Livers, 147 Mo. 580; Doll *v.* Crume, 41 Neb. 655; Kaufmann *v.* Cooper, 46 Neb. 644; King *v.* Murphy, 49 Neb. 670.

[53] Ames, Cas. Trusts, 2d ed., 232–234.

[54] Henderson *v.* McDonald, 84 Ind. 149, and Waterman *v.* Morgan, 114 Ind. 237; Thompson *v.* Gordon, 3 Strobh. 196; Tweeddale *v.* Tweeddale, 116 Wis. 517. See also Knowles *v.* Erwin, 43 Hun, 150; affd., 124 N. Y. 623. A few cases of the debtor and creditor type seem to hold a similar doctrine. Starbird *v.* Cranston, 24 Col. 20; Bay *v.* Williams, 112 Ill. 91; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Rogers *v.* Gosnell, 58 Mo. 589.

The almost universal doctrine that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently is in accord. The numerous cases are collected in 3 Am. & Eng. Cyc., 2d ed., 980.

not been clearly stated in the decisions between cases of sole beneficiary and cases of debtor and creditor. Most of the cases have been of the latter sort, and it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a rescission or release is operative.[55] In theory, however, in a case of debtor and creditor the situation is very different from that arising where the third person is a sole beneficiary. The creditor's right is purely derivative, and if the debtor no longer has a right against the promisor the creditor can have none. In one respect only has the creditor any right to object to a rescission or release. The promise to the debtor to pay the debt is a valuable right belonging to the debtor. Like his other property the debtor has no right to give it away if he thereby deprives himself of sufficient means to pay his debts. Even though insolvent, however, he has a right to change the form of his assets. Consequently to a rescission or release for adequate consideration paid to the debtor, the creditor should never have a right to object. A release or rescission by an insolvent debtor, without any consideration, or without adequate consideration, however, is a fraudulent conveyance. It is a gift of property by one whose circumstances do not justify him in giving, and the creditor may disregard the gift. Here, too, the knowledge of the promise by the third person or his assent thereto should make no difference. A promise to a debtor to pay his debt is a valuable asset whether the creditor knows of it or not, and the debtor, if in-

[55] Biddel *v.* Brizzolara, 64 Cal. 354; Merrick *v.* Giddings, 1 Mackey (D. C.), 394; Durham *v.* Bischof, 47 Ind. 211; Carnahan *v.* Tousey, 93 Ind. 561; Smith *v.* Flack, 95 Ind. 116, 120; Gilbert *v.* Sanderson, 56 Ia. 349; Cohrt *v.* Kock, 56 Ia. 658; Seiffert Lumber Co. *v.* Hartwell, 94 Ia. 576, 582: Dodge's Adm'r *v.* Moss, 82 Ky. 441; Mitchell *v.* Cooley, 5 Rob. 243; Cucullu *v.* Walker, 16 La. Ann. 198; Garnsey *v.* Rogers, 47 N. Y. 233, 242; Gifford *v.* Corrigan, 117 N. Y. 257; Seaman *v.* Hasbrouck, 35 Barb. 151; Holder *v.* Nat. Bank, 9 Hun, 108; affd., 73 N. Y. 599; Wilson *v.* Stilwell, 14 Ohio St. 464; Trimble *v.* Strother, 25 Ohio St. 378; Brewer *v.* Maurer, 38 Ohio St. 543; Emmitt *v.* Brophy, 42 Ohio St. 82; McCown *v.* Schrimpf, 21 Tex. 22; Huffman *v.* Western Mortgage Co., 13 Tex. Civ. App. 169; Clark *v.* Fisk, 9 Utah, 94; Bassett *v.* Hughes, 43 Wis. 319 (overruled by Tweeddale *v.* Tweeddale, 116 Wis. 517).

What is required in the way of assent or acting upon the promise is not defined. Doubtless in many jurisdictions if the third person had knowledge of the promise and made no objection he would be regarded as assenting. But in Crowell *v.* Currier, 27 N. J. Eq. 152 (s. c. on appeal *sub nom.* Crowell *v.* Hospital, 27 N. J. Eq. 650), it was held that rescission was permissible because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission; and in Wood *v.* Moriarty, 16 R. I. 201, a release by the promisee was held effectual, though the creditors had made a demand upon the promisor for the money, because the creditors "did not do or say anything inconsistent with their continuing to look to T. (the original debtor) for the debt."

solvent, has no right to dispose of it without receiving an adequate price for it.[56]

Another kind of defence to a promise to pay a debt has given rise to considerable litigation. May the promisor set up that the debtor did not owe the debt or that it was an illegal debt? The true answer to this question depends upon the true meaning in fact of the promise rather than upon any rule of law. If the promisor's agreement is to be construed as a promise to discharge whatever liability the promisee is under, the promisor must certainly be allowed to show that the promisee was under no liability. Thus one who in return for an assignment of property assumed all the grantor's debts would be allowed to dispute the validity of any debt. On the other hand, if the promise means that the promisor agrees to pay a sum of money to A., to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted to that amount or at all. The promisee has decided that question himself. Where the promise is to pay a specific debt, for example to assume a specific mortgage, this construction will generally be the true one. Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury[57] or other defences[58] of which the debtor might have availed himself.

[56] This analysis finds some support in the cases of Trustees *v.* Anderson, 30 N. J. Eq. 366; Youngs *v.* Trustees, 31 N. J. Eq. 290, and Willard *v.* Worsham, 76 Va. 392, where the validity of a release by the mortgagor of one who had purchased the equity of redemption from him and assumed the mortgage was made to depend on the solvency of the mortgagor.

[57] Millington *v.* Hill, 47 Ark. 301; People's Bank *v.* Collins, 27 Conn. 142; Henderson *v.* Bellew, 45 Ill. 322; Valentine *v.* Fish, 45 Ill. 462; Essley *v.* Sloan, 16 Ill. App. 63; Flanders *v.* Doyle, 16 Ill. App. 508; Cleaver *v.* Burcky, 17 Ill. App. 92; Stephens *v.* Muir, 8 Ind. 352; Spinney *v.* Miller, 114 Ia. 210; Hough *v.* Hersey, 36 Mo. 181; Log Cabin Assoc. *v.* Gross, 71 Md. 456; Scanlan *v.* Grimmer, 71 Minn. 351; Cramer *v.* Lepper, 26 Ohio St. 59; Jones *v.* Insurance Co., 40 Ohio St. 583; Spaulding *v.* Davis, 51 Vt. 77; Conover *v.* Hobart, 24 N. J. Eq. 120; Post *v.* Dart, 8 Paige, 639; Cole *v.* Savage, 10 Paige, 583; Root *v.* Wright, 21 Hun, 344; Sands *v.* Church, 6 N. Y. 347; Hartley *v.* Harrison, 24 N. Y. 170; Ritter *v.* Phillips, 53 N. Y. 586 (payment). But see Knickerbocker Life Ins. Co. *v.* Nelson, 78 N. Y. 137.

[58] Pope *v.* Porter, 33 Fed. Rep. 7 (informal execution); Kennedy *v.* Brown, 61 Ala. 296 (coverture); Gowans *v.* Pierce, 57 Kan. 180 (unauthorized signature to note); Bowser *v.* Patrick, (Ky.) 65 S. W. Rep. 824 (champerty); Cox *v.* Hoxie, 115 Mass. 120 (erroneous amount); Comstock *v.* Smith, 26 Mich. 306 (coverture); Miller *v.* Thompson, 34 Mich. 10 (invalid execution); Crawford *v.* Edwards, 33 Mich. 354 (failure of consideration); Lee *v.* Newman, 55 Miss. 365 (invalidity); Johnson *v.* Parmely, 14 Hun, 398 (payment); Ferris *v.* Cranford, 2 Den. 595 (payment); Horton *v.* Davis, 26 N. Y. 495 (want of record); Freeman *v.* Auld, 44 N. Y. 50 (failure of consideration); Parkinson *v.* Sherman, 74 N. Y. 88 (failure of consideration); Bennett *v.* Bates, 94 N. Y. 354, 370 (invalidity of mortgage). But see Goodman *v.* Randall, 44 Conn. 321.

All parties should joined. In dealing with any of these defences it is obvious that all three parties should have an opportunity of litigating the question since all are interested in it, and it is desirable to have all concluded by the judgment. If a creditor who sues the promisor and is met by the defence of fraud or mistake in the contract nevertheless prevails, but being unable to collect his judgment sues the original debtor, as he would be allowed to do in many jurisdictions, clearly the debtor cannot be concluded by the judgment in the first case and the creditor must try the same question again and perhaps with a different result.[59]

Contracts under seal. None of the earlier cases which allowed a right of action to one who was not a party to the contract related to contracts under seal, and where statutes have not taken away the importance of the distinction between sealed and parol contracts the rule that one who is not a party to a contract under seal cannot sue upon it is still applied to contracts to benefit or pay a debt to a third person.[60] But in some states the rules of the common law distinguishing contracts under seal from other written contracts have been abolished or diminished, so that it is not surprising that the distinction as to the right of a third person to sue has also been disregarded.[61]

[59] In Green *v.* Stone, 54 N. J. Eq. 387, the court held that the defense that the clause assuming payment of a mortgage was inserted in a deed by mistake must be asserted by a crossbill to which the promisee must be made a party.

[60] Hendricks *v.* Lindsay, 93 U. S. 143; Willard *v.* Wood, 135 U. S. 311, 313; 152 U. S. 502; Douglass *v.* Branch Bank, 19 Ala. 659; Hunter *v.* Wilson, 21 Fla. 250, 252; Gunter *v.* Mooney, 72 Ga. 205; Moore *v.* House, 64 Ill. 162; Gautzert *v.* Hoge, 73 Ill. 30; Harms *v.* McCormick, 132 Ill. 104, 109 (now changed by statute); Hinkley *v.* Fowler, 15 Me. 285; Farmington *v.* Hobart, 74 Me. 416; Seigman *v.* Hoffacker, 57 Md. 321; Montague *v.* Smith, 13 Mass. 396; Millard *v.* Baldwin, 3 Gray, 484; Robb *v.* Mudge, 14 Gray, 534, 538; Flynn *v.* North American Life Ins. Co., 115 Mass. 449; Lee *v.* Newman, 55 Miss. 365, 374; How *v.* How, 1 N. H. 49; Crowell *v.* Currier, 27 N. J. Eq. 152; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141, 146; Cocks *v.* Varney, 45 N. J. Eq. 72; Styles *v.* Long Co., 67 N. J. L. 413, 418 (but by statute in 1898 the rule was extended to sealed contracts, *ibid.*); Strohecker *v.* Grant, 16 S. & R. 237; De Bollé *v.* Pennsylvania Ins. Co., 4 Whart 68; Mississippi R. R. Co. *v.* Southern Assoc., 8 Phila. 107; McAlister *v.* Marberry, 4 Humph. 426; Fairchild *v.* North Eastern Assoc., 51 Vt. 613; Jones *v.* Thomas, 21 Gratt. 96, 101 (now changed by statute); McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

[61] Central Trust Co. *v.* Berwind-White Co., 95 Fed. Rep. 391; Starbird *v.* Cranston, 24 Col. 20; Webster *v.* Fleming, 178 Ill. 140; Harts *v.* Emery, 184 Ill. 560; Robinson *v.* Holmes, 75 Ill. App. 203; Am. Splane Co. *v.* Barber, 91 Ill. App. 359; Garvin *v.* Moblev, 1 Bush, 48; Jefferson *v.* Asch, 53 Minn. 446; Rogers *v.* Gosnell, 51 Mo. 466; 58 Mo. 589; Van Schaick *v.* Railroad, 38 N. Y. 346; Coster *v.* Albany, 43 N. Y. 399; Riordan *v.* First Church, 26 N. Y. Supp. 38; Emmitt *v.* Brophy, 42 Ohio St. 82; Hughes *v.* Oregon Co., 11 Oreg. 437; McDowell *v.* Laev, 35 Wis. 171; Bassett *v.* Hughes, 43 Wis.

Person incidentally benefited. It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance. A typical case is where A. promises B. to pay him money for his expenses. A creditor of B. is not generally allowed to sue A.[62] It is obvious that such a creditor's right can properly be only a derivative one. As the obligation is to pay money to the debtor, there seems no reason why garnishment proceedings are not appropriate.

Further illustrations. A different case arises where the promise is to indemnify against damages. Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right.[63] Nor can the promisee sue for the benefit of persons claiming damages.[64]

A third person's benefit under a contract may be still more incidental. In a recent case the failure of the grantee of land to keep his promise to the grantor to pay a mortgage, resulted in a loss to the plaintiff of an interest in the land when the mortgagee foreclosed the mortgage. The New York court rightly refused relief.[65] The contract was not made even partially for the plaintiff's benefit, and as the promisee was under no obligation to the plaintiff it is not possible to work out an indirect right.[66]

A Louisiana case[67] furnishes another illustration. A number of hatters agreed to close their shops on Sundays, and for any breach it

319; Houghton *v.* Milburn, 54 Wis. 554; Stites *v.* Thompson, 98 Wis. 329, 331. A third person was allowed to enforce a promise under seal also in the following cases, but the point was not discussed. South Side Assoc. *v.* Cutler Co., 64 Ind. 560; Anthony *v.* Herman, 14 Kan. 494; Brenner *v.* Luth, 28 Kan. 581. See also Va. Code, § 2415; Newberry Land Co. *v.* Newberry, 95 Va. 111.

[62] Cragin *v.* Lovell, 109 U. S. 194, 199; Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Burton *v.* Larkin, 36 Kan. 246. See also Jackson Iron Co. *v.* Negannee Concentrating Co., 65 Fed. Rep. 298; Hill *v.* Omaha, etc., R. R. Co., 82 Mo. App. 188. But see *contra*, Rothwell *v.* Skinker, 84 Mo. App. 169; Houghton *v.* Milburn, 54 Wis. 554. And where an insurance company had reinsured its risks, a policy-holder was allowed to sue the reinsuring company directly in Glen *v.* Hope Mut. Life Ins. Co., 56 N. Y. 379; Fiseher *v.* Hope Mut. Life Ins. Co., 69 N. Y. 161; Johannes *v.* Phenix Ins. Co., 66 Wis. 50.

[63] Hill *v.* Omaha, etc., R. R. Co., 82 Mo. App. 188; French *v.* Vix, 143 N. Y. 90; Embler *v.* Hartford Ins. Co., 158 N. Y. 431; Mansfield *v.* Mayor of New York, 165 N. Y. 208.

[64] New Haven *v.* Railroad, 62 Conn. 253.

[65] Durnherr *v.* Rau, 135 N. Y. 219. See also Pearson *v.* Bailey, 62 N. E. Rep. 265 (Mass.).

[66] See also Constable *v.* National Steamship Co., 154 U. S. 51; Hennessy *v.* Bond, 77 Fed. Rep. 403, 405.

[67] New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338.

was agreed that the offender should pay $100 to a specified charitable society. It was held that the society could not recover. The object of the contract was not to benefit the plaintiff, but to enforce performance of a promise by the imposition of a penalty.

Assignment of Contracts.

Rule 4. **Transfer of rights under contract.** We now come to the fourth rule, which we have expressed thus:—

Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

We need say nothing here about the right of personal representatives to enforce the contracts of the person they represent, except that it has been recognized from the earliest period of the history of our present system of law (*h*).

Right to sue on contract not assignable at common law. With regard to assignment, the benefit of a contract cannot be assigned (except by the Crown) at common law so as to enable the assignee to sue in his own name (*i*).[68] The origin of the rule was attributed by Coke to the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation (*k*): but it is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the creditor and the debtor (*l*). Anyhow it has been long established that the proper course at com-
218] mon *law is for the assignee to sue in the name of the assignor.[69] It appears from the Year Books that attempts were sometimes made to object to actions of this kind on the ground of maintenance, but without success. That same rule is stated by Gaius as prevailing in the Roman law (*m*).

(*h*) Subject to some technical exceptions which have now disappeared: see notes to *Wheatley* v. *Lane* (1667) 1 Wms. Saund. 240 *sqq.* and for early instances of actions of debt brought by executors, Y. B. 20 & 21 Ed. I. pp. 304, 374.

(*i*) *Termes de la Ley*, tit. *Chose in Action*.

(*k*) *Lampet's case* (1613) 10 Co. Rep. 48 *a*. For exposition of the rule in detail, see Dicey on Parties, 115.

(*l*) Spence, Eq. Jurisd. of Chy. 2. 850. An examination of the earlier authorities has been found to confirm this view. The rule is assumed as unquestionable, and there is no trace of Coke's reason for it. The objection of maintenance was set up, not against the assignee suing in his own name, which was never attempted so far as we can find, but against his suing in the name of the assignor: see Note F in Appendix.

(*m*) Gai. 2. 38, 39. Quod mihi ab

68 "The United States may sue at law in their name on a claim assigned to them." United States *v.* Buford, 3 Pet. 12.

69 Glenn *v.* Marbury, 145 U. S. 499.

In equity assignee may sue, if necessary. In equity the right of the assignee was pretty soon recognized and protected, that is, if the assignor refused to empower the assignee to sue in his name at law.[70] Where the assignee had an easy remedy by suing in the name of the assignor, the Court of Chancery would not interfere (*n*).

Legal right of assignee under Judicature Act, 1873. The Supreme Court of Judicature Act, 1873 (s. 25, sub-s. 6), creates a legal right to sue in the assignee's own name, but confined to cases where the assignment is absolute (*o*), and by writing under the hand of the assignor, and express notice in writing has been given to the debtor.

In equity more extensive: how far governed by Statute of Frauds. There may still be more extensive equitable rights of this kind. By the

aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur, id efficere possum: sed opus est, ut iubente me tu ab eo stipuleris: quae res efficit ut a me liberetur et incipiat tibit teneri quae dicitur novatio obligationis. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri. In later times the transferee of a debt was enabled to sue by *utilis actio* in his own name. This seems to have been first introduced only for the benefit of the purchaser of an inheritance: D. 2. 14 de pactis, 16 *pr.*, C. 4. 39. de hered. vel act. vend. 1, 2, 4—6; and afterwards extended to all cases: C. eod. tit. 7, 9. See too C. 4. 10. de obl. et act. 1, 2, C. 4. 15. quando fiscus, 5, Arndts, Lehrbuch der Pandekten, § 254.

(*n*) *Hammond* v. *Messenger* (1838) 9 Sim. 327, Spence, 2. 854, Harv. Law Rev. i. 6—7.

(*o*) *Tancred* v. *Delagoa Bay and E. Africa Ry. Co.* (1889) 23 Q. B. D. 239, 58 L. J. Q. B. 459. An absolute assignment may be subject to a trust in respect of the moneys recovered: *Comfort* v. *Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. 656, C. A. Whether the sub-section applies to an assignment of part of an entire debt, *quære: Durham Bros.* v. *Robertson* [1898] 1 Q. B. 765, 774, 67 L. J. Q. B. 484, C. A. At all events an undefined part will not do: *Jones* v. *Humphreys* [1902] 1 K. B. 10, 71 L. J. K. B. 23. See further as to what amounts to an absolute assignment, *Mercantile Bank of London* v. *Evans* [1899] 2 Q. B. 613, 68 L. J. Q. B. 921, C. A.; *Marchant* v. *Morton, Down & Co.* [1901] 2 K. B. 829, 70 L. J. K. B. 820. The term "legal chose in action" in a corresponding Colonial Act has been held to include a cause of action for negligence: *King* v. *Victoria Insurance Co.* [1896] A. C. 250, 65 L. J. P. C. 38; and see per Farwell, J., *Manchester Brewery Co.* v. *Coombs* [1901] 2 Ch. 608, 619.

70 "A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy." Walker *v.* Brooks, 125 Mass. 241; Hayward *v.* Andrews, 106 U. S. 672; N. Y. Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205; Glenn *v.* Marbury, 145 U. S. 499; Adair *v.* Winchester, 7 G. & J. 114; Carter *v.* Insurance Co., 1 Johns. Ch. 463; Bank *v.* Mumford, 2 Barb. Ch. 596; Smiley *v.* Bell, Mart & Yerg. 378; Moseley *v.* Bush, 4 Rand. 392.

Statute of Frauds (29 Car. 2, c. 3), s. 9, "all grants and assign-
219] ments of any trust or confidence" *must be in writing signed by the assignor, and by sect. 7, equitable interests in land must be created by writing. Sect. 9 does not require writing for the creation in the first instance by the legal owner or creditor of an equitable interest in personal property or a chose in action: and it may be argued perhaps that its operation is altogether confined to interests in land by the context in which it occurs. The writer is not aware of any decision upon it (*p*).

It seems that to constitute an equitable assignment there must be at least an order to pay out of a specified fund (*q*).

As for the notice to the debtor, the rule of equity is that it must be express but need not be in writing (*r*).[71]

There remain, therefore, a great number of cases where the right is purely equitable, although the enlarged jurisdiction of every branch of the Supreme Court makes the distinction less material than formerly.

Partial statutory exceptions. Several partial exceptions to the common rule have been made at different times by modern statutes, on which, however, it seems unnecessary to dwell (*s*).

Limitation of assignee's rights. In ordinary cases rights under a con-
220] tract derived by *assignment from the orignial creditor are subject, as already stated, to the following limitations:—

1st. Title by assignment is not complete as against the debtor

(*p*) See 1 Sanders on Uses, 5th ed. 343.

(*q*) *Percival* v. *Dunn* (1885) 29 Ch. Div. 128, 54 L. J. Ch. 572. An adventurous attempt to extend the conception of equitable assignment may be seen in *Western Wagon and Property Co.* v. *West* [1892] 1 Ch. 271, 61 L. J. Ch. 244.

(*r*) *Re Tichener* (1865) 35 Beav. 317.

(*s*) The more important instances are these:—

East India Bonds, 51 Geo. 3, c. 64, s. 4, which makes them *negotiable*.

Mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20.

Policies of life assurance: 30 & 31 Vict. c. 144.

Policies of marine insurance: 31 & 32 Vict. c. 86.

Things in action of companies (Companies Act, 1862, s. 157) and bankrupts (Bankruptcy Act, 1883, ss. 56, 57, and see definition of "property," s. 168) assigned in pursuance of those Acts respectively. As to the effect of registration under the present Acts of previously existing companies, &c., in transferring the right to sue on the contracts made by the company or its officers in its former state, see the Companies Act, 1862, s. 193.

Local authorities (including any authority having power to levy a rate) may issue transferable debentures and debenture stock under the Local Loans Acts, 1875, 38 & 39 Vict. c. 83.

[71] Skobis *v.* Ferge, 102 Wis. 122.

without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

2nd. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the orignal contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

1. Rules of equitable assignment in general — Notice to debtor. As to notice to the debtor. Notice is not necessary to complete the assignee's equitable right as against the original creditor himself, or as against his representatives, including assignees in bankruptcy (*t*):[72] but the claims of competing assignees or incumbrancers rank as between themselves not according to the order in date of the assignments, but according to the dates at which they have respectively given notice to the debtor. This was decided by the cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (*u*), the principle of which was soon afterwards affirmed by the House of Lords (*x*).[73] The same rule prevails

(*t*) *Burn* v. *Carvalho* (1839) 4 M. & Cr. 690, 48 R. R. 213.

(*u*) (1823–7) 3 Russ. 1, 38, 48, 27 R. R. 1.

(*x*) *Foster* v. *Cockerell* (1835) 3 Cl. & F. 456, 39 R. R. 24. It has only lately been decided that a second assignee who takes his assignment not from the beneficiary himself, but from his legal personal representative, may equally gain priority by notice: *Freshfield's Trusts* (1879) 11 Ch. Div. 198. The rule is criticized, though allowed to be settled law, in *Ward* v. *Duncombe* [1893] A. C. 369, per Lord Macnaghten at pp. 391–3, 62 L. J. Ch. 881.

[72] Jackson *v.* Hamm, 14 Col. 58; Bishop *v.* Holcomb, 10 Conn. 444; Wood *v.* Partridge, 11 Mass. 488, 491; Thayer *v.* Daniels, 113 Mass. 129; Conway *v.* Cutting, 51 N. H. 407, 409; Muir *v.* Schenk, 3 Hill, 228. And see cases cited *infra*, n. 79.

[73] *Re* Gillespie, 15 Fed. Rep. 734; Methven *v.* S. I. Light Co., 66 Fed. Rep. 113; Graham Paper Co. *v.* Pembroke, 124 Cal. 117; Bishop *v.* Holcomb, 10 Conn. 444, 446; Enochs-Havis, etc., Co. *v.* Newcomb, 79 Miss. 462; Murdock *v.* Finney, 21 Mo. 138; Copeland *v.* Manton, 22 Ohio St. 398, 401; Fraley's Appeal, 76 Pa. 42; Pratt's Appeal, 79 Pa. 378; Phillips's Est., 205 Pa. 515; Clodfelter *v.* Cox, 1 Sneed, 330; Ward *v.* Morrison, 25 Vt. 593.

In many States of this country, however, the English rule does not prevail. Sutherland *v.* Reeve, 151 Ill. 384; White *v.* Wiley, 14 Ind. 496; Summers *v.* Hutson, 48 Ind. 228; Thayer *v.* Daniels, 113 Mass. 129; Burton *v.* Gage, 85 Minn. 355; Kennedy *v.* Parke, 17 N. J. Eq. 415; Kamena *v.* Huelbig, 23 N. J. Eq. 78; Emley *v.* Perrine, 58 N. J. L. 472; Muir *v.* Schenck, 3 Hill, 228; Bush *v.* Lathrop, 22 N. Y. 535, 546; Greentree *v.* Rosenstock, 61 N. Y. 583, 593; Williams *v.* Ingersoll, 89 N. Y. 508, 523; Fairbanks *v.* Sargent, 104 N. Y. 108, 118; Fortunato *v.* Patten, 147 N. Y. 277; Lindsay *v.* Wilson, 2 Dev. & Bat. Eq. 85; Meier *v.* Hess, 23 Oreg. 599; Clarke *v.* Hogeman, 13 W. Va. 718; Tingle *v.* Fisher, 20 W. Va. 497. See further, Roberts *v.* Insurance Co., 120 U. S. 511; Bank *v.* Schuler, 120 U. S. 511.

"Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee, *e. g.*, (1) if acting in good faith he obtains payment of the claim assigned; Judson *v.* Corcoran,

in the modern civil law (*y*),[74] and has been adopted from it in the Scottish law (*z*); and the true reason of it, though not made very prominent in the decisions which establish the rule in England, is the protection of the debtor. He has a right to look to the person with whom he made his contract to accept performance of it, and to
221] give him a *discharge, unless and until he is distinctly informed that he is to look to some other person. According to the original strict conception of contract ("à ne considérer que la subtilité du droit" as Pothier (*a*) expressed it), his creditor or his creditor's assignee cannot even require him to do this, any more than in the converse but substantially different case a debtor can require his creditor to accept another person's liability, and his assent must be expressed by a novation (*b*). Such was in fact the old Roman law, as is shown by the passage already cited from Gaius. By the modern practice the novation is dispensed with, and the debtor becomes bound to the assignee of whom he has notice. But he cannot be bound by any other assignment, though prior in time, of which he knows nothing. He is free if he has fulfilled his obligation to the original creditor without notice of any assignment;[75] he is equally

(*y*) See Pothier, Contrat de Vente, §§ 560, 554 *sqq.*
(*z*) Erskine Inst. Bk. 3, tit. 5.
(*a*) Contrat de Vente, § 551.
(*b*) See p. *204, above.

17 How. 612; Bridge *v.* Connecticut Ins. Co., 152 Mass. 343; Bentley *v.* Root, 5 Paige, 632, 640; or (2) if he reduces his claim to a judgment in his own name: Judson *v.* Corcoran, 17 How. 612; Mercantile Co. *v.* Corcoran, 1 Gray, 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself; New York Co. *v.* Schuyler, 34 N. Y. 30, 80; Strange *v.* Houston Co., 53 Tex. 162; or (4) if he obtains the document containing the obligation when the latter is in the form of a specialty; *Re* Gillespie, 15 Fed. Rep. 734; Bridge *v.* Connecticut Ins. Co., 152 Mass. 343; Fisher *v.* Knox, 13 Pa. 622. In all these cases having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right." Ames Cas. Trusts (2d ed.), 328. And see further *ibid.*, 326–328.

74 Not in Germany. See 4 Harv. L. Rev. 309, n. 2.

75 Bull *v.* Sink, (Kan. App.) 57 Pac. Rep. 853; Clark *v.* Boyd, 6 T. B. Mon. 293; Leahi *v.* Dugdale's Adm'r, 34 Mo. 99; Reed *v.* Marble, 10 Paige, 409; Trustees *v.* Wheeler, 61 N. Y. 88, 120; Heermans *v.* Ellsworth, 64 N. Y. 159; Van Keuren *v.* Corkins, 66 N. Y. 77; Brindle *v.* McIlvaine, 9 S. & R. 74; Gaullagher *v.* Caldwell, 22 Pa. 300; Skobis *v.* Ferge, 102 Wis. 122.

On the other hand, no discharge from the original creditor after the debtor has notice of the assignment is of any avail. Welch *v.* Mandeville, 1 Wheat. 233; Mandeville *v.* Welch, 5 Wheat. 277, 283; Fassett *v.* Mulock, 5 Col. 466; Chapman *v.* Shattuck, 8 Ill. 49, 52; Marr *v.* Hanna, 7 J. J. Marsh. 642; Hackett *v.* Martin, 8 Me. 77; Matthews *v.* Houghton, 10 Me. 420; Eastman *v.* Wright, 6 Pick. 316; Cutler *v.* Haven, 8 Pick. 490; St. Johns *v.* Charles, 105 Mass. 262; Anderson *v.* Miller, 15 Miss. 586; Lipp *v.* South Omaha Co., 24 Neb. 692; Duncklee *v.* Greenfield Co., 23 N. H. 245; Sloan *v.* Sommers, 2 Green (N. J.) 509; Gaullagher *v.* Caldwell, 22 Pa. 300, 302; Strong *v.*

free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor (*c*). It is enough for the completion of the assignee's title "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment" (*d*), *e. g.*, as an agent entrusted with a particular fund. Notice not given by the assignee may be sufficient, if shown to be such as a reasonable man would act upon (*e*).[76]

Doctrine of notice does not apply to interests in land; but does to all other equitable interests. All this doctrine of notice has no application to interests in land (*f*): but, subject to that *exception, it applies [222 to rights created by trust as well as to those created by contract; the beneficial interest being treated for this purpose exactly as if it were a debt due from the trustee. In the case of trusts a difficulty may arise from a change of trustees; for it may happen that a fund is transferred to a new set of trustees without any notice of an assignment which has been duly notified to their predecessors, and that notice is given to the new trustees of some other assignment. It is still unsettled which of the assignees is entitled to priority in such a case: but it has been decided that the new trustees cannot be made personally liable for having acted on the second assignment (*g*).[77]

(*c*) See per Willes J., L. R. 5 C. P. at p. 594. Per Knight Bruce L. J. *Stocks* v. *Dobson* (1853) 4 D. M. & G. 11, 17, 22 L. J. Ch. 884. Notice after a negotiable instrument has been given by the debtor is too late even if the instrument is still held by the original creditor: *Bence* v. *Shearman* [1898] 2 Ch. 582, 67 L. J. Ch. 513, C. A.

(*d*) Per Lord Selborne C. *Addison* v. *Cox* (1872) L. R. 8 Ch. 76, 79, 42 L. J. Ch. 291.

(*e*) *Lloyd* v. *Banks* (1868) L. R. 3 Ch. 488.

(*f*) Although the exception is fully established its reasonableness is doubtful. Its effect is that equitable interests in land stand on a different footing from personal rights: see this relied on as the ground of the exception, *Jones* v. *Jones* (1837–38) 8 Sim. 633, 42 R. R. 249. But on the other hand their liability to be defeated by a purchase of the legal estate for value without notice shows that they fall short of real ownership.

(*g*) *Phipps* v. *Lovegrove* (1873) L. R. 16 Eq. 80, 42 L. J. Ch. 892; see

Strong, 2 Aikens, 373. See also Brown *v.* Hartford Ins. Co., 4 Fed. Cas. 379; Wagner *v.* National Ins. Co., 90 Fed. Rep. 395; Chisolm *v.* Newton, 1 Ala. 371; Cunningham *v.* Carpenter, 10 Ala. 109, 112; Reed *v.* Nevins, 38 Me. 193; Rockwood *v.* Brown, 1 Gray, 261.

[76] See Anderson *v.* Van Alen, 12 Johns. 343; Guthrie *v.* Bashline, 25 Pa. 80; Tritt's Adm'r *v.* Colwell's Adm'r, 31 Pa. 228; Barron *v.* Porter, 44 Vt. 587. Notice given on Sunday is good. Crozier *v.* Shants, 43 Vt. 478. Notice given to one of two trustees is sufficient. Pardee *v.* Platt, 20 Conn. 395.

[77] Where a trustee (who is also one of the beneficiaries) himself makes successive assignments of his interest, his knowledge of the first assignment is not notice to his co-trustees. Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865.

The rules as to notice apply to dealings with future or contingent as well as with present and liquidated claims. "An assurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy of which no notice had been given to them" (*h*).

2. **Assignee takes subject to equities: double meaning of the rule.** As to the debtor's rights against assignees. The rule laid down in the second explanation is often expressed in the maxim "The assignee of an equity is bound by all the equities affecting it." This, however, includes another rule founded on a distinct principle, which is that no transaction purporting to give a beneficial interest apart from 223] legal ownership (*i*) can confer on the person who takes or *is intended to take such an interest any better right than belonged to the person professing to give it him. If A. contracts with B. to give B. something which he has already contracted to give C., then C.'s claim to have the thing must prevail over B.'s, whether B. knew of the prior contract with C. or not (*k*). And if B. makes over his right to D., D. will have no better right than B. had (*l*).[78] And this ap-

L. R. 16 Eq. p. 90 as to the precautions to be taken by an assignee of an equitable interest who wishes to be perfectly safe. The death of one of two or more trustees, being the only one who has notice of an incumbrance, does not deprive that incumbrance of the priority it has gained: *Ward* v. *Duncombe* [1893] A. C. 369, 62 L. J. Ch. 881.

(*h*) L. R. 16 Eq. at p. 88.

(*i*) Certain dicta in *Sharples* v. *Adams* (1863) 32 Beav. 213, 216, and *Maxfield* v. *Burton* (1873) L. R. 17 Eq. 15, 19, 43 L. J. Ch. 46, go even farther; but it seems at least doubtful whether they can be supported.

(*k*) This is of course consistent with B. having his remedy in damages. Cp. p. *31, above.

(*l*) See *Pinkett* v. *Wright* (1842) 2 Ha. 120, affd. nom. *Murray* v. *Pinkett* (1846) 12 Cl. & F. 764; *Ford* v. *White* (1852) 16 Beav. 120; *Clack* v. *Holland* (1854) 19 Beav. 262.

78 The American law on this point is in great conflict. It is universally admitted that the assignee takes subject to all defenses the debtor may have against the assignor prior to notice of the assignment. McCarthy *v.* Mt. Tecarte Co., 110 Cal. 689; Parmly *v.* Buckley, 103 Ill. 115; Barker *v.* Barth, 192 Ill. 460; Brown *v.* Leavitt, 26 Me. 251; Weinwick *v.* Bender, 33 Mo. 80; Marsh *v.* Garney, 69 N. H. 236; Bury *v.* Hartman, 4 Serg. & R. 177; Frantz *v.* Brown, 17 Serg. & R. 287; Pellman *v.* Hart, 1 Pa. 263, 266; Gaullagher *v.* Caldwell, 22 Pa. 300; Commonwealth *v.* Sides, 176 Pa. 616; Stebbins *v.* Bruce, 80 Va. 389; Stebbins *v.* Union Pac. R. R. Co., 2 Wyo. 71.

It is also settled that defenses acquired by the debtor against the assignor after notice of assignment are invalid. Leigh *v.* Leigh, 1 B. & P. 477; State *v.* Jenning, 10 Ark. 428; Kitzinger *v.* Beck, 4 Col. App. 206; Chapman *v.* Shattuck, 8 Ill. 49; Carr *v.* Waugh, 28 Ill. 418; Chicago Title Co. *v.* Smith, 158 Ill. 417; Daggett *v.* Flanagan, 78 Ind. 253; McFadden *v.* Wilson, 96 Ind. 253; Milliken *v.* Loring, 37 Me. 408; Jones *v.* Witter, 13 Mass. 304; Schilling *v.* Mullen, 55 Minn. 122; Leahy *v.* Dugdale, 41 Mo. 517; Cameron *v.* Little, 13 N. H. 23; Andrews *v.* Becker, 1 Johns. 426; Littlefield *v.* Story, 3 Johns. 426;

plies not only to absolute but to partial interests (such as equitable charges on property) to the extent to which they may affect the property dealt with. Again, by a slightly different application of the same principle, a creditor of A. who becomes entitled by operation of law to appropriate for the satisfaction of his debt any beneficial interest of A.'s (whether an equitable interest in property or a right of action) can claim nothing more than such interest as A. actually had; and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him (*m*).[79] But we are not concerned here with the development of these doctrines, and we return to the

(*m*) *Pickering* v. *Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. 235, 37 L. J. C. P. 118, overruling virtually *Watts* v. *Porter* (1854) 3 E. & B. 743, 23 L. J. Q. B. 345, see *Crow* v. *Robinson* (1868) L. R. 3 C. P. 264; judgment of Erle J. (*diss.*) in *Watts* v. *Porter*.

Wilson *v.* Stilwell, 14 Ohio St. 464, 471. Compare Beran *v.* Tradesmen's Nat. Bank, 137 N. Y. 450; First Nat. Bank *v.* Clark, 9 Baxt. 589.

In England the assignee also takes subject to unknown equities of others than the debtor, and this rule is followed in New York and some other States in this country. The authorities are collected in Ames, Cas. Trust, p. 309, n. Recent decisions to this effect are Owen *v.* Evans, 134 N. Y. 514; Central Trust Co. *v.* West India Co., 169 N. Y. 314, 324; Culmer *v.* American Co., 21 N. Y. App. Div. 556; State *v.* Hearn, 109 N. C. 150; Kernohan *v.* Durham, 48 Ohio St. 1; Patterson *v.* Rabb, 38 S. C. 138. But many States protect an assignee who has taken an assignment of chose in action for value and without notice from such latent equities. See Ames, Cas. Trusts, p. 310, n. and the following recent decisions: First Bank *v.* Perris, 107 Cal. 55; Humble *v.* Curtis, 160 Ill. 193; Mann *v.* Merchants' Trust Co., 100 Ill. App. 224; Hale *v.* First Bank, 50 Ia. 642; Newton *v.* Newton, 46 Minn. 33; Moffett *v.* Parker, 71 Minn. 139; Brown *v.* Equitable Soc., 75 Minn. 412; Duke *v.* Clark, 58 Miss. 465. This view is supported by Professor Ames in 1 Harv. L. Rev. 6–8, on the ground that the assignee has acquired a legal power of attorney to collect the claim from the debtor, and that equity should not deprive him of this legal right. As to the possibility of the right to assert an equity being lost by estoppel, see *infra*, p. 294, n. 88.

[79] Pickering *v.* Ilfracombe Ry. Co., L. R. 3 C. P. 235; Jones *v.* Lowery, 104 Ala. 252; Walton *v.* Horkan, 112 Ga. 814; Savage *v.* Gregg, 150 Ill. 161; McGuire *v.* Pitts, 42 Ia. 535; Littlefield *v.* Smith, 17 Me. 327; Wakefield *v.* Marvin, 3 Mass. 558; Dix *v.* Cobb, 4 Mass. 512; Thayer *v.* Daniels, 113 Mass. 129; MacDonald *v.* Kneeland, 5 Minn. 352; Schoolfield *v.* Hirsh, 71 Miss. 55; Smith *v.* Sterritt, 24 Mo. 260; Knapp *v.* Standley, 45 Mo. App. 264; Hendrickson *v.* Trenton Bank, 81 Mo. App. 332; Marsh *v.* Garney, 69 N. H. 236; Board *v.* Duparquet, 50 N. J. Eq. 234; Van Buskirk *v.* Warren, 34 Barb. 457; Williams *v.* Ingersoll, 89 N. Y. 508; Meier *v.* Hess, 23 Oreg. 599; Stevens *v.* Stevens, 1 Ashmead, 190; United States *v.* Vaughan, 3 Binn. 394; Pellman *v.* Hart, 1 Pa. 263; Speed *v.* May, 17 Pa. 91; Patton *v.* Wilson, 34 Pa. 299; Noble *v.* Thompson Oil Co., 79 Pa. 354, 367; Tierney *v.* McGarity, 14 R. I. 231; Brown *v.* Minis, 1 McCord, 80; Ballingham Co. *v.* Brisbois, 14 Wash. 173. But see *contra*, Bishop *v.* Holcomb, 10 Conn. 444; Vanbuskirk *v.* Hartford Ins. Co., 14 Conn. 141 (*conf.* Clark *v.* Connecticut Peat Co., 35 Conn. 303); Clodfelter *v.* Cox, 1 Sneed, 330; Dews *v.* Olwill, 3 Baxt. 432; Rhodes *v.* Haynes, 95 Tenn. 673; Ward *v.* Morrison, 25 Vt. 593; Nichols *v.* Hooper, 61 Vt. 295. See also McWilliams *v.* Webb, 32 Ia. 577; Ruthven *v.* Clarke, 109 Ia. 25; Whiteside *v.* Tall, 88 Mo. App. 168, 171.

other sense of the general maxim. In that sense it is used in such judicial expressions as the following:

"If there is one rule more perfectly established in a court of equity than another, it is this, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment" (*n*).

"It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or 224] a trust fund, and it is assigned, the person who holds the debt or *obligation, or has undertaken to hold the trust fund, has as against the assignee exactly the same equities that he would have as against the assignor" (*o*).

This is in fact the same principle which is applied by common law as well as equity jurisdictions for the protection of persons who contract with agents not known to them at the time to be agents (*p*). What is meant by this special use of the term "equities" will be best shown by illustration. A debt is due from B. to A., but there is also a debt due from A. to B. which B. might set off in an action by A. In this state of things A. assigns the first debt to C. without telling him of the set-off. B. is entitled to the set-off as against C. (*q*).[80] Again, B. has contracted to pay a sum of money to A., but the contract is voidable on the ground of fraud or misrepresentation. A.

(*n*) Lord St. Leonards, *Mangles* v. *Dixon* (1852) 3 H. L. C. 702, 731.

(*o*) James L.J. (sitting as V.-C.) *Phipps* v. *Lovegrove* (1873) L. R. 16 Eq. 80, 88, 42 L. J. Ch. 892.

(*p*) See pp. *103, *104, above.

(*q*) *Cavendish* v. *Geaves* (1857) 24 Beav. 163, 173, 27 L. J. Ch. 314, where the doctrine is fully expounded. As to set-off accruing after notice of assignment, *Stephens* v. *Venables* (1862) 30 Beav. 625; *Watson* v. *Mid Wales Ry. Co.* (1867) L. R. 2 C. P. 593, 30 L. J. C. P. 285.

[80] Hall *v.* Hickman, 2 Del. Ch. 318; Hooper *v.* Brundage, 22 Me. 460; McKenna *v.* Kirkwood, 50 Mich. 544; Hunt *v.* Shackleford, 55 Miss. 94; Sanborn *v.* Little, 3 N. H. 539; Wood *v.* Mayor, 73 N. Y. 556; Bank *v.* Bynum, 84 N. C. 24; Metzgar *v.* Metzgar, 1 Rawle, 227. And see *infra*, p. *231. In an action by the assignee of a chose in action, the defendant cannot set off a debt existing in his favor against the assignor at the time of the assignment, but maturing afterwards. Graham *v.* Tilford, 1 Met. (Ky.) 112; Chambliss *v.* Matthews, 57 Miss. 306; Beckwith *v.* Bank, 9 N. Y. 211; Myers *v.* Davis, 22 N. Y. 489; Martin *v.* Kunzmuller, 37 N. Y. 396; Roberts *v.* Carter, 38 N. Y. 107; Fuller *v.* Steiglitz, 27 Ohio St. 355. And see Adams *v.* Rodarmel, 19 Ind. 339; Walker *v.* McKay, 2 Met. (Ky.) 294; Backus *v.* Spalding, 129 Mass. 234; Follett *v.* Buyer, 4 Ohio St. 586. Cp. Railroad Co. *v.* Rhodes, 8 Ala. 206; Morrow *v.* Bright, 20 Mo. 298; Williams *v.* Helme, 1 Dev. Eq. 151; Miller *v.* Bomberger, 76 Pa. 78. The assigned debt, however, need not have been due at the time of the assignment. If the defendant's claim was due at that time he can set it off against an assigned debt maturing in the assignee's hands. Scott *v.* Armstrong, 146 U. S. 499; *Re* Hatch, 155 N. Y. 401. *Contra*, Koegel *v.* Trust Co., 117 Mich. 54. He can set off a claim against the assignor, which he has acquired after the assignment, and before notice thereof. McCabe *v.* Grey, 20 Cal. 509; Adams *v.* Leavens, 20 Conn. 73; Bank *v.* Balliet, 8 W. & S. 311. But not one acquired after notice of the assignment. Crayton *v.* Clark, 11 Ala. 787; Goodwin *v.* Cunningham, 12 Mass. 193; St. Andrew *v.* Manchoug, 134 Mass. 42; Lake *v.* Brown, 7 How. (Miss.) 661; Weeks *v.* Hunt, 6 Vt. 15; *infra*, p. 295, n. 90.

assigns the contract to C., who does not know the circumstances that render it voidable. B. may avoid the contract as against C. (*r*). Again, in a some what less simple case, there is a liquidated debt from B. to A. and a current account between them on which the balance is against A. A. assigns the debt to C., who knows nothing of the account. B. may set off as against C. the balance which is due on the current account when he receives notice of the assignment, but not any balance which becomes due afterwards (*s*).

The rule may be excluded by original contract. But it is open to the contracting parties to exclude the operation of this rule if they think fit by making it a term of the original contract that the debtor shall not set up against an assignee of the contract any counter claim which he may have against the original creditor. This is *established [225 by the decision of the Court of Appeal in Chancery in *Ex parte Asiatic Banking Corporation,* the facts of which have already been stated for another aspect of the case (*t*).

Two alternative grounds were given for the decision in favour of the claim of the Asiatic Banking Corporation under the letter of credit. One, which we have already noticed, was that the letter was a general proposal, and that there was a complete contract with any one who accepted it by advancing money on the faith of it. The other was that, assuming the original contract to be only with Dickson, Tatham, & Co. to whom the letter was given, yet the takers of bills negotiated under the letter were assignees of the contract, and it appeared to have been the intention of the original parties that the equities which might be available for the bank against Dickson, Tatham, & Co. should not be available against assignees. Lord Cairns, then Lord Justice, thus stated the law:—

"Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."

Where assignees of a chose in action are enabled by statute to sue at law, similar consequences may be produced by way of estoppel (*u*); which really comes to the same thing, the doctrine of estoppel being a mere technical and definite expression of the same principle.

(*r*) *Graham* v. *Johnson* (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374.

(*s*) *Cavendish* v. *Geaves* (1857) 24 Beav. 163, 27 L. J. Ch. 314.

(*t*) (1867) L. R. 2 Ch. 391, 36 L. J. Ch. 222, p. *23, *supra*.

(*u*) *Webb* v. *Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

Later decisions: form of instrument, how far material. The principle thus laid down has been followed out in several later decisions on the effect of transferable debentures issued by companies. The question whether the holder of such a debenture takes it free from equities is to be determined by the original intention of the parties.

226] *The form of the instrument is of course material, but the general tenor is to be looked to rather than the words denoting to whom payment will be made; these cannot be relied on as a sole or conclusive test. Making a debenture payable to the holder or bearer does not necessarily mean more than that the issuing company will not require the holder who presents the instrument for payment to prove his title, especially if the object of the debenture is on the face of it to secure a specific debt (*x*).[81] But an antecedent agreement to give debentures in such a form is evidence that they were meant to be assignable free from equities (*y*); and debentures payable to bearer without naming any one as payee in the first instance are *prima facie* so assignable (*z*) and may be negotiable (*a*); so again if the document resembles a negotiable instrument rather than a common money bond or debenture in its general form (*b*).

Even when there is nothing on the face of the instrument to show the special intention of the parties, the issuer cannot set up equities against the assignee if the instrument was issued for the purpose of raising money on it (*c*). The general circumstances attending the original contract — *e. g.* the issue of a number of debentures to a creditor instead of giving a single bond or covenant for the whole amount due — may likewise be important. Moreover, apart from any contract with the original creditor, the issuing company may be

(*x*) *Financial Corporation's claim* (1868) L. R. 3 Ch. 355, 360, 37 L. J. Ch. 362.

(*y*) *Ex parte New Zealand Banking Corporation* (1867) L. R. 3 Ch. 154, 37 L. J. Ch. 418.

(*z*) *Ex parte Colborne & Strawbridge* (1870–1) L. R. 11 Eq. 478, 40 L. J. Ch. 393, 343.

(*a*) Notwithstanding *Crouch* v. *Crédit Foncier* (1873) L. R. 8 Q. B. 374, 385, 42 L. J. Q. B. 183, see *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 986.

(*b*) *Ex parte City Bank* (1868) L. R. 3 Ch. 758.

(*c*) *Dickson* v. *Swansea Vale Ry. Co.* (1868) L. R. 4 Q. B. 44, 38 L. J. Q. B. 17; *Graham* v. *Johnson* (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374, seems not consistent with this.

[81] "Contracts are not necessarily negotiable, because by their terms they inure to the benefit of the bearer." Railroad Co. *v.* Howard, 7 Wall. 392. But bonds made payable to bearer, issued by corporations, are treated in this country as negotiable securities transferable free from equities. Mercer County *v.* Hackett, 1 Wall. 83, 95. *Supra*, p. 144, n. 18.

estopped from setting up *equities against assignees by subse- [227
quent recognition of their title (*d*).

The rule extends to an order for the delivery of goods as well as to debentures or other documents of title to a debt payable in money (*e*).[82]

Quære, when the original contract is voidable. On principal this doctrine seems inapplicable in a case where the original contract is not merely subject to a cross claim but voidable. For the agreement that the contract shall be assignable free from equities is itself part of the contract, and should thus have no greater validity than the rest. A collateral contract for a distinct consideration might be another matter: but the notion of making it a term of the contract itself that one shall not exercise any right of rescinding it that may afterwards be discovered seems to involve the same kind of fallacy as the sovereign power in a state assuming to make its own acts irrevocable.[83] Nor does it make any difference, so long as we adhere to the general rules of contract, that the stipulation is in favour, not of the original creditor, but only of his assignees (*f*). However, the point has not been distinctly raised in any of the decided cases. In *Graham* v. *Johnson* (*g*), where the contract was originally voidable (if not altogether void: the plaintiff had executed a bond under the impression that he was accepting or indorsing a bill of

(*d*) *Higgs* v. *Northern Assam Tea Co.* (1869) L. R. 4 Ex. 387, 38 L. J. Ex. 233; *Ex parte Universal Life Assurance Co.* (1870) L. R. 10 Eq. 458, 39 L. J. Ch. 829 (on same facts); *Ex parte Chorley* (1870) L. R. 11 Eq. 157, 40 L. J. Ch. 153; cp. *Re Bahia & San Francisco Ry. Co.* (1868) L. R. 3 Q. B. 584, 37 L. J. Q. B. 176. *Qu.* can *Athenæum Life Assurance Soc.* v. *Pooley* (1858) 3 De G. & J. 294, 28 L. J. Ch. 119, be reconciled with these cases? It seems not: *Brunton's claim* (1874) L. R. 19 Eq. 302, 312, 44 L. J. Ch. 450.

(*e*) *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205, 46 L. J. Ch. 418.

(*f*) In principle it is the same as the case put in the Digest (50. 17, de reg. iuris. 23) "non valere si convenerit, ne dolus praestetur."

(*g*) (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374.

82 See Jaqua *v.* Montgomery, 33 Ind. 36; 2 Ames Cas. B. & N. 782, n.

83 But an agreement in a life insurance policy that it should be incontestable after two years is held valid on the ground that the agreement in effect fixes a short Statute of Limitations within which fraud must be discovered. See Murray *v.* Insurance Co., 22 R. I. 524, and cases cited. An agreement that an architect's certificate should be binding in spite of error or fraud was sustained in Tullis *v.* Jacson, [1892] 3 Ch. 441. Cp. Redmond *v.* Wynne, 13 N. S. Wales (Law), 39. See further on the general question. Hofflin *v.* Moss, 67 Fed. Rep. 440; Kelley *v.* Insurance Co., 109 Fed. Rep. 56; Hill *v.* Thixton, 94 Ky. 96; McCarthy *v.* Insurance Co., 74 Minn. 530; Chism *v.* Schipper, 51 N. J. L. 1; Wright *v.* Mutual Benefit Assoc., 118 N. Y. 237; Bridger *v.* Goldsmith, 143 N. Y. 424.

exchange) (*h*), an assignee of the bond as well as the obligee was
228] restrained from enforcing the bond: but the *decision was rested on the somewhat unsatisfactory ground that, although the instrument was given for the purpose of money being raised upon it, there was no intention expressed on the face of it that it should be assignable free from equities.

However, if the contract were not enforceable as between the original parties only by reason of their being *in pari delicto,* as not having complied with statutory requirements or the like, an assignee for value without notice of the original defect will, at all events, have a good title by estoppel (*i*).

Difficulties of assignee of ordinary contract. We may now observe the difficulties which make the mere assignment of a contract inadequate for the requirements of commerce, and to meet which negotiable instruments have been introduced.

The assignee of a contract is under two inconveniences (*k*). The first is that he may be met with any defence which would have been good against his assignor. This, we have seen, may to a considerable extent if not altogether be obviated by the agreement of the original contracting parties.

The second is that he must prove his own title and that of the intermediate assignees, if any; and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part, provided against by agreement of the parties. It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge; but such a stipulation will neither affect the rights of intermediate assignees nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights.

Remedy by special rules of law merchant. The complete solution of the
229] problem, for which the *ordinary law of contract is inadequate, is attained by the law merchant (*l*) in the following manner:—

(i) The absolute benefit of the contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract.

(*h*) The evidence was conflicting, but the Court took this view of the facts: see L. R. 8 Eq. at p. 43.

(*i*) See *Webb* v. *Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

(*k*) Cp. Savigny, Obl. § 62.

(*l*) Extended to promissory notes by statute: 3 & 4 Ann. c. 8 (in Rev. Stat.) ss. 1–3, now superseded and repealed by the Bills of Exchange Act, 1882.

(ii) The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers: this is the case with instruments transferable by indorsement.

(iii) Finally this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner: this is the case with instruments transferable by delivery, which are negotiable in the fullest sense of the word.

Negotiable instruments — Peculiar and extensive rights of bona fide holder. The result is that the contract is completely embodied (*m*) for all practical purposes in the instrument which is the symbol of the contract; and both the right under the contract and the property in the instrument are treated in a manner quite at variance with the general principles of contract and ownership. We give references to a few passages where specimens will be found of the positive terms in which the privileges of *bona fide* holders of negotiable instruments have been repeatedly asserted by the highest judicial authority (*n*).

The narrower doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the facts affecting his transferor's title *or wilful and therefore dis- [230 honest avoidance of inquiry (*o*) will defeat the holder's right (*p*).[84]

(*m*) "Verkörperung der Obligation," Savigny.

(*n*) See per Lyles J. *Swan* v. *N. B. Australasian Co.* (1863) in Ex. Ch. 2 H. & C. 184, 31 L. J. Ex. 425; per Lord Campbell, *Brandao* v. *Barnett* (1846) 12 Cl. & F. 787; opinion of Supreme Court, U. S. delivered by Story J. *Swift* v. *Tyson* (1842) 16 Peters 1, 15. The following references as to the nature of the contracts undertaken by the parties to a bill of exchange may be found useful. Acceptor and drawer: *Jones* v. *Broadhurst* (1850) 9 C. B. 173, 181; *Lebel* v. *Tucker* (1867) L. R. 3 Q. B. 77, 84, 37 L. J. Q. B. 46. Indorser: L. R. 3 Q. B. 83; *Denton* v. *Peters* (1870) L. R. 5 Q. B. 475, 477.

(*o*) Lord Blackburn in *Jones* v. *Gordon* (1377) 2 App. Ca. at p. 629.

(*p*) *Goodman* v. *Harvey* (1836) 4 A. & E. 870, 876, 43 R. R. 507, 509; *Raphael* v. *Bank of England* (1855) 17 C. B. 161, 175, 25 L. J. C. P. 33: Bills of Exchange Act, s. 90, and Mr. Chalmers' note thereon.

[84] Goodman *v.* Simonds, 20 How. 243; Murray *v.* Lardner. 2 Wall. 110; Hotchkiss *v.* Banks, 21 Wall. 354; Coors *v.* German Bank, 14 Col. 202; Craft's Appeal, 42 Conn. 146; Matthews *v.* Poythress, 4 Ga. 287; Shreves *v.* Allen, 79 Ill. 553; Pope *v.* Hartwig, 23 Ind. App. 333; Lake *v.* Reed. 29 Ia. 258; Lane *v.* Evans, 49 Ia. 156; Lehman *v.* Press, 106 Ia. 37; Fox *v.* Bank, 30 Kan. 441; Farrell *v.* Lovett, 68 Me. 326; Bank *v.* Hooper, 47 Md. 88; Williams *v.* Huntington, 68 Md. 590; Smith *v.* Livingston, 111 Mass. 342; Bank *v.* Savery, 127 Mass. 75, 79; International Trust Co. *v.* Wilson, 161 Mass. 80; Davis *v.* Seeley, 71 Mich. 209; Helms *v.* Douglas, 81 Mich. 442; Bank *v.* McNeir, 51 Minn. 123; Edwards *v.* Thomas, 66 Mo. 468, 483; Welsh *v.* Sage, 47 N. Y. 143; Insurance Co. *v.* Hachfield, 73 N. Y. 226; Bank *v.* Weston, 161 N. Y. 520, 526; Johnson *v.* Way, 27 Ohio St. 374; Kitchen *v.*

Moreover, there is no discrepance between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but at law no title to sue on the instrument can be made through a forgery (*q*);[85] and "the cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in equity" (*r*). The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere (*s*).

Qualities of negotiable instruments. The most frequent examples of negotiable instruments are bills of exchange (of which cheques are a

(*q*) The *bona fide* holder of an instrument with a forged indorsement may be exposed to considerable hardship. See *Bobbett* v. *Pinkett* (1876) 1 Ex. D. 368, 35 L. J. Ex. 555.

(*r*) *Jones* v. *Lane* (1838–9) 3 Y. & C. Ex. in Eq. 281, 293.

(*s*) *Thiedemann* v. *Goldschmidt* (1859) 1 D. F. & J. 4.

Loudenback, 48 Ohio St. 177; Kernohan *v.* Manss, 53 Ohio St. 118, 134; Hamilton *v.* Vought, 34 N. J. L. 187; Phelan *v.* Moss, 67 Pa. 59; McSparran *v.* Neeley, 91 Pa. 17; Bank *v.* Morgan, 165 Pa. 199; Frank *v.* Lilienfeld, 33 Gratt. 377; Crawford, Negot. Inst. Act, § 95, note (a). But see Smith *v.* Mechanics' Bank, 6 La. Ann. 610; Nutter *v.* Stover, 48 Me. 163; Drew *v.* Wheelihan, 75 Minn. 68; Bank *v.* Diefendorf, 123 N. Y. 191; Merritt *v.* Duncan, 7 Heisk. 156; Ormsbee *v.* Howe, 54 Vt. 182; Bank *v.* Adams, 70 Vt. 132.

That a *bona fide* purchaser of negotiable paper secured by mortgage takes the mortgage as he takes the negotiable instrument, free from equities, see Carpenter *v.* Longan, 16 Wall. 271; Kenicott *v.* Supervisors, 16 Wall. 452, 469; Sawyer *v.* Prickett, 19 Wall. 146, 166; Chicago, etc., Ry. Co. *v.* Merchants' Bank, 136 U. S. 268, 283; Swett *v.* Stark, 31 Fed. Rep. 858; Myers *v.* Hazzard, 50 Fed. Rep. 155; O'Rourke *v.* Wahl, 109 Fed. Rep. 276; Swift *v.* Bank, 114 Fed. Rep. 643; Hawley *v.* Bibb, 69 Ala. 52; Hart *v.* Adler, 109 Ala. 467; Cowing *v.* Cloud, 16 Col. App. 326; Gabbert *v.* Schwartz, 69 Ind. 450; Preston *v.* Morris, 42 Ia. 549; Updegraft *v.* Edwards, 45 Ia. 513; Lewis *v.* Kirk, 28 Kan. 497, 501; Duncan *v.* Louisville, etc., 13 Bush, 378; Collins *v.* Bradbury, 64 Me. 37; Taylor *v.* Page, 6 Allen, 86; Town *v.* Rice, 122 Mass. 67, 73; Helmer *v.* Krolick, 36 Mich. 371; Logan *v.* Smith, 62 Mo. 455; Webb *v.* Hoselton, 4 Neb. 308; Paige *v.* Chapman, 58 N. H. 333; Nashville Trust Co. *v.* Smythe, 94 Tenn. 513; Cornell *v.* Hichens, 11 Wis. 353; Kelly *v.* Whitney, 45 Wis. 110. *Contra*, Kleeman *v.* Frisbie, 63 Ill. 482; Bryant *v.* Vix, 83 Ill. 11; Railroad Co. *v.* Loewenthal, 93 Ill. 433; Towner *v.* McClelland, 110 Ill. 542; Romberg *v.* McCormick, 194 Ill. 205 (cp. Himrod *v.* Gilman, 147 Ill. 293); Johnson *v.* Carpenter, 7 Minn. 176; Hostetter *v.* Alexander, 22 Minn. 559; Baily *v.* Smith, 14 Ohio St. 396 (but see Holmes *v.* Gardner, 50 Ohio St. 167).

[85] Bank *v.* Adams, 91 Ind. 280; Bank *v.* Holtsclaw, 98 Ind. 85; Cochran *v.* Atchison, 27 Kan. 728; Dick *v.* Leverich, 11 La. 573; Carpenter *v.* Bank, 123 Mass. 66; Lennon *v.* Brainard, 36 Minn. 330; Star Fire Insurance Co. *v.* Bank, 60 N. H. 442; Buckley *v.* Bank, 35 N. J. L. 400; Graves *v.* Bank, 17 N. Y. 205; Colson *v.* Arnot, 57 N. Y. 253; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74; Citizens' Bank *v.* Importers' Bank, 119 N. Y. 195; Shipman *v.* Bank, 126 N. Y. 318; Shaffer *v.* McKee, 19 Ohio St. 526; Armstrong *v.* Bank, 46 Ohio St. 512; Chism *v.* Bank, 96 Tenn. 641; Farmer *v.* People's Bank, 100 Tenn. 187.

species) (*t*) and promissory notes. Their exceptional qualities are concisely stated in *Crouch* v. *Crédit Foncier* (*u*) :—

"Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

It is doubtful at common law whether the seal of a corporation can be treated as equivalent to signature for the purpose of making a bill or note under it negotiable; in England the doubt is removed by the Bills of Exchange Act (*x*).[86]

*A negotiable instrument must be a contract to pay money or [231 to deliver another negotiable security representing money (*y*) : therefore a promise in writing to deliver 1000 tons of iron to the bearer is not negotiable and gives no right of action to the possessor (*z*).

Mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments.[87] But the fact that a *universal* mercantile usage is modern is no reason against its being judicially recognized as part of the law merchant. The notion that general usage is insufficient merely because it is not ancient is founded on the erroneous assumption that the law merchant is to be treated as fixed and invariable (*a*). The negotiability of debentures issued by limited companies has now been recognized on the ground of general though modern mercantile custom (*b*).

The bonds of foreign governments issued abroad and treated in the English market as negotiable instruments are recognized as such

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. And they are equally negotiable: *M'Lean* v. *Clydesdale Banking Co.* (1883) 9 App. Ca. 95.

(*u*) L. R. 8 Q. B. 374, 42 L. J. Q. B. 183.

(*x*) But the addition of the seal will not prevent an instrument from being a good bill or note if it is also signed by an agent or agents for the company so that it would be good without the seal: see *Halford* v. *Cameron's Coalbrook &c. Co.* (1851) 16 Q. B. 442, 20 L. J. Q. B. 160; *Aggs* v. *Nicholson* (1856) 1 H. & N. 165, 25 L. J. Ex. 348; *Balfour* v. *Ernest* (1859) 5 C. B. N. S. 601, 28 L. J. C. P. 170: *Dutton* v. *Marsh* (1871) L. R. 6 Q. B. 361, 40 L. J. Q. B. 175. See now Bills of Exchange Act, 1882, s. 91, sub-s. 2.

(*y*) *Goodwin* v. *Robarts* (1876) Ex. Ch., L. R. 10 Ex. 337, 1 App. Ca. 476, 45 L. J. Ex. 748.

(*z*) *Dixon* v. *Bovill* (1856) 3 Macq. 1. Such a contract may however be made assignable free from equities: *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205, 46 L. J. Ch. 418.

(*a*) *Goodwin* v. *Robarts*, note (*y*) *supra*, overruling *Crouch* v. *Crédit Foncier* on this point; *Rumball* v. *Metropolitan Bank* (1877) 2 Q. B. D. 194, 46 L. J. Q. B. 346.

(*b*) *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 986. This decision of Kennedy J. has been

86 See *supra*, p. 145, n. 19.

87 See Bank *v.* Dean, 137 N. Y. 110, 117; Dean *v.* Driggs, 137 N. Y. 274, 289.

by law (*c*). So is the provisional scrip issued in England by the agent of a foreign government as preparatory to giving definite bonds (*d*). Such bonds or scrip, and other foreign instruments negotiable by the law of the country where they are made, may 232] be *recognized as negotiable by our Courts though they do not satisfy all the conditions of an English negotiable instrument (*e*).

Negotiability by estoppel. From what was said in *Goodwin* v. *Robarts* (*f*) in the House of Lords it seems that where the holder of an instrument purporting on the face of it to be negotiable, and in fact usually dealt with as such, intrusts it to a broker or agent who deals with it in the market where such usage prevails, he is estopped from denying its negotiable quality as against any one who in good faith and for value takes it from the broker or agent.[88] But where a person takes documents of value, negotiable or not, from one whom he knows to be an agent having limited authority, he must at his own peril ascertain what that authority is; and this whether his knowledge be derived from the principal or not (*g*).

How instruments may cease to be negotiable. It is also to be observed that an instrument which has been negotiable may cease to be so in various ways, namely —

criticized by Mr. Bosanquet K.C. but supported by Mr. F. B. Palmer, L. Q. R. xv. 130, 245.

(*c*) *Gorgier* v. *Mieville* (1824) 3 B. & C. 45, 27 R. R. 290. Negotiability in a foreign market is not enough: *Picker* v. *London and County Banking Co.* (1887) 18 Q. B. Div. 515.

(*d*) *Goodwin* v. *Robarts* (1876) L. R. 10 Ex. 76, affd. in Ex. Ch. *ib.* 337, in H. L. 1 App. Ca. 476, 45 L. J. Ex. 748.

(*e*) See *Crouch* v. *Crédit Foncier* (1873) L. R. 8 Q. B. at pp. 384–5; *Goodwin* v. *Robarts*, 1 App. Ca. at pp. 494–5.

(*f*) 1 App. Ca. 486, 489, 493, 497.

(*g*) *Earl of Sheffield* v. *London Joint Stock Bank* (1888) 13 App. Ca. 333, 57 L. J. Ch. 986. This applies only where there is actual knowledge of the limited authority: *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201, 61 L. J. Ch. 723.

88 "A *bona fide* purchaser for value of a non-negotiable *chose in action* from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, when the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting title thereto." Jarvis *v.* Rogers, 13 Mass. 105; Cowdrey *v.* Vandenburgh, 101 U. S. 572; Bridge *v.* Connecticut Ins. Co., 152 Mass. 343; Russell *v.* American Tel. Co., 180 Mass. 467; Otis *v.* Gardner, 105 Ill. 436; Walker *v.* Railway Co., 47 Mich. 338; Cochran *v.* Stewart, 21 Minn. 435; Brown *v.* Equitable Assur. Soc., 75 Minn. 412; International Bank *v.* German Bank, 71 Mo. 183; Prall *v.* Tilt, 28 N. J. Eq. 479; Bank *v.* Neet, 29 N. J. Eq. 449; McNeil *v.* Bank, 46 N. Y. 325; Moore *v.* Bank, 55 N. Y. 41; Coombes *v.* Chandler, 33 Ohio St. 178; Wood's Appeal, 92 Pa. 379; Burton's Appeal, 93 Pa. 214; Cherry *v.* Frost, 7 Lea, 1; Strange *v.* Railway Co., 53 Tex. 162; State *v.* Hastings, 15 Wis. 75. Cp. Osborn *v.* McClelland, 43 Ohio St. 284.

Payment by the person ultimately liable (*h*).[89]

Restrictive indorsement (*i*).

Crossing with the words "not negotiable" (*k*).

To a certain extent, in the case of bills payable to order, indorsement when overdue, which makes the indorsee's right subject to what are called equities attaching to the bill itself, *e. g.* an agreement between the original parties to the bill that in certain events the acceptor shall not *be held liable, but not to collateral equities such as [233 set-off (*l*).[90]

Transfer of contracts where duties as well as rights transferred. We have purposely left to the last the consideration of certain important classes of contracts which may be roughly described as involving the transfer of duties as well as of rights. This happens in the cases[91]

(A) Of transferable shares in partnerships and companies.

(B) Of obligations (*m*) attached to ownership or interests in property.

(*h*) *Lazarus* v. *Cowie* (1842) 3 Q. B. 464. As to the possibility of suing on a bill after it has been paid by some other person, see *Cook* v. *Lister* (1863) 13 C. B. N. S. 543, 32 L. J. C. P. 121.

(*i*) Bills of Exchange Act, 1882, ss. 35, 36.

(*k*) Bills of Exchange Act, 1882, s. 77. A person taking a cheque so crossed has not and cannot give a better title than the person from whom he took it: s. 81. The practice of crossing cheques is unknown in America.

(*l*) See *Ex parte Swan* (1868) L. R. 6 Eq. 344, 359, where the authorities are discussed.

(*m*) We use the word here in its wide sense so as to denote the bene-

[89] Beebe *v.* Real Estate Bank, 4 Ark. 551; Blenn *v.* Lyford, 70 Me. 149; Hopkins *v.* Farwell, 32 N. H. 425; Rolfe *v.* Wooster, 58 N. H. 526; Citizens' Bank *v.* Lay, 80 Va. 436.

[90] Bank *v.* Texas, 20 Wall. 72, 88; Murphy *v.* Arkansas Co., 97 Fed. Rep. 723; Robertson *v.* Breedlove, 7 Port. 541; Robinson *v.* Lyman, 10 Conn. 30; Simpson *v.* Hall, 47 Conn. 417, 426; Wilkinson *v.* Jeffers, 30 Ga. 153; Hankins *v.* Shoupe, 2 Ind. 342; Richards *v.* Daily, 34 Ia. 427: Eversole *v.* Maule, 50 Md. 95, 102; Arnot *v.* Woodburn, 35 Mo. 99; Cutter *v.* Cook, 77 Mo. 388; Barnes *v.* McMullins, 78 Mo. 260; Kernohan *v.* Durham, 47 Ohio St. 1; Long *v.* Rhawn, 75 Pa. 128; Young *v.* Shriner, 80 Pa. 463; Trafford *v.* Hall, 7 R. I. 104; Britton *v.* Bishop, 11 Vt. 70; Armstrong *v.* Noble, 55 Vt. 428; Haley *v.* Congdon, 56 Vt. 65; Davis *v.* Noll, 38 W. Va. 66; Crawford, Negot. Inst. Act. § 97, note (a). *Contra*, that the indorsee after maturity does take the paper subject to set-off, see Robinson *v.* Perry, 73 Me. 168; Stockbridge *v.* Damon, 5 Pick. 223; Sargent *v.* Southgate. 5 Pick. 312; Ranger *v.* Cary, 1 Met. 369; McKenna *v.* Kirkwood, 50 Mich. 544; Cross *v.* Brown, 51 N. H. 486; McDuffie *v.* Dame, 11 N. H. 244; Miner *v.* Hoyt, 4 Hill, 193; Haywood *v.* McNair, 2 Dev. & B. 283; Turner *v.* Beggarly, 11 Ired. L. 331; Baker *v.* Kinsey, 41 Ohio St. 403; Cain *v.* Spann, 1 McMull. 258.

But where the right of set-off is permitted, it is not extended to claims acquired by the defendant after the transfer of the paper, but is limited to debts due to him at that time. Baxter *v.* Little, 6 Met. 7; Linn *v.* Rugg, 19 Minn. 181; Johnson *v.* Bloodgood, 1 Johnson's Cas. 51; Cain *v.* Spann, 1 McMull. 258; Williams *v.* Hart, 2 Hill (S. C.). 483; Davis *v.* Miller, 14 Gratt. 1. See also Y. M. C. A. Gymnasium Co. *v.* Bank, 179 Ill. 599.

[91] Other classes of cases might have been here included. Any attempt to

A. **Shares in partnerships and unincorporated companies may be made transferable at common law.** The contract of partnership generally involves personal confidence, and is therefore of a strictly personal character. But, "if partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not: nor why, having so agreed, they should not be bound by the agreement" (*n*). At common law the number of persons engaged in a contract of partnership does not make any difference in the nature or validity of the contract; hence it follows that if in a partnership of two or three the share of a partner may be transferred on terms agreed on by the original partners, there is nothing at common law to prevent the same arrangement from being made in the case of a larger partnership, however numerous the members may be; in other words, unincorporated companies with transferable shares are not unlawful at common law.[92] But this, as Lord Lindley observes, is now only of historical interest (*o*).

But no uncertain contract and no real anomaly in this. At first sight this
234] may seem to involve the anomaly of *a floating contract between all the members of the partnership for the time being, who by the nature of the case are unascertained persons when we look to any future time (*p*). But there is no need to assume any special exception from the ordinary rules of contract. It was pointed out by Lord Westbury that the transfer of a share in a partnership at common

fit or burden of a contract, or both, according to the nature of the case.

(*n*) Lindley on Partnership, 368.

(*o*) Lindley on Companies, 130–135.

(*p*) Cp. per Abbott C. J. in *Josephs* v. *Pebrer* (1825) 3 B. & C. 639, 643. This line of objection, however, does not appear to have been distinctly taken in any of the cases where the legality of joint-stock companies was discussed.

assign a bilateral contract so as to substitute a new person in the place of one of the original contractors involves, if successful, the transfer of duties as well as of rights. The various meanings given to the word assign and an excellent analysis of the legal principles applicable may be found in 18 Harv. L. Rev. 23, by Professor F. C. Woodward.

[92] Phillips *v.* Blatchford, 137 Mass. 510; Edwards *v.* Gasoline Works, 168 Mass. 564; Farnum *v.* Patch, 60 N. H. 294; Townsend *v.* Goewey, 19 Wend. 424, 427; Warner *v.* Beers, 24 Wend. 101, 149; McFadden *v.* Leeka, 48 Ohio St. 513, 526.

In mining partnerships a sale of his interest by a partner to a stranger does not dissolve the partnership, but the stranger by his purchase becomes a partner. Taylor *v.* Castle, 42 Cal. 367; Kahn *v.* Smelting Co., 102 U. S. 641; Bissell *v.* Foss, 114 U. S. 252.

law is strictly not the transfer of the outgoing partner's contract to the incoming partner, but the formation of a new contract. "By the ordinary law of partnership as it existed previously to" the Companies Acts "a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a transfer of his share, it would in effect be the creation of a new partnership" (*q*). This therefore is to be added to the cases in which we have already found apparent anomalies to vanish on closer examination.

Practical difficulties of unincorporated companies would remain, even apart from compulsory provisions of Companies Act. Notwithstanding the theoretical legality of unincorporated companies, there does not appear to be any very satisfactory way of enforcing either the claims of the company against an individual member (*r*), or those of an individual member against the company (*s*). But the power of forming such companies is so much cut short by the Companies Act, 1862, which renders (with a few exceptions) unincorporated and unprivileged (*t*) partnerships of more than twenty (*u*) persons positively illegal, that questions of this kind have lost practical importance in this country. In like manner the transfer of shares in *companies as well as [235 their original formation is almost entirely governed by modern statutes.

B. **Obligations attached to property.** Obligations *ex contractu* attached to ownership or interests in property are of several kinds. With regard to those attached to estates and interests in land, which alone offer any great matter for observation, the discussion of them in detail is usually and conveniently treated as belonging to the law of real property. There are however matters of general principle to be noted, and misunderstanding to be avoided, as to the respective methods of common law and equity in dealing with burdens imposed on the use of land by contract.

(*q*) *Webb* v. *Whiffin* (1872) L. R. 5 H. L. 711, 727, 42 L. J. Ch. 161.

(*r*) We have seen (*supra*, p. *216) that they cannot empower an officer to sue on behalf of the association.

(*s*) See *Lyon* v. *Haynes* (1843) 5 M. & Gr. 504. A partner can now sue or be sued by the partnership in the firm-name. See Ord. XLVIIIA. rr. 1, 10.

(*t*) *i. e.* such as but for the Act would have been mere partnerships at common law.

(*u*) Ten in the case of banking: Companies Act, 1862, s. 4.

A preliminary statement in a summary form may be useful.

OBLIGATIONS ATTACHED TO OWNERSHIP AND INTERESTS IN PROPERTY.

I. GOODS.

A contract cannot be annexed to goods so as to follow the property in the goods either at common law (*x*)[93] or in equity (*y*).[94]

By statute 18 & 19 Vict. c. 111 the indorsement of a bill of lading operates as a legal transfer of the contract, if and whenever by the law merchant it operates as a transfer of the property in the goods.

II. LAND (*z*).

a. Relations between landlord and tenant on a demise.

Burden:	
of lessee's covenants	As to an existing thing parcel of the demise, assignees are bound whether named or not. As to something to be newly made on the premises, assignees are bound only if named (*a*).
236] *of lessor's covenants	runs with the reversion. (32 Hen. VIII. c. 34.)
Benefit:	
of lessee's covenants	runs with the reversion. (32 Hen. VIII. c. 34.)

The statute of Hen. VIII. applies only to demises under seal (*b*), and includes (by construction in *Spencer's case*) only such covenants as *touch and*

(*x*) 3rd resolution in *Spencer's case*, 1 Sm. L. C. 65; *Splidt* v. *Bowles* (1808) 10 East 279, 10 R. R. 296. "In general contracts do not by the law of England run with goods": Blackburn on Sale, 276.

(*y*) *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, 295.

(*z*) On this generally see Dart V. & P. 2. 862 *sqq.*; 3rd Report of R. P. Commission, Dav. Conv. 1. 122 (4th ed.); and above all the notes to *Spencer's case* in 1 Sm. L. C.: and also as to covenants in leases the notes to *Thursby* v. *Plant*, 1 Wms. Saund. 278–281, 299, 305. [Covenants Running with the Land, by Henry U. Sims, Chicago, 1901.]

(*a*) As to this distinction, see 1 Sm. L. C. 67 *sqq.* [American Strawboard Co. *v.* Haldeman Paper Co. 83 Fed. Rep. 619, 624; Hansen *v.* Myer, 81 Ill. 321; Thompson *v.* Rose, 8 Cow. 266; Tallman *v.* Coffin, 4 N. Y. 134; Masury *v.* Southworth, 9 Ohio St. 340; Brown *v.* Railway Co. 36 Oreg. 128; Cronin *v.* Watkins, 1 Tenn. Ch. 119; Doty *v.* Railroad Co. 103 Tenn. 564; Hartung *v.* Witte, 59 Wis. 285.]

(*b*) *e. g. Smith* v. *Eggington* (1874) L. R. 9 C. P. 145, 43 L. J. C. P. 140.

[93] A warranty is not enforceable by a sub-purchaser of the warranted chattel. Smith *v.* Williams, 117 Ga. 782; Prater *v.* Campbell, 110 Ky. 23. As to the right of a subpurchaser to sue in tort, see Skinn *v.* Reutter, (Mich.) 63 L. R. A. 743, and note.

[94] A restrictive agreement as to the use of chattels cannot be enforced against a sub-purchaser with notice. Taddy *v.* Sterious, 20 T. L. R. 102; Apollinaris Co. *v.* Scherer, 27 Fed. Rep. 18; Bobbs-Merrill Co. *v.* Snellenburg, 131 Fed. Rep. 530; Garst *v.* Hall & Lyon Co., 179 Mass. 588. But see *contra*, New York Bank Note Co. *v.* Hamilton, &c. Co., 28 N. Y. App. Div. 411; Murphy *v.* Christian Press, etc., Co., 38 N. Y. App. Div. 426; 17 Harv. L. Rev. 415.

concern the thing demised (*c*).[95] It applies only to the reversion which the covenanter had at the time of entering into the covenant (*d*).

of lessor's covenants	runs with the tenancy.

See also 44 & 45 Vict. c. 41, ss. 10, 11, 58.

Note.

(i) The lessee may safely pay rent (*e*) to his lessor so long as he has no notice of any grant over of the reversion: 4 & 5 Anne c. 3 [in Rev. Stat.: *al* 4 Anne c. 16], which is in fact a declaration of common law: see per Willes J., L. R. 5 C. P. 594.

(ii) The lessee may still be sued on his express covenants (though under the old practice he could not be sued *in debt* for rent) after an assignment of the term (*f*).[96]

(iii) The doctrine concerning a reversion in a term of years is the same as concerning a freehold reversion (*g*).

(iv) Where the statute of Henry VIII. does not apply, the assignee of the reversion cannot sue an original lessee who has assigned over all his estate, there being neither privity of estate nor privity of contract (*h*).

β. Mortgage debts.

The transfer of a mortgage security operates *in equity* as a transfer of the debt (*i*).[97] Notice to the mortgagor is not needed to make the assign-

(*c*) For the meaning of this see 1 Sm. L. C. 65; *Fleetwood* v. *Hull* (1889) 23 Q. B. D. 35, 58 L. J. Q. B. 341. [Clegg *v.* Hands, 44 Ch. D. 503; White *v.* Southend Hotel Co. [1897] 1 Ch. 767.]

(*d*) *Muller* v. *Trafford* [1901] 1 Ch. 54, 70 L. J. Ch. 72.

(*e*) In the case of the lessee's covenants other than for payment of rent, an assignee of the reversion is not bound to give notice of the assignment to the lessee as a condition precedent to enforcing his rights: *Scaltock* v. *Harston* (1875) 1 C. P. D. 106, 45 L. J. C. P. 125.

(*f*) 1 Sm. L. C. 24, 1 Wms. Saund. 298.

(*g*) 1 Sm. L. C. 74, 75.

(*h*) *Allcock* v. *Moorhouse* (1882) 9 Q. B. Div. 366.

(*i*) This is one of the cases in which the equitable transfer of a debt is not made = a legal transfer by the Judicature Act, 1873. In practice an express assignment of the debt is always added: the old power of attorney however is now superfluous.

[95] Northern Trust Co. *v.* Snyder, 76 Fed. Rep. 34; Salesbury *v.* Shirley, 66 Cal. 223; Wiggins Ferry Co. *v.* Railway Co., 94 Ill. 83; Gordon *v.* George 12 Ind. 408; Shaber *v.* St. Paul Water Co., 30 Minn. 179; Norman *v.* Wells, 17 Wend. 136; Norfleet *v.* Cromwell, 70 N. C. 634, 640; Masury *v.* Southworth, 9 Ohio St. 340.

[96] Wilson *v.* Gerhardt, 9 Col. 585; Harris *v.* Heackman, 62 Ia. 411; Baltimore *v.* Peat, 93 Md. 696; Pfaff *v.* Golden, 126 Mass. 402; Greenleaf *v.* Allen, 127 Mass. 248; Rees *v.* Lowy, 57 Minn. 381; Bouscaren *v.* Brown, 50 Neb. 722; Harmony Lodge *v.* White, 30 Ohio St. 569; Smith *v.* Harrison, 42 Ohio St. 180; Ghegan *v.* Young, 23 Pa. 18.

[97] Carpenter *v.* Longan, 16 Wall. 271, 274; Converse *v.* Michigan Dairy Co., 45 Fed. Rep. 18; McHugh *v.* O'Connor, 91 Ala. 241; Sanford *v.* Kane, 133 Ill. 199; Hamilton *v.* Browning, 94 Ind. 242; Meeker Co. Bank *v.* Young, 51 Minn. 254; Gamble *v.* Wilson, 33 Neb. 270; Cram *v.* Cottrell, 48 Neb. 646; Tildon *v.* Stilson, 49 Neb. 382; Jackson *v.* Blodget, 6 Cow. 202; Jackson *v.* Willard, 4 Johns. 41; Holmes *v.* Gardner, 50 Ohio St. 167; Stimpson *v.* Bishop, 82 Va. 190.

An assignment of the mortgage alone is a nullity. Kernohan *v.* Manss, 53 Ohio St. 118, 133; Boyle *v.* Lybrand, 113 Wis. 79.

ment valid; but without such notice the assignee is bound by the [237 state of the accounts between mortgagor and mortgagee (*k*).[98]

γ. Rent-charges and annuities imposed on land independently of tenancy or occupation (*l*).

An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment (*m*); but by a somewhat curious distinction the burden of a covenant to pay a rent-charge does *not* run with the land charged, nor does the benefit of it run with the rent (*n*).[99]

δ. Other covenants not between landlord and tenant, relating to land and entered into *with* the owner of it.

The benefit runs with the covenantee's estate so that an assignee can sue at common law. The lessee for years of the covenantee may enforce the covenant as an assign if assigns are named (o). It is immaterial whether the covenanter was the person who conveyed the land to the covenantee or a stranger (*p*).[1] The usual vendor's covenants for title come under this head. It is doubtful whether a *bona fide* purchaser from a purchaser who obtained his conveyance by fraud can in any circumstances sue on the former vendor's covenants for title (*q*).

ε. The covenants entered into *by* the owner.

The burden of such covenants appears on the whole *not* to run with the land in any case at common law (*r*).[2] But where a right or easement

(*k*) *Jones* v. *Gibbons* (1864) 9 Ves. 407, 411, 7 R. R. 247; *Matthews* v. *Wallwyn* (1798) 4 Ves. 118, 126.

(*l*) These must be regarded as arising from contract (we do not speak of rents or services incident to *tenure*): the treatment of rent-charges in English law as real rights or incorporeal hereditaments seems arbitrary. For a real right is the power of exercising some limited part of the rights of ownership, and is quite distinct from the right to receive a fixed payment without the immediate power of doing any act of ownership on the property on which the payment is secured.

(*m*) *Bower* v. *Cooper* (1842) 2 Ha. 408, 11 L. J. Ch. 287.

(*n*) 1 Wms. Saund. 303.

(o) *Taite* v. *Gosling* (1879) 11 Ch. D. 273, 48 L. J. Ch. 397.

(*p*) *Contra* Sugd. V. & P. 584–5, but alone among modern writers. The cases from the Year Books relied on by Lord St. Leonards (*Pakenham's case*, H. 42 E. III. 3, pl. 14; *Horne's case*, M. 2 H. IV. 6, pl. 25) seem to show only that it was once thought doubtful whether the assignee could sue without being also *heir* of the original covenantee. See also O. W. Holmes, The Common Law, 395, 404.

(*q*) *Onward Building Society* v. *Smithson* [1893] 1 Ch. 1, 15, 62 L. J. Ch. 138, C. A.

(*r*) 3rd report of R. P. Commissioners, in 1 Dav. Conv. *Austerberry* v. *Corporation of Oldham* (1885) 29 Ch. Div. 750, 55 L. J. Ch. 633; Farwell J. in *Rogers* v. *Hosegood* [1900] 2 Ch. 388, 395; 69 L. J. Ch. 59.

[98] See *supra*, p. 281.

[99] As to the rule in the United States see Sm. L. C. (8th Am. ed.) I. 189.

[1] See Shaber *v.* St. Paul Water Co., 30 Minn. 179; Mygatt *v.* Coe, 124 N. Y. 229; Manderbach *v.* Bethany Orphans' Home, 109 Pa. 231; Gulf, etc., Ry. Co. *v.* Smith, 72 Tex. 122.

[2] "This doctrine has not usually been accepted in the United States. It has been held in many decisions in this Commonwealth and elsewhere, that at law the burden of a covenant may run with the land. Savage *v.* Mason, 3 Cush. 500; Bronson *v.* Coffin, 108 Mass. 175; Richardson *v.* Tobey, 121 Mass. 457; King *v.* Wight, 155 Mass. 444; Joy *v.* St. Louis, 138 U. S. 1; Fitch *v.* Johnson, 104 Ill. 111; Hazlett *v.* Sinclair, 76 Ind. 488; Norfleet *v.* Cromwell, 64 N. C. 1; Pomeroy Eq. Jur. 1295." Whittenton Mfg. Co. *v.* Staples, 164 Mass. 319, 327. See as to the liability of purchasers, both at law and in equity, American Strawboard Co. *v.* Haldeman Paper Co., 83 Fed. Rep. 619; Robbins *v.*

affecting land—such as a right to get minerals free from the ordinary duty of not letting down the surface—is granted subject to the duty of paying compensation for damage done to the land by the exercise of the *right, there the duty of paying compensation runs at law with the benefit [238 of the grant. Here, however, the correct view seems to be that the right itself is a qualified one—*viz.* to let down the surface, &c., paying compensation, and not otherwise (*s*).

The burden is said to run with the land in equity (*t*) (subject to the limitation to be mentioned) in this sense, that a court of equity will enforce the covenant against assignees who have actual or constructive (*u*) notice of it; and when the covenant is for the benefit of other land (as in practice is commonly the case) the benefit generally though not always runs with that other land.

Explanation. Let us call the land on the use of which a restriction is imposed by covenant the *quasi-servient* tenement, and the land for whose benefit it is imposed the *quasi-dominant* tenement. Now, restrictive covenants may be entered into

(1) By a vendor as to the use of other land retained or simultaneously sold, for the benefit of the land sold by him:

In this case the burden runs with the quasi-servient tenement and the benefit also runs with the quasi-dominant tenement.

(2) By a purchaser as to the use of the land purchased by him, for the benefit of other land retained or simultaneously sold by the vendor:

In this case the burden runs with the quasi-servient tenement, and the benefit *may* run with the quasi-dominant tenement when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan (*r*).[3]

(*s*) *Aspden* v. *Seddon* (1876) 1 Ex. Div. 496, 509, 46 L. J. Ex. 353.

(*t*) The phrase is not free from objection: see per Rigby L.J. [1900] 2 Ch. at p. 401.

(*u*) *Wilson* v. *Hart* (1866) L. R. 1 Ch. 463; *Patman* v. *Harland* (1881) 17 Ch. D. 353, 50 L. J. Ch. 642.

(*v*) *Keates* v. *Lyon*, L. R. 4 Ch. 218, 38 L. J. Ch. 357, and other cases there considered; *Harrison* v. *Good* (1871) L. R. 11 Eq. 338, 40 L. J. Ch. 294; *Renals* v. *Cowlishaw* (1878) 9 Ch. D. 125, 11 Ch. Div. 866, 48 L. J. Ch. 830; *Spicer* v. *Martin* (1888) 14 App. Ca. 12, 58 L. J. Ch. 309; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 69 L. J. Ch. 652, C. A. [See also John Brothers Co. *v.* Holmes [1900] 1 Ch. 188; Holloway *v.* Hill [1902] 2 Ch. 612; Osborne *v.* Bradley [1903] 2 Ch. 446; Formby *v.* Barker [1903] 2 Ch. 539.]

Webb, 68 Ala. 393; Webb *v.* Robbins, 77 Ala. 176; Railway Co. *v.* Gilmer, 85 Ala. 422; Fresno Canal Co. *v.* Dunbar, 80 Cal. 530; Hottell *v.* Farmers' Assoc., 25 Col. 67; Railroad Co. *v.* Reeves, 64 Ga. 492; Fitch *v.* Johnson, 104 Ill. 111; Hazlett *v.* Sinclair, 76 Ind. 488; Railroad Co. *v.* Power, 15 Ind. App. 179; Savage *v.* Mason, 3 Cush. 500; Bronson *v.* Coffin, 108 Mass. 175; Norcross *v.* James, 140 Mass. 188; Whittenton Mfg. Co. *v.* Staples, 164 Mass. 319, 327; Burbank *v.* Pillsbury, 48 N. H. 475; Nye *v.* Hoyle, 120 N. Y. 195; Easter *v.* Railroad Co., 14 Ohio St. 48; Huston *v.* Railroad Co., 21 Ohio St. 235; Hickey *v.* Railway Co., 51 Ohio St. 40; Brown *v.* Railroad, 36 Oreg. 128; Landell *v.* Hamilton, 175 Pa. 327; Doty *v.* Railway Co., 103 Tenn. 564; Kellogg *v.* Robinson, 6 Vt. 276; Wooliscroft *v.* Norton, 15 Wis. 198; Hartung *v.* Witte, 59 Wis. 285; Crawford *v.* Witherbee, 77 Wis. 419.

[3] Robbins *v.* Webb, 68 Ala. 393; Willoughby *v.* Lawrence, 116 Ill. 11; Halle *v.* Newbold, 69 Md. 265; Parker *v.* Nightingale, 6 Allen, 341; Whitney *v.* Railroad Co., 11 Gray, 359; Peck *v.* Conway, 119 Mass. 546; Sharp *v.* Ropes, 110 Mass. 381; Payson *v.* Burnham, 141 Mass. 547; Hamlen *v.* Werner, 144 Mass. 396; Hopkins *v.* Smith, 162 Mass. 444; Hills *v.* Metzenroth, 173 Mass. 423; Burbank *v.* Pillsbury, 48 N. H. 475, 482; Winfield *v.* Henning, 21 N. J. Eq. 188; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Hayes *v.* Waverly, &c. Co.,

All these rights and liabilities being purely equitable are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defence. An assign of a covenantee may be entitled to the benefit of the covenant without having known of it at the date of his purchase: the question is whether he acquired it as annexed to the land (*x*).

Further, this doctrine applies only to restrictive, not to affirmative covenants. Thus it does not apply to a covenant to repair. "Only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice" (*y*).[4]

239] * Further remarks: as to bills of lading. The only points which seem to call for more notice here are the doctrines as to bills of lading (I.) and restrictive covenants as to the use of land (II. ε).

As to (I.) it is to be borne in mind that bills of lading are not properly negotiable instruments, though they may be called so "in a limited sense as against stoppage *in transitu* only" (*z*).[5] As far as the law merchant goes the bill of lading only represents the goods, and does not enable any one who gets it into his hands to give a better title than his own to a transferee; "the transfer of the symbol does not operate more than a transfer of what is represented" (*a*).[6]

(*x*) *Rogers* v. *Hosegood*, last note.

(*y*) Lindley L. J. *Haywood* v. *Brunswick Building Society* (1881) 8 Q. B. Div. 403, 410, 51 L. J. Q. B. 73; *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. Div. 562, 51 L. J. Ch. 530; *Austerberry* v. *Corporation of Oldham*, note (*v*), p. *237, above; *Hall* v. *Ewin* (1887) 37 Ch. Div. 74, 57 L. J. Ch. 95.

(*z*) Per Willes J. *Fuentes* v. *Montis* (1868) L. R. 3 C. P. at p. 276, 38 L. J. C. P. 95.

(*a*) *Gurney* v. *Behrend* (1854) 3 E. & B. 622, 633, 23 L. J. Q. B. 265.

51 N. J. Eq. 345; Cornish *v.* Wiessman, 56 N. J. Eq. 610; Roberts *v.* Scull, 58 N. J. Eq. 396; Barrow *v.* Richard, 8 Paige, 351; Gilbert *v.* Peteler, 38 N. Y. 165; Trustees *v.* Lynch, 70 N. Y. 440; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Lewis *v.* Gollner, 129 N. Y. 227; Rowland *v.* Miller, 139 N. Y. 93; Stines *v.* Dorman, 25 Ohio St. 580; Shields *v.* Titus, 46 Ohio St. 528; St. Andrew's Church's Appeal, 67 Pa. 512; Muzzarelli *v.* Hulshizer, 163 Pa. 643; Green *v.* Creighton, 7 R. I. 1; Lydick *v.* Railroad Co., 17 W. Va. 427. Cp. Clapp *v.* Wilder, 176 Mass. 332; Hazen *v.* Mathews, 184 Mass. 388; American Unitarian Assoc. *v.* Minot, 185 Mass. 589; Hemsley *v.* Hotel Co., 62 N. J. Eq. 164, 63 N. J. Eq. 804; Equitable Ass'n *v.* Brennan, 148 N. Y. 661. See further Ames, Cas. Eq. Jur. 149, n., 152, n., 162, n., 165, n., 180, n.; 29 Am. L. Reg. 73; 17 Harv. L. Rev. 174.

[4] The law seems otherwise in this country. Whittenton Mfg. Co. *v.* Staples, 164 Mass. 319, 327; Burbank *v.* Pillsbury, 48 N. H. 475, 482; Gould *v.* Partridge, 52 N. Y. App. Div. 40; Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. 284.

[5] Munroe *v.* Philadelphia Warehouse Co., 75 Fed. Rep. 545; Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320; Knigbt *v.* Railway Co., 141 Ill. 110; Dows *v.* Perrin, 16 N. Y. 325.

[6] Shaw *v.* Railroad Co., 101 U. S. 557, 565; Pollard *v.* Vinton, 105 U. S. 7; Friedlander *v.* Texas, &c. Ry. Co., 130 U. S. 416; Voss *v.* Robertson, 46 Ala. 483; Tison *v.* Howard, 57 Ga. 410; Railroad *v.* Live Stock Bank, 178 Ill. 506; Anchor Mill Co. *v.* Railroad Co., 102 Ia. 262; Stollenwerck *v.* Thacher, 115 Mass. 224; Bank *v.* Bemis, 177 Mass. 95, 98; Bank *v.* Elliott, 83 Minn. 469; Hazard *v.* Railroad, 67 Miss. 32; Skilling *v.* Bollman, 6 Mo. App. 76; Dows *v.* Perrin, 16 N. Y. 325; Bank of Batavia *v.* Railroad, 106 N. Y. 195; Emery's Sons *v.* Bank, 25 Ohio St. 360, 368; Strauss *v.* Wessel, 30 Ohio St. 211; Empire Transportation Co. *v.* Steele, 70 Pa. 188.

And the whole effect of the statute is to attach the rights and liabilities of the shipper's contract not to the symbol, but to the property in the goods themselves (*b*): the right to sue on the contract contained in the bill of lading is made to "follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser" (*c*).[7]

As to burden of covenants running with land. As to (II. ε) the theory of the common law is to the following effect. The normal operation of a contract, as we have already had occasion to say, is to limit or cut short in some way the contracting party's control over his own actions. Among other kinds of actions the exercise of rights of ownership over a particular portion of property may be thus limited. So far then an owner "may bind himself by covenant to allow any right he pleases over his property" (*d*) *or to deal with it in [240 any way not unlawful or against public policy (*e*). But if it be sought to annex such an obligation to the property itself, this is a manifest departure from the ordinary rules of contract. An obligation attached to property in this manner ceases to be only a burden on the freedom of the contracting party's individual action, and becomes practically a burden on the freedom of ownership. Now the extent to which the law will recognize such burdens is already defined. Certain well-known kinds of permanent burdens are imposed by law, or may be imposed by the act of the owner, on the use of land, for the permanent benefit of other land: these, and these only, are recognized as being necessary for the ordinary convenience of mankind, and new kinds cannot be admitted. And this principle, it may be observed, is not peculiar to the law of England (*f*). Easements and other real rights *in re aliena* cannot therefore be extended at the arbitrary discretion of private owners: "it is not competent for an owner of land to ren-

(*b*) *Fox* v. *Nott* (1861) 6 H. & N. 630, 636, 30 L. J. Ex. 259; *Smurthwaite* v. *Wilkins* (1862) 11 C. B. N. S. 842, 850, 31 L. J. C. P. 214.

(*c*) *The Freedom*, L. R. 3 P. C. 594, 599. As to indorsement by way of pledge, see *Sewell* v. *Burdick* (1884) 10 App. Ca. 74, 103.

(*d*) *Hill* v. *Tupper* (1863) 2 H. & C. 121, 127, 32 L. J. Ex. 217.

(*e*) It is not unlawful for a landowner to let all his land lie waste; but a covenant to do so would probably be invalid.

(*f*) Cp. Savigny, Obl. 1. 7; and for a singular coincidence in detail, D. 8. 3. de serv. praed. rust. 5 § 1, 6 *pr.* = *Clayton* v. *Corby* (1843) 5 Q. B. 415, 14 L. J. Q. B. 364.

But see Pollard *v.* Reardon, 65 Fed. Rep. 848; Ratzer *v.* Burlington, &c. Railway Co., 64 Minn. 245. See further 7 Yale L. J. 169, 219.

7 Under the reformed procedure the transferee of a bill of lading may bring an action thereon in his own name against the carrier. Bank *v.* Union R. & T. Co., 69 N. Y. 373.

der it subject to a new species of burden at his fancy or caprice" (*g*).[8] Still less is it allowable to create new kinds of tenure or to attach to property incidents hitherto unknown to the law. But if it is not convenient or allowable that these things should be done directly in the form of easements, neither is it convenient or allowable that they should be done indirectly in the form of obligations created by con-
241] tract but annexed to ownership. If the *burden of restrictive covenants is to run with land, people can practically create new easements and new kinds of tenure to an indefinite extent. Such appears to be the view of legal policy on which the common law doctrine rests (*h*).

Doctrine in equity. The history of the doctrine in the Court of Chancery is somewhat curious. Lord Brougham, in an elaborate judgment which seems to have been intended to settle the question (*i*), treated what we have called the common law theory as final, and, ignoring the difference between positive and negative covenants, broadly laid down that where a covenant does not run with the land at law, an assignee cannot be affected by notice of it. But this judgment, though treated as an authority in courts of law (*k*), has never been followed in courts of equity. After being disregarded in two reported cases (*l*) it was overruled by Lord Cottenham in *Tulk* v. *Moxhay* (*m*), now the leading case on the subject. The most im-

(*g*) Per Martin B. *Nuttall* v. *Bracewell* (1866) L. R. 2 Ex. 10, 36 L. J. Ex. 1; for the C. L. principles generally, see *Ackroyd* v. *Smith* (1850) 10 C. B. 164, 19 L. J. C. P. 315; *Bailey* v. *Stephens* (1862) 12 C. B. N. S. 91, 31 L. J. C. P. 226. Rights of this kind are to be carefully distinguished from those created by grants in gross; see per Willes J. *ib.* 12 C. B. N. S. 111. The Courts might have held that new negative easements might be created, but not positive ones, but this solution does not seem to have ever been proposed; and the whole subject of negative easements is still obscure, as is shown by the widely different opinions held in *Dalton* v. *Angus* (1881) 6 App. Ca. 740, 50 L. J. Q. B. 689.

(*h*) See per Willes J. delivering the judgment of the Ex. Ch. in *Dennett* v. *Atherton* (1872) L. R. 7 Q. B. 316, 325.

(*i*) *Keppell* v. *Bailey* (1834) 2 M. & K. 517, 527, 39 R. R. 264, 270; and see the preface to that volume.

(*k*) *Hill* v. *Tupper* (1863) 2 H. & C. 121, 32 L. J. Ex. 217.

(*l*) *Whatman* v. *Gibson* (1838) 9 Sim. 196, 47 R. R. 214; *Mann* v. *Stephens* (1846) 15 Sim. 377.

(*m*) (1848) 2 Ph. 774. See per Fry J. in *Luker* v. *Dennis* (1877) 7 Ch. D. 227, at pp. 235, 236, 47 L. J. Ch. 174.

[8] Taylor *v.* Owen, 2 Blackf. 301; Norcross *v.* James, 140 Mass. 188; Haeussler *v.* Missouri Iron Co., 110 Mo. 188; Brewer *v.* Marshall, 19 N. J. Eq. 537; Blount *v.* Harvey, 6 Jones L. 186, 190; Masury *v.* Southworth, 9 Ohio St. 340, 348; Tardy *v.* Creasy, 81 Va. 553; West Va. Transp. Co. *v.* Pipe Line Co., 22 W. Va. 600. Cp. Kettle River R. Co. *v.* Eastern Ry. Co., 41 Minn. 461; Huntington *v.* Asher, 96 N. Y. 604; Hodge *v.* Sloan, 107 N. Y. 244. See further Ames, Cas. Eq. Jur. 186.

portant of the recent cases are *Keates* v. *Lyon* (*n*) (where the authorities are collected), *Haywood* v. *Brunswick Building Society* (*o*), which explicitly decided that the rule applies only to negative covenants,[9] and *Nottingham Brick Co.* v. *Butler* (*p*). When a vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, not entering into any covenant himself, it is a question of fact whether these covenants are meant to operate for the protection of purchasers as *between themselves, or as [242 against the vendor in his dealings with parcels retained by him (*q*). Where such is the intention, any purchaser can enforce the restriction against any other purchaser, or his assigns having notice, or the vendor as the case may be, nor can the vendor release the covenant to any purchaser or his successors in title without the consent of all the rest (*r*).

Foundation of the equitable doctrine. The result of the equitable doctrine is in practice to enable a great number and variety of restrictions to be imposed on the use of land for an indefinite time, subject to the contingency of a purchase for value without notice of the restriction (*s*). But equity does not profess to enforce a restrictive covenant on a purchaser with notice as being a constructive party to the covenant; it only restrains him from using the land in a manner which would be unconscientious as depriving the covenantee of his effectual remedy (*t*). So far as common law remedies go, covenants

(*n*) (1869) L. R. 4 Ch. 218, 38 L. J. Ch. 357.

(*o*) (1881) 8 Q. B. Div. 403, 51 L. J. Q. B. 73.

(*p*) (1886) 16 Q. B. Div. 778. For the corresponding Scottish doctrine, see *Hislop* v. *Leckie* (1881) 6 App. Ca. 560.

(*q*) *Re Birmingham and District Land Co.* v. *Allday* [1893] 1 Ch. 342, 62 L. J. Ch. 90. As to what is sufficient evidence of a "building scheme," *Tucker* v. *Vowles* [1893] 1 Ch. 195, 62 L. J. Ch. 172. The vendor's taking restrictive covenants and not reserving any part of the property is strong affirmative evidence, but his reservation of part is by no means conclusive the other way.

(*r*) See *Spicer* v. *Martin* (1888) 12 App. Ca. 12, 23, 58 L. J. Ch. 309, per Lord Macnaghten, approving the statement of Hall V.C. in *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 129. As to the effect of a purchaser of lots in a building estate under a restrictive scheme forming a "sub-scheme" by re-selling portions under new conditions, see *Knight* v. *Simmons* [1896] 2 Ch. 294, 65 L. J. Ch. 583, C. A.

(*s*) Where there has once been such a purchase, a subsequent purchaser cannot be affected by notice. See per Lindley L.J. 16 Q. B. Div. at p. 788.

(*t*) "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it": Rigby L.J. *Rogers* v. *Hosegood* [1900] 2 Ch. 388, 401; 69 L. J. Ch. 652.

[9] See *supra*, p. 302, n. 4.

of this kind can be always or almost always evaded; if the equitable remedy by injunction were confined to the original covenantor, that also could be evaded by a collusive assignment. On this principle however an assign cannot be and is not made answerable for the active performance of his predecessor's covenant: he can only be expected not to prevent its performance. Hence the decisions to that effect
243] which have been *cited (*u*). The jurisdiction is a strictly personal and restraining one. No rule of the law of contract is violated, for the assign with notice is not liable on the contract but on a distinct equitable obligation in his own person. Lord Brougham fell into the mistake of supposing that the covenant must be operative in equity, if at all, by way of giving effect to an intention to impose permanent burdens unknown to the law. Equity does not trouble itself to assist intentions which have no legal merits, and any such action, Lord Brougham rightly saw, was beyond its proper province. The law laid down in *Keppell* v. *Bailey* (*x*) was erroneous on this point, not from any defect of reasoning in the judgment, but because the reasoning proceeded on an erroneous assumption.

Change of conditions. The true principle is further illustrated by the rule that even with notice an assign is not liable "where an alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreasonable" (*y*). Were the liability really on the covenant, nothing short of release or estoppel would avoid it.

(*u*) See a note in L. Q. R. iv. 119 (not by the present writer) on *Hall* v. *Ewin*, 36 W. R. 84, 37 Ch. Div. 74, 57 L. J. Ch. 95, where the doctrine is well explained.

(*x*) 2 M. & K. 57, 39 R. R. 264. Other reasons with which we are not concerned here were given; the actual decision was perhaps also right on the ground that the covenant in question was not merely negative: see 39 R. R. 264, *n.*

(*y*) Fry L.J. in *Sayers* v. *Collyer* (1884) 28 Ch. Div. 103, 109, 52 L. J. Ch. 770, explaining the limits of the rule as originally laid down in *Duke of Bedford* v. *Trustees of British Museum* (1822) 2 M. & K. 552, 39 R. R. 288. In New York this limitation seems not to be recognized: *Trustees* v. *Thacher* (1882) 87 N. Y. 311, where, the residential amenity of a street having been destroyed by the elevated railway, the Court refused to enforce a covenant against using the house for trade. [See also Everstein *v.* Gerstenberg, 186 Ill. 344; Duncan *v.* Central, &c. Railroad Co. 85 Ky. 525; Jackson *v.* Stevenson, 156 Mass. 496; Troup *v.* Lucas, 54 N. J. Eq. 361; Amerman *v.* Dean, 132 N. Y. 355; Orne *v.* Friedenberg, 143 Pa. 48; Landell *v.* Hamilton, 175 Pa. 331. Cp. Reilly *v.* Otto, 108 Mich. 330. The right to relief was held lost by laches in Hemsley *v.* Hotel Co. 62 N. J. Eq. 164, 63 N. J. Eq. 804; Ocean City Assoc. *v.* Headley, 62 N. J. Eq. 322. In McGuire *v.* Caskey, 62 Ohio St. 419, the plaintiff had himself violated the covenant, but as his violation was not substantial the court granted relief.]

*CHAPTER VI. [244

Duties under Contract.

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1. *Interpretation generally.*

Necessity of interpretation. We have now gone through the general and necessary elements of a contract, and shall hereafter consider the further causes which may annul or restrain its normal effect.

This work is not directly concerned with the rules of law which govern the construction, performance, and discharge of contracts. But we cannot apply the principles by which disputes as to the validity of an agreement have to be determined without first determining what the substance of the agreement is; and a dispute as to the original substance and force of a promise may often be resolved into a conflict on the less fundamental question of what is a sufficient performance of a promise admitted to be binding. A summary view of the leading rules of interpretation may therefore be found useful at this stage. We suppose an agreement formed with all the positive requisites of a good contract; and we proceed to ascertain what are the specific duties created by this agreement.

Measure of promisor's duty. If there be not any special cause of exception, the promisor must fulfil the obligation which his own act has created. He must perform his promise according to its terms. Here there are two distinct elements of which either or both may be more or less difficult to ascertain: first the terms in which the promise was made, and then the true sense and effect of those terms. The former
245] must be determined by proof or admission, the latter by *interpretation, which, however, may have to take account of specific facts other than those by which the promise itself is established. We assume the terms to be reduced to a form in which the Court can understand them, as for example by translation from any language of which the Court does not assume judicial knowledge, or by explanation of terms of art in sciences other than the law, which is really a kind of translation out of the language of specialists.

Expectation of promisee. The nature of a promise is to create an expectation in the person to whom it is made. And, if the promise be a legally binding one, he is entitled to have that expectation fulfilled by the promisor. It has, therefore, to be considered what the promisor did entitle the promisee to expect from him. Every question which can arise on the interpretation of a contract may be brought, in the last resort, under this general form.

In order to ascertain what the promisee had a right to expect, we do not look merely to the words used. We must look to the state of things as known to and affecting the parties at the time of the promise, including their information and competence with regard to the matter in hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same

means of judgment (*a*).[1] The reasonable expectation thus determined gives us the legal effect of the promise.

Reasonable effect of promise on promisee. Now this measure of the contents of the promise will be found to coincide, in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promisee. But this is not a constant or a necessary coincidence. In exceptional cases a promisor may be *bound [246 to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him. The problem has been dealt with by moralists as well as by lawyers. Paley's solution is well known, and has been quoted by text-writers and in Court (*b*): "where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it." But this does not exactly hit the mark. Reflection shows that, without any supposition of fraud, Paley's rule might in peculiar cases (and only for such cases do we need a rule) give the promisee either too much or too little. And Archbishop Whately, a writer of great acuteness and precision within the limits he assigned to himself, perceived and corrected the defect: "Paley," he says, "is nearly but not entirely right in the rule he has here laid down . . . . Every assertion, or promise, or declaration of whatever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be *fairly presumed to be understood* by it" (*c*). And such is the rule of judicial interpretation as laid down and used in our Courts. "In all deeds and instruments"—and not less, when occasion arises, in the case of spoken words—"the language used by one party is to be construed in the sense in which it would be reasonably understood by the other" (*d*). All rules of construction may be said to be more or

(*a*) See per Blackburn J. *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597, 607, 40 L. J. Q. B. 221; *Birrell* v. *Dryer* (1884) 9 App. Ca. 345.

(*b*) L. R. 6 Q. B. 600, 610.

(*c*) Paley, Moral Phil. bk. 3, pt. 1, c. 5; Whately thereon in notes to ed. 1859. I am indebted to my learned friend Mr. A. V. Dicey for calling my attention to Whately's amendment. Austin's attempt (Jurisprudence, i. 456, ed. 1869) is nothing to the purpose. Some modern civilians have said, with useless subtilty, that a promisor who has by his own fault caused the promisee to expect more than was meant is bound "non ex vi promissionis sed ex damno per culpam dato."

(*d*) Blackburn J. in *Fowkes* v. *Manchester and London Assurance Association* (1863) 3 B. & S. 917, 929, 32 L. J. Q. B. 153, 159.

[1] Mansfield *v.* Hodgdon, 147 Mass. 66. And see *ante*, p. 4.

less direct applications of this principle. Many rules of evidence
247] involve it, and in par*ticular its development in one special direction, extended from words to conduct, constitutes the law of estoppel *in pais,* which under somewhat subtle and technical appearances is perhaps the most complete example of the power and flexibility of English jurisprudence.

Agreements in writing: rule against parol variations. We have already seen that the terms of an offer or promise may be expressed in words written or spoken, or conveyed partly in words and partly by acts, or signified wholly by acts without any use of words (*e*). For the purposes of evidence, the most important distinction is not between express and tacit significations of intention, but between writing and all other modes of manifesting one's intent. The purpose of reducing agreements to writing is to declare the intention of the parties in a convenient and permanent form, and to preclude subsequent disputes as to what the terms of the agreement were. It would be contrary to general convenience, and in the great majority of cases to the actual intention of the parties at the time, if oral evidence were admitted to contradict the terms of a contract as expressed in writing by the parties. Interpretation has to deal not with conjectured but with manifest intent, and a supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded. Our law, therefore, does not admit evidence of an agreement by word of mouth against a written agreement in the same matter. The rule is not a technical one, and is quite independent of the peculiar qualities of a deed. "The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it" (*f*). "If A. and B. make a contract in writing, evidence is not admissible to show that A. meant some-
248] thing different from what is stated in the *contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything" (*g*).[2]

(*e*) P. *11, above.

(*f*) *Martin* v. *Pycroft* (1852) 2 D. M. & G. 785, 795, 22 L. J. Ch. 94.

(*g*) Per Pollock C.B. *Nichol* v. *Godts* (1854) 10 Ex. 191, 194, 23 L. J. Ex. 314. See also *Hotson* v. *Browne* (1860) 9 C. B. N. S. 442, 30 L. J. C. P. 106; *Halhead* v. *Young* (1856) 6 E. & B. 312, 25 L. J. Q. B. 290.

[2] Northeastern Ry. Co. *v.* Hastings, [1900] A. C. 260; Blake *v.* Pine Mountain Co., 76 Fed. Rep. 624; Godkin *v.* Monahan, 83 Fed. Rep. 116 (C. C. A.); Brewton *v.* Glass, 116 Ala. 629; Rector *v.* Bernaschina, 64 Ark. 650; Poole *v.*

Rule of equity. Under normal conditions the same rule prevails in equity, and this in actions for specific performance as well as in other proceedings, and whether the alleged variation is made by a contemporaneous (*h*) or a subsequent (*i*) verbal agreement. "Variations verbally agreed upon . . . are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining unaltered" (*k*).

Similarly, when a question arises as to the construction of a written instrument *as it stands,* parol evidence is not admissible (and was always inadmissible in equity as well as at law) to show what was the intention of the parties. A vendor's express contract to make a good marketable title cannot be modified by parol evidence that the purchaser knew there were restrictive covenants (*l*). It is otherwise where it is sought to *rectify* the instrument *under the peculiar [249 equitable jurisdiction which will be described in a later chapter. And therefore the Court has in the same suit refused to look at the same evidence for the one purpose and taken it into account for the other (*m*).

Apparent exceptions at law and in equity. It is no real exception to this rule that though "evidence to vary the terms of an agreement in writing is not admissible," yet "evidence to show that there is not an

(*h*) *Omerod* v. *Hardman* (1801) 5 Ves. 722, 730. Lord St. Leonards (V. & P. 163) says this cannot be deemed a general rule: but see *Hill* v. *Wilson,* L. R. 8 Ch. 888; per Mellish L.J. at p. 899, 42 L. J. Ch. 817.

(*i*) *Price* v. *Dyer* (1810) 17 Ves. 356, 11 R. R. 102; *Robinson* v. *Page* (1826) 3 Russ. 114, 121, 27 R. R. 26. But a subsequent waiver by parol, if complete and unconditional, may be a good defence; *ib.: Goman* v. *Salisbury,* 1 Vern. 240; and cp. 6 Ves. 337*a*, note. *Qu,* if not also at law, if the contract be not under seal: see Dart V. & P. 1096. *Noble* v. *Ward* (1867) L. R. 2 Ex. 135, does not prove that a verbal waiver of a written agreement is no defence at law, but only that a new verbal agreement intended to supersede an existing contract, but by reason of the Statute of Frauds incapable of being enforced, cannot operate as a mere rescission of the former contract; the ground being that there is nothing to show any intention of the parties to rescind the first contract absolutely.

(*k*) *Price* v. *Dyer* (1810) 17 Ves. at p. 364, 11 R. R. 107; *Clowes* v. *Higginson* (1813) 1 Ves. & B. 524, 12 R. R. 284, where it was held (1) that evidence was not admissible to explain, contradict, or vary the written agreement, but (2) that the written agreement was too ambiguous to be enforced.

(*l*) *Cato* v. *Thompson* (1882) 9 Q. B. Div. 616. In such a case the true intention may well be that the vendor shall remove the defect.

(*m*) *Bradford* v. *Romney* (1862) 30 Beav. 431, cp. per Lindley L.J. 9 Q. B. Div. 620.

Mass. Plush Co., 171 Mass. 49; Harrison *v.* Howe, 109 Mich. 476; Long *v.* Perine, 41 W. Va. 314. Cp. Bogk *v.* Gassert, 149 U. S. 17; Patek *v.* Waples, (Mich.) 72 N. W. Rep. 995.

agreement at all is admissible,"[3] as where the operation of a writing as an agreement is conditional on the approval of a third person (*n*) or on something to be done by the other party (*o*). "A written contract not under seal is not the contract itself, but only evidence — the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract" (*p*).

"The rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect" (*q*).[4] It may even be shown that what appears to be a deed was delivered as an escrow, notwithstanding that a deed once fully delivered is conclusive (*r*). Still less does the rule apply to proof of the circumstances in which a docu-
250] ment was signed which was not really part of the *agreement at all, but only a memorandum made at the same time or immediately after (*s*).

So in *Jervis* v. *Berridge* (*t*) it was held that a document purporting to be a written transfer of a contract for the purchase of lands "was . . . not a contract valid and operative between the parties but omitting (designedly or otherwise) some particular term which had been verbally agreed upon, but was a mere piece of machinery . . . subsidiary to and for the purposes of the verbal and only real agreement." And since the object of the suit was not to enforce the verbal agreement, nor "any hybrid agreement compounded of the written instru-

(*n*) *Pym* v. *Campbell* (1856) 6 E. & B. 370, 374, 25 L. J. Q. B. 277.

(*o*) *Pattle* v. *Hornibrook* [1897] 1 Ch. 25, 66 L. J. Ch. 144.

(*p*) Per Bramwell B. *Wake* v. *Harrop* (1861–2) 6 H. & N. at p. 775, 30 L. J. Ex. at p. 277; cp. *Wace* v. *Allen* (1888) 128 U. S. 590.

(*q*) *Guardhouse* v. *Blackburn* (1866) L. R. 1 P. & D. 109, 115, 35 L. J. P. 116. And see per Page Wood V.-C. in *Druiff* v. *Lord Parker* (1868) L. R. 5 Eq. 131, 137, 37 L. J. Ch. 241.

(*r*) See *Watkins* v. *Nash* (1875) L. R. 20 Eq. 262; *Whelan* v. *Palmer* (1888) 39 Ch. D. 648, 655, 57 L. J. Ch. 784.

(*s*) *Bank of Australasia* v. *Palmer* [1897] A. C. 540, 66 L. J. P. C. 105, J. C.

(*t*) (1873) L. R. 8 Ch. 351, 359, 360, 42 L. J. Ch. 518; *Clarke* v. *Grant* (1807) 14 Ves. 519, 9 R. R. 336, appears really to belong to this class.

[3] Ware *v.* Allen, 128 U. S. 590; Vierling *v.* Iroquois Furnace Co., 170 Ill. 189; O'Donnell *v.* Clinton, 145 Mass. 461; Adams *v.* Morgan, 150 Mass. 148; Grierson *v.* Mason, 60 N. Y. 394; Reynolds *v.* Robinson, 110 N. Y. 654; Heeter *v.* Glasgow, 79 Pa. 79.

[4] See Greenleaf on Evidence (16th ed.), I. § 305*a et seq.*

ment and some terms omitted therefrom," but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, "which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." If it appears that a document signed by the parties, and apparently being the record of a contract, was not in fact intended to operate as a contract, then "whether the signature is or is not the result of a mistake is immaterial" (*u*).

Collateral parol agreements. Again it has been held, and that by Courts of common law not having equity jurisdiction, that even where there is an agreement by deed a collateral agreement not inconsistent with the written terms may be shown.[5] For such a collateral agreement, moreover, the promisee's execution of the principal writing or deed is consideration *enough (*x*), in the same way as on a [251 sale of goods no distinct consideration is required for a simultaneous collateral warranty.

Evidence to explain particular terms. Another class of cases in which an apparent, or sometimes, perhaps, a real exception occurs, is that in which external evidence is admitted to explain the meaning in which particular terms in a contract were understood by the parties, having regard to the language current in that neighbourhood or among persons dealing in that kind of business. Witnesses have been allowed, in this way, to prove that by local custom "a thousand" of rabbits was 1,200 (*i. e.*, ten long hundreds of six score each, the old "Anglicus numerus" of Anglo-Norman surveys) (*y*); to show what was meant by "weekly accounts" among builders (*z*); to define

(*u*) Per Bramwell B. *Rogers* v. *Hadley* (1863) 2 H. & C. 227, 249, 32 L. J. Ex. 241. In this case there was "a real contract not in writing and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price." Cp. *Bank of Australasia* v. *Palmer*, note (*s*), above.

(*x*) *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46 (agreement by lessor to keep down rabbits); *Angell* v. *Duke* (1875) L. R. 10 Q. B. 174 (agreement to do repairs and send in furniture); see [1901] 2 K. B. at p. 223; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A. (warranty of drains in good order).

(*y*) *Smith* v. *Wilson* (1832) 3 B. & Ad. 728. 37 R. R. 536.

(*z*) *Myers* v. *Sarl* (1860) 3 E. & E. 306, 30 L. J. Q. B. 9.

[5] See Greenleaf on Evidence (16th ed.), I. §§ 281, 282, 305*f*.

"year," in a theatrical contract to pay a weekly salary for three years, as meaning only the part of the year during which the theatre was open (*a*); to identify the wool described as "your wool" in a contract to buy wool (*b*).[6]

Not contradictory but auxiliary to the writing. The theory is that such evidence is admitted "not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used" (*c*) (or other meaning received by persons in the condition of the parties, as the case may be). The process may be regarded as an extension of the general rule that words shall have their primary meaning. For when words are used by persons accustomed to use
252] them technically, *the technical meaning is for those persons at any rate the primary meaning (*d*). It is a question not of adding or altering, but of identifying the subject-matter. "Suppose that I sell 'all my wool which I have on Dale Farm,' evidence must always be admissible to show that the wool which was delivered was the wool on Dale Farm" (*e*). The terms thus explained need not be ambiguous on their face (*f*). Parol evidence is equally admissible to explain words in themselves ambiguous or obscure and to show, as in the case of "a thousand of rabbits," that common words were used in a special sense. "The duty of the Court . . . is to give effect to the intention of the parties. . . . It has always been held . . . that where the terms in the particular contract have, besides their ordinary and popular sense, also a scientific or peculiar meaning, the parties who have drawn up the contract with reference to that particular department of trade or business must fairly be taken to have intended that the words should be used not in their ordinary but in their peculiar sense" (*g*).

This kind of special interpretation must be kept distinct from the general power of the Court to arrive at the true construction of a

(*a*) *Grant* v. *Maddox* (1846) 15 M. & W. 737, 16 L. J. Ex. 227.

(*b*) *Macdonald* v. *Longbottam*, Ex. Ch. 1859–60, 1 E. & E. 977, 28 L. J. Q. B. 293, 29 *ib.* 256.

(*c*) Lord Cairns, *Bowes* v. *Shand* (1877) 2 App. Ca. 455, 468.

(*d*) See Elphinstone, Norton and Clark on Interpretation, 48, 57; and Sir Howard Elphinstone on "The Limits of Rules of Construction," L. Q. R. i. 466.

(*e*) Erle J. in *Macdonald* v. *Longbottam* (1859–60) 28 L. J. Q. B. at p. 297; ep. *Bank of New Zealand* v. *Simpson* [1900] A. C. 182, 69 L. J. P. C. 22. J. C.

(*f*) See the judgment of Blackburn J. in *Myers* v. *Sarl*, above.

(*g*) Cockburn C.J. in *Myers* v. *Sarl* (1860) 30 L. J. Q. B. at p. 12.

[6] See Greenleaf on Evidence (16th ed.), I. § 305*l*.

contract by taking account of the material facts and circumstances proved or judicially known. The words "warranted no St. Lawrence" in a time policy of marine insurance have been decided, by reason of the known facts of geography and the nature and risks of the navigation, to include the Gulf of St. Lawrence as well as the river, notwithstanding the failure of an attempt to prove that such was the customary meaning (*h*). In another modern case the Court found *no difficulty in holding that, in the circumstances of [253 the transaction, a guaranty for the price of goods to be supplied, definite as to the amount but otherwise loosely worded, must be read as a continuing guaranty and not as a guaranty confined to a single sale then about to be made (*i*).

Incorporation of customary terms by parol evidence. The Courts have taken yet a further step in this line of interpretation by reference to unexpressed matter. Not only particular terms may be explained, but whole new terms (provided they be not inconsistent with the terms actually expressed in writing) may be added by proving those terms to be an accustomed part of such contracts, made between such persons, as the Court has before it.[7] Custom, when the word is used in these cases, does not necessarily imply either antiquity or universality or any definite local range. It is merely a usage so general and well understood in fact, with reference to the business, place, and class of persons, that the parties are presumed to have made their contract with tacit reference to it, and to have intended to be governed by it in the same way and to the same extent as other like persons in like cases. The Court may act, it seems, on a proved change of usage within recent memory (*k*). It might perhaps be better not to use in this connexion the word "custom," which has a perfectly distinct meaning in the law of tenure and rights over land, or at least to speak by preference of "usage," except where the phrase "custom of trade" has become too familiar to be easily dropped. It would take us too far to enlarge upon this class of cases; it must suffice to indicate them and refer to a few leading authorities.

(*h*) *Birrell* v. *Dryer* (1884) 9 App. Ca. 345. In *Johnson* v. *Raylton* (1881) 7 Q. B. Div. 438, 50 L. J. Q. B. 753, an implied warranty alleged to be customary was decided to be part of the general law.

(*i*) *Heffield* v. *Meadows* (1869) L. R. 4 C. P. 595.

(*k*) See per Channell J. in *Moult* v. *Halliday* [1898] 1 Q. B. at p. 130.

7 See Greenleaf on Evidence (16th ed.), I. § 292 *et seq.*

Customs of the country. Rights allowed to agricultural tenants by
254] the "custom *of the country," such as to take the away-going crop after the expiration of the term, to receive compensation for particular kinds of improvement, and the like, have been held for more than a century (*l*) not to be excluded by anything short of actual contradiction in the terms expressed between the parties, and this even where the contract is under seal. In recent cases of this class (*m*) the question has generally been whether something in the express terms was or was not so inconsistent with the usage as to exclude the presumption that "the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*n*).

Customs of trade, &c. In the present century there have been a great number of decisions arising out of the usages current in trades and in various kinds of mercantile dealings and public employments. One strong application of the principle now before us has been to make agents or brokers in certain trades and markets personally liable (unconditionally or in some particular event) notwithstanding that they contracted only as agents (*o*). This has been thought to go too far, as adding to the written contract not merely a new term as between the same parties, but a new party. But the point is settled by an unbroken current of authority (*p*). Some important groups of cases have turned on particular rules and usages of the Stock Exchange, with regard especially to the determination of the persons on whom they were binding without individual assent or notice (*q*).
255] As it is not always easy to say where the ordinary *construction of the language used in affairs ends, and explanation of special terms and senses by a "mercantile dictionary" as Lord Cairns called it (*r*), begins, so there is a more or less fluctuating boundary line, even now that the law merchant is part of the general law, between the establishment, by evidence of usage, of particular incidents of particular mercantile contracts, and the general development of mercantile law by the judicial recognition of universal custom.

(*l*) The earliest case commonly cited is *Wigglesworth* v. *Dallison* (1778–81) Dougl. 201, 1 Sm. L. C. 528, where see the notes.

(*m*) As in *Tucker* v. *Linger* (1883) 8 App. Ca. 508, 52 L. J. Ch. 941. See per Lord Blackburn, 8 App. Ca. at p. 511.

(*n*) Parke B. in *Hutton* v. *Warren*, 1 M. & W. 466, 475, 46 R. R. 368, 377.

(*o*) *Humfrey* v. *Dale* (1857) E. B. & E. 1004, 26 L. J. Q. B. 137, and other cases cited p. *101, above.

(*p*) See 1 Sm. L. C. 543—545.

(*q*) See *Nickalls* v. *Merry* (1875) L. R. 7 H. L. 530.

(*r*) Page *251, above.

Construction proper: preference of general intention to particular terms. Supposing the terms of the contract, express or incorporated by reference, to be finally established, there remains the task of construction in the stricter sense; namely of deciding, where the terms are capable of more than one meaning, which meaning is to be preferred. On this head there are few rules, if any, which are confined to contracts, or are more applicable to them than to instruments in writing generally. The one universal principle is that effect is to be given to the intention of the parties collected from their expression of it as a whole. It must be collected from the whole; that is, particular terms are to be construed in that sense which is most consistent with the general intention (*s*). It must also be collected from what is expressed, not from a mere conjecture of some intention which the parties may have had in their minds, and would have expressed if they had been better advised (*t*). This caution, however, does not prevent the correction of mistakes which are obvious on the face of the document. In such cases the general intent, as expressed by the immediate context, or collected from the whole scope of the instrument, is clear enough to overcome the difficulty arising from erroneous or defective expression in some part. Mere verbal blunders have always, in modern times *at any rate, been corrected without [256 difficulty by the ordinary jurisdiction even of courts of common law (*u*). *Mala grammatica non vitiat chartam* (*x*). In construing instruments of well-known types, such as family settlements, even omitted clauses have often been supplied by aid of the context (*y*).

Limits of rules of construction. For the rest, our Courts are now much less disposed to hold themselves bound by canons of construction than

(*s*) See *Ford* v. *Beech* (1848) (Ex. Ch.) 11 Q. B. 852, 17 L. J. Q. B. 114.

(*t*) Jessel M.R. *Smith* v. *Lucas* (1881) 18 Ch. D. 531, 542; and see other authorities in Elphinstone, Norton and Clark on Interpretation, p. 37.

(*u*) See per Lord Mansfield, 3 Burr. 1635, and *Doe* d. *Leach* v. *Micklem* (1805) 6 East, 486; Lord St. Leonards, *Wilson* v. *Wilson* (1854) 5 H. L. C. 40, 66, 23 L. J. Ch. 697, Sugd. V. & P. 171.

(*x*) See Shepp. Touchst. 55, 87, 369.

(*y*) *Cropton* v. *Davies* (1869) L. R. 4 C. P. 159, 38 L. J. C. P. 159; *Savage* v. *Tyers* (1872) L. R. 7 Ch. 356; *Daniel's Settlement* (1875) 1 Ch. Div. 375, 45 L. J. Ch. 105; *In re Bird's Trusts* (1876) 3 Ch. D. 214; *Greenwood* v. *Greenwood* (1877) 5 Ch. Div. 954, 47 L. J. Ch. 298; *Redfern* v. *Bryning* (1877) 6 Ch. D. 133; as to deciding on conflict in the terms of a lease by reference to the counterpart, *Burchell* v. *Clark* (1876) 2 C. P. Div. 88, 46 L. J. C. P. 115. Sometimes it is not easy to decide whether the doctrine of *falsa demonstratio* suffices, or recourse must be had to the equitable jurisdiction to rectify an instrument on the ground of common mistake (Ch. IX. pt. iii. below): see *Cowen* v. *Truefitt, Ltd.* [1899] 2 Ch. 309, 68 L. J. Ch. 563, C. A.

they were even one or two generations ago. "They were framed with a view to general results, but are sometimes productive of injustice by leading to results contrary to the intention of the parties" (*z*); and the recent tendency is to pay less attention to any such rules and more to all admissible indications of what the intention actually was in the case in hand, including the practical construction of the contract by the conduct of the parties themselves (*a*). It will be remembered that a rule which does not yield to sufficient evidence of contrary intention is not a rule of construction at all, but a rule of law (*b*). Again, many rules of construction are in truth more auxiliary than explanatory; their purpose is to supply the guidance required for dealing with events for which the parties have omitted to provide. In the language of Willes J. "disputes arise not as to the terms of the contract, but as to their application to unforeseen
257] questions which arise inci*dentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers" (*c*). The parties may really have taken no thought, and therefore had no intention at all with respect to those events, and yet something must be done. In such cases any rule not inconsistent with justice is better than uncertainty, and it matters little whether the reasons originally assigned for an established rule be convincing or not. Among rules or maxims of construction some are much weaker than others, and are entitled, as it were, only to a casting vote. Such is that which says that words are to be taken, in case of doubt, against the person using them; a maxim to which Sir G. Jessel denied even a subsidiary value (*d*), but which is in substance classical (*e*) and seems reasonable, and on the whole stands approved on condition of being used to turn the scale where there is real doubt, not to force a less natural meaning on words which have a more natural one (*f*).

Artificial rules originally paramount to intention. There are artificial rules of construction in particular cases which stand apart from the

(*z*) Cockburn C.J. 2 C. P. Div. at p. 93.

(*a*) See *D. C.* v. *Gallaher* (1888) 124 U. S. 505.

(*b*) F. V. Hawkins on the Construction of Wills, Preface.

(*c*) *Lloyd* v. *Guibert* (1865) (Ex. Ch.) L. R. 1 Q. B. 115, 120, 35 L. J. Q. B. 74.

(*d*) *Taylor* v. *Corporation of St. Helens* (1877) 6 Ch. Div. 264, 270.

(*e*) Papinian in D. 2, 14, de pactis, 39. Veteribus placet pactionem obscuram vel ambiguam venditori, et qui locavit, nocere, in quorum fuit potestate legem apertius conscribere.

(*f*) Elphinstone, Norton and Clark, *op. cit.* 93. Lord Selborne in *Neill* v. *Duke of Devonshire* (1882) 8 App. Ca. at p. 149, states it in a guarded form.

ordinary principles; they are derived chiefly, but not wholly, from the jurisdiction of the Court of Chancery, and in their origin did not profess to be consistent with the expressed intention of the parties. To some extent they went upon a presumed real intention, but the presumption was at least as much of what the Court thought the parties ought to have intended as of what it thought they did intend (*g*). They were in truth rules of positive restriction, imposed by a *policy which was then in the hands of the judges, but is now [258 held to be in the exclusive competence of the Legislature, and for the purpose of making the substance of the transaction conform to the requirements of fair dealing, as understood by the Court. Our Courts have long ceased to dictate to parties of full age and with the means of independent judgment on what terms they shall contract, but certain forms and terms have had an artificial meaning firmly impressed on them. The modern justification of such rules is that they are well known, and parties using the accustomed forms do in fact know and expect that their words will be construed in that sense which, by the standing practice of the Courts, has become a received and settled technical sense.

" If cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons in framing their agreements have had regard to settled law and may have purposely used words which, though on the face of them they may have a different meaning, they know, by reason of the decided cases, must bear a particular or special meaning" (*h*).

Parties are now presumed to adopt the artificial sense. Policies of marine insurance are to this day made in a form which on the face of it is clumsy, imperfect, and obscure. But the effect of every clause and almost every word has been settled by a series of decisions, and the common form really implies a whole body of judicial rules, "which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognized by the Courts without further proof. Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same *form. According to ordinary principle, then, the later [259

(*g*) Cp. Lindley L.J. 21 Ch. Div. at p. 274.

(*h*) Jessel M. R. *Wallis* v. *Smith* (1882) 21 Ch. Div. 243, 254, 52 L. J. Ch. 145.

policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract" (*i*).

The rules applied to restrain the effect of releases in general terms, of stipulations as to time, and of penal clauses, had a different origin, but have been brought round to rest on similar reasons. They are now admitted to be rules of construction which the parties can supersede, if so minded, by the adequate expression of a different intention. Still, they preserve traces of their history, and so lead up to the methods by which equity jurisdiction has dealt, and still deals, with cases of real mistake in expressing an agreement; and in that connexion we shall find it useful to return to them.

2. *Order and Mutuality of Performance.*

Order of performance in executory contracts. When a contract consists in mutual promises which on one or both sides are not to be completely performed at one time, and a party who has not performed the whole of his own obligation complains of a failure on the other side, questions arise which may be of great difficulty. How far is the plaintiff bound to show performance of the contract on his own part, or readiness and willingness to perform? Or, to look at it from the other side, how far will a failure of one party to fulfil some part of his duties under the contract have the effect of discharging the other party from further performance or the offer thereof on his part? Such cases have been of increasing frequency and importance in recent times, especially with regard to contracts for delivery and payment by instalments. To a certain extent the difficulty is one of interpretation, for the modern decisions at any rate endeavour 260] to find a solution *in accordance with the true intent of the parties, although the difficulty is much increased by the general want of any specific evidence of that intent. Most contracts are originally made in good faith, and the parties do not necessarily, perhaps they do not usually, expect that all or any of the promises contained in the contract will be broken, or contemplate in any distinct way what will be the consequences of a breach.

The modern authorities look to intention of contract as a whole. From Lord Mansfield's time to the present attempts have been made to lay down rules for determining, in the absence of express provisions

(*i*) *Cur.* per Brett L.J. *Lohre* v. *Aitchison* (1878) 3 Q. B. Div. 558, 562.

or other clear indication of intent (*k*), the relation of the one party's obligation to the other as regards the order of performance of mutual promises and the extent to which either is bound to accept performance of part, notwithstanding failure to perform other part. In the earlier decisions the Courts inclined to treat the several terms of a contract, unless expressed to be dependent on the other party's performance (*l*), as separate and independent promises, paying little regard to the effect which default in some or one of them might produce in defeating the purpose of the contract as a whole. At this day the tendency is the other way. The Court looks to the purpose and effect of the contract as a whole as a guide to the probable intention of the parties (*m*), and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole.

Common terms. Certain terms which constantly recur in the authorities must be well understood and distinguished.

Promises or covenants are said to be *independent* when, although they be mutual, breach of any of them gives the other party a right of action without showing performance on his own part (*n*).

*They are said to be *dependent* where "the performance of [261 one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant."

Where one party cannot sue for breach of the other's promise without showing on his own part performance of some promise made by himself, or at least readiness and willingness to perform it, there, if the performance on his part was due before the other party's, it is said to be a *condition precedent* to his right of action (*o*).

If the fulfilment of mutual promises is due at the same time, and so that the party suing must be at least ready and willing to perform his part, it may be said that these are *concurrent conditions*. "Neither is a condition precedent," but "the performance of each is conditional upon the other's being performed at the same time" (*p*).

A contract which can be fulfilled only as a whole, so that failure

(*k*) Cp. Leake, 3rd ed. 566. and the chapter on "The Promise" generally.

(*l*) 15 H. VII. 10, pl. 17.

(*m*) *Bradford* v. *Williams* (1872) L. R. 7 Ex. 259, 41 L. J. Ex. 259, see judgment of Martin B.

(*n*) Lord Mansfield in *Kingston* v. *Preston* (1773) cited in *Jones* v. *Backley*, Doug. 689; Finch, Sel. Ca. 735.

(*o*) See *Bankart* v. *Bowers* (1866) L. R. 1 C. P. 484; *Norrington* v. *Wright* (1885) 115 U. S. 189.

(*p*) Langdell, Summary, § 132.

in any part is failure in the whole, is said to be entire. A contract of which the performance can be separated, so that failure in one part affects the parties' rights as to that part only, is said to be divisible.

It must always be understood that quesions of this kind are possible only where a contract consists of mutual promises. For if performance itself is the consideration for a promise, there is no contract at all without performance. But when there is a contract made by mutual promises, we may have to enquire whether, in addition to each promise or set of promises being the consideration for the other, the performance thereof on the one side is not a condition, precedent or concurrent, of the right to claim performance on the other. There is no logical reason why it should not be so, or why express words should 262] be required to manifest an intention that it should. *Each party's promise is the consideration for the promise of the other, not for the performance which is due by reason of the promise. What are the terms and conditions of the duty created by the promise is another matter. In an executory contract of sale the promise to deliver is the consideration for the promise to pay; but this need not be a promise to pay before or without delivery. However, the earlier line of decision was biassed by rules laid down in cases on promises by deed before the law of executory simple contracts was developed; and for a long time it was supposed that promises which were the consideration for each other must, as a matter of law, be independent (*q*). Late in the eighteenth century this view was abandoned, and it was held that "whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done," so that "if one party covenant to do one thing in consideration (*r*) of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance" (*s*).

Order of performance. Generally "the order in which the several things are to be done" is the test most readily applicable (*t*); ac-

(*q*) See Langdell, § 140, and the whole title of "Dependent and Independent Covenants and Promises," and notes to *Pordage* v. *Cole*, 1 Wms. Saund. 549.

(*r*) The word "consideration" is here used in an elliptical manner, and not quite accurately. The promises are the consideration, and the only consideration, for each other. But if the substance of the promises is that performance shall be exchanged for performance, neither party can demand performance on any other terms.

(*s*) *Morton* v. *Lamb* (1797) 7 T. R. 125, 4 R. R. 395, per Lord Kenyon C.J. and Grose J.

(*t*) Cp. Clark Hare on Contracts. 589.

cordingly it is said that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money (or other act) is to be performed, an action may be brought for the money (or for not doing such other act) *before* performance" (*u*). But *this is really no more than a rule [263 of interpretation; it "only professes to give the result of the intention of the parties" (*x*); the reason given for it is that "it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." Therefore the rule, like all rules of its kind, must yield to evidence of a different intention, and "where it is clear that the intention was to rely on the performance of the condition and not on the remedy, the performance is a condition precedent" (*x*).[8]

(*u*) Wms. Saund. 551; Jervis C.J. in *Roberts* v. *Brett* (1856) 18 C. B. 373, 25 L. J. C. P. 280, 286.

(*x*) Jervis C.J. *loc. cit.*

[8] Though the rules excusing or refusing to excuse one party to a bilateral contract because of the failure of the other party to perform are customarily dealt with as rules of construction or interpretation, and unquestionably found a place in our law on the theory that the question was one of construction, it is probable that a final analysis will disclose a deeper basis. Doubtless either party to a contract may expressly make performance of his promise conditional on the precedent or concurrent performance of the other party, and whether he has done so in a given case is a question of interpretation, but even though nothing is said in the contract which justifies the inference that the parties intended such a condition, the substantial default of one party, nevertheless, in general excuses the other. There are a few classes of cases which test the reasoning upon which the innocent promisor is excused. Suppose A by the terms of the contract is to perform on January 1 and B on February 1. According to the rule of construction as usually stated A's liability to perform is absolute and B's is conditional. No doubt during January A can be sued by B without performance or tender by B. But if, either before January 1 or later, B is disabled from performing his promise A is excused from performing his promise, if he has not already done so. *Ex parte* Chalmers, L. R. 8 Ch. 289; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Morgan *v.* Bain, L. R. 10 C. P. 15; Mess *v.* Duffus, 6 Comm. Cas. 165; *Re* Phenix Bessemer Steel Co., 4 Ch. D. 108; Robinson *v.* Davenport, 27 Ala. 574; Brassel *v.* Troxel, 68 Ill. App. 131; Rappleye *v.* Racine Seeder Co., 79 Iowa, 220; Hobbs *v.* Columbia Falls Co., 157 Mass. 109; Lennox *v.* Murphy, 171 Mass. 370, 373; Pardee *v.* Kanady, 100 N. Y. 121; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435; Diem *v.* Koblitz, 49 Ohio St. 41; Dougherty Bros. *v.* Central Bank, 93 Pa. 227; Lancaster Bank *v.* Huver, 114 Pa. 216. See also Sale of Goods Act, §§ 18, 41.

Cp. *Ex parte* Pollard, 2 Low, 411; Stokes *v.* Baar, 18 Fla. 656; Chemical Nat. Bank *v.* World's Fair Exposition, 170 Ill. 82; C. F. Jewett Pub. Co. *v.* Butler, 159 Mass. 517; Bank Commissioners *v.* New Hampshire Trust Co., 69 N. H. 621.

In these cases B's disability was due to insolvency. In the following cases his disability was due to a voluntary transfer to a third person of the property to which the contract related. Such a transfer was held an excuse in Fort Payne Co. *v.* Webster, 163 Mass. 134; Meyers *v.* Markham, 90

Total or partial default. Another test often applied is whether the term of the contract in which default has been made "goes to the whole of the consideration," or only to part; in other words, whether the importance of that term with regard to the contract as a whole is or is not such that performance of the residue would be, not a defective performance of that which was contracted for, but a total failure to perform it. Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him? or is the point of failure so vital that his expectation is in substance defeated? The necessity of dealing with this

Minn. 230; James *v.* Burchell, 82 N. Y. 108; Brodhead *v.* Reinbold, 200 Pa. 618. See also Leonard *v.* Bates, 1 Blackf. 172; Russ Lumber Co. *v.* Muscupiabe Co., 120 Cal. 521. Garberino *v.* Roberts, 109 Cal. 125; Webb *v.* Stephenson, 11 Wash. 342, are decided otherwise on the ground that the property might be regained by B in time for the performance of the contract. See also Joyce *v.* Shafer, 97 Cal. 335; Shively *v.* Semi-Tropic, etc., Co., 99 Cal. 259.

The result is the same if B repudiates his obligation before A performs. See *infra*, p. 350.

A's liability then is not strictly absolute. Even though B is not disabled and does not repudiate his promise but simply fails to sue A until after February 1 many cases hold that B must tender performance in order to maintain his action. Hill *v.* Grigsby, 35 Cal. 656; McCroskey *v.* Ladd, 96 Cal. 455; Irwin *v.* Lee, 34 Ind. 319; Soper *v.* Gabe, 55 Kan. 646; Brentnall *v.* Marshall, 10 Kan. App. 488; Beecher *v.* Conradt, 13 N. Y. 108; Eddy *v.* Davis, 116 N. Y. 247; Shelly *v.* Mikkelson, 5 N. Dak. 22; Boyd *v.* McCullough, 137 Pa. 7, 16; First Nat. Bank *v.* Spear, 12 S. Dak. 108; Hogan *v.* Kyle, 7 Wash. 595. See also McElwee *v.* Bridgeport Land Co., 54 Fed. Rep. 627 (C. C. A.) But see *contra*, Weaver *v.* Childress, 3 Stew. (Ala.) 361; Hays *v.* Hall, 4 Port. 374, 387; White *v.* Beard, 5 Port. 94, 100; Duncan *v.* Charles, 5 Ill. 561; Sheeran *v.* Moses, 84 Ill. 448; Gray *v.* Meek, 199 Ill. 136, 139; Allen *v.* Sanders, 7 B. Mon. 593; Coleman *v.* Rowe, 6 Miss. 460; Clopton *v.* Bolton, 23 Miss. 78; McMath *v.* Johnson, 41 Miss. 439; Bowen *v.* Bailey, 43 Miss. 405; Biddle *v.* Coryell, 3 Har. (N. J. L.) 377. See also Loud *v.* Pomona Land Co., 153 U. S. 564, 580; Bean *v.* Atwater, 4 Conn. 3; White *v.* Atkins, 8 Cush. 367; Kettle *v.* Harvey, 21 Vt. 301.

In regard to sales of personal property the English Sale of Goods Act provides: "Sec. 41, (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

"(*b*) Where the goods have been sold on credit, but the term of credit has expired." See further, Chalmers, Sale of Goods Act (5th ed.), 82; Mechem on Sales, § 1521.

The explanation of these decisions, and the true basis of the rule excusing one party to a contract on account of the default of the other whenever the contract itself does not provide for such excuse is to be found in the fact that parties to a bilateral contract save in exceptional cases always contemplate that the performance on one side is the exchange or price for the performance on the other, and it is inequitable that either party should be required to perform on his side not only when he has not received but when he is not going to receive performance from the other party. This doctrine is entirely analogous to the doctrine of failure of consideration. So the matter has been worked out in the civil law (13 Harv. L. Rev. 80), and many of the results reached in our courts cannot be adequately explained on any other theory.

question as a whole was perhaps obscured to some extent by the requirements of formal pleading (*y*), but it has been strongly asserted in all the recent authorities.

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, *and if they sufficiently expressed such an intention, it [264 will not be a condition precedent. . . . . .

"And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke B. to be acknowledged (*z*), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent" (*a*).

The agreement sued on in the case where the principle was thus declared was an opera singer's engagement. The singer, who was plaintiff in the cause, was to sing in concerts as well as operas, and during a period of a year, beginning three months before the active duties of the engagement, he was not to sing out of the theatre in the United Kingdom (in the opera season, or within fifty miles of London) without the defendant's permission. He was also to be in London for rehearsals six days before the commencement of the engagement. This last term was not fulfilled, but it was held that, having regard to the whole scope of the agreement, it did not go to the root of the matter so as to justify the defendant in determining the engagement and refusing to employ the plaintiff. Matter of excuse was alleged by the plaintiff for his failure to arrive at the time stipulated, but nothing turned upon this.

Agreements are now presumed entire rather than divisible. If, however, there be any presumption either way in the modern view of such cases,

(*y*) It cannot be said that it was overlooked: see *Withers* v. *Reynolds* (1831) 2 B. & Ad. 882, 36 R. R. 782, *Franklin* v. *Miller* (1836) 4 A. & E. 599, both long before the Common Law Procedure Act.

(*z*) In *Graves* v. *Legg* (1854) 9 Ex. at p. 716, 23 L. J. Ex. 228.

(*a*) Blackburn J. *Bettini* v. *Gye* (1876) 1 Q. B. D. 183, 187, 188; Finch Sel. Ca. 742, 745.

it is that, in mercantile contracts at any rate, all express terms are
265] material. "Merchants *are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (*b*).[9] In a case not mercantile, where the contract before the Court was held on its terms to be divisible, the late Lord Justice Mellish said:—

"I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a court of equity might treat an agreement as entire even in cases where a court of law would say that the performance of one part is not a condition precedent to the performance of the other part, because the Court might see that those rules as to conditions precedent, which to a certain extent are technical, might not meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame an agreement that there may be a specific performance of part" (*c*).

Entire consideration and quantum meruit. The question to what extent, if at all, a party is bound to accept performance of less than all that was promised him is to be distinguished from the question, not to be

(*b*) Lord Cairns in *Bowes* v. *Shand* (1877) 2 App. Ca. 455, 463.

(*c*) *Wilkinson* v. *Clements* (1872) L. R. 8 Ch. 96, 110.

9 "The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent, or unimportant omissions or defects. A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to details that are unimportant. There must be no wilful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact." Miller *v.* Benjamin, 112 N. Y. 613, 617. Applications of this principle to cases where a partial breach was held fatal may be found in Glazebrook *v.* Woodrow, 8 T. R. 366; H. D. Williams Cooperage Co. *v.* Schofield, 115 Fed. Rep. 119 (C. C. A.); Worthington *v.* Gwin, 119 Ala. 44; Leopold *v.* Salkey, 89 Ill. 412; Lake Shore, &c. Ry. Co. *v.* Richards, 152 Ill. 59; Ballance *v.* Vanuxem, 191 Ill. 319; Davis *v.* Jeffris, 5 S. Dak. 252; McLean *v.* Brown, 15 Ont. 313, 16 Ont. App. 106; National Machine Co. *v.* Standard Machinery Co., 181 Mass. 275.

pursued here, of the duty incurred by one who does accept and in fact has some benefit from a partial performance.[10] It may be the intention of a contract that nothing less than complete performance on one side shall found any claim at all to payment on the other. In such cases effect is given to the intention, and an imperfect performance, *from whatever cause remaining imperfect, affords [266 no ground of action. The express terms are not fulfilled and a term or new contract to pay what the benefit received is reasonably worth cannot be introduced where the express terms exclude it (*d*). But such a contract, it seems, cannot be executory; the complete performance itself is the only consideration for the promise to pay. It is like the offer of a reward by advertisement to the first person who procures certain information. A person who brings the information, but is not the first to bring it, evidently has no claim on the advertiser, whatever amount of trouble and expense he may have incurred, and although the delay may be due to inevitable accident (*e*).

3. *Default in First or other Instalments of Discontinuous Performance.*

Questions on sales for delivery by instalments. Peculiarly troublesome questions have arisen upon contracts for the sale of goods to be delivered and paid for by instalments. It is not yet settled whether failure to deliver the first or any subsequent instalments is or is not presumed, in the absence of any special indication of the parties' intention, to go to the whole of the consideration and entitle the buyer to refuse acceptance of any further deliveries. It seems to be ad-

(*d*) Where performance has been defective by the plaintiff's own fault, the burden is on him to show a fresh contract to pay for what he has actually done: see *Sumpter* v. *Hedges* [1898] 1 Q. B. 673, 67 L. J. Q. B. 545, C. A.

(*e*) See *Cutter* v. *Powell* (1795) 6 T. R. 320, 3 R. R. R. 185, and notes thereto in 2 Sm. L. C.

10 "The reason of the decision in that [Boone *v.* Eyre, 1 H. Bl. 273] and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. . . . It is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all." Parke, B., in Graves *v.* Legg, 9 Ex. 709. See also White *v.* Beeton, 7 H. & N. 42; Fillicul *v.* Armstrong, 7 A. & E. 557; Kauffman *v.* Raeder, 108 Fed. Rep. 171 (C. C. A.); Keller *v.* Reynolds, 12 Ind. App. 383; Swobe *v.* New Omaha Electric Light, 39 Neb. 586.

mitted that failure on the buyer's part to pay according to the terms of the contract for the first or any particular instalment as delivered is not of itself a breach of the entire contract (*f*); but such default or refusal may by the reason assigned for it, or because of other par-
267] ticular circum*stances, manifest an intention to repudiate the contract as a whole, in which case the seller may justly refuse in his turn to go on with the contract (*g*).

Hoare v. Rennie. In *Hoare* v. *Rennie* (*h*), a case decided on pleadings, the contract appeared to have been to sell about 667 tons of iron of a specified kind, to be shipped in June, July, August, and September, in about equal portions each month. The action was by the sellers for non-acceptance, and for wrongful repudiation of the contract. The buyers pleaded, in effect, that a June shipment of 21 tons only was offered by the plaintiffs, who were never ready and willing to deliver a proper June shipment according to the contract, and that the defendants thereupon refused to receive the portion shipped and tendered, and gave notice that they would not receive the residue. The plaintiffs demurred, and the pleas were upheld, as showing that the plaintiffs had not been ready and willing to perform the substance of their contract within the appointed time. In the judgments almost exclusive attention is paid to the question whether the defendants were bound to accept the first shipment; in only one of them (*i*) is it stated in general terms that the defendants were at liberty to rescind the contract, but the decision evidently involves this (*k*).

Simpson v. Crippin. In *Simpson* v. *Crippin* (*l*) the contract was to supply about 6,000 to 8,000 tons of coal, to be delivered into the buyers' waggons, in "equal monthly quantities during the period of
268] twelve months from the 1st of July next." *During the first month of the contract the buyers, though pressed by the sellers to

(*f*) *Mersey Steel and Iron Company* v. *Naylor* (1884) 9 App. Ca. 434, 439, 444, 53 L. J. Q. B. 497; *Freeth* v. *Burr* (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91.

(*g*) *Withers* v. *Reynolds* (1831) 2 B. & Ad. 882, 36 R. R. 782; *Freeth* v. *Burr* (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91; and see per Lord Blackburn, *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884) 9 App. Ca. at p. 442.

(*h*) (1859) 5 H. & N. 19, 29 L. J. Ex. 73.

(*i*) Channell B. 5 H. & N. at p. 29.

(*k*) Much of the language of the judgments would certainly have been more appropriate if the action had been for non-acceptance of the first shipment only. Cf. L. Q. R. ii. 281: and per Bowen L.J. in *Mersey Steel and Iron Co.* v. *Naylor* (1884) 9 Q. B. Div. at p. 671; and per Jessel M.R. *ib.* at p. 658.

(*l*) (1872) L. R. 8 Q. B. 14.

send waggons, took only 158 tons. The sellers thereupon gave notice to the buyers that they cancelled the contract. It was held that the breach did not justify rescission, and great doubt was thrown upon *Hoare* v. *Rennie*.

Honck v. Muller. In *Honck* v. *Muller* (*m*) the contract was to deliver 2,000 tons of iron, "November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The buyer failed to take any of the iron in November, but near the end of the month offered to "take delivery of all in December and January" (*n*). On December 1 the seller cancelled the contract, and was held by the majority of the Court of Appeal to have been entitled to do so, even on the supposition that in the circumstances the buyer could and did elect to take delivery in three portions in the three months named. "I think," said Bramwell L.J. "where no part of a contract has been performed, and one party to its refuses to perform the entirety to be performed by him, the other party has a right to refuse any part to be performed by him. I think if a man sells 2,000 tons of iron, he ought not to be bound to deliver 1,333⅓ only, if it can be avoided" (*o*).

Freeth v. Burr. Meanwhile it had been held in *Freeth* v. *Burr* (*p*) that refusal by a buyer to pay for a much delayed delivery of the first instalment (under a mistaken claim to set off loss arising from any future default in delivering the residue) did not entitle the seller to rescind the contract. It was suggested that, "in cases of this sort, where the question *is whether the one party is set free [269 by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract," or, in other words, "evince an intention no longer to be bound by the contract" (*q*).

(*m*) (1881) 7 Q. B. Div. 92, 50 L. J. Q. B. 529.

(*n*) See 7 Q. B. Div. at p. 94 (not one-third in December and one-third in January, as stated in the head-note).

(*o*) 7 Q. B. Div. 98. Baggallay L.J. to the same effect approving *Hoare* v. *Rennie*, and disapproving *Simpson* v. *Crippin*, which Bramwell L.J. endeavoured to distinguish on the ground that the contract had in that case been partly performed. Brett L.J. dissented, thinking *Simpson* v. *Crippin* right, and *Hoare* v. *Rennie* wrong; cp. his dissenting judgment in *Reuter* v. *Sala* (1879) 4 C. P. Div. 239, 48 L. J. C. P. 492.

(*p*) (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91.

(*q*) Lord Coleridge C.J. at p. 213; Keating and Denman J.J. concurred in affirming this principle.

Mersey Steel and Iron Company v. Naylor. The later case of the *Mersey Steel and Iron Company* (*r*), where there was only a postponement of payment, in peculiar circumstances, under erroneous advice, confirms *Freeth* v. *Burr*, so far as it goes (*s*). As a positive test, the rule of *Freeth* v. *Burr* is doubtless correct; that is, a party who, by declaration or conduct, "evinces an intention no longer to be bound by the contract," entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? Must it not depend on the nature of the contract and the order and apparent connection of its terms? All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach. In other words, non-payment will not as a rule justify refusal to perform on the other side, unless there be something more in the circumstances by which it is shown to amount to repudiation, as in *Withers* v. *Reynolds* (*t*), where there was a deliberate and wilful refusal to pay for the successive deliveries according to the terms of the contract.

270] **Norrington v. Wright.** In 1885 the Supreme Court of the United States (*u*) had to deal with a case very like *Hoare* v. *Rennie*. The contract was for 5,000 tons of iron rails to be shipped from Europe "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." The action was for non-acceptance. A few passages from the judgment of the Court will best show the view taken by them.

"In the contracts of merchants, time is of the essence (*x*). The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons . . .

"The contract sued on is a single contract for the sale and pur-

(*r*) (1884) 9 App. Ca. 434, 53 L. J. Q. B. 497. The House of Lords seems to have thought criticism of *Hoare* v. *Rennie* not relevant.

(*s*) See per Lord Selborne, 9 App. Ca. at p. 438, and per Lord Blackburn at pp. 442–3.

(*t*) (1831) 2 B. & Ad. 882, 36 R. R. 782, Finch Sel. Ca. 749.

(*u*) *Norrington* v. *Wright* (1885) 115 U. S. 189.

(*x*) This had already been laid down in England: *Reuter* v. *Sala* (1879) 4 C. P. Div. 239, see per Cotton L.J. at p. 249, 48 L. J. C. P. 492. Cp. *Brown* v. *Guarantee Trust Co.* 128 U. S. 403, 414.

chase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to payment for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron . . .

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

"The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and *885 tons in March. His fail- [271 ure to fulfil the contract on his part in respect of these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

The Court went on to review the English cases, which did not in their opinion establish any rule inconsistent with the decision arrived at in the case at bar. All will agree with them that "a diversity in the law as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated" (*y*). And although the decision is not authoritative in this country, we may expect that an opinion of such weight, and so carefully and critically expressed, will receive full consideration whenever the point is again before the Court of Appeal or the House of Lords. It is a notable addition of force to the modern tendency to eschew stiff and artificial canons of construction, and to hold parties who have made deliberate promises to the full and plain meaning of their terms.[11]

(*y*) 115 U. S. at p. 206.

[11] The tendency of the decisions upon instalment contracts in this country has been to hold non-performance of one instalment justification for refusal to proceed with the remainder of the contract. Thus failure to deliver one instalment as agreed was held to excuse the buyer from taking other instalments in Norrington *v.* Wright, 115 U. S. 188; Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255; Johnson *v.* Allen, 78 Ala. 387; Roebling *v.* Lock Stitch Fence Co., 28 Ill. App. 184; Ballman *v.* Burt, 61 Md. 415; Robson *v.* Bohn, 27 Minn. 333; Smith *v.* Keith Coal Co., 36 Mo. App. 567; Pope *v.* Porter, 102 N. Y. 366; King Philip Mills *v.* Slater, 12 R. I. 82; Providence Coal Co. *v.* Coxe, 19 R. I. 380. But see *contra*, Blackburn *v.* Reilly, 47

Sale of Goods Act. The Sale of Goods Act, 1893, has now declared as follows:—

Sect. 10.—(1.) Unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Sect. 31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the

N. J. L. 290; Gerli *v.* Poidebard Silk Co., 57 N. J. L. 432. See also Norris *v.* Harris, 15 Cal. 256; Herzog *v.* Purdy, 119 Cal. 99; Myer *v.* Wheeler, 65 Iowa, 390.

Similarly default in accepting delivery of one instalment is held to excuse the seller from tendering the remainder. Cresswell Co. *v.* Martindale, 63 Fed. Rep. 84 (C. C. A.); Londenback Fertilizer Co. *v.* Tennessee Phosphate Co., 121 Fed. Rep. 298; Middle Division Elevator Co. *v.* Vandeventer, 80 Ill. App. 669. See also Worthington *v.* Gwin, 119 Ala. 44; Hamilton *v.* Thrall, 7 Neb. 210.

Non-payment for one instalment excuses the seller from delivering the others. Hull Coal Co. *v.* Empire Coal Co., 113 Fed. Rep. 256 (C. C. A.); Stakes *v.* Baars, 18 Fla. 656; Branch *v.* Palmer, 65 Ga. 210; Savannah Ice Co. *v.* American Transit Co., 110 Ga. 142; Bradley *v.* King, 44 Ill. 339; Hess *v.* Dawson, 149 Ill. 138; Curtis *v.* Gibney, 59 Md. 131; McGrath *v.* Gegner, 77 Md. 331; Baltimore *v.* Schaub (Md.), 54 Atl. Rep. 106; Palmer *v.* Breen, 34 Minn. 39; Berthold *v.* St. Louis Construction Co., 165 Mo. 280; Gardner *v.* Clark, 21 N. Y. 399; Kokomo Co. *v.* Inman, 134 N. Y. 92; American Broom Co. *v.* Addicks, 42 N. Y. Supp. 871; Johnson *v.* Tyng, 43 N. Y. Supp. 435; Reybold *v.* Voorhees, 30 Pa. 116; Rugg *v.* Moore, 110 Pa. 236; Easton *v.* Jones, 193 Pa. 147. See also Raabe *v.* Squier, 148 N. Y. 81. But see *contra*, Monarch Cycle Co. *v.* Royer Wheel Co., 105 Fed. Rep. 324; West *v.* Bechtel, 125 Mich. 144; Blackburn *v.* Reilly, 47 N. J. L. 290; Otis *v.* Adams, 56 N. J. L. 38. See also Johnson Forge Co. *v.* Leonard (Del.), 57 L. R. A. 225; Winchester *v.* Newton, 2 Allen, 492; Beatty *v.* Howe Lumber Co., 77 Minn. 272; Trotter *v.* Heckscher, 40 N. J. Eq. 612; Lucesco Oil Co. *v.* Brewer, 66 Pa. 351; Tucker *v.* Billings, 3 Utah, 82.

Non-payment of an instalment under a building contract or similar contract justifies cessation of work. Phillips Co. *v.* Seymour, 91 U. S. 646; Cox *v.* McLaughlin, 54 Cal. 605; Dobbins *v.* Higgins, 78 Ill. 440; Keeler *v.* Clifford, 165 Ill. 544; Greary *v.* Bangs, 37 Ill. App. 301; Shute *v.* Hennessy, 40 Iowa, 352; McCullough *v.* Baker, 47 Mo. 401; Bean *v.* Miller, 69 Mo. 384; Mugan *v.* Regan, 48 Mo. App. 461; Graf *v.* Cunningham, 109 N. Y. 369; Thomas *v.* Stewart, 132 N. Y. 580; Miller *v.* Sullivan, (Tex. Civ. App.) 33 S. W. Rep. 695; Bennett *v.* Shaughnessy, 6 Utah, 273; Preble *v.* Bottom, 27 Vt. 249. See also Rioux *v.* Ryegate Brick Co., 72 Vt. 148. Campbell *v.* McLeod, 24 Nova Scotia, 66, is *contra*.

Defective quality of one instalment, however, does not seem generally to excuse the purchaser from taking other instalments, either in England or this country, though he may refuse to accept any instalment when offered, if it is of poor quality. Jonassohn *v.* Young, 4 B. & S. 296; Wayne's Coal Co. *v.* Morewood, 46 L. J. Q. B. N. S. 746; Guernsey *v.* West Coast Lumber Co., 87 Cal. 249; Vallens *v.* Tillman, 103 Cal. 187; Blackburn *v.* Reilly, 47 N. J. L. 290; Cahen *v.* Platt, 69 N. Y. 348; Scott *v.* Kittanning Coal Co., 89 Pa. 231.

seller makes defective deliveries in respect of one or more instalments, it is a ques*tion in each case depending on the terms of the [272 contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The apparent intention and effect of these enactments is to put on record the existing state of the authorities without deciding any question that still remains fairly open. What is said as to repudiation is obviously derived from *Freeth* v. *Burr* (p. 268 above), but does not seem to amount to a legislative approval of everything that was said in that case: for the Act does not say "shows an intention to repudiate," but "is a repudiation." Indeed, the opinion that the real question is not of intention but of results seems to be rather strengthened than otherwise by this language.

4. *Repudiation of Contracts.*

Use of repudiation is modern. The use of the word "repudiation" in the law of contracts is modern, and though the conduct to which this name has been applied can hardly have been confined to modern times, still it is chiefly in recent cases that the legal effect of such conduct has been considered. Indeed, it cannot be said that the courts have even as yet worked out a consistent and logical doctrine on the subject.

Meaning of term. By repudiation of a contract is to be understood such words or actions by a contracting party as indicate that he is not going to perform his contract in the future. He may already have performed in part; part performance may already have become due from him under the contract, but not have been rendered; or the time when any performance is due from him may still be in the future. The essential element which exists in all these cases is something still to be performed in the future under the contract which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word "repudiation" is more strictly appropriate to cases where an intention not to perform is manifested, irrespective of ability.

Two remedies in case of repudiation. In case such repudiation of a contract is made by one contracting party, the other may frequently, at least, take one of two courses.

A. Rescission.

General rules. He may elect to rescind the contract entirely. This right generally exists where there has been repudiation or a material breach of the contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value. Thus he has a right to restitution as an alternative remedy instead of compensation in damages. This choice of remedies was not allowed by the early English law,[12] and there are still many exceptions and inconsistencies in the application of the rule, which are due in part to the fact that the rule has been developed largely under cover of the fictitious declaration in *indebitatus assumpsit,* and of equally fictitious inferences that a refusal to perform a contract indicates assent to the rescission of the contract and the restoration of what has been given under it. As may be observed in other branches of the law, the English cases are more conservative than the American—less ready to accept a new general rule varying from early precedents. So that the principle stated above must be taken only with very considerable qualifications as a statement of the law of England. Indeed, that principle is directly at variance with statements of law made in recent English cases—statements which would doubtless in many classes of cases be acted on.[13] In this country, though there are exceptions to the rule, it may safely be laid down as a general principle. The following paragraphs show its applications and limitations.

Restitution of money paid. If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had both in England[14] and in this country.[15]

[12] The earliest cases allowing an action for restitution against a defendant guilty of breach of contract, and who might have been sued on the contract for damages, are Dutch *v.* Warren, 1 Str. 406, and Anonymous, 1 Str. 407, decided in 1721; but in the first of these decisions, though the action was in form for restitution, the plaintiff's damages were restricted to the value of what he ought to have received by the contract. No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord Mansfield and Lord Kenyon at the end of the eighteenth century.

[13] See *e. g.* James *v.* Cotton, 7 Bing. 266, 274, per Tindal, C. J.; Street *v.* Blay, 2 B. & Ad. 456, 462; Dawson *v.* Collis, 10 C. B. 523, 528.

[14] Towers *v.* Barrett, 1 T. R. 133; Giles *v.* Edwards, 7 T. R. 181; Farrer *v.* Nightingal, 2 Esp. 639; Widdle *v.* Lynam, Peake, A. C. 30; Greville *v.* Da Costa, Peake, A. C. 113; Squire *v.* Tod, 1 Camp. 293; Wilde *v.* Fort, 4 Taunt. 334; Bartlett *v.* Tuchin, 6 Taunt. 259; Gosbell *v.* Archer, 4 N. & M. 485; So in the colonies: Wrayton *v.* Naylor, 24 S. C. Canada, 295; Wolff *v.* Pickering, 12 S. C. Cape of Good Hope, 429, 432.

[15] Nash *v.* Towne, 5 Wall. 689; Lyon *v.* Annable, 4 Conn. 350; Thresher *v.* Stonington Bank, 68 Conn. 201; Barr *v.* Logan, 5 Harr. (Del.) 52; Payne

Restitution of land conveyed. If land has been conveyed instead of money paid, the special right given by the vendor's lien is the only right the English seller has, other than an action on the contract for damages.[16] But in this country, in some cases at least, the vendor may obtain restitution by a bill in equity.[17]

Restitution of personal property transferred. If the title to personal property has been transferred, whether under a contract of exchange[18] or sale,[19] the English law does not permit the transferrer to rescind the transaction and revest the title in himself because he has not received the promised payment. This is true even though the seller has retained possession of the property, and therefore has a vendor's lien.[20] The right of stoppage *in transitu,* although it may seem equivalent in effect to a right of rescission in the limited class of cases where it is applicable, does no more than continue the vendor's lien after the property has passed from his possession.[21] In this country, however, if the seller has not parted with possession of the goods, or has regained his lien by stoppage *in transitu,* he is allowed,

v. Pomeroy, 21 D. C. 243; Trinkle *v.* Reeves, 25 Ill. 214; German, etc., Assoc. *v.* Droge, 14 Ind. App. 691; Wilhelm *v.* Fimple, 31 Ia. 131; Doherty *v.* Dolan, 65 Me. 87; Ballou *v.* Billings, 136 Mass. 307; Dakota, etc., Co. *v.* Price, 22 Neb. 96; Weaver *v.* Bentley, 1 Caines, 47; Cockcroft *v.* Muller, 71 N. Y. 367; Bigler *v.* Morgan, 77 N. Y. 312, Brokaw *v.* Duffy, 165 N. Y. 391; Glenn *v.* Rossler, 88 Hun, 74; Wilkinson *v.* Ferree, 24 Pa. 190; Newberry *v.* Ruffin, 102 Va. 73; King *v.* British Am. Co., 7 Can. Exch. 119.

[16] Dart, Vendors & Purchasers (6th ed.), 1248. It is common practice in England to insert an express stipulation allowing rescission. Dart, 178.

[17] Howlin *v.* Castro, 136 Cal. 605; Savannah, etc., Ry. Co. *v.* Atkinson, 94 Ga. 780; Cooper *v.* Gum, 152 Ill. 471; McClelland *v.* McClelland, 176 Ill. 83; Patterson *v.* Patterson, 81 Ia. 626; Clark *v.* McCleery, 115 Ia. 3; Scott's Heirs *v.* Scott, 3 B. Mon. 2; Reeder *v.* Reeder, 89 Ky. 529; Shepardson *v.* Stevens, 77 Mich. 256; Pinger *v.* Pinger, 40 Minn. 417; Lathrop *v.* Morris, 86 Mo. App. 355; Pironi *v.* Corrigan, 47 N. J. Eq. 135; Michel *v.* Hallheimer, 56 Hun, 416; Wilfong *v.* Johnson, 41 W. Va. 283; Glocke *v.* Glocke, 113 Wis. 303, 57 L. R. A. 458. In most of these cases the consideration for the conveyance was a promise to support the grantor. If possession has been given, but no conveyance passed, ejectment or trespass will lie. McDaniel *v.* Gray, 69 Ga. 433; Graves *v.* White, 87 N. Y. 463; Clough *v.* Hosford, 6 N. H. 231; Williams *v.* Noisseux, 43 N. H. 388. See, also, Ferris *v.* Hoglan, 121 Ala. 240. Even where a conveyance had passed the vendor was allowed to treat it as null, and a conveyance to another was held effectual in Thompson *v.* Westbrook, 56 Tex. 265, and Kennedy *v.* Embry, 72 Tex. 387. But these cases were questioned in Huffman *v.* Mulkey, 78 Tex. 556, 561, and are opposed to McCardle *v.* Kennedy, 92 Ga. 198.

[18] Emanuel *v.* Dane, 3 Camp. 299; Power *v.* Wells, Cowp. 818.

[19] Greaves *v.* Ashlin, 3 Camp. 426; Martindale *v.* Smith, 1 Q. B. 389; Gillard *v.* Brittan, 8 M. & W. 575; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127. But see the early case of Langfort *v.* Tiler, 1 Salk. 113. See, also, Sale of Goods Act, § 48; Chalmers, Sale of Goods Act (3d ed.), 91.

[20] Martindale *v.* Smith, 1 Q. B. 389; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127.

[21] Benjamin, Sales, § 867; Diem *v.* Koblitz, 49 Ohio St. 41.

on default of the buyer to rescind the sale and keep the goods as his own.[22] But if the seller has parted with both possession and title, and is unable to regain possession by stoppage *in transitu,* there seems to be no authority, either in England or in this country, allowing him to bring trover or other action for the recovery of what he had transferred.[23]

Recovery of value of services. If the performance rendered consists of services, there cannot ordinarily, from the nature of legal remedies, be actual restitution, but it is possible to give the equivalent in value under a common count. Since money paid may be thus recovered back, and similarly in this country land, logic would require such a remedy; and it is allowed in part, but only in part. If the plaintiff has fully performed, the only redress he has for breach of contract

[22] Warren *v.* Buckminster, 24 N. H. 336; Bridgford *v.* Crocker, 60 N. Y. 627. See also Strickland *v.* McCulloch, 8 N. S. Wales, 324.

In Dustan *v.* McAndrew, 44 N. Y. 73, 78, Earl, Com., in the opinion of the court said: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

This statement of the law is frequently quoted exactly or substantially and generally no distinction seems to be taken between cases where title to the property in question bas passed and cases where title has not passed. Habeler *v.* Rogers, 131 Fed. Rep. 43, 45; Magnes *v.* Sioux City Seed Co., 14 Col. App. 219, 225; Bagley *v.* Findlay, 82 Ill. 524; Ames *v.* Moir, 130 Ill. 582, 591; Comstock *v.* Price, 103 Ill. App. 19, 21; Bell *v.* Offutt, 10 Bush, 639; Putnam *v.* Glidden, 159 Mass. 47, 49; Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555, 561; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 75; Moore *v.* Potter, 155 N. Y. 481; Ackerman *v.* Rubens, 167 N. Y. 405, 408; Levy *v.* Glassberg, 92 N. Y. Supp. 50; Shawhan *v.* Van Nest, 25 Ohio St. 90; Ballentine *v.* Robinson, 46 Pa. 177; Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648, 654.

The Indian Contract Act, § 107, provides that the lienholder, though title has passed, may resell, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale."

[23] See Benjamin Sales, § 766; Power *v.* Wells, Cowp. 818; Emanuel *v.* Dane, 3 Camp. 299; Neal *v.* Boggan, 97 Ala. 611, and cases cited; Holland *v.* Cincinnati, etc., Co., 97 Ky. 454; Thompson *v.* Conover, 32 N. J. L. 466. Hornberger *v.* Feder, 61 N. Y. Supp. 865. The Indian Contract Act, § 121, expressly denies the right to rescind after delivery, in the absence of express stipulation.

In Dow *v.* Harkin, 67 N. H. 383, however, the plaintiff, who had assigned a patent and conveyed tools to the defendant in consideration of an executory agreement which the defendant had failed to perform, was allowed to recover the tools as well as have the assignment set aside by proceedings in equity. The court intimated that the jurisdiction of equity arose from the assignment of the patent, but that as it took jurisdiction of the case it would also act in regard to the tools.

by the other side is damages for the breach. It is true that if the performance to which he is entitled in return is a liquidated sum of money, he may sue in *indebitatus assumpsit* and not on the special contract,[24] but the measure of damages is what he ought to have received—not the value of what he has given.[25] If, however, the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover, either in England or America, the value of what he has given,[26] though such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy, in an action on the contract for damages. In some jurisdictions, if a price is fixed by the contract, that is made the conclusive test of the value of the services rendered.[27] More frequently, however, the plaintiff is allowed to recover the real value of the services though in excess of the contract price.[28] The latter rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible.

[24] Keener, Quasi-Contracts, 300; Leake, Contracts (3d ed.), 45; Chitty, Pleadings (7th ed.), i. 358; Atkinson *v.* Bell, 8 B. & C. 277, 283; Gandell *v.* Pontigny, 1 Stark. 198; Savage *v.* Canning, Ir. R. 1 C. L. 434; Wardrop *v.* Dublin, etc., Co., Ir. R. 8 C. L. 295; Shepard *v.* Mills, 173 Ill. 223; Southern Bldg. Assoc. *v.* Price, 88 Md. 155; Nicol *v.* Fitch, 115 Mich. 15.

[25] Keener, Quasi-Contracts, 301; Leake, Contracts (3d ed.), 45; Barnett *v.* Sweringen, 77 Mo. App. 64, 71, and cases cited; Porter *v.* Dunn, 61 Hun, 310 (S. C., 131 N. Y. 314). And see cases in the preceding note.

[26] Mavor *v.* Pyne, 3 Bing. 285; Planchè *v.* Colburn, 8 Bing. 14; Clay *v.* Yates, 1 H. & N. 73; Bartholomew *v.* Markwick, 15 C. B. (N. S.) 711; M'Connell *v.* Kilgallen, 2 L. R. Ir. 119; Jenson *v.* Lee, 67 Kan. 539; North *v.* Mallory, 94 Md. 305; Posner *v.* Seder, 184 Mass. 331; Dempsey *v.* Lawson, 76 Mo. App. 522; Person *v.* Stoll, 72 N. Y. App. D. 141, 174 N. Y. 548. But the right was denied as recently as 1802 in Hulle *v.* Heightman, 2 East, 145. Many American cases are collected *infra*, p. 342, n. 43.

[27] Chicago *v.* Sexton, 115 Ill. 230; Keeler *v.* Clifford, 165 Ill. 544, 548; Chicago Training School *v.* Davies, 64 Ill. App. 503; Rice *v.* Partello, 88 Ill. App. 52; Western *v.* Sharp, 14 B. Mon. 177; Doolittle *v.* McCullough, 12 Ohio St. 360 (much qualified by Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182); Harlow *v.* Beaver Falls Borough, 188 Pa. 263, 266; Noyes *v.* Pugin, 2 Wash. 653. See also Eastern Arkansas Fence Co. *v.* Tanner, 67 Ark. 156.

[28] United States *v.* Behan, 110 U. S. 338, 345; Clover *v.* Gottlieb, 50 La. Ann. 568; Rodemer *v.* Hazlehurst, 9 Gill, 288; Fitzgerald *v.* Allen, 128 Mass. 232; Kearney *v.* Doyle, 22 Mich. 294; Hemminger *v.* Western Assurance Co., 95 Mich. 355; McCullough *v.* Baker, 47 Mo. 401; Ehrlich *v.* Ætna L. I. Co., 88 Mo. 249, 257; Clark *v.* Manchester, 51 N. H. 594; Clark *v.* Mayor, 4 N. Y. 338; Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182; Derby *v.* Johnson, 21 Vt. 17; Chamberlin *v.* Scott, 33 Vt. 80.

But in these jurisdictions the prices fixed in the contract are evidence (though not conclusive) of the value of the work. Monarch *v.* Board of School Fund, 49 La. Ann. 991; Walsh *v.* Jenvey, 85 Md. 240; Fitzgerald *v.* Allen, 128 Mass. 232, 234; Eakright *v.* Torrent, 105 Mich. 294.

Where no performance has been rendered. While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to the contract without more. That he may do this is perhaps intimated by Parke, B., in *Phillpotts* v. *Evans*;[29] it is expressly stated by Crompton, J., in *Hochster* v. *De La Tour*,[30] where the repudiation preceded the time for performance by either party. It was so decided in *King* v. *Faist*.[31] There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The plaintiffs sued for this failure to perform, but the Court held it justified, saying: "Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract." [32] This right may become of great importance if the contract while it exists operates as a threatened liability or a cloud on title. Thus if a contract for the sale of real estate is recorded, the owner has no longer a salable title, and if the purchaser fails to carry out his agreement, the owner, to regain a clear title to his land, will desire the rescission of the contract. In order that there may be recorded evidence of this a court of equity will decree the rescission and cancellation of such a contract.[33] So one who has given negotiable paper in return for a promise which has been broken is entitled to proceed affirmatively for the rescission of the contract and the surrender of the negotiable paper,

[29] 5 M. & W. 475, 477. See also Grimaldi *v.* White, 4 Esp. 95.

[30] 2 E. & B. 678, 685. "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract."

[31] 161 Mass. 449.

[32] *Ib.* at p. 457. See also Howe *v.* Smith, 27 Ch. D. 89, 105; Munsey *v.* Butterfield, 133 Mass. 492; Warters *v.* Herring, 2 Jones L. (N. C.) 46.

[33] Howe *v.* Hutchison, 105 Ill. 501; Nelson *v.* Hanson, 45 Minn. 543; Kirby *v.* Harrison, 2 Ohio St. 326.

lest it should be negotiated by the holder to a *bona fide* purchaser for value without notice, to whom the maker would be liable.[34]

Repudiation without breach sufficient. There seems to be no doubt that repudiation without any actual failure to perform the contract is enough to give rise to the right. This point is covered by the remark of Crompton, J., just referred to. So, in *Ballou* v. *Billings*,[35] the Court say: "Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and therefore it did not amount to breach of covenant." And again, "It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach." [36]

Breach without repudiation sufficient. Question is more likely to be made whether breach of contract without repudiation justifies rescission than whether repudiation without actual breach is sufficient. There are many expressions, chiefly in English cases, which seem to mean that repudiation or abandonment of the contract is essential to give rise to the right of rescission. Thus, in *Ehrensperger* v. *Anderson*, Parke, B., said, "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying 'I rescind this contract,' . . . a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'" [37] In accordance with this doctrine it was held that failure by the defendant to remit a bill of exchange did not justify the plaintiff to treat the contract as rescinded and sue in money had and received for restitution of what the defendant had received. In *Freeth* v. *Burr*,[38] the Court, and particularly Lord Coleridge, laid stress on the question whether the breach

[34] See Randolph on Commercial Paper (2d ed.), §§ 1686, 1687; Campbell Printing Press Co. *v.* Marsh, 20 Col. 22; Duggar *v.* Dempsey, 13 Wash. 396.

[35] 136 Mass. 307, 308.

[36] P. 309. See also Drake *v.* Goree, 22 Ala. 409; Ryan *v.* Dayton, 25 Conn. 188; Elder *v.* Chapman, 176 Ill. 142; Festing *v.* Hunt, 6 Manitoba, 381.

[37] 3 Ex. 148, 158. This is quoted in Keener on Quasi-Contracts, 304, as a correct exposition of the law. Similar expressions may be found in Fay *v.* Oliver, 20 Vt. 118, 122.

[38] L. R. 9 C. P. 208, 214. Reliance was placed on earlier expressions in Withers *v.* Reynolds, 2 B. & Ad. 882, and Jonassohn *v.* Young, 4 B. & S. 296. See also the language of Coleridge, J., in Franklin *v.* Miller, 4 A. & E. 599.

of contract amounted to an "abandonment of the contract or a refusal to perform it on the part of the person so making default;" and in *Mersey Steel and Iron Co.* v. *Naylor,* the Earl of Selborne, citing Lord Coleridge's statement, expressed the same view even more explicitly.[39] This doctrine, though perhaps it is that of the English law to-day,[40]

[39] 9 App. Cas. 434, 438. In both Freeth *v.* Burr and Mersey Steel and Iron Co. *v.* Naylor, the question was not directly as to the right of rescission, but as to the right of a party to maintain an action on the express contract when himself in default. In both those cases such an action was held maintainable, in part at least, because the default relied on did not show an intention to abandon the whole contract. It seems clear, however, that a default which is not sufficient to warrant the other party in refusing to perform his promise, and is no answer to an action on that promise, will not entitle him to treat the contract as rescinded. These cases may, therefore, be cited in this connection. It is without the scope of the present chapter to criticise fully the doctrine so far as it relates to the sufficiency of the plaintiff's non-performance without repudiation or abandonment of the contract as a defense to an action upon it, but it may be briefly pointed out that if a party to a contract fails to perform, it is immaterial to the other party whether the default is wilful or negligent, and if the contract has been substantially broken already it does not help matters that the wrong-doer has the best intentions for the future. Lord Blackburn, in commenting on the Earl of Selborne's statement, might have put more strongly than he did the implied criticism of its adequacy: "That is, I will not say the only ground of defense, but a sufficient ground of defense." 9 App. Cas. 434, 443. See this same criticism *supra,* p. 330.

In some American cases, also, it has been said that mere breach of contract does not justify rescission unless an intention is manifested to be no longer bound by the contract, or unless the wrong-doer has prevented performance by the other party. Monarch Cycle Co. *v.* Royer Wheel Co., 105 Fed. Rep. 324; Wright *v.* Haskell, 45 Me. 489 (see also Dixon *v.* Fridette, 81 Me. 122); West *v.* Bechtel, 125 Mich. 144; Blackburn *v.* Reilly, 47 N. J. L. 290; Trotter *v.* Heckscher, 40 N. J. Eq. 612; Graves *v.* White, 87 N. Y. 463; Hubbell *v.* Pacific Mut. Ins. Co., 100 N. Y. 41, 47 (cp. Bogardus *v.* N. Y. Life Ins. Co. 101 N. Y. 328); Suber *v.* Pullin, 1 S. C. 273. But it is to be noticed that it is much easier to find cases where such expressions are used, than it is to find cases where it was actually held that a breach so material as to make the partial performance of the contract different in substance from the performance promised was insufficient ground for rescission because no intention was manifested to refuse absolutely to perform in the future. Thus, in spite of the remarks in some New York cases, it was held in Welsh *v.* Gossler, 89 N. Y. 540, that a contract to ship in May or June might be rescinded for non-performance of this requirement, though there was so far from an absolute repudiation that shipment was actually made in July and the cargo tendered. This was followed in Hill *v.* Blake, 97 N. Y. 216. See also Mansfield *v.* N. Y. Central R. R. Co., 102 N. Y. 205.

[40] See in addition to the cases cited in the previous note, Cornwall *v.* Henson, L. R. [1900] 2 Ch. 298; Rhymney Ry. Co. *v.* Brecon, etc., Ry. Co. 83 L. T. 111; *In re* Phœnix, etc., Co., 4 Ch. D. 108; Bloomer *v.* Bernstein, L. R. 9 C. P. 588. There are strong expressions to the same effect in Colonial decisions. In Bradley *v.* Bertoumieux, 17 Victorian L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." So in Oaten *v.* Stanley, 19 Victorian L. R. 553, 555, "The point is whether the person who committed the breach meant to abandon the contract." And see, to similar effect, Prendergast *v.* Lee, 6 Victorian L. R. (Law) 411; Hacker *v.* Australian, etc., Co., 17 Victorian L. R. 376;

must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify such a rescission of the contract, mutual assent of the parties must be established—an offer by the party in default accepted by the other party.[41] In almost any case this can be established only by resorting to the baldest fiction. As matter of theory a man who repudiates a contract no more than one who negligently breaks it offers to rescind it, and if he did, his offer could only be construed as expressing a willingness to drop matters as they stood at the time, not with the addition imposed by the court of making restitution of what he has received.[42] And as a practical question the only important consideration is how defective the performance of a contracting party has been or is likely to be, not whether it was negligence or wilfulness on his part that led him to break his promise. In truth rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only

Moroney *v.* Roughan, 29 Vict. L. R. 541; Midland Ry. Co. *v.* Ontario Rolling Mills, 10 Ont. App. 677. See, however, Muston *v.* Blake, 11 S. C. New South Wales, 92.

[41] Thus, Coleridge, J., in Franklin *v.* Miller, 4 A. & E. 599, says: "The rule is that, in rescinding, as in making a contract, both parties must concur," and, "therefore, the refusal which is to authorize the rescission of the contract must be an unqualified one." See also the reasoning of Lord Esher in Johnstone *v.* Milling, 16 Q. B. D. 460, 467. And in an American case it is said: "Where one of the contracting parties absolutely refuses to perform, such refusal . . will be regarded as equivalent to a consent on his part to a rescission of the contract, and the other contracting party may, if he choose, so treat it, rescind the contract, and if he have done anything under it, may immediately sue for compensation on a *quantum meruit*." Shaffner *v.* Killian, 7 Ill. App. 620. So in Cromwell *v.* Wilkinson, 18 Ind. 365, 370; Stevens *v.* Cushing, 1 N. H. 17, 18; Dow *v.* Harkin, 67 N. H. 383, and other cases.

[42] How inadequate any doctrine of mutual consent is to account for even the English cases may be seen from the decision in Clay *v.* Yates, 1 H. & N. 73. The plaintiff contracted to print for the defendant a second edition of a treatise with a new dedication, which had not then been written. After the treatise was printed the plaintiff discovered that the dedication which had been furnished him was libellous and refused to complete the fulfilment of the contract. He was held entitled to recover for the printing he had done. Here the defendant, so far from assenting to a rescission of the contract, demanded that it should be performed. The plaintiff recovered because the defendant had given ground for, though not assented to, the interruption of the contract.

Rescission by mutual consent is, of course, an entirely possible solution for parties to elect when they are disputing over a contract. An instance of it it to be found in Skillman Hardware Co. *v.* Davis, 53 N. J. L. 144. The court found from the conduct of the parties that there had been rescission by mutual consent. See also Vider *v.* Ferguson, 88 Ill. App. 136; Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109; Beal *v.* Minneapolis Co., 84 Mo. App. 539. Neither party is entitled to damages in such a case without special agreement. Leake, Contracts (3d ed.), 52; McCreery *v.* Day, 119 N. Y. 1; Vacuum Brake Co. *v.* Prosser, 157 N. Y. 289. See Coyle *v.* Baum, 3 Okl. 695.

for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as should constitute a defence to an action brought by the party in default for a refusal to proceed with the contract.[43]

Anything received by plaintiff must be returned. If a contract has been partly performed by the party in default, the other party, at least if he has received any benefit from such part performance, cannot ordinarily rescind the contract according to the English law. Even though he return what he has received, it is said the parties cannot be restored to their original position, because he has had the temporary enjoyment of the property. In the leading case of *Hunt* v. *Silk*,[44] the plaintiff, who sought to recover money he had paid under an agreement for a lease, because of the defendant's failure to make repairs as agreed, had had possession of the premises a few days. This was held fatal. Lord Ellenborough said: "If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account?" *Hunt* v. *Silk* has been consistently followed.[45] It is in accordance with this rule that a buyer is not allowed to rescind a contract for breach of warranty,[46] though there is the additional

[43] Panama, etc. Co. *v.* India, etc. Co., L. R. 10 Ch. 515, 532 (*semble*); Phillips, etc., Co. *v.* Seymour, 91 U. S. 646; Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156; Watson *v.* Ford, 93 Fed. Rep. 359; Powell *v.* Sammons, 31 Ala. 552; Ferris *v.* Hoglan, 121 Ala. 240; Porter *v.* Arrowhead Reservoir Co., 100 Cal. 500; San Francisco Bridge Co. *v.* Dumbarton Co., 119 Cal. 272; Campbell Printing Press Co. *v.* Marsh, 20 Col. 22; Code of Georgia, § 3712; Bacon *v.* Green, 36 Fla. 325; Harrison Machine Works *v.* Miller, 29 Ill. App. 567; Wolf *v.* Schlacks, 67 Ill. App. 117; Cromwell *v.* Wilkinson, 18 Ind. 365; Anderson *v.* Haskell, 45 Ia. 45; Wernli *v.* Collins, 87 Ia. 548; Stahelin *v.* Sowle, 87 Mich. 124; Robson *v.* Bohn, 27 Minn. 333; Nelson *v.* Hanson, 45 Minn. 543; Gullich *v.* Alford, 61 Miss. 224; Mugan *v.* Regan, 48 Mo. App. 461; Oliver *v.* Goetz, 125 Mo. 370; Drew *v.* Claggett, 39 N. H. 431; Foster *v.* Bartlett, 62 N. H. 617; Pattridge *v.* Gildermeister, 1 Keyes, 93; Welsh *v.* Gossler, 89 N. Y. 540; Hill *v.* Blake, 97 N. Y. 216; North Dak. Civ. Code, § 3932; Rummington *v.* Kelley, 7 Ohio, pt. 2. 97; Higby *v.* Whittaker, 8 Ohio, 198; Kirby *v.* Harrison, 2 Ohio St. 326; Oklahoma Stat., § 866; Miller *v.* Phillips, 31 Pa. 218; Greene *v.* Haley, 5 R. I. 260; Bennett *v.* Shaughnessy, 6 Utah, 273; Fletcher *v.* Cole, 23 Vt. 114; Preble *v.* Bottom, 27 Vt. 249; Meeker *v.* Johnson, 5 Wash. 718; School District *v.* Hayne, 46 Wis. 511. Many earlier decisions are cited in the cases above.

[44] 5 East, 449.

[45] Beed *v.* Blandford, 2 Y. & J. 278; Street *v.* Blay, 2 B. & Ad. 456, 464; Blackburn *v.* Smith, 2 Ex. 783. See also Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 451.

[46] Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 C. & M. 207; Poulton *v.* Lattimore, 9 B. & C. 259; Parsons *v.* Sexton, 4 C. B. 899; Dawson *v.* Collis, 10 C. B. 523. So provided in the Indian Contract Act, sect. 117.

reason in the case of a warranty that it is said to be a collateral contract. In the United States the law is more liberal. It is universally agreed that rescission is not allowable unless the party seeking to rescind can and does first restore or offer to restore anything he has received under the contract,[47] but the construction of this rule is far less severe than in England. Though it is frequently said that "A contract cannot ordinarily be rescinded unless both parties can be reinstated in their original situation in respect of their contract. And if one party have already received benefit from the contract he cannot rescind it wholly, but is put to his action for damages," [48] or the like, yet some courts have gone very far in allowing a rescission upon restitution *in specie* of what had been given in spite of benefits derived from temporary possession.[49] Thus, in many of the states, rescission is allowed for breach of warranty.[50] The most satisfactory disposition of many cases where the plaintiff cannot, without any fault on his part, return all he has received, would be to allow the plaintiff to recover subject to a deduction for what he has received and cannot

[47] Kauffman *v.* Raeder, 108 Fed. Rep. 171 (C. C. A.), 54 L. R. A. 247; Los Angeles Traction Co. *v.* Wilshire, 135 Cal. 654; Naugle *v.* Yerkes, 187 Ill. 358; Code of Virginia, § 3712; Summerall *v.* Graham, 62 Ga. 729; Harden *v.* Lang, 110 Ga. 392; Clover *v.* Gottlieb, 50 La. Ann. 568; Pochè *v.* New Orleans Co., 52 La. Ann. 1287; Morrow *v.* Moore, 98 Me. 373; Miner *v.* Bradley, 22 Pick. 457; Clark *v.* Baker, 5 Met. 452; Snow *v.* Alley, 144 Mass. 546; De Montague *v.* Bacharach, 181 Mass. 256; Gullich *v.* Alford, 61 Miss. 224; Doughten *v.* Camden Assoc., 41 N. J. Eq. 556; Gale *v.* Nivon, 6 Cow. 445; North Dak. Civ. Code, § 3934; Brown *v.* Witter, 10 Ohio, 142; Oklahoma Stat., § 686; Potter *v.* Taggart, 54 Wis. 395; 50 Am. Decisions, 674, n.; 74 Am. Decisions, 661, n.

[48] Story, Contracts (5th ed.), § 1337. See also Peck Co. *v.* Stratton, 95 Fed. Rep. 741; Moore *v.* Barr, 11 Ia. 198; Burge *v.* Cedar Rapids, etc., R. R. Co., 32 Ia. 101; Stevenson *v.* Polk, 71 Ia. 278; Handforth *v.* Jackson, 150 Mass. 149; Spencer *v.* St. Clair, 57 N. H. 9, 13; Fay *v.* Oliver, 20 Vt. 118.

[49] In Ankeny *v.* Clark, 148 U. S. 345, the plaintiff was allowed to recover the full value of wheat delivered by him to the defendant, on surrendering possession of land which the defendant had contracted but failed to convey, though the plaintiff had had possession of the land for over four years, and this possession was admitted to be worth over two thousand dollars. The cases cited by the court in support of its position merely establish the point that if the suit had been reversed the vendor could not have recovered for the use and occupation of the land — a different matter. Contrary to Ankeny *v.* Clark, but not cited in that case, are Axtel *v.* Chase, 77 Ind. 74, 83 Ind. 546, 554; Fay *v.* Oliver, 20 Vt. 118. Cp., however, Nothe *v.* Nomer, 54 Conn. 326. In Campbell Printing Press, etc., Co. *v.* Marsh, 20 Col. 22, it was held that one who had received and used a printing press might return it and rescind his contract on the failure of the seller to furnish another piece of machinery included in the bargain, though the market value of the press was impaired by the fact that it had been used. Cp. Aultman & Taylor Co. *v.* Mead, 109 Ky. 583. In Benson *v.* Cowell, 52 Ia. 137, the plaintiff was allowed to rescind on returning money of which he had had the use, without being required to pay interest.

[50] The authorities are collected *infra*, p. 607, n. 67.

return, and some authorities seem to support such a solution of the problem.[51]

Rescission of sealed contracts. The right of rescission is frequently stated as if it were confined to simple contracts;[52] and it is obviously inconsistent with the early common law doctrines in regard to dissolution of sealed contracts to allow matter *in pais* to afford ground for their rescission. But in many jurisdictions in this country a seal no longer has its common law effect, and it is clear that at least in some jurisdictions where a seal still retains its old importance so far as to make consideration for a promise unnecessary, a contract under seal may be rescinded or avoided for breach of promise by one party at the suit of the other, and a recovery had on a *quantum meruit*. This was so held in *Ballou* v. *Billings*.[53] Holmes, J., in delivering the opinion of the Court, refers to earlier Massachusetts decisions which had decided that a contract under seal might be rescinded by parol, and adds, "Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side."[54] In other jurisdictions, however, such relaxation of common law doctrines has not as yet been sanctioned.[55]

[51] See Keener, Quasi-Contracts, 305; Wilson *v.* Burks, 71 Ga. 862; Todd *v.* Leach, 100 Ga. 227; Todd *v.* McLaughlin, 125 Mich. 268; Brewster *v.* Wooster, 131 N. Y. 473; Mason *v.* Lawing, 10 Lea, 264.

In Higby *v.* Whittaker, 8 Ohio, 198, and Hood *v.* People's, etc., Assoc., 8 Tex. Civ. App. 385, the vendor was allowed to recover land for which he had received part payment without returning what he had received, on the ground that the possession which the vendee had enjoyed equalled in value this part payment. See also McDaniel *v.* Gray, 69 Ga. 433; Travelers' Ins. Co. *v.* Redfield, 6 Col. App. 190.

[52] See *e. g.* Ankeny *v.* Clark, 148 U. S. 345, 353, quoting from Smith's Leading Cases; Weart *v.* Hoagland's Adm'r, 2 Zab. 517, 519; Fay *v.* Oliver, 20 Vt. 118, 122; Brown *v.* Ralston, 9 Leigh, 532, 545; Festing *v.* Hunt, 6 Manitoba, 381, 384.

[53] 136 Mass. 307.

[54] This was allowed also in 1803 in Weaver *v.* Bentley, 1 Caines, 47, and see the following note.

[55] Atty *v.* Parish, 1 B. & P., N. R. 104; Middleditch *v.* Ellis, 2 Ex. 623; McManus *v.* Cassidy, 66 Pa. 260. (But see Am. Life Ins. Co. *v.* McAden, 109 Pa. 399.)

Professor Keener, in his excellent work on Quasi-Contracts (p. 308), draws the distinction from the cases cited above in this and the two preceding notes, that where money has been paid by the plaintiff it may be recovered from a defendant who is in default though the contract was under seal, but where services have been rendered or property other than money delivered the plaintiff's only remedy is on the contract, if it is under seal. Possibly the case of Greville *v.* Da Costa, Peake, A. C. 113, taken in connection with the English cases cited above, may lend some support to this view, but the American cases certainly do not seem to warrant the distinction. On the one hand, in Weaver *v.* Bentley, the plaintiff, who had given notes,

One guilty of a breach cannot rescind. A party who has himself been guilty of a substantial breach of contract cannot rescind the contract because of subsequent refusal or failure to perform by the other party.[56]

Election must be manifested. As rescission is only an alternative remedy, and is in derogation of the contract, a party who wishes to avail himself thereof must manifest his election in some way;[57] and must do

money, and farm stock, was apparently allowed to recover for the property as well as the money; and later New York cases make it evident that the law of that State made no such distinction. See Jewell *v.* Schroeppel, 4 Cow. 564; Allen *v.* Jaquish, 21 Wend. 628. Certainly, also, the court in Ballou *v.* Billings indicate no intention to rest that case on the fact that the plaintiff had paid money instead of rendering services or delivering property, but rather broadly decide that contracts under seal generally may be rescinded or avoided for breach. This was decided also in regard to a contract for work and labor in Webster *v.* Enfield, 10 Ill. 298. See also Wolf *v.* Schlacks, 67 Ill. App. 117, 118. A dictum by Redfield, J., in Myrick *v.* Slason, 19 Vt. 121, 126, points in the same direction. On the other hand, though the cases where the plaintiff was not allowed to recover were in fact actions for the value of services or property, there is nothing to indicate that the courts so deciding would have treated the plaintiff better had he been suing for money paid. Indeed, a contrary inference seems justified.

[56] Horne *v.* Smith, 27 Ch. D. 89; Sumpter *v.* Hedges [1898], 1 Q. B. 637; Forman *v.* The Liddesdale [1900], A. C. 190; Kane *v.* Jenkinson, 10 Nat. B. R. 316; Baston *v.* Clifford, 68 Ill. 67; Downey *v.* Riggs, 102 Ia. 88; Getty *v.* Peters, 82 Mich. 661; Feeney *v.* Bardsley, 66 N. J. L. 239; Green *v.* Green, 9 Cow. 46; Ketchum *v.* Evertson, 13 Johns. 359, 364; Higgins *v.* Eagleton, 155 N. Y. 466; Ashbrook *v.* Hite, 9 Ohio St. 357. See also Hickock *v.* Hoyt, 33 Conn. 553; Wilkinson *v.* Blount, 169 Mass. 374; Norwood *v.* Lathrop, 178 Mass. 208. This principle, however, is only accepted with much qualification in many States. The right of one who is himself in default to recover compensation for what he has done is beyond the scope of this chapter. It is fully treated in Keener on Quasi-Contracts, 214 *et seq.*

[57] Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 5 E. & B. 729; Cornwall *v.* Henson, L. R. (1900) 2 Ch. 298; Hennessy *v.* Bacon, 137 U. S. 78; Carney *v.* Newberry, 24 Ill. 203; Sanford *v.* Emory's Adm'r, 34 Ill. 468; Graham *v.* Holloway, 44 Ill. 385; Mullin *v.* Bloomer, 11 Ia. 360; Supple *v.* Iowa State Ins. Co., 58 Ia. 29; Weeks *v.* Robie, 42 N. H. 316; Swazey *v.* Choate Mfg. Co., 48 N. H. 200; Andrews *v.* Cheney, 62 N. H. 404. Cp. Dow *v.* Harkin, 67 N. H. 383); Levy *v.* Loeb, 89 N. Y. 386, 390; Higby *v.* Whittaker, 8 Ohio, 198; Kirby *v.* Harrison, 2 Ohio St. 326; Phillips *v.* Herndon, 78 Tex. 378.

The way in which election must be manifested may vary in different cases. Formal notice is certainly not always requisite. In Thresher *v.* Stonington Bank, 68 Conn. 201; Graham *v.* Holloway, 44 Ill. 385; Brown *v.* St. Paul, etc., Ry. Co., 36 Minn. 236; Graves *v.* White, 87 N. Y. 463, it was held that bringing an action for restitution promptly was sufficient. And see Kirby *v.* Harrison, 2 Ohio St. 326. In New Hampshire, however, it is held some manifestation of election must precede such an action. See New Hampshire cases cited above. In Texas it is laid down, at least in cases of sales of real estate, that "where there has been part performance by the vendee, as paying a portion of the purchase money or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. The reason of this rule is obvious. He may be able to give a reasonable excuse for his failure to fully perform that would entitle him in equity to protection to the extent he had performed. If the vendee has actually abandoned the contract or has

so without undue delay.[58] An offer to rescind must be kept good.[59] Election once made determines the plaintiff's rights.[60]

Minor inconsistencies. There are a few minor inconsistencies in applying or failing to apply the rule allowing restitution as an alternative remedy for breach of contract.[61] These inconsistencies are unfortunate, as they not only are at variance with logical theory, but seem to rest on no adequate foundation of practical convenience. They should, therefore, where it is possible, be swept away by future decisions.

Rule in civil law. It may seem that the whole doctrine of allowing restitution when an adequate remedy on the contract exists is

so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee." Kennedy *v.* Embry, 72 Tex. 387, 390.

Where no time is fixed by the contract or where time is not of the essence, the injured party may by notice fix a reasonable time after which the contract, if not performed, will be treated as abandoned. Green *v.* Levin, 13 Ch. Div. 589; Cover *v.* McLaughlin, 18 N. S. Wales, 107, and decisions collected in 50 Am. Decisions, 678, n.

58 Harden *v.* Lang, 110 Ga. 392, 395; Carney *v.* Newberry, 24 Ill. 203; Axtel *v.* Chase, 77 Ind. 74, 83 Ind. 546, 554; Mills *v.* Osawatomie, 59 Kan. 463; World Pub. Co. *v.* Hull, 81 Mo. App. 277; J. B. Alfree Mfg. Co. *v.* Grape, 59 Neb. 777; Lawrence *v.* Dale, 3 Johns. Ch. 22; Caswell *v.* Black River Mfg. Co., 14 Johns. 453; North Dakota Civ. Code, § 3934; Oklahoma Stat., § 868; Thomas *v.* McCue, 19 Wash. 287, 74 Am. Dec. 662 n.

59 J. B. Alfree Mfg. Co. *v.* Grape, 59 Neb. 777.

60 Goodman *v.* Pocock, 15 Q. B. 576; Routledge *v.* Hislop, 29 L. J. M. (N. S.) 90; Sole *v.* Hines, 81 Md. 476; Daley *v.* Peoples' Assoc., 178 Mass. 13; Wolff *v.* Pickering, 12 S. C. of Cape of Good Hope, 429. Cp. Savage *v.* Canning, Ir. R. 1 C. L. 434.

61 Thus, one who has sold goods to another, who has agreed to give a bill or note made by himself payable at a future day and who has failed to do so, cannot, it is generally held, recover in *indebitatus assumpsit* the value of the goods delivered until the stipulated period of credit has expired. Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582; Manton *v.* Gammon, 7 Ill. App. 201 (cp. Dunsworth *v.* Wood Machine Co., 29 Ill. App. 23); Carson *v.* Allen, 6 Dana, 395; Hanna *v.* Mills, 21 Wend. 90. Yet the failure to give the promised bill or note is surely a material breach. And so it was held in Stocksdale *v.* Schuyler, 29 N. Y. St. Repr. 380; affd., 130 N. Y. 674). See also Tyson *v.* Doe, 15 Vt. 571; Jaquith *v.* Adams, 60 Vt. 392.

If a bill or note signed by a third person should have been given, the contract may be rescinded and action brought at once.

Again, it has been held that a plaintiff cannot recover the money value of goods or services given to the defendant if by the contract he was to receive not money but goods or services. Harrison *v.* Luke, 14 M. & W. 139 (cp. Keys *v.* Harwood, 2 C. B. 905); Anderson *v.* Rice, 20 Ala. 239; Oswald *v.* Godbold, 20 Ala. 811; Eastland *v.* Sparks, 22 Ala. 607; Bernard *v.* Dickins, 22 Ark. 351; Baldwin *v.* Lessner, 8 Ga. 71; Cochran *v.* Tatum, 3 T. B. Mon. 404; Slayton *v.* McDonald, 73 Me. 50; Pierson *v.* Spaulding, 61 Mich. 90; Mitchell *v.* Gile, 12 N. H. 390; Weart *v.* Hoagland's Adm'r, 2 Zab. 517; Brooks *v.* Scott's Exec., 2 Munf. 344; Bradley *v.* Levy, 5 Wis. 400. But see *contra*, Sullivan *v.* Boley, 24 Fla. 501; Stone *v.* Nichols, 43 Mich. 16; Dikeman *v.* Arnold, 78 Mich. 455; Brown *v.* St. Paul Ry. Co., 36 Minn. 236; Clark

anomalous;[62] and from a technical point of view this may be so. But the doctrine must have the merit either of practical convenience or of conformity to men's sense of fairness, for the history of the civil law shows even more strikingly than that of the common law the development of the doctrine, in spite of ancient rules to the contrary, that a person aggrieved by breach of contract may have rescission and restitution. The Roman law, like the early English law, did not allow this, but it was permitted by the Code Napoléon, and consequently is permitted now not only in France, but in the numerous countries which have copied French legislation. Germany clung longest to the old Roman rule, but in contracts within the commercial code the remedy in question has been authorized since 1861–1868, when a uniform commercial code was gradually adopted by the various German states, and since January 1, 1900, under the Bürgerliches Gesetzbuch the remedy is well-nigh uniformly allowable.[63]

Rule in India. The same tendency may be observed in another direction. The Indian Contract Act, though supposed to be generally a codification of contracts, seems to go beyond the law of England in allowing rescission.[64]

B. Action on the Contract.

Action on the contract lies. On repudiation of a contract the aggrieved party must have a remedy on the contract. The only question can be what he must do in order to perfect his right of action.

If he has performed may sue at once. If he has already performed all that the contract required of him, there can be no doubt that he may sue at once on the contract if the time when the defendant's performance was due has arrived. Whether suit may be brought at once even though that time has not arrived will be discussed later.

v. Fairfield, 22 Wend. 522; Way *v.* Wakefield, 7 Vt. 223; Wainwright *v.* Straw, 15 Vt. 215. And see Jackson *v.* Hall, 53 Ill. 440.

[62] Professor Keener so regards it, and finds in the anomalous character of the remedy a reason for some of its illogical limitations. Quasi-Contracts, 306.

[63] See 13 Harv. L. Rev. 84, 85, 94, 95.

[64] Sect. 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

See also sect. 53, which allows rescission because of prevention of performance, and sect. 107, which allows a vendor who has parted with title but retained a lien to make a resale of the goods.

It should be said, however, that the court in Sooltan Chund *v.* Schiller, 4 Calcutta, 252, showed a tendency to restrict the effect of sect. 39.

If he has been prevented from performing may also sue. The situation is in legal effect similar when the injured party has not fully performed, but is literally prevented by the other party from continuing performance. Where work requires some coöperation of both parties this frequently happens. Though the plaintiff's damages may not be the same as if he had fully performed, his right of action is as complete, for when the defendant has himself caused the plaintiff's non-performance he cannot take advantage of it as a defence.

Where he has not performed or been prevented — Cockburn's rule. But if the injured party has not fully performed and is not prevented from continuing, yet because of the repudiation by the other party has just reason to believe that the latter will not fulfil his contractual obligation, the situation presents greater difficulty. In *Frost* v. *Knight*,[65] Cockburn, C. J., thus stated the law: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." [66]

Rule approved in England but inconsistent with American decisions. This language was quoted with approval by Cotton, L. J., in *Johnstone* v. *Milling*,[67] and may be regarded as expressing the present understanding of English lawyers on the matter in question.[68] The alternative stated as permissible in the first paragraph of Lord Cockburn's

[65] L. R. 7 Ex. 111.
[66] L. R. 7 Ex. 111, 112.
[67] 16 Q. B. D. 460.
[68] See *e. g.* Leake, Contracts (4th ed.), 618; Mayne, Damages (7th ed.), 184. It is also quoted and acted on in Dalrymple *v.* Scott, 19 Ont. App. 477.

statement is not allowed generally in this country. There is a line of cases running back to 1845[69] which hold that after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise.

American decisions sound. By every consideration of mercantile convenience these decisions are correct. The facts of one of the few cases[70] which are directly opposed to them need only be stated to illustrate this. The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire.

[69] Clark *v.* Marsiglia, 1 Denio, 317, is the earliest decision. In this case the plaintiff was employed to clean and repair a number of pictures, for which the defendant agreed to pay. After the plaintiff had begun work upon them the defendant countermanded the order. The plaintiff nevertheless completed the work and sued for the full price. The court held he could recover only for what he had done before the order was countermanded, with such further sum as would compensate him for the interruption of the contract at that point. To similar effect are Kingman *v.* Western Mfg. Co., 92 Fed. Rep. 486 (C. C. A.); Black *v.* Woodrow, 39 Md. 194, 216; Heaver *v.* Lanahan, 74 Md. 493; Collins *v.* Delaporte, 115 Mass. 159 (*semble*); Hosmer *v.* Wilson, 7 Mich. 294; Gibbons *v.* Bente, 51 Minn. 499; American Publishing Co. *v.* Walker, 87 Mo. App. 503; Dillon *v.* Anderson, 43 N. Y. 231; Lord *v.* Thomas, 64 N. Y. 107 (*semble*); Johnson *v.* Meeker, 96 N. Y. 93; People *v.* Aldridge, 83 Hun, 279 (*semble*); Reiser *v.* Mears, 120 N. C. 443; Davis *v.* Bronson, 2 N. Dak. 300; Collyer *v.* Moulton, 9 R. I. 90; Ault *v.* Dustin, 100 Tenn. 366; Chicago, &c. Co. *v.* Barry, 52 S. W. Rep. 451 (Tenn.); Tufts *v.* Lawrence, 77 Tex. 526; Derby *v.* Johnson, 21 Vt. 17; Danforth *v.* Walker, 37 Vt. 239; 40 Vt. 257; Cameron *v.* White, 74 Wis. 425; Tufts *v.* Weinfeld, 88 Wis. 647. But see *contra*, Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660; McAlister *v.* Safley, 65 Ia. 719 (cp. Moline Scale Co. *v.* Beed, 52 Ia. 307). See also Southern Cotton Oil Co. *v.* Heflin, 99 Fed. Rep. 339 (C. C. A.); Lake Shore, &c. Ry. Co. *v.* Richards, 152 Ill. 59.

[70] Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660. See also Lake Shore, etc. Ry. Co. *v.* Richards, 152 Ill. 59.

After 120 tons had been delivered the defendant requested the plaintiff to stop further shipments, and on the refusal of the latter, telegraphed, "Will not take wire if shipped." Nevertheless, the plaintiff went through the futile and expensive steps of preparing and sending the rest of the wire, and was held entitled to recover damages for so doing.

Rule of damages not perhaps applicable in every case. The English courts have recognized the duty of a plaintiff to mitigate or at least not to enhance the damages which a defendant is to be called upon to pay;[71] and it is quite possible that Lord Cockburn, in stating as he did the first alternative right of a party aggrieved by repudiation of a contract, did not appreciate that his statement justified a violation of that duty.[72] It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages. But it is clear that such cases must be exceptional.

Inconsistency of Cockburn's language — True rule. Lord Cockburn's statement of the plaintiff's second alternative is that "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." The two clauses of this sentence logically contradict each other. If the contract is put an end to, no action can be brought upon it.[73] If an action may be brought upon it, either at once or at any time in the future, it is not put an end to.[74] The question of the time when the action should be brought is not immediately essential here, and that question being left for subsequent discussion, it may be laid down as a more logically coherent and more practically useful statement that the promisee may, if he thinks proper, treat the repudiation of the other party as a ground for putting an end to the contract, as shown in the earlier part of this article. If this course is adopted no rights under the contract

[71] Mayne, Damages (7th ed.), 185; Harries *v.* Edmonds, 1 C. & K. 686, 687; Roper *v.* Johnson, L. R. 8 C. P. 167; Roth *v.* Taysen (C. A.), 12 T. L. R. 211; Brace *v.* Calder (C. A.), [1895] 2 Q. B. 253. Cp. Brown *v.* Muller, L. R. 7 Ex. 319; *Re* South African Trust Co. (C. A.), 74 L. T. 769.

[72] Lord Cockburn's statement is also sometimes repeated by American courts, which would not be likely to enforce it to its logical conclusion. See Foss, etc., Co. *v.* Bullock, 59 Fed. Rep. 83, 87; Smith *v.* Georgia Loan Co., 113 Ga. 975; Strauss *v.* Meertief, 64 Ala. 299, 307; Claes, etc., Mfg. Co., *v.* McCord, 65 Mo. App. 507; Walsh *v.* Myers, 92 Wis. 397.

[73] Heagney *v.* J. I. Case Machinery Co. (Neb.), 96 N. W. Rep. 175; McCormick Machine Co. *v.* Brown (Neb.), 98 N. W. Rep. 697; Ward *v.* Warren, 44 Oreg. 102.

[74] Speirs *v.* Union Forge Co., 180 Mass. 87, 92.

can remain, though a quasi-contractual right to recover the value of anything which has been done will survive. Or the promisee may decline to continue to perform and sue the promisor for his breach of contract. Ordinarily, of course, a plaintiff in an action upon a contract cannot succeed if he has himself failed to perform at the proper time; but if that failure to perform was excused by the defendants' own conduct this principle does not apply. The authorities furnish abundant illustration of this when the excuse for the plaintiff's failure to perform consisted in a prior serious breach of the contract by the defendant.[75] The same principle covers the case of repudiation without an actual breach of contract. The reason why the plaintiff must ordinarily have performed in order that he may recover is the same reason which underlies the doctrine of failure of consideration. The mutual performances in a bilateral contract are, barring exceptional cases, intended to be given in exchange for each other, and if the exchange fails on one side owing to defective performance, the other party may likewise decline to perform. This reason was pretty well hidden during the early development of the doctrine under the terminology of implied conditions, but it is sufficiently apparent at the present day.[76] Now, if it be an excuse which will justify a promisor in breaking his promise that his co-contractor has failed to give the performance agreed upon as an exchange, it should likewise be an excuse that the co-contractor has made it plain, as by repudiation, that he will not give such performance when it becomes due in the future. A promisor can no more be expected to perform his promise when he is not going to receive counter-performance than when he actually has not received it. Baron Parke—a judge not likely to stretch too far the rules of the common law in order to work out justice—so held in *Ripley* v. *M'Clure*.[77]

Contract not terminated. Neither where the plaintiff's excuse for his own non-performance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse. The contract still exists, but one party to it has a defence and an excuse for non-performance. It may be thought that this statement differs from that of Lord Cockburn's second alternative only in words. Even so, words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions

[75] See Parsons on Contracts (8th ed.), ii. 790.
[76] See *e. g.*, Hull Coal Co. *v.* Empire Coal Co., 113 Fed. Rep. 256, 258 (C. C. A.).
[77] 4 Ex. 345.

follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as "rescinded" or "put an end to," when in truth one party to the contract has merely exercised his right to refuse to perform because of the wrongful conduct of the other party.[78] To be sure it frequently makes little practical difference whether this is the case or whether the contract is in fact rescinded. Where the only question that arises is in regard to the liability of a defendant for his refusal to perform the result is the same whether the whole contract is rescinded or whether it still subsists subject to a defence on the part of the defendant. But if the defendant seeks by counter-claim or cross-action to establish a right on his part to damages, his success depends on the existence of the contract. And more than one court has been led into the error of holding that no such right of action existed—that a voluntary exercise of the right to refuse to continue performance necessarily involved a total termination of the contract.[79]

[78] This error is adverted to in Anvil Mining Co. *v.* Humble, 153 U. S. 540, 551. The plaintiff in that case had ceased to perform because of a breach of contract by the defendant and sought to recover damages. Brewer, J., delivering the opinion of the court, said (p. 551): "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his [its?] nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. So Holmes, J., in Daley *v.* People's Building Assoc., 178 Mass. 13, 18, "conduct going no further than the defendant's might not justify even a refusal of further performance on the other side, . . . a right which must not be confounded with rescission, and which in some cases is more easily made out." See also the remarks of Bowen, L. J., in Boston, &c. Co. *v.* Ansell, 39 Ch. D. 339, 365; Hayes *v.* Nashville, 80 Fed. Rep. 641, 645.

[79] Cox *v.* McLaughlin, 54 Cal. 605; Porter *v.* Arrowhead Reservoir Co., 100 Cal. 500, 502; Palm *v.* Ohio, etc., R. Co., 18 Ill. 217; Howe *v.* Hutchison, 105 Ill. 501; Lake Shore, etc. Ry. Co. *v.* Richards, 32 N. E. Rep. 402 (Ill. Sup. Ct. 1892); Jones *v.* Mial, 79 N. C. 164. These cases hold that though a serious breach of contract will justify the other party in treating the contract as rescinded and so refusing to continue to perform, yet at least unless the breach amounts to actual prevention the party aggrieved cannot, if he ceases to perform, sue on the contract. The late Illinois case cited was, however, reversed on rehearing, and though somewhat limited in its language, perhaps overrules the earlier decisions in the same state. 152 Ill. 59, 80, 82. The first California decision was chiefly based on the early Illinois case. So in Hochster *v.* De La Tour, 2 E. & B. 678, counsel for the defendant, though their case did not require it, based their whole argument on the assumption that repudiation was equivalent to an offer to rescind, and that if the aggrieved party did not continue to hold himself ready and willing to perform he could not sue upon the contract.

No manifestation of election necessary. Further, in order to exercise his right to rescind a contract, an injured party must indicate his election so to do by positive action,[80] but if he only wishes to refrain from performing his part of the contract, he is not seeking to assert an affirmative right, but standing on the defensive. He need do nothing except refrain from performing or receiving performance until he sues or is sued, when he should plead the cause which justifies his non-performance.[81] Of course he may waive this justification, but only by some positive action or estoppel.[82]

In Bethel *v.* Salem Improvement Co., 93 Va. 354, also, the plaintiff was not allowed to recover for loss of profits, after having ceased to perform owing to the defendant's breach of contract. See also Beatty *v.* Howe Lumber Co., 77 Minn. 272.

Citations need not be multiplied to prove the error of the foregoing decisions and the right of the plaintiff to cease performance upon the defendant's repudiation and yet sue upon the contract. Mayne's Case, 5 Coke, 20*b* (3d Resolution); Cort *v.* Ambergate, etc. Ry. Co., 17 Q. B. 127; Ripley *v.* McClure, 4 Ex. 345; Marshall *v.* Mackintosh, 78 L. T. 750; Leeson *v.* North British, &c. Co., Ir. R. 8 C. L. 309; Anvil Mining Co. *v.* Humble, 153 U. S. 540; McElwee *v.* Bridgeport Land, &c. Co., 54 Fed. Rep. 627 (C. C. A.); Cherry Valley Works *v.* Florence, &c. Co., 64 Fed. Rep. 569 (C. C. A.); Martin *v.* Chapman, 6 Port. 344; Baldwin *v.* Marqueze, 91 Ga. 404; Weill *v.* American Metal Co., 182 Ill. 128; Riley *v.* Walker, 6 Ind. App. 622; Morris *v.* Globe Refining Co. (Ky.), 59 S. W. Rep. 12; Lowe *v.* Harwood, 139 Mass. 133; Lee *v.* Briggs, 99 Mich. 487; Armstrong *v.* St. Paul, &c. Co., 48 Minn. 113; Berthold *v.* St. Louis Construction Co., 165 Mo. 280; Vickers *v.* Electrozone Commercial Co., 67 N. J. L. 665; Wharton *v.* Winch, 140 N. Y. 287; Reynolds *v.* Reynolds, 48 Hun, 142; Davis *v.* Tubbs, 7 S. Dak. 488.

Another instance of the confusion of ideas due to the improper use of words here criticised may be found in Fox *v.* Kitton, 19 Ill. 519, where the court says that there is no conflict between the views of Parke, B., and the decision of Hochster *v.* De La Tour, 2 E. & B. 678, since Parke, B., said in Phillpotts *v.* Evans, 5 M. & W. 475, 477: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract." This, the Illinois court adds, "is in strict accordance with the principles recognized in . . . Hochster *v.* De La Tour." Now Parke was using the word "rescinds" in its true sense. What he meant and what he said was that the seller might at his option terminate the contract. The Illinois court thought he was using the word in the improper way in which Lord Cockburn did, and that his meaning was that the seller might, without himself performing, so act as to entitle himself to sue the buyer immediately for breach of the contract—a doctrine Parke expressly denied both in Phillpotts *v.* Evans and Ripley *v.* M'Clure, 4 Ex. 345, 359. The mistake made in Fox *v.* Kitton is repeated in Kadish *v.* Young, 108 Ill. 170.

[80] *Supra*, p. 345.

[81] Where the ground of non-performance is an actual breach of contract by the other party, it is an obvious consequence of the rule of common law pleading which required the plaintiff to allege and prove his own performance, that he would fail if he had not duly performed, though the defendant had not manifested any election. Changes in modern pleading cannot have affected the substantive law on this point. Where the ground of non-performance is repudiation or a prospective breach, there should be no difference for the essential nature of the defense is the same.

[82] See Langdell, Summary of Contracts, § 177; Harriman on Contracts, (2d ed.).

Prospective inability to perform should excuse. If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a wilful intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *vis major* this should be true.[83]

Cases of prospective inability. There is some difficulty in determining when it is sufficiently certain that one side of a contract will not be performed, to justify a refusal to perform the other side. Certainly if a party announces that he cannot perform, the other party is justified in taking him at his word.[84] Destruction of the subject-matter of the promise of one party is clearly a defence to the other.[85] Transfer to a third person of property forming the subject-matter of the contract is not so clear, since it is possible that the grantor may recover the title in time to fulfil the contract, but ordinarily the chance seems so remote that the defence should be allowed.[86] Insolvency of one party to a contract of sale is not always sufficient reason for refusal to perform by the other, for an assignee or trustee in insolvency or bankruptcy may find it for the advantage of the insolvent estate to complete the bargain, and if so he ought to have

[83] Langdell, Summary, § 158. And see cases in the following notes.

[84] But it must be a clear and positive statement. Smoot's Case, 15 Wall. 36. See also *Re* Phœnix Bessemer Steel Co., 4 Ch. D. 108.

[85] 9 Harv. L. Rev. 106. Courts of equity in some jurisdictions have, however, established an exception to this rule in the case of contracts for the sale of real estate. 9 Harv. L. Rev. 111.

[86] Fort Payne, etc., Co. *v.* Webster, 163 Mass. 134; Meyers *v.* Markham, 90 Minn. 230; James *v.* Burchell, 82 N. Y. 108; Brodhead *v.* Reinbold, 200 Pa. 618. *Contra* are Garberino *v.* Roberts, 109 Cal. 125; Webb *v.* Stephenson, 11 Wash. 342. See also Joyce *v.* Shafer, 97 Cal. 335; Shively *v.* Semi-Tropic, etc., Co., 99 Cal. 259. In the latter cases the court cites decisions establishing the doctrine that a man may contract to sell land which he does not own, and draws the inference that if the seller ceases to own land which is the subject of a contract it does not excuse the other party. The inference does not seem warranted. In Ziehen *v.* Smith, 148 N. Y. 558, at the time of performance there was an outstanding lien on the property, of which neither buyer nor seller knew at the time of entering into the contract. The buyer, without demanding fulfilment of the contract, at once brought suit to recover part of the price which he had paid. The court held he could not recover, as the incumbrance was one which was in the power of the vendor to remove, and he might have done so if requested. This decision was followed in Higgins *v.* Eagleton, 155 N. Y. 466. In the absence of any fraudulent concealment the determining question should be, Would a reasonable man be warranted in inferring that the contract would not be carried out? See Forrer *v.* Nash, 35 Beav. 167; Brewer *v.* Broadwood, 22 Ch. D. 105; Lytle *v.* Breckenridge, 3 J. J. Marsh. 663; Payne *v.* Pomeroy, 21 D. C. 243. Cp. Easton *v.* Jones, 193 Pa. 147.

that right.[87] But no one is obliged to give credit to one who is insolvent or bankrupt. Insolvency or bankruptcy affords a defence to any such contractual obligation, and payment may be required on delivery, though the contract expressly provides for a term of credit.[88] And if a contract is of such a nature that an assignee cannot carry it out, insolvency will excuse further performance by the other party.[89] These seem to be the only cases in which prospective inability of one party is sufficiently certain to be a defence to the other party.

C. Time When Right of Action Accrues.

Relation of pleading to the question. The final question remains, When may the injured party bring his action upon the contract? If a technical declaration were as much thought of to-day as it was once, the question could hardly have become troublesome. From a technical point of view, it seems obvious that in an action on a contract the plaintiff must state that the defendant broke some promise which he had made. If he promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he was not going to employ the plaintiff upon June 1 can be a breach only of a contract not to make such statements. It is perhaps not wholly by chance that the doctrine of anticipatory breach has arisen as the exactness of common law pleading has become largely a thing of the past; for the science of special pleading, in spite of the grave defects attending it, had the great merit of making clear the exact questions of law and fact to be decided.

Arguments from principle and precedent. The matter is so plain on principle that theoretical discussion is hardly possible,[90] but certain

87 Leake, Contracts (4th ed.), 461, 620, and cases cited; Mess *v.* Duffus, 6 Comm. Cas. 165; Brassel *v.* Troxel, 68 Ill. App. 131; Rappleye *v.* Racine Seeder Co., 79 Ia. 220, 228; Hobbs *v.* Columbia Falls Brick Co., 159 Mass. 109; Vandegrift *v.* Cowles Co., 161 N. Y. 435.

88 See authorities above cited. Also, Lennox *v.* Murphy, 171 Mass. 370, 373; Diem *v.* Koblitz, 49 Ohio St. 41; Pardee *v.* Kanady, 100 N. Y. 121; Dougherty Bros. *v.* Central Bank, 93 Pa. 227; Lancaster Bank *v.* Huver, 114 Pa. 216. Mere doubts of solvency, even though reasonable, furnish no defense to the literal performance of a contract. C. F. Jewett Publishing Co. *v.* Butler, 159 Mass. 517.

89 Leake, Contracts (4th ed.), 908; Mess *v.* Duffus, 6 Comm. Cas. 165; *Ex parte* Pollard, 2 Low. 411; Chemical Nat. Bank *v.* World's Fair Exposition, 170 Ill. 82; Bank Commissioners *v.* New Hampshire Trust Co., 69 N. H. 621.

90 It need hardly be said that the doctrine of anticipatory breach is peculiar to our law.

In Mommsen's Beiträge zum Obligationenrecht, Abtheilung. 3, § 4, it is said: "The obligation must be already due. So long as the time of maturity

distinctions may be made which have not always been observed, and which, if observed, are a sufficient answer to the claims of practical convenience that furnish the only support for the advocates of the doctrine of anticipatory breach. It seems desirable, also, to explain certain early cases which have led to some confusion, and thereby show the lack of historical basis for the doctrine; and of this first.

Early decision. In Y. B. 21 Edw. IV. 54, pl. 26, Choke, J., says: "If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of that manor to another before the said feast, notwithstanding that you repurchase the property before the said feast, still you have forfeited your obligation because you were once disabled from making the feoffment." [91] This and similar statements are repeated several times in the early books.[92]

Explanation of the decision. What Choke was talking about was a bond with a condition. This appears from the case itself where his remark was made as an illustration, and so it was understood.[93] At the present day a bond with a condition to convey before a certain day would be regarded as in substance the equivalent of a covenant to pay on or after the day the penal sum of the bond (for which the law would substitute appropriate damages) if a conveyance was not made before the day. That does not represent the early understanding of such an instrument. The words of a bond, which are still used, acknowledging an immediate indebtedness, and adding a proviso in which case the instrument is to become void, had a literal meaning for our ancestors. "A specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release." [94] It has been frequently pointed out that a debt was not regarded in

has not arrived, the obligor has always a defense in case the creditor should endeavor to enforce the obligation."

And in the typical case of one who regardless of his contract to sell and deliver in the future specific property to A sells and delivers it to B, Oesterlen, Der Mehrfache Verkauf, pp. 17, 18, says: "The temporary impossibility of performance due to the first delivery is wholly immaterial if it is removed at the proper time." . . . "When fulfilment is not made to the latter (*i. e.* A) at the proper time, then for the first time has a legal injury been done."

91 In Mayne's Case, 5 Coke, 20 b, 21 a, this passage is literally translated from the Year Book, and it is to Coke, probably, that the later currency of the citation is due.

92 In 1 Rolle's Ab. 447, 448, under the title "Condition," this and several other similar cases are put. See also 5 Viner's Ab. 224.

93 This is evident, *e. g.* from Rolle's classification of the authority under "Condition." See also *infra*, p. 358, n. 98.

94 9 Harv. L. Rev. 56, by Professor Ames.

our early law as a contractual right but a property right, and a deed creating a debt was not looked upon, as it is to-day, as a promise to pay money, but as a grant or conveyance of a sum of the grantor's money to the grantee.[95] Accordingly a bond was closely analogous to a mortgage,—a conveyance with a provision of defeasance attached. If the condition was or became impossible there remained an absolute debt created by the bond.[96] Choke's idea seems to have been that when the obligor of the bond sold the property, the condition became at that moment impossible of performance. There was, therefore, at that moment, by virtue of the bond itself, an absolute indebtedness, and this indebtedness, having once become absolute, could not subsequently be qualified. The condition could not be temporarily in abeyance.

Explanation of case continued. Whether this view of the law was that generally taken by the contemporary judges, and, if so, when it gave way to a more modern conception, is not very material to this discussion, but it may be mentioned that Choke's statement seems inconsistent with the opinions of writers of authority not long afterwards.[97] What is material to observe is that, whichever way the point is decided, these authorities have no bearing upon the question of the immediate right to sue upon the repudiation of a contract. It may safely be asserted that Choke and his contemporaries and successors

[95] Parol Contracts prior to Assumpsit, by Professor Ames, 8 Harv. L. Rev. 252; Pollock & Maitland, Hist. Eng. Law (2d ed.), ii. 205; Langdell, Summary of Contracts, § 100.

[96] 2 Vynior's Case, 8 Coke, 81 b, 83 a; Perkins, Profitable Book, §§ 736, 757; 1 Rolle's Ab. 419 (C) pl. 2; Ib. 420 (E) pl. 1, 2. The last passage reads: "If the condition of a bond or feoffment is impossible when it is made it is a void condition, but the obligation or feoffment is not void but single, because the condition is subsequent. But if a condition precedent be impossible when it is made the whole is void, for nothing passes before the condition is performed." Perkins (§ 757) gives a case of a condition originally possible, but subsequently becoming impossible.

[97] Perkins, Profitable Book, § 800: "And there is a diversity when the condition is to be performed on the part of the feoffor or grantor, etc., and when on the part of the feoffee or grantee, etc. For when it is to be performed on the part of the feoffee or grantee, it behoveth him that he be not disabled at any time to do or perform the same."

§ 801. "But when the condition is to be performed on the part of the feoffor or grantor, although they are disabled to perform it at any time before the day on which it ought to be performed, yet if they are able to perform the same at the day, etc., it is sufficient, except in special cases." Illustrations are also given by the author.

This was written in the first half of the sixteenth century. Coke adopted the diversity (Co. Litt. 221 b); but neither author gives a satisfactory reason for it.

In the case put by Choke the condition was to be performed by the obligor, grantor of the bond.

would all have agreed that a covenant to convey land before a certain feast, or a covenant to pay damages if the covenantor failed to convey land before a certain feast, could in no event have been sued upon before the feast.[98]

Erroneous statement of Fuller, C. J. When, therefore, Fuller, C. J., in a case recently decided by the Supreme Court of the United States, asserts, "It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract,"[99] it must, with deference, be said that the learned judge is mistaken. The mistake is perhaps more pardonable than it would otherwise be, had not an English court fallen into the same error. In *Ford* v. *Tiley*,[1] Bayley, J. in delivering the opinion of the court, draws the conclusion from some of the old authorities above referred to "that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives."[2] This was not, so far as appears, necessary to the decision of the case. The decision seems to have been correct, as will presently be shown, but Bayley's remark is noteworthy as the first statement in the English books authorizing the idea that an action may be brought on a promise before it is broken. It is to be noticed that this remark is confined to the case of an estate, and is not made as laying down a general principle of the law of contracts.[3] Where the owner of specific property agrees to sell it at a

[98] This is neatly proved by an extract from the case of Hoe *v.* Marshall, Cro. Eliz. 579, 580, S. C. Goldsb. 167, 168. The reader should first be reminded that in our early law a release of a claim or debt was treated as a conveyance and that consequently a release could not be made of a possible future claim, and further that the word "obligation" here as always in the early books means a bond with condition. "If one covenants to infeoff me before Michaelmas, a release of all actions before Michaelmas is no bar to an action of covenant brought after Michaelmas, for there was not any cause of action at the time of the release made. But if an obligation be for the performance of that covenant, a release of all actions is a discharge of that bond, for it was a duty defeasible."

[99] Roehm *v.* Horst, 178 U. S. 1, 18. It is also stated in the opinion (p. 8) that this was "not disputed." If so, the counsel for the defendant conceded more than they should.

[1] 6 B. & C. 325 (1827). But the error is pointed out, though perhaps not conclusively shown, in the able opinion of Wells, J., in Daniels *v.* Newton, 114 Mass. 530. It is also adverted to in the argument of counsel for the defendant in Short *v.* Stone, 8 Q. B. 358, 364, and in Lovelock *v.* Franklyn, 8 Q. B. 371, 376.

[2] 6 B. & C. 325, 327.

[3] Bayley's remark was repeated as representing the law in Heard *v.* Bowers, 23 Pick. 455, 460; but in that case, as the impossibility was not due to the

future day, it is certainly much easier to imply a promise that he will not otherwise dispose of it in the meantime, than it is to imply a promise in every contract not only to do but to say nothing inconsistent with the principal promise.

Other English cases. In 1846 there were decided two cases in which a defendant was held liable for the breach of a promise to marry. In one of these cases[4] the defendant's promise was alleged to be simply to marry the plaintiff; in the other case "to marry her within a reasonable time next after he should thereunto be requested."[5] In both cases the defendant was held liable without any request by the plaintiff.

Dicta against anticipatory breach. These cases did not profess to establish any general doctrine that a contract could be broken before the time for its performance. Moreover, Parke, B., twice expressly ruled the contrary at about this time;[6] and Lord Denman expressed a similar opinion.[7]

Hochster v. De La Tour. So the matter stood in 1852 when the case of *Hochster* v. *De La Tour*[8] was decided. In that case the plaintiff

voluntary act of the promisor, the rule was held inapplicable. In Daniels *v.* Newton, 114 Mass. 530, the *dictum* in Heard *v.* Bowers, was repudiated.

4 Caines *v.* Smith, 15 M. & W. 189.

5 Short *v.* Stone, 8 Q. B. 358.

6 Phillpotts *v.* Evans, 5 M. & W. 475, 477 (1839): "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract, for all that he stipulates for is that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them, nevertheless; and, *vice versa*, the plaintiffs could not sue him before."

In Ripley *v.* M'Clure, 4 Ex. 345 (1849), Parke reiterated his statement that a notice before the time for performance could not be a breach of contract, but held that it might excuse the other party from continuing to perform.

7 Lovelock *v.* Franklyn, 8 Q. B. 371, 378 (1846): "This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more on the point now before us than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the meantime." As Lord Denman had immediately before taken part in the decision of Short *v.* Stone, 8 Q. B. 356, it may be assumed he did not regard that decision as inconsistent with his later remarks.

In Thomson *v.* Miles, 1 Esp. 184, Lord Kenyon had said that it had been solemnly adjudged that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of Parliament, gets such an estate as will enable him to make a title, that is sufficient."

See also Alexander *v.* Gardner, 1 Bing. N. C. 671, 677, per Tindal, C. J.

8 2 E. & B. 678.

had entered into a contract with the defendant to serve him as a courier for three months beginning June 1, 1852. On May 11, the defendant wrote to the plaintiff declining his services. The action was begun May 22, and, after a verdict for the plaintiff, objection was taken that the action was prematurely brought. Counsel for the defendant, however, argued—unnecessarily so far as the immediate case was concerned — that the plaintiff, having taken other employment, had terminated the contract. Lord Campbell, in delivering the opinion of the court in favor of the plaintiff, showed that the situation would be unfortunate if the plaintiff, as a condition of getting a right of action, must decline other employment and hold himself ready to perform until June 1. From this, apparently misled by the argument of counsel, Lord Campbell drew the conclusion that the plaintiff must have an immediate right of action; and also drew the conclusion from the earlier cases already referred to[9] that incapacity before the time for performance had already been settled by decision to be a breach, neglecting to notice the distinction, hereafter adverted to, between a fixed future day and a day which may be fixed at any time in the present or future.

Modern law. These two misapprehensions of Lord Campbell, for as such they must be regarded, make the case an unsatisfactory one. It has, however, settled the law in England,[10] and the doctrine for which it stands has been adopted in Canada,[11] in this country either by *dictum* or decision, in the Federal courts[12] and in the courts of a

[9] He adds the case of Bowdell *v.* Parsons, 10 East, 359, as establishing the proposition that "if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them." In fact, the contract in that case was to deliver upon request.

[10] Frost *v.* Knight, L. R. 7 Ex. 111; Johnstone *v.* Milling, 16 Q. B. D. 460; Synge *v.* Synge (C. A.), [1894] 1 Q. B. 466; Roth *v.* Taysen, 73 L. T. 628. See also Danube, etc., Co. *v.* Xenos, 13 C. B. (N. S.) 825; Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 6 E. & B. 953; Roper *v.* Johnson, L. R. 8 C. P. 167; Brown *v.* Muller, L. R. 7 Ex. 319; *Re* South African Trust Co., 74 L. T. 769.

[11] Dalrymple *v.* Scott, 19 Ont. App. 477, 483; Ontario Lantern Co. *v.* Hamilton Mfg. Co., 27 Ont. 346.

[12] Rochm *v.* Horst, 178 U. S. 1, affirming 91 Fed. Rep. 345 (C. C. A.), which affirmed 84 Fed. Rep. 565; Grau *v.* McVicker, 8 Biss. 13; Dingley *v.* Oler, 11 Fed. Rep. 372; Foss, &c. Co. *v.* Bullock, 59 Fed. Rep. 83, 87; Marks *v.* Van Eeghen, 85 Fed. Rep. 853 (C. C. A.). The Supreme Court long remained apparently undecided. Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, 264; Pierce *v.* Tennessee, &c. R. R. Co., 173 U. S. 1, 12. See also Edward Hines Lumber Co. *v.* Alley, 73 Fed. Rep. 603 (C. C. A.).

Clark *v.* National Benefit Co., 67 Fed. Rep. 222, must now be regarded as overruled.

majority of the States in which the question has arisen.[13] There are strong opinions to the contrary,[14] however, and in many States the question is still undecided,[15] so that the final outcome in America is not yet certain.

Distinction between defence and right of action. The reasoning in *Hochster* v. *De la Tour*,[16] already adverted to, illustrates the importance of a distinction, which should be observed — the distinction between a defence and a right of action. This seems obvious, but it is frequently lost sight of, as it was in that case. Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. It is a consequence of allowing such an excuse that when he brings an action

[13] Wolf *v.* Marsh, 54 Cal. 228; Fresno, &c. Co. *v.* Dunbar, 80 Cal. 530; Poirier *v.* Gravel, 88 Cal. 79; Remy *v.* Olds, 88 Cal. 537; Garberino *v.* Roberts, 109 Cal. 125, 128; Thomson *v.* Kyle, 39 Fla. 582; Fox *v.* Kitton, 19 Ill. 519; Follansbee *v.* Adams, 86 Ill. 13; Kadish *v.* Young, 108 Ill. 170; Engesette *v.* McGilvray, 63 Ill. App. 461; Kurtz *v.* Frank, 76 Ind. 594; Adams *v.* Byerly, 123 Ind. 368, 371; Crabtree *v.* Messersmith, 19 Iowa, 179; Holloway *v.* Griffith, 32 Iowa, 409; McCormick *v.* Basal, 46 Iowa, 235; Platt *v.* Brand, 26 Mich. 173; Sheahan *v.* Barry, 27 Mich. 217; Kalkhoff *v.* Nelson, 60 Minn. 284, 287; Bignall, &c. Mfg. Co. *v.* Pierce, &c. Mfg. Co., 59 Mo. App. 673; Claes, &c. Mfg. Co. *v.* McCord, 65 Mo. App. 507; Vickers *v.* Electrozone Co., 67 N. J. L. 665; O'Neill *v.* Supreme Council, 70 N. J. L. 410; Burtis *v.* Thompson, 42 N. Y. 246; Howard *v.* Daly, 61 N. Y. 362; Ferris *v.* Spooner, 102 N. Y. 10; Matthews *v.* Matthews, 62 Hun, 110; Nichols *v.* Scranton, &c. Co., 137 N. Y. 471; Stokes *v.* McKay, 147 N. Y. 223; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633, 643 (cp. Shaw *v.* Republic L. I. Co., 69 N. Y. 286, 293; Benecke *v.* Haebler, 38 N. Y. App. Div. 344; Hicks *v.* British Am. Assur. Co., 162 N. Y. 284; Langan *v.* Supreme Council, 174 N. Y. 266); Schmitt *v.* Schnell, 14 Ohio C. C. 153; Diem *v.* Koblitz, 49 Ohio St. 41; Stark *v.* Duvall, 7 Oklahoma, 213; Zuck *v.* McClure, 98 Pa. 541; Hocking *v.* Hamilton, 158 Pa. 107; Mountjoy *v.* Metzger, 9 Phila. 10; Ault *v.* Dustin, 100 Tenn. 366; Brown *v.* Odill, 104 Tenn. 250; Burke *v.* Shaver, 92 Va. 345; Lee *v.* Mutual, &c. Assoc., 97 Va. 160; Mutual Assoc. *v.* Taylor, 99 Va. 208; Davis *v.* Grand Rapids, &c. Co., 41 W. Va. 717; Chapman *v.* Beltz Co., 48 W. Va. 1. See also Wells *v.* Hartford Co., 76 Conn. 27; Trammell *v.* Vaughan, 158 Mo. 214; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435.

[14] Pittman *v.* Pittman (Ky.), 61 S. W. Rep. 461; South Gardner Lumber Co. *v.* Bradstreet, 97 Me. 165; Martin *v.* Meles, 179 Mass. 114; Porter *v.* American Legion, 183 Mass. 326; Carstens *v.* McDonald, 38 Neb. 858; King *v.* Waterman, 55 Neb. 324; Parker *v.* Pettit, 43 N. J. L. 512, 517 (overruled); Stanford *v.* Megill, 6 N. Dak. 536; Markowitz *v.* Greenwall Co. (Tex. Civ. App.), 75 S. W. Rep. 74, 317. See also Perkins *v.* Frazer, 107 La. 390.

[15] The question is referred to but expressly left open in Day *v.* Connecticut, etc., Co., 45 Conn. 480, 495 (but see Wells *v.* Hartford Co., 76 Conn. 27); Sullivan *v.* McMillan, 26 Fla. 543 (but see Thomson *v.* Kyle, 39 Fla. 582); Maltby *v.* Eisenhauer, 17 Kan. 308, 311; Dugan *v.* Anderson, 36 Md. 567; Pinckney *v.* Dambmann, 72 Md. 173, 182 (but see Lewis *v.* Tapman, 90 Md. 294).

[16] 2 E. & B. 678.

he shall not be defeated by reason of the fact that he himself has not performed, since that failure to perform was excused by the defendant's fault.[17] But though the defendant cannot defeat the action on this ground, any other defence is as effectual as ever, and that the action is prematurely brought is an entirely different defence.

Distinction between action for restitution and action on the contract. Another important and frequently neglected distinction is that between an action for restitution and an action on the contract. Since repudiation affords immediate cause for rescission it also entitles the party aggrieved to bring an immediate suit for the restitution specifically or in money equivalent of whatever he has parted with.[18] Cases allowing this do not involve the consequence that an action might be brought at that time on the contract.

No inconsistency in allowing full damages before all performance due. Again, it is often thought that to allow a plaintiff to sue and recover full damages before the time for the completion of all the defendant's performance is to allow the doctrine of anticipatory breach,[19] yet this is not the case. As soon as a party to a contract breaks any promise he has made, he is liable to an action. In such an action the plaintiff will recover whatever damages the breach has caused. If the breach is a trifling one such damages cannot well be more than the direct injury caused by that trifling breach. But if the breach is serious or is accompanied by repudiation of the whole contract, it may and frequently will involve as a consequence that all the rest of the contract will not be carried out. This may be a necessary consequence of the situation of affairs or it may result simply from the plaintiff's right to decline to let the defendant continue performance, since even if all the remaining performance were properly rendered, the plaintiff would not get substantially what he bargained for. The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach, and therefore to damages for the loss of the entire contract. This is no different principle

17 Thus where an owner of a building refused to allow a contractor to go on with work upon it a condition of the contract requiring the contractor to produce a certificate of an engineer showing full performance cannot be set up by the owner in answer to an action by the contractor. Smith *v.* Wetmore, 167 N. Y. 234.

18 *Supra*, p. 339.

19 Nichols *v.* Scranton, etc., Co., 137 N. Y. 471; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633; Hocking *v.* Hamilton, 158 Pa. 107, illustrate this. These cases are unquestionably right. They do not involve the question of anticipatory breach, though in each of them the court seems to have thought so.

from allowing a plaintiff in an action of tort for personal injuries to recover the damages he will probably suffer in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation. This is law where the doctrine of *Hochster* v. *De la Tour* is denied, as well as where it is admitted.[20]

Action may be based on breach of subsidiary promise. Under this principle a right of action may accrue by breach of a subsidiary promise, long before the defendant's main performance is due, and the subsidiary promise may be an implied one. In any case where the plaintiff's performance requires the coöperation of the defendant, as in a contract to serve or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this coöperation, and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day.[21] So in a contract of life insurance a promise on the part of the company to accept the premiums is clearly implied in fact and a refusal to receive premiums is an immediate breach of contract.[22] It may indeed possibly be argued that there is in every bilateral contract an implied promise not to prevent performance by the other party.[23] Such prevention would in that case be an immediate breach of contract, and

20 Pierce *v.* Tennessee, &c. Co., 173 U. S. 1; *Re* Manhattan Ice Co., 114 Fed. Rep. 399; Northrop *v.* Mercantile Trust Co., 119 Fed. Rep. 969; Strauss *v.* Meertief, 64 Ala. 299; Howard Col. *v.* Turner, 71 Ala. 429; Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; Goldman *v.* Goldman, 51 La. Ann. 761; Sutherland *v.* Wyer, 67 Me. 64; Speirs *v.* Union Drop-Forge Co., 180 Mass. 87; Cutter *v.* Gillette, 163 Mass. 95; Girard *v.* Taggart, 5 S. & R. 19; King *v.* Steiren, 44 Pa. 99; Chamberlin *v.* Morgan, 68 Pa. 168; Remelee *v.* Hall, 31 Vt. 582; Treat *v.* Hiles, 81 Wis. 280. See also Mayne on Damages (6th ed.), 106 *et seq.;* Sutherland on Damages, §§ 108, 112, 113.

The contrary decisions of Lichtenstein *v.* Brooks, 75 Tex. 196, 198; Gordon *v.* Brewster, 7 Wis. 355 (cp. Treat *v.* Hiles, 81 Wis. 280; Walsh *v.* Myers, 92 Wis. 397), are not to be supported. See also Salyers *v.* Smith, 67 Ark. 526.

21 Inchbald *v.* Western, etc., Co., 17 C. B. (N. S.) 833.

Ford *v.* Tiley, 6 B. & C. 325, was clearly correctly decided under this principle. The defendant promised to make a lease to the plaintiff as soon as he should become possessed of the property, which was then under lease to a third party. The defendant before the expiration of the prior lease executed another to the same lessee, thereby preventing possession reverting to him at the expiration of the previous lease.

22 O'Neill *v.* Supreme Council, 70 N. J. L. 410; Fischer *v.* Hope Ins. Co., 69 N. Y. 161. The contrary decisions of Porter *v.* American Legion, 183 Mass. 326, and Langan *v.* Supreme Council, 174 N. Y. 266, must be deemed erroneous.

23 Bishop, Contracts, § 1431; Indian Contract Act, § 53; United States *v.* Peck, 102 U. S. 64. But see Murdock *v.* Caldwell, 10 Allen, 299.

if of sufficiently serious character damages for the loss of the entire contract may be recovered. As countermanding work may have the legal effect of prevention in this country,[24] though it does not involve actual physical prevention, it would be a breach of contract on this theory at the time when a stoppage in the performance of the contract had been caused thereby.[25]

Time of performance fixed by act of the other party. The time for the defendant's performance is frequently fixed in a contract, not by naming a definite day, but by some act to be done by the plaintiff — either a counter-performance or a request. If the defendant repudiates the contract, it excuses the plaintiff from doing a nugatory act, and, as in the case of any other condition which the defendant's conduct excuses, he cannot take advantage of its non-performance.[26] He is deprived of nothing thereby, except what he has indicated a willingness to go without, for he has said that even if the request be made he will not heed it, or if the counter-performance be offered he will not accept it. The case is very different where the defendant promises to pay on a fixed day, or when an outside event happens. To hold him immediately liable in such an event is to enlarge the scope of his promise, and entirely without his assent. If he prevented the time for his performance from coming, his assent might be dispensed with, but not otherwise.[27] The English cases prior to *Hochster* v. *De la*

[24] See *ante*, p. 349. See also Cort *v.* Ambergate, etc., Ry. Co., 17 Q. B. 127, 145.

[25] Hosmer *v.* Wilson, 7 Mich. 294; Chapman *v.* Kansas City, etc., Ry. Co., 146 Mo. 481.

[26] The leading case for this well-settled doctrine is Cort *v.* Ambergate, etc., Ry. Co., 17 Q. B. 127. A few of the many other cases which might be cited are: Hinckley *v.* Pittsburg Steel Co., 121 U. S. 264; Dwyer *v.* Tulane, etc., Adm's, 47 La. Ann. 1232; Murray *v.* Mayo, 157 Mass. 248; Canda *v.* Wick, 100 N. Y. 127. See *supra*, p. 353, n. 79.

The distinction here contended for is well brought out in Lowe *v.* Harwood, 139 Mass. 133. In that case there was a contract for an exchange of real estate. No time was fixed for performance. Before any tender or demand for performance the defendant repudiated the contract. Holmes, J., in delivering the opinion of the court, held that this "not only excused the plaintiff from making any tender and authorized him to rescind if he chose, but amounted to a breach of the contract. The contract was for immediate exchange, allowing a reasonable time for necessary preparations. In the absence of special circumstances, which do not appear, sufficient time had been allowed, even if any consideration of that sort could not be and was not waived by the defendant. The case is not affected by Daniels *v.* Newton, 114 Mass. 530, but falls within principles that have been often recognized."

[27] In Ford *v.* Tiley, 6 B. & C. 325, the time for performance was to be fixed by the defendant's coming into possession of certain property—an event depending on outside contingencies, which the defendant prevented from happening as expected. In the nature of the case, however, a party cannot prevent a day fixed by reference to the calendar from arriving.

Tour,[28] which are cited in support of the doctrine of anticipatory breach,[29] may be satisfactorily explained on these principles with possibly one exception.[30]

Contracts to marry. A great many of the cases are upon contracts to marry;[31] and these cases may well be distinguished. Lord Cockburn said in *Frost* v. *Knight:* "On such a contract being entered into . . . a new status, that of betrothment, at once arises between the parties."[32] When a man promises to pay money or deliver goods at a future day, all he understands, all a reasonable man would understand, is that he will be ready to perform on the day. When a man promises to marry, his obligation, as he understands it and as it is understood, is wider, and includes some undertaking as to his conduct before the marriage-day. If this be so, marriage with another than the betrothed is an immediate breach, not directly of the promise to marry, but of the subsidiary obligation implied from it. As this breach necessarily involves a loss of the marriage, full damages could be recovered. Lord Cockburn tries to apply the same line of reasoning to other contracts, saying, "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his inter-

[28] 2 E. & B. 678.

[29] Bowdell *v.* Parsons, 10 East, 359; Ford *r.* Tiley, 6 B. & C. 325; Caines *v.* Smith, 15 M. &. W. 189. In Bowdell *r.* Parsons and Caines *r.* Smith the defendant promised to perform upon request, and later by making his own performance impossible excused the request. As to Ford *r.* Tiley, see *ante.* So in Clements *r.* Moore, 11 Ala. 35—a decision before the days when anticipatory breaches were talked of—the defendant was held liable for breach of a promise to marry on request without a request on his marriage with another than the plaintiff.

[30] Short *r.* Stone, 8 Q. B. 358. Here the promise was to perform a reasonable time after request. The defendant, by making his own performance impossible, clearly dispensed with the necessity of a request as such. It does not seem so clear why he should forego the "reasonable time." Coleridge, J., avoided the difficulty by a strained construction of the declaration, holding the promise to mean after request made within a reasonable time. The other members of the court simply say the request is dispensed with.

[31] Frost *v.* Knight, L. R. 7 Ex. 111; Kurtz *v.* Frank, 76 Ind. 594; Adams *r.* Byerly, 123 Ind. 368; Holloway *v.* Griffith, 32 Ia. 409; Lewis *r.* Tapman, 90 Md. 294; Sheahan *r.* Barry, 27 Mich. 217; Trammell *r.* Vaughan, 158 Mo. 214; Burtis *v.* Thompson, 42 N. Y. 246; Brown *v.* Odill, 104 Tenn. 250; Burke *v.* Shaver, 92 Va. 345. The distinction here suggested was referred to in Stanford *r.* Megill, 6 N. Dak. 536; and in Lewis *v.* Tapman, 90 Md. 294, 308. the court said: "There is no occasion to adopt and we do not adopt Hochster *v.* De la Tour further than it applies under Knight *v.* Frost to an action for breach of promise to marry."

[32] L. R. 7 Ex. 111, 115.

ests." [33] But this is fanciful. If true the action should be brought for breach of a promise to have the contract kept open. If there is such an implied obligation in any case there should be in case of negotiable paper, for in no other case is it more important that the promise should not be discredited before the time for performance. Yet it may be doubted if any court would apply the doctrine to bills and notes.[34]

Practical convenience. The reason most strongly urged in support of the doctrine of anticipatory breach is, however, its practical convenience. It is said that if it is certain that the plaintiff is going to have an action, it is better for both parties to have it disposed of at once. It may be conceded that practical convenience is of more importance than logical exactness, but yet the considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts. The law is not important solely or even chiefly for the just disposal of the litigated cases immediately before the court. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected. But it is not logic only which is injured. The defendant is injured. He is held liable on a promise he never made. He has only promised to do something at a future day. He is held to have broken his contract by doing something before that day. Enlarging the obligation of contracts is perhaps as bad as impairing it. This may be of great importance. Suppose the defendant, after saying that he will not perform, changes his mind and concludes to keep his promise. Unless the plaintiff relying on the repudiation, as he justly may, has so changed his position that he cannot go on with the contract without injury, the defendant ought surely to be allowed to do this.[35] But if the plaintiff is allowed to bring an action at once this possibility is

[33] L. R. 7 Ex. 112, 114.

[34] Benecke *v.* Haebler, 38 N. Y. App. Div. 344; affirmed without opinion in 166 N. Y. 631. See also Honour *v.* Equitable Soc., [1900] 1 Ch. 852; Greenway *v.* Gaither, Taney, 227; Flinn *v.* Mowry, 131 Cal. 481.

In Roehm *v.* Horst, 178 U. S. 1, 7, Chief Justice Fuller distinguishes the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations. This has not before been suggested, though in fact the cases where the doctrine has been applied have been cases of bilateral contracts. Lord Cockburn's line of reasoning is certainly as applicable to unilateral as to bilateral contracts. It would be interesting to know what Chief Justice Fuller would say to the case of a promissory note given in exchange for an executory promise, or of an instrument containing mutual covenants, one of which was to pay money on a fixed day, the party bound to the money payment having repudiated his obligation before it was due.

[35] Nilson *v.* Morse, 52 Wis. 240.

cut off. "Why," says Fuller, C. J., "should a *locus poenitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage?" [36] Because such is the contract the parties made. A promise to perform in June does not preclude changing position in May.[37]

Illustrations of inconvenience. Not only, moreover, do logic and the defendant suffer, but the very practical convenience which is the excuse for their suffering is not attained. A few illustrations from recent cases will show that as at present applied the doctrine of anticipatory breach is so full of pitfalls for the unwary as to be objectionable rather than advantageous practically. In the last English case where the doctrine was much considered, it is thus stated: "It would seem on principle that the declaration of such intention [not to carry out the contract] is not in itself and unless acted on by the promisee a breach of contract. . . . Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." [38] The conception that a breach of contract is caused by something which the promisee does is so foreign to the notions not only of lawyers but of business men that it cannot fail to make trouble. If the promisee, after receiving the repudiation, demands or manifests a willingness to receive performance, his rights are lost. Not only can he not thereafter bring an action on the repudiation,[39]

[36] Roehm *v.* Horst, 178 U. S. 1, 19.

[37] The California Civil Code, § 1440, provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

This necessarily implies that if the notice is retracted the obligation cannot be enforced without an offer to perform. Yet in California the doctrine of anticipatory breach, which in effect denies the right of retraction, is followed, and no reference is made to this section of the Code. The California cases are cited *ante*, p. 361, n. 13.

The same provision is contained in the Montana Civil Code, § 1956.

The North Dakota Civil Code also has copied in § 3774 this provision of the California Code, but the Supreme Court of North Dakota has denied the doctrine of anticipatory breach. Stanford *v.* Mcgill, 6 N. Dak. 536.

[38] Johnstone *v.* Milling, 16 Q. B. D. 460, 472, per Lord Bowen. The late authorities continually refer to the necessity of the promisee acting on the repudiation. What action is necessary is not stated. It is to be noticed, however, that in Hochster *v.* De La Tour, 2 E. & B. 678; Frost *v.* Knight, L. R. 7 Ex. 111, and most of the other cases, there was no manifestation of election other than bringing an action. This was held enough in Mutual Assoc. *v.* Taylor, 99 Va. 208.

[39] Zuck *v.* McClure, 98 Pa. 541; Dalrymple *v.* Scott, 19 Ont. App. 477.

but "he keeps the contract alive for the benefit of the other as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." [40] This is a severe penalty imposed upon the injured party for not seizing the right moment. When A. repudiates his promise, what is more natural or reasonable than for B. to write urging him to perform. Yet if B. does so, it seems not only does he lose his right of immediate action, but he is bound to perform his own promise, though he has reason to expect A. will not perform his.[41]

Johnstone v. Milling. In *Johnstone* v. *Milling*,[42] the promisor stated that he could not get money enough to perform his promise. He made this statement "constantly in answer to the defendant's direct question, and at other times in conversation." It was held that this was not such a repudiation as would justify an action. Lord Esher, M. R., made the test, "Did he mean to say that whatever happened, whether he came into money or not, his intention was not to rebuild the premises," [43] as he had promised, and the other judges expressed similar views. A distinction between inability and wilful intention not to perform is not of practical value. As far as the performance of the contract is concerned they are of equal effect, and should be followed by the same consequences.

Dingley v. Oler. In *Dingley* v. *Oler*,[44] the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote, "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the

[40] Frost *v.* Knight, L. R. 7 Ex. 111, 112. Quoted as stating the law in Leake, Contracts (4th ed.), 618.

[41] In accordance with this rule in Dalrymple *v.* Scott, 19 Ont. App. 477, the plaintiff lost his case. The defendant had repudiated the contract. The plaintiff did not manifest an election to treat that as an immediate breach, but on the contrary testified that he would have been willing to have accepted performance after the repudiation. When the time for performance had passed he brought an action. Judgment was given for the defendant, because the plaintiff had not performed or offered to perform on his part. Cp. Mutual Assoc. *v.* Taylor, 99 Va. 208; Walsh *v.* Myers, 92 Wis. 397.

[42] 16 Q. B. D. 460.

[43] Page 468. There were also other grounds of decision to which the present criticism is not intended to apply.

[44] 117 U. S. 490.

price you offered it to other parties here (fifty cents a ton), or give you ice when the market reaches that point." At the time when this letter was written ice was worth five dollars a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one-tenth of the price for which it is selling in July, and yet the court held the letter constituted no anticipatory breach of contract because the refusal was not absolute, but "accompanied with the expression of an alternative intention" to ship the ice "if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them." Surely a man must be well advised to know when he has the right to regard his contracts as broken by anticipation.

Measure of damages. In contracts for the sale of goods when there is a repudiation of the contract before the time for performance, the question often arises as to the basis on which the plaintiff's damages are to be calculated. It is often thought that the decision of this question turns on whether a breach of the contract is made at the date of the repudiation or at the date when the goods were to be delivered. But this is not so. Even though the doctrine of anticipatory breach is not adopted the plaintiff should, if he knows the contract is going to be broken, as much as if it has already been broken,[45] take any reasonable action to mitigate the damages which the defendant's action will cause, so that the price of the goods at the time when they should have been delivered will not necessarily be the sole criterion of the loss. On the other hand, even though the breach be regarded as having occurred at the time of repudiation, yet it was a breach of a contract to deliver at a later day, and, if it was not a reasonable thing under the circumstances to take some action at the earlier day the damages must be calculated on the basis of the price of the goods at the time when delivery should have been made. By no reasoning can the contract be treated as a contract to deliver goods at the date of the repudiation.[46]

[45] This is doubtless contrary to the early cases (Leigh *v.* Patterson, 8 Taunt. 540; Phillpotts *v.* Evans, 5 M. & W. 475), but seems in accord with reason and with the principle of the American cases cited, *ante*, p. 349, n. 69.

[46] The recent decisions on the point seem to have been made exclusively by courts which recognize the doctrine of anticipatory breach. Some of these decisions go very far in requiring the plaintiff to take affirmative action at his own risk. See Brown *v.* Muller, L. R. 7 Ex. 319; Roper *v.* Johnson, L. R. 8 C. P. 167; Roth *v.* Taysen, 12 T. L. R. 211 (C. A.); *Re* South African Trust Co., 74 L. T. 769; Ashmore *v.* Cox, [1899] 1 Q. B. 436; Nickoll *v.* Ashton, [1900] 2 Q. B. 298; Roehm *v.* Horst, 178 U. S. 1. Cp. James H. Rice Co. *v.* Penn Co., 88 Ill. App. 407.

273] *CHAPTER VII.

UNLAWFUL AGREEMENTS.

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Subject-matter or performance a thing positively forbidden, or part of a transaction which is forbidden (illegal). We have already seen that an agreement is not in any case enforceable by law without satisfying sundry conditions: as, being made between capable parties, being sufficiently certain, and the like. If it does satisfy these conditions, it is in general a contract which the law commands the parties to perform. But there are many things which the law positively commands people not to do. The reasons for issuing such commands, the weight of the sanctions by which they are enforced, and the degree of their apparent necessity or expediency, are exceedingly various, but for the present purpose unimportant. A murder, the obstruction of a highway, and the sale of a loaf otherwise than by weight, are all on the same footing in so far as they are all forbidden acts. If the subject-matter of an agreement be such that the performance of it would either consist in doing a forbidden act or be so connected therewith as

to be in substance part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is: but at all events it will give no sort of assistance to such a transaction. Agreements of this kind are void as being *illegal* in the strict sense.

274] ***Not positively forbidden but immoral.** Again, there are certain things which the law (*a*) does not forbid in the sense of attaching penalties to them, but which are violations of established rules of decency, morals, or good manners, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as the ground of any legal rights. "A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it" (*b*).[1] Agreements whose subject-matter falls within this description are void as being *immoral.*

Not positively forbidden, but against public policy. Further, there are many transactions which cannot fairly be brought within either of the foregoing classes, and yet cannot conveniently be admitted as the subject-matter of valid contracts, or can be so admitted only under unusual restrictions. It is doubtful whether these can be completely reduced to any general description, and how far judicial discretion may go in novel cases. They seem in the main, however, to fall into the following categories:

Matters governed by reasons outside the regular scope of municipal law, and touching the relations of the commonwealth to foreign states:

Matters touching the good government of the commonwealth and the administration of justice:

Matters affecting particular legal duties of individuals whose performance is of public importance:

Things lawful in themselves, but such that individual citizens could not without general inconvenience be allowed to set bounds to their

(*a*) *i. e.* the common law. But *qu.* whether the common law could take notice of anything as immoral which would not constitute an offence against either common or ecclesiastical law.

(*b*) Bramwell B. *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. at p. 236, 36 L. J. Ex. 124.

[1] Mogul S. S. Co. *v.* McGregor, [1892] A. C. 25, 39, 46, 51, 58; United States *v.* Addystone Pipe Co., 85 Fed. Rep. 271, 279; American Live Stock Co. *v.* Chicago Live Stock Exchange Co., 143 Ill. 210; Raymond *v.* Leavitt, 46 Mich. 447, 452; Rosenbaum *v.* U. S. Credit Co., 65 N. J. L. 255; King *v.* King, 63 Ohio St. 363.

freedom of action with regard to those things in the same manner or to the same extent as they may with regard to other things (*c*).

*Summary. Agreements falling within this third description [275 are void as being *against public policy.*

We have then in the main three sorts of agreements which are unlawful and void, according as the matter or purpose of them is—

A. Contrary to positive law. (*Illegal.*)

B. Contrary to positive morality recognized as such by law. (*Immoral.*)

C. Contrary to the common weal as tending

(a) To the prejudice of the State in external relations

(b) To the prejudice of the State in internal relations

(c) To improper or excessive interference with the lawful actions of individual citizens. (*Against public policy.*)

Caution as to use of terms. The distinction here made is in the reasons which determine the law to hold the agreement void, not in the nature or operation of the law itself: the nullity of the agreement itself is in every case a matter of positive law. Bearing this in mind, it is a harmless abbreviation to speak of the agreement itself as contrary to positive law, to morality, or to public policy, as the case may be.

The arrangement only approximate. The arrangement here given is believed to be on the whole the most convenient, and to represent distinctions which are in fact recognized in the decisions that constitute the law on the subject. But like all classifications it is only approximate: and where the field of judicial discretion is so wide as it is here (for nowhere is it wider) we must expect to find many cases which may nearly or quite as well be assigned to one place as to another. The authorities and dicta are too numerous to admit of any detailed review. But the general rules are (with some few exceptions) sufficiently well settled, so far as the nature of the case admits of general rules existing. Any given decision, on the other hand, is likely to be rather suggestive than conclusive when applied to a new set of facts. Some *positive rules for the construction of stat- [276 utes have been worked out by a regular series of decisions. But with this exception we find that the case-law on most of the branches of the subject presents itself as a clustered group of analogies rather than

(*c*) We have already seen that the specific operation of contract is none other than to set bounds to the party's freedom of action as regards the subject-matter of the contract.

a linear chain of authority. We have then to select from these groups a certain number of the more striking and as it were central instances. The statement of the general rules which apply to all classes of unlawful agreements indifferently will be reserved, so far as practicable, until we have gone through the several classes in the order above given.

A. *Agreements contrary to positive law.*

1. Agreement to commit offence, void. The simplest case is an agreement to commit a crime or indictable offence:

"If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void" (*d*).

With one or two exceptions on which it is needless to dwell, obviously criminal agreements do not occur in our own time and in civilized countries, and at all events no attempt is made to enforce them. In the eighteenth century a bill was filed on the Equity side of the Exchequer by a highwayman against his fellow for a partnership account. The bill was reported to the Court both scandalous and impertinent, and the plaintiff's solicitors were fined and his counsel ordered to pay costs (*e*).

Sometimes doubtful if performance of agreement would be offence — Mayor of Norwich v. Norfolk Ry. Co. The question may arise, however, whether a particular thing agreed to be done is or is not an offence, or whether a particular agreement is or is not on the true construction of it an agreement to commit an offence. In the singular case of *Mayor of Norwich* v. *Norfolk Ry. Co.* (*f*), the defendant company, being authorized to make a bridge over a navigable river at one par-
277] ticular place, had found difficulties in executing the *statutory plan, and had begun to build the bridge at another place. The plaintiff corporation took steps to indict the company for a nuisance. The matter was compromised by an arrangement that the company should—not discontinue their works, but—complete them in a particular manner, intended to make sure that no serious obstruction to the navigation should ensue: and an agreement was made by deed, in which the company covenanted to pay the corporation £1000 if the works should not be completed within twelve months, whether an Act of Parliament should within that time be obtained to authorize them or not. The corporation sued on this covenant, and the com-

(*d*) Shepp. Touchst. 370.

(*e*) Lindley, on Partnership, 101. See L. Q. R. ix. 197, for an account of the case (*Everet* v. *Williams*) verified from the originals in the Record Office.

(*f*) (1855) 4 E. & B. 397, 24 L. J. Q. B. 105.

pany set up the defence that the works were a public nuisance, and therefore the covenant to complete them was illegal. The Court of Queen's Bench was divided on the construction and effect of the deed. Erle J. thought it need not mean that the defendants were to go on with the works if they did not obtain the Act. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted."[2] Here it should be taken that the works contracted for were works to be rendered lawful by Act of Parliament. Coleridge J. to the same effect: he thought the real object was to secure by a penalty the speedy reduction of a nuisance to a nominal amount, which was quite lawful, the corporation not being bound to prosecute for a nominal nuisance. Lord Campbell C.J. and Wightman J. held the agreement bad, as being in fact an agreement to continue an existing unlawful state of things. The performance of it (without a new Act of Parliament) would have been an indictable offence, and the Court could not presume that an Act would have been obtained. Lord Campbell said:— "In principle I do not see how the present case is to be distinguished from an action by A. against B. to recover £1000, B. having covenanted with A. that within twelve calendar months he would murder C., and that on failing to do so he would forfeit and pay to A. £1000 as liqui*dated damages, the declaration alleging that although [278 B. did not murder C. within the twelve calendar months he had not paid A. the £1000" (*g*).

It seems impossible to draw any conclusion in point of law from such a division of opinion (*h*). But the case gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.

(*g*) 4 E. & B. 441.

(*h*) Not only was the Court equally divided, but a perusal of the judgments at large will show that no two members of it really looked at the case in the same way. The reporters (4 E. & B. 397) add not without reason to the headnote: *Et quaere inde.*

[2] Mills *v.* Dunham, [1891] 1 Ch. 576, 590; Hobbs *v.* McLean, 117 U. S. 567, 576; United States *v.* Railroad Co., 118 U. S. 235; Van Winkle *v.* Satterfield, 58 Ark. 617; Hunt *v.* Elliott, 80 Ind. 245; Guernsey *v.* Cook, 120 Mass. 501; White *v.* Western Assur. Co., 52 Minn. 352; Bank *v.* Wallace, 61 N. H. 24; Ellerman *v.* Chicago, etc., Co. 49 N. J. Eq. 217; Curtis *v.* Gokey, 68 N. Y. 300; Ormes *v.* Dauchy, 82 N. Y. 443; Lorillard *v.* Clyde, 86 N. Y. 384; Shedeinsky *v.* Budweiser Brewing Co., 163 N. Y. 437; Hoffman *v.* Machall, 5 Ohio St. 124, 132; Miller *v.* Ratterman, 47 Ohio St. 141, 164; Watters *v.* McGuigan, 72 Wis. 155.

When the ulterior object is an offence. Moreover a contract may be illegal because an offence is contemplated as its ulterior result, or because it invites to the commission of crime. For example, an agreement to pay money to A.'s executors if A. commits suicide would be void (*i*);[3] and although there is nothing unlawful in printing, no right of action can arise for work done in printing a criminal libel (*k*).[4] But this depends on the more general considerations which we reserve for the present.

2. **Agreement for civil wrong to third persons is void.** Again an agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates (*l*) any civil injury to third persons.[5] Thus an agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself not unlaw-
279] ful by means of an apparent trespass, breach of *contract, or breach of trust is unlawful and void (*m*).[6] A. applies to his friend

(*i*) Per Bramwell L.J. 5 C. P. D. at p. 307.

(*k*) *Poplett* v. *Stockdale* (1825) R. & M. 337, 2 C. & P. 198, 31 R. R. 662.

(*l*) If A. contracts with B. to do something which in fact, but not to B.'s knowledge, would involve a breach of contract or trust, A. cannot lawfully perform his promise, but yet may well be liable in damages for the breach. *Millward* v. *Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2. See further at end of this chapter.

(*m*) An agreement to commit a civil injury is a conspiracy in many, but it seems impossible to say precisely in what cases. See the title of Conspiracy in Roscoe's Digest, (ed. Horace Smith, 1884). An agreement to commit a trespass likely to lead to a breach of the peace, *Reg.* v. *Rowlands* (1851) 17 Q. B. 671, 686, 21 L.

[3] Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139. Cp. Knights Templars Co. *v.* Jarman, 18 U. S. 197; Seiler *v.* Economic Life Assoc., 105 Ia. 87; Morris *v.* State Mut. L. Assur. Co., 183 Pa. 563; Patterson *v.* Natural Premium Ins. Co., 100 Wis. 118.

So in Burt *v.* Union Central Ins. Co., 187 U. S. 362, where a man committed a murder and thereafter assigned a policy on his life and was subsequently executed, it was held that the assignee could not recover on the policy.

[4] So an agreement to reprint a literary work, in violation of a copyright secured to a third person, is void. Nichols *v.* Ruggles, 3 Day, 145.

[5] In Church *v.* Proctor, 66 Fed. Rep. 240, it was held a good defense to an agreement for the sale of menhaden that the buyer intended to pack and sell them as mackerel. See also Materne *v.* Horwitz, 101 N. Y. 469; Blakely *v.* Sousa, 197 Pa. 305.

[6] Thus in Guernsey *v.* Cook, 120 Mass. 501, the court held illegal a contract between two stockholders who together owned a majority of the stock of a corporation, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back, and an allowance made for interest, "in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." To similar effect are West *v.* Camden, 135 U. S. 507; Noel *v.* Drake, 28 Kan. 265; Noyes *v.* Marsh, 123 Mass. 286; Woodruff *v.* Wentworth, 133 Mass. 309; Wilbur *v.* Stoepel, 82 Mich. 344; Cone *v.* Russell, 48 N. J. Eq. 208; Fenness *v.* Ross,

B. to advance him the price of certain goods which he wants to buy of C. B. treats with C. for the sale, and pays a sum agreed upon between them as the price. It is secretly agreed between A. and C. that A. shall pay a further sum: this last agreement is void as a fraud upon B., whose intention was to relieve A. from paying any part of the price (*n*).[7] Again, A. and B. are interested in common with other persons in a transaction the nature of which requires good faith on all hands, and a secret agreement is made between A. and B. to the prejudice of those others' interest.

Agreement in fraud of creditors is void. Such are in fact the cases of agreements "in fraud of creditors"; that is, where there is an arrangement between a debtor and the general body of the creditors,

J. M. C. 81—or to commit a civil wrong by fraud and false pretences, *Reg.* v. *Warburton* (1870) L. R. 1 C. C. R. 274, 40 L. J. M. C. 22, cp. *Reg.* v. *Aspinall* (1876) 2 Q. B. Div. at p. 59, 46 L. J. M. C. 145—is a conspiracy. An agreement to commit a simple breach of contract is not a conspiracy. See on the whole subject. *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. 295; *Quinn* v. *Leathem*, [1901] A. C. 395, 70 L. J. P. C. 76. Before the C. L. P. Act a court of common law could not take notice of an agreement being in breach of trust so as to hold it illegal: *Warwick* v. *Richardson* (1842) 10 M. & W. 284, and agreements to indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid in equity as well as law.

(*n*) *Jackson* v. *Duchaire* (1790) 3 T. R. 551.

5 N. Y. App. Div. 342; Snow *v.* Church, 13 N. Y. App. Div. 108; Gage *v.* Fisher, 5 N. Dak. 297; Withers *v.* Edwards, (Tex.) 62 S. W. Rep. 795. See also Blue *v.* Capital Nat. Bank, 145 Ind. 518; Fuller *v.* Dame, 18 Pick. 472; McClure *v.* Law, 161 N. Y. 78; Gilbert *v.* Finch, 173 N. Y. 455; Wood *v.* Manchester, etc., Co., 54 N. Y. App. Div. 522; Flaherty *v.* Cary, 62 N. Y. App. Div. 116, 172 N. Y. 646. But compare Greenwell *v.* Porter, [1902] 1 Ch. 530; Almy *v.* Orme, 165 Mass. 126; Gassett *v.* Glazier, 165 Mass. 473; Seymour *v.* Detroit, etc., Mills, 56 Mich. 117; Barnes *v.* Brown, 80 N. Y. 527; Bonta *v.* Gridley, 77 N. Y. App. Div. 33.

So a contract by a railroad construction company (bound to lay a railroad by the nearest and best route) by which it agrees for a valuable consideration to lay the road through a town not on the direct line is illegal. Woodstock Iron Co. *v.* Richmond & Dansville Extension Co., 129 U. S. 643. To similar effect are Heirs of Burney *v.* Ludeling, 47 La. Ann. 73, 96; Lum *v.* McEwen, 56 Minn. 278. Compare the following decisions in regard to the location of public buildings. Fearnley *v.* De Mainville, 5 Col. App. 441; Woodman *v.* Innes, 47 Kan. 26; Beal *v.* Polhemus, 67 Mich. 130.

Other illustrations of the general doctrine of the text may be found in Jackson *v.* Ludeling, 21 Wall. 616; Oscanyan *v.* Arms Co., 103 U. S. 261; Forbes *v.* McDonald, 54 Cal. 98; Brown *v.* Brown, 66 Conn. 493; Rice *v.* Wood, 113 Mass. 133; Woodruff *v.* Wentworth, 133 Mass. 309; Spinks *v.* Davis, 32 Miss. 152; Cone's Exec. *v.* Russell, 48 N. J. Eq. 208; Glenn *v.* Mathews, 44 Tex. 400; Foote *v.* Emerson, 10 Vt. 338. Cp., however, Barnes *v.* Brown, 80 N. Y. 527; Robison *v.* McCracken, 52 Fed. Rep. 726, and the decisions in some States which hold an agreement binding between the parties though it contemplates as part of the transaction a conveyance in fraud of creditors. Harcrow *v.* Harcrow, 69 Ark. 6; Stillings *v.* Turner, 153 Mass. 534; Still *v.* Buzzell, 60 Vt. 478.

[7] Patton *v.* Taft, 143 Mass. 140.

but in order to procure the consent of some particular creditor, or for some other reason, the debtor or any person on his behalf, or with his knowledge (*o*),[8] secretly promises that creditor some advantage over the rest. All such secret agreements are void: securities given in pursuance of them may be set aside, and money paid under them ordered to be repaid (*p*).[9]

280] * **Other creditors not bound by the composition.** Moreover, the other creditors who know nothing of the fraud and enter into the arrangement on the assumption "that they are contracting on terms of equality as to each and all" are under such circumstances not bound by any release they give (*q*).[10] And it will not do to say that the underhand

(*o*) Equality among the creditors is of the essence of the transaction. Any agreement to give a preference, made with the debtor's privity, strikes at the root of the deed. It is immaterial whether the arrangement is under a statute or not, and whether the preferential payment is to come out of the debtor's funds or not. *Ex parte Milner* (1885) 15 Q. B. Div. 605, 54 L. J. Q. B. 425.

(*p*) *McKewan* v. *Sanderson* (1873) L. R. 15 Eq. at p. 234, per Malins V.-C. 42 L. J. Ch. 296.

(*q*) *Dauglish* v. *Tennent* (1866) L. R. 2 Q. B. 49, 54, 36 L. J. Q. B. 10.

[8] Clarke *v.* White, 12 Pet. 178, 199; Smith *v.* Owens, 21 Cal. 11; Kullman *v.* Greenebaum, 92 Cal. 403; Clement's Appeal, 52 Conn. 464; Cary *v.* Hess, 112 Ind. 398; Morrison *v.* Schlesinger, 10 Ind. App. 665; Cheveront *v.* Textor, 53 Md. 295; Case *v.* Gerrish, 15 Pick. 49; Lothrop *v.* King, 8 Cush. 382; Sternberg *v.* Bowman, 103 Mass. 325: Harvey *v.* Hunt, 119 Mass. 279; Huckins *v.* Hunt, 138 Mass. 366; Tirrell *v.* Freeman, 139 Mass. 297; Brown *v.* Nealley, 161 Mass. 1; Vreeland *v.* Turner, 117 Mich. 366; Newell *v.* Higgins, 55 Minn. 82; O'Shea *v.* Collier, etc., Co., 42 Mo. 397; Trumbull *v.* Tilton, 21 N. H. 128; Winn *v.* Thomas, 55 N. H. 294; Feldman *v.* Gamble, 26 N. J. Eq. 494; Lawrence *v.* Clark, 36 N. Y. 128; Bliss *v.* Matteson, 45 N. Y. 22; Patterson *v.* Boehm, 4 Pa. 507; Stuart *v.* Blum, 28 Pa. 225; Lee *v.* Sellers, *81 Pa. 473; Dansby *v.* Frieberg, 76 Tex. 463. See also Bank *v.* Ohio Buggy Co., 110 Ala. 360; Lobdell *v.* Bank, 180 Ill. 56.

Where a composition agreement was made, by the terms of which the debtor was to give his notes for a percentage of his indebtedness, and he afterwards voluntarily gave to one of his debtors, party to the composition agreement, notes for the balance of his claim, which by their terms would mature before the composition notes, the notes last given were held void. Way *v.* Langley, 15 Ohio St. 392.

[9] Bean *v.* Brookmire, 2 Dill. 108; Bean *v.* Amsinck, 10 Blatchf. 361 (not affected as to the general rule by the reversal in 22 Wall. 395); Fairbanks *v.* Bank, 38 Fed. Rep. 630; Brown *v.* Everett, etc., Co., 111 Ga. 404; Crossley *v.* Moore, 40 N. J. L. 27.

Sureties on composition notes are released by such a secret agreement. Powers Dry Goods Co. *v.* Harlin, 68 Minn. 193.

[10] They may sue for and recover the full amount of their original claims less the amount received under the composition agreement. Kullman *v.* Greenebaum, 92 Cal. 403; Woodruff *v.* Saul, 70 Ga. 271; Kahn *v.* Gumberts, 9 Ind. 430; Partridge *v.* Messer, 14 Gray, 180; Powers Dry Goods Co. *v.* Harlin, 68 Minn. 193; Bank of Commerce *v.* Hoeber, 88 Mo. 37; White *v.* Kuntz, 107 N. Y. 518, 525. And it is not essential to the right of action that the creditor should first return the money he has received under the compensation agreement. Cobb *v.* Tirrell, 137 Mass. 143; Hefter *v.* Cahn, 73 Ill. 296; Stuart *v.* Blum, 28 Pa. 225; Bank *v.* Hoeber, 8 Mo. App. 171. In Bartlett *v.* Blaine, 83 Ill. 25, it was

bargain was in fact for the benefit of the creditors generally, as where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full; for the creditors ought to have the means of exercising their own judgment (*r*).[11] But where one creditor is induced to become surety for an instalment of the composition by an agreement of the principal debtor to indemnify him, and a pledge of part of the assets for that purpose, this is valid: for a compounding debtor is master of the assets and may apply them as he will (*s*).

The principle of these rules was thus explained by Erle J. in *Mallalieu* v. *Hodgson* (*t*) :—

"Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void—not only can he take no advantage from it, but he is also to lose the benefit of the composition (*u*).[12] The requirement of good faith among the creditors and the preventing of gain by agreements for preference have been uniformly maintained by a series of cases from *Leicester* v. *Rose* (*x*) to *Howden* v. *Haigh* (*u*) and *Bradshaw* v. *Bradshaw*" (*y*).

From the last cited case (*y*) it seems probable, though *it is [281 not decided, that when a creditor is induced to join in a composition by having an additional payment from a stranger without the knowledge of either the other creditors or the debtor, the debtor on discovering this may refuse to pay him more than with such extra payment will make up his proper share under the composition, or may

(*r*) *Wood* v. *Barker* (1865) L. R. 1 Eq. 139.

(*s*) *Ex parte Burrell* (1876) 1 Ch. Div. 537. 45 L. J. Bk. 68.

(*t*) (1851) 16 Q. B. 689, 20 L. J. Q. B. 339, 347. See further *Ex parte Oliver* (1849–51) 4 De G. & Sm. 354.

(*u*) (1840) 11 A. & E. 1033; 52 R. R. 579.

(*x*) (1803) 4 East, 372: showing that the advantage given to the preferred creditor need not be in money.

(*y*) (1841) 9 M. & W. 29.

held that "where a party induced a creditor to sign a composition agreement, whereby he accepted one-half of his claim in full, upon the representations of his debtor that no person had received any other thing, etc., the fact that the debtor had given his note for five hundred dollars to induce another creditor to sign the same agreement, which note, upon suit thereon, was adjudged void, is not sufficient to avoid the contract of composition, as it worked no injury to the creditor." This decision is believed to be wrong, as each creditor has a right to rely upon the unbiased judgment of every other as to the advisability of becoming a party to the proposed agreement of composition, and the purchased assent of one creditor is a fraud upon the others.

[11] Baldwin *v.* Rosenman, 49 Conn. 105.

[12] Doughty *v.* Savage, 28 Conn. 146; Huntington *v.* Clark, 39 Conn. 540, 554; Frost *v.* Gage, 3 Allen, 560; Moses *v.* Katzenberger, 1 Handy, 46. But see *contra*, Hanover Nat. Bank *v.* Blake, 142 N. Y. 404.

even recover back the excess if he has paid it involuntarily, *e. g.* to *bona fide* holders of bills given to the creditor under the composition.[13]

A debtor who has given a fraudulent preference can claim no benefit under the composition even as against the creditor to whom the preference has been given (*z*).[14]

A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is equally void,[15] and it does not matter whether it is made with the debtor himself or with a stranger (*a*),[16] nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not (*b*); and this even if it is part of the agreement that the creditor shall not prove against the estate at all (*c*). In like manner if a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void (*d*).

We have here at an early stage of the subject a good instance of the necessarily approximate character of our classification. We have placed these agreements in fraud of creditors here as being in effect

(*z*) *Higgins* v. *Pitt* (1849) 4 Ex. 312, 18 L. J. Ex. 488.

(*a*) *Higgins* v. *Pitt*, last note.

(*b*) *Hall* v. *Dyson* (1852) 17 Q. B. 785, 21 L. J. Q. B. 224.

(*c*) *McKewan* v. *Sanderson* (1875) L. R. 20 Eq. 65, 42 L. J. Ch. 296.

(*d*) *Blacklock* v. *Dobie* (1876) 1 C. P. D. 265, 45 L. J. C. P. 498.

[13] If a creditor receives a secret advantage from a stranger without the authority but with the knowledge of the debtor the composition may be avoided. Kullman *v.* Greenebaum, 92 Cal. 403; Bank of Commerce *v.* Hoeber, 88 Mo. 37; Solinger *v.* Earle, 82 N. Y. 393. See also Coleman *v.* Waller, 3 Y. & J. 212; Knight *v.* Hunt, 5 Bing. 432; *Ex parte* Milner, 15 Q. B. D. 605; *Re* Sawyer, 14 N. B. Reg. 241; Brown *v.* Nealley, 161 Mass. 1. Compare Continental Nat. Bank *v.* McGeoch, 92 Wis. 286. If the debtor is ignorant of the advantage given by a third person to one creditor, other creditors cannot avoid the composition. Martin *v.* Adams, 81 Hun, 9. See also *Ex parte* Milner, 15 Q. B. D. 605; Bank of Commerce *v.* Hoeber, 88 Mo. 37, 44.

[14] If the debtor has been released, the release is valid against such a creditor. Huckins *v.* Hunt, 138 Mass. 366; White *v.* Kuntz, 107 N. Y. 518. Cp. Walker *v.* Mayo, 143 Mass. 42.

[15] Nat. Bankruptcy Act, 1867, R. S. U. S., § 5131; Austin *v.* Markham, 44 Ga. 161; Marble *v.* Grant, 73 Me. 423; Blasdel *v.* Fowle, 120 Mass. 447; Tirrell *v.* Freeman, 139 Mass. 297; Tinker *v.* Hurst, 70 Mich. 159; Rice *v.* Maxwell, 13 S. & M. 289; Sharp *v.* Teese, 4 Halst. 352; Payne *v.* Eden, 3 Caines, 213; Bruce *v.* Lee, 4 Johns. 410; Yeomans *v.* Chatterton, 9 Johns. 295; Wiggin *v.* Bush, 12 Johns. 305; Tuxbury *v.* Miller, 19 Johns. 311; Dansby *v.* Frieberg, 76 Tex. 463.

An agreement for a consideration to vote for a particular person as assignee is illegal. Eaton *v.* Littlefield, 147 Mass. 122.

[16] Frost *v.* Gage, 3 Allen, 560; Bell *v.* Leggett, 7 N. Y. 176. See also *Re* Dietz, 97 Fed. Rep. 563.

agreements to commit civil injuries. But a composition with creditors is in most cases something more than an ordinary civil contract; it is in truth a quasi-judicial proceeding, and as such is to a certain extent assisted by the law (*e*).[17] Public policy, *therefore, as well as private right, requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand. [282

Fraud on third parties not to be presumed from mere possibilities. The doctrine of fraud on third parties, as it may be called, is however not to be extended to cases of mere suspicion or conjecture. A possibility that the performance of a contract may injure third persons is no ground for presuming that such was the intention, and on the strength of that presumed intention holding it invalid between the parties themselves.

"Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding, according to the true construction of its language, as between themselves."

Nor can a supposed fraudulent intention as to third persons (inferred from the general character and circumstances of a transaction) be allowed to determine what the true construction is (*f*).

3. Certain cases of analogous nature as involving "fraud on third persons." There are certain cases analogous enough to the foregoing to call for mention here, though not for any full treatment. Their general type is this: There is a contract giving rise to a continuing relation to which certain duties are incident by law; and a special sanction is provided for those duties by holding that transactions inconsistent with them avoid the original contract, or are themselves voidable at the option of the party whose rights are infringed. We have results of this kind from

(a) Dealings between a principal debtor and creditor to the prejudice of a surety:

(b) Dealings by an agent in the business of the agency on his own account:

(c) Voluntary settlements before marriage "in fraud of marital rights."

(*e*) Bankruptcy Act, 1833, ss. 18, 19. Since this Act there is a notable increase of private compositions independent of the Act.

(*f*) *Shaw* v. *Jeffery* (1860) 13 Moo. P. C. 432, 455.

17 See Nat. Bankruptcy Act, 1898, §§ 12, 13, 14*c*.

283] *In the first case the improper transaction is as a rule valid in itself, but avoids the contract of suretyship. In the second it is voidable as between the principal and the agent. In the third it is (or was) voidable at the suit of the husband.

(a) **Dealings between principal creditor and debtor to prejudice of surety.** "Any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance" (*g*), unless it is evident to the Court "that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety" (*h*).[18] The surety is not the less discharged "even though the original agreement may notwithstanding such variance be substantially performed" (*i*). An important application of this rule is that "where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided" (*k*).[19] But when the guaranty is for the performance

(*g*) Indian Contract Act, s. 133.

(*h*) *Holme* v. *Brunskill* (1877) 3 Q. B. Div. 495 (diss. Brett L.J.), overruling on this point *Sanderson* v. *Aston* (1873) L. R. 8 Ex. 73, 42 L. J. Ex. 64.

(*i*) Per Lord Cottenham, *Bonar* v. *Macdonald* (1850) 3 H. L. C. 226, 238.

(*k*) *Oswald* v. *Mayor of Berwick-on-Tweed* (1856) 5 H. L. C. 856, 25 L. J. Q. B. 383; *Pybus* v. *Gibb* (1846) 6 E. & B. 902, 911, 26 L. J. B. 41; *Mayor of Cambridge* v. *Dennis* (1858) E. B. & E. 660, 27 L. J. Q. B. 474.

[18] Board *v.* Branham, 57 Fed. Rep. 179. "The law requires that if there is any agreement between the principals with reference to a contract to the performance of which another is bound as surety, he ought to be consulted in regard to any proposed alteration, and if he is not or does not consent to the alteration he will be no longer bound, and the court will not inquire whether it is or not to his injury." Paine *v.* Jones, 76 N. Y. 274, 278; Reese *v.* United States, 9 Wall. 13, 21; Bank *v.* United States, 164 U. S. 227; United States Glass Co. *v.* West Virginia Flint Co., 81 Fed. Rep. 993, 995; O'Neal *v.* Kelly, 65 Ark. 550; Driscoll *v.* Winters, 122 Cal. 65; Rowan *v.* Sharp's Rifle Mfg. Co., 33 Conn. 1, 23; Weir Plow Co. *v.* Walmsley, 110 Ind. 242; Stillman *v.* Wickham, 106 Ia. 597; Warren *v.* Lyons, 152 Mass. 310; Fidelity Assoc. *v.* Dewey, 83 Minn. 389; Page *v.* Krekey, 137 N. Y. 307, 314; Antisdel *v.* Williamson, 165 N. Y. 372, 375; Ide *v.* Churchill, 14 Ohio St. 372, 384; Bensinger *v.* Wren, 100 Pa. 500.

The surety's assent, if given in advance, is binding upon him. Kretschmar *v.* Bruss, 108 Wis. 396.

A surety is not discharged by an independent collateral agreement, not injurious to him. Glass Co. *v.* Mathews, 89 Fed. Rep. 828, 831; Bank *v.* Hyde, 131 Mass. 77; Stuts *v.* Strayer, 60 Ohio St. 384.

[19] Miller *v.* Stewart, 9 Wheat. 680; United States *v.* Freel, 186 U. S. 309; Gass *v.* Stinson, 2 Sumner, 453; United States *v.* Cheeseman, 3 Sawyer, 424; Reynolds *v.* Hall, 1 Scam. 35; People *v.* Tompkins, 74 Ill. 482; Roman *v.* Peters, 2 Rob. (La.) 479; First Bank *v.* Gerke, 68 Md. 449; Plunkett *v.* Davis Co., 84 Md. 529; Boston Hat Manufactory *v.* Messinger, 2 Pick. 223; Denio *v.*

of several and distinct duties, and there is a change in one of them, or if an addition is made to the duties of the principal debtor by a distinct contract, the surety remains liable as to those which are unaltered (*l*).[20] The following rules rest on the same ground:

"The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor *the legal consequence of [284 which is the discharge of the principal debtor" (*m*).[21]

"A contract between the creditor and the pricipal debtor, by which the creditor makes a composition with, or promises to give time to or not to sue the principal debtor, discharges the surety,[22] unless the

(*l*) *Harrison* v. *Seymour* (1866) L. R. 1 C. P. 518, 35 L. J. C. P. 264; *Skillett* v. *Fletcher* (1866) L. R. 1 C. P. 217, 224, in Ex. Ch. 2. C. P. 469, 36 L. J. C. P. 206.

(*m*) I. C. A. s. 134. *Kearsley* v. *Cole* (1846) 16 M. & W. 128, 16 L. J. Ex. 115; *Cragoe* v. *Jones*, (1873) L. R. 8 Ex. 81, 42 L. J. Ex. 68. The discharge extends to any security given by the surety: *Bolton* v. *Salmon* [1891] 2 Ch. 48, 60 L. J. Ch. 239.

State, 60 Miss. 949; Blair *v.* Insurance Co., 10 Mo. 559; Bank *v.* Dickerson, 41 N. J. L. 448; Kellogg *v.* Scott, 58 N. J. Eq. 344; Nat. Mechanics' Banking Assn. *v.* Conkling, 90 N. Y. 116; American Telegraph Co. *v.* Lennig, 139 Pa. 594; Munford *v.* Railroad Co., 2 Lea, 393. And see White *v.* East Saginaw, 43 Mich. 567.

20 See Gaussen *v.* United States, 97 U. S. 584; Garnett *v.* Farmers' Bank, 91 Ky. 614; State *v.* Swinney, 60 Miss. 39; Bank *v.* Traube, 75 Mo. 199; Bank Supervisors *v.* Clark, 92 N. Y. 391; Major *v.* Kelly, 98 N. Y. 467; Dawson *v.* State, 38 Ohio St. 1; Lane's Appeal, 105 Pa. 49; Shackamaxom Bank *v.* Yard, 150 Pa. 351; Harrisburg Assoc. *v.* United States Fidelity Co., 197 Pa. 177; Commonwealth *v.* Holmes, 25 Gratt. 771; Ames, Cas. Suretyship, 274, n. Or if only an additional amount of duty is added, not amounting to a change in the nature of the office, the sureties remain liable. United States *v.* Gaussen, 2 Woods, 92; Smith *v.* Peoria Co., 59 Ill. 412; Commonwealth *v.* Gabbert's Admr., 5 Bush, 438; Strawbridge *v.* Railroad Co., 14 Md. 360; People *v.* Vilas, 36 N. Y. 459; King *v.* Nichols, 16 Ohio St. 80.

21 Trotter *v.* Strong, 63 Ill. 272; Sohier *v.* Loring, 6 Cush. 537; Bingham *v.* Wentworth, 11 Cush. 123; Moore *v.* Paine, 12 Wend. 123; Eichelberger *v.* Morris, 6 Watts, 42. "The consent of the surety to the release of the principal prevents such release operating as a discharge of the surety." Osgood *v.* Miller, 67 Me. 174.

22 Bank *v.* Hatch, 6 Pet. 250; Cox *v.* Railroad Co., 44 Ala. 611; Stewart *v.* Parker, 55 Ga. 656; Meyers *v.* Bank, 78 Ill. 257; White *v.* Whitney, 51 Ind. 124; Chickasaw Co. *v.* Pitcher, 36 Ia. 593; Lambert *v.* Shitler, 62 Ia. 72; Hubbard *v.* Ogden, 22 Kan. 363; Andrews *v.* Marrett, 58 Me. 539; Dixon *v.* Spencer, 59 Md. 246; Farnsworth *v.* Coots, 46 Mich. 117; Campion *v.* Whitney, 30 Minn. 177; Stilwell *v.* Aaron, 69 Mo. 539; Wild *v.* Howe, 74 Mo. 551; Haskell *v.* Burdette, 35 N. J. Eq. 31; Ducker *v.* Rapp, 67 N. Y. 464; Calvo *v.* Davies, 73 N. Y. 211; Prarie *v.* Jenkins, 75 N. C. 545; Carter *v.* Duncan, 84 N. C. 676; Forbes *v.* Sheppard, 98 N. C. 111; Bank *v.* Lucas, 26 Ohio St. 385; Osborn *v.* Low, 40 Ohio St. 347; Apperson *v.* Cross, 5 Heisk. 481; Dey *v.* Martin, 78 Va. 1; Sayre *v.* King, 17 W. Va. 562; Weed Co. *v.* Oberreich, 38 Wis. 325. As to the application of this doctrine where a mortgagee gives time to one who has assumed the mortgage, see *ante*, p. 264.

To release the surety by agreement to give time, the agreement must be for an extension for a definite time. King *v.* Haynes, 35 Ark. 463; Gardner *v.*

surety assents to such contract" (*n*),[23] or unless in such contract the creditor reserves his rights against the surety (*o*),[24] in which case the

(*n*) I. C. A. s. 135. *Oakeley* v. *Pasheller* (1836) 4 Cl. & F. 207, 10 Bli. N. S. 548, 42 R. R. 1; *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1874) L. R. 7 H. L. 348; *Green* v. *Wynn* (1869) L. R. 4 Ch. 204, 38 L. J. Ch. 220; *Bateson* v. *Gosling* (1871) L. R. 7 C. P. 9, 41 L. J. C. P. 53. It must be a binding contract with the principal debtor: *Clarke* v. *Birley* (1889) 41 Ch. D. 422, 434, 58 L. J. Ch. 616.

(*o*) Whether the surety knows of it or not: *Webb* v. *Hewitt* (1857) 3

Watson, 13 Ill. 347; Menifee *v.* Clark, 35 Ind. 304; Bucklen *v.* Huff, 53 Ind. 474; Morgan *v.* Thompson, 60 Ia. 280; Way *v.* Dunham, 166 Mass. 263; Freeland *v.* Compton, 30 Miss. 424; McCormick, &c. Co. *v.* Rae, 9 N. Dak. 482; Ward *v.* Wick, 17 Ohio St. 159; Edwards *v.* Bedford Chair Co., 41 Ohio St. 17; Hayes *v.* Wells, 34 Md. 512; Bank *v.* Legrand, 103 Pa. 309.

If a surety who has been discharged by indulgence to the principal afterwards with knowledge of the facts promises to pay, his promise is binding without a new consideration. Porter *v.* Hodenpuyl, 9 Mich. 11; Fowler *v.* Brooks, 13 N. H. 240; Bramble *v.* Ward, 40 Ohio St. 267; Churchill *v.* Bradley, 58 Vt. 403. *Contra,* Walters *v.* Swallow, 6 Whart. 446. And see Warren *v.* Fant, 79 Ky. 1. See further Ames's Cas. Suretyship, 227, n.; 2 Ames's Cas. B. & N. 504, n.

An agreement by the creditor to give time procured by the debtor upon the fraudulent representation that the surety consents thereto may be avoided by the creditor upon discovery of the fraud, leaving the surety liable. Allen *v.* Sharpe, 37 Ind. 67; Kirby *v.* Landis, 54 Ia. 150; Dwinnell *v.* McKibben, 93 Ia. 331; Douglass *v.* Ferris, 138 N. Y. 192; Bebout *v.* Bodle, 38 Ohio St. 500; Bank *v.* Field, 143 Pa. 473; First Bank *v.* Buchanan, 87 Tenn. 32; McDougall *v.* Walling, 15 Wash. 78.

The fact that the creditor assented to a discharge in bankruptcy of the principal debtor has generally been held not to release a surety. Browne *v.* Carr, 7 Bing. 508; Megrath *v.* Gray, L. R. 9 C. P. 216; Ellis *v.* Wilmot, L. R. 10 Ex. 10; *Ex parte* Jacobs, L. R. 10 Ch. 211 (overruling Wilson *v.* Lloyd, L. R. 16 Eq. 60; *Re* Burchell, 4 Fed. Rep. 406; Guild *v.* Butler, 122 Mass. 498; Mason & Hamlin Co. *v.* Bancroft, 1 Abb. N. C. 415; Hill *v.* Trainer, 49 Wis. 537. But see *contra, Re* McDonald, 14 B. R. 477; Calloway *v.* Snapp, 78 Ky. 561; Union Nat. Bank *v.* Grant, 48 La. Ann. 18.

In Cilley *v.* Colby, 61 N. H. 63, even though it was found as a fact that the assent of the plaintiff was necessary to make the required amount to confirm a composition in bankruptcy of the principal debtor it was held the surety was not discharged. In Phelps *v.* Borland, 103 N. Y. 406, however, a surety was held discharged by the action of the creditor in taking part in a foreign bankruptcy of the principal debtor and thereby making the debt subject to the foreign discharge. See also Third Bank *v.* Hastings, 134 N. Y. 501, 505.

[23] Gray's Exrs. *v.* Brown, 22 Ala. 262; Rockville Bank *v.* Holt, 58 Conn. 526; Bank *v.* Whitman, 66 Ill. 331; Crutcher *v.* Trabue, 5 Dana, 80; Treat *v.* Smith, 54 Me. 112; Hutchinson *v.* Wright, 61 N. H. 108; Kuhlman *v.* Leavens, 5 Okl. 562; Van Horne *v.* Dick, 151 Pa. 341; Sawyer *v.* Senn, 27 S. C. 251; Bowling *v.* Flood, 1 Lea, 678. Nor will the surety be discharged where the principal has indemnified him by giving ample collateral security. Chilton *v.* Robbins, 4 Ala. 223; Wilson *v.* Tibbetts, 29 Ark. 579; Moore *v.* Paine, 12 Wend. 123; Kleinhaus *v.* Generous, 25 Ohio St. 667; Smith *v.* Steele, 25 Vt. 427; Fay *v.* Tower, 58 Wis. 286; Jones *v.* Ward, 71 Wis. 152.

It was held in Guderian *v.* Leland, 61 Minn. 67, and Bramble *v.* Ward, 40 Ohio St. 267, that the burden of proof was upon the surety to show that he did not assent. But see *contra,* Mundy *v.* Stevens, 61 Fed. Rep. 77; United States *v.* M'Intyre, 111 Fed. Rep. 590; Menke *v.* Gerbracht, 75 Hun, 181.

[24] Hodges *v.* Elyton Land Co., 109 Ala. 617. Cp. Elyton Co. *v.* Hood, 121 Ala. 373.

surety's right to be indemnified by the principal debtor continues (*p*).[25] One reported case constitutes an apparent exception to the general rule, but is really none, as there the nominal giving of time had in substance the effect of accelerating the creditor's remedy (*q*).[26] The rule applies as against a creditor of two principal debtors of whom one has become primarily liable as between themselves, whether the creditor assents to the arrangement or not, provided he has notice of it (*r*).

"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged" (*s*).[27]

*"A surety is entitled to the benefit of every security which the [285 creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the exist-

K. & J. 438, 442; and see per Lord Hatherley, L. R. 7 Ch. 150.

(*p*) *Close* v. *Close* (1853) 4 D. M. & G. 176, 185.

(*q*) *Hulme* v. *Coles* (1827) 2 Sim. 12, 29 R. R. 52.

(*r*) *Oakeley* v. *Pasheller* (note (*n*) above) as discussed and explained in *Rouse* v. *Bradford Bkg. Co.* [1894] 2 Ch. 32, 63 L. J. Ch. 337, C. A.; affirmed [1894] A. C. 586, 63 L. J. Ch. 890.

(*s*) I. C. A. s. 139 (= Story, Eq. Jur. § 325 nearly); *Watson* v. *Allcock* (1853) 4 D. M. & G. 242, *supra*, p. 179; *Burgess* v. *Eve* (1872) L. R. 13 Eq. 450, 41 L. J. Ch. 515; *Phillips* v. *Foxall* (1872) L. R. 7 Q. B. 666, 41 L. J. Q. B. 293; *Sanderson* v. *Aston* (1873) L. R. 8 Ex. 73, 42 L. J. Ex. 64.

[25] Rockville Bank *v.* Holt, 58 Conn. 526; Mueller *v.* Dobschuetz, 89 Ill. 176; Jones *v.* Sarchett, 61 Ia. 520; Dean *v.* Rice, 63 Kan. 691; Claggett *v.* Salmon, 5 Gill & J. 314, 353; Sohier *v.* Loring, 6 Cush. 537; Kenworthy *v.* Sawyer, 125 Mass. 28; Richardson *v.* Pierce, 119 Mass. 165; Hubbell *v.* Carpenter, 5 N. Y. 171; Morgan *v.* Smith, 70 N. Y. 537; Bank *v.* Lineberger, 83 N. C. 454; Hagey *v.* Hill, 75 Pa. 108; Viele *v.* Hoag, 24 Vt. 46; Ames's Cas. Suretyship, 150, n.

[26] Suydam *v.* Vance, 2 McLean, 99; Fletcher *v.* Gamble, 3 Ala. 335; Barker *v.* McClure, 2 Blackf. 14; Hallett *v.* Holmes, 18 Johns. 28; Upington *v.* May, 40 Ohio St. 247; Gardner *v.* Van Nostrand, 13 Wis. 543.

[27] White *v.* Life Assn. of America, 63 Ala. 419; Roberts *v.* Donovan, 70 Cal. 108; Railroad Co. *v.* Gow, 59 Ga. 685; Walsh *v.* Colquitt, 64 Ga. 740; Gradle *v.* Hoffman, 105 Ill. 147; Estate of Rapp *v.* Phœnix Ins. Co., 113 Ill. 390; Insurance Co. *v.* Scott, 81 Ky. 540; Clow *v.* Derby Coal Co., 98 Pa. 432.

In the case of guaranty of the conduct of an employe, the surety is not discharged by the employer's omission to notify him of the employe's default and thereafter continuing him in his service, unless the default is of a nature indicating a want of integrity in the employe. Williams *v.* Lyman, 88 Fed. Rep. 237; Insurance Co. *v.* Holway, 55 Ia. 571; Insurance Co. *v.* Findley, 59 Ia. 591; Insurance Co. *v.* Simmons, 131 Mass. 85; Cumberland Assoc. *v.* Gibbs, 119 Mich. 318; McKecknie *v.* Ward, 58 N. Y. 541; Telegraph Co. *v.* Barnes, 64 N. Y. 385; Railroad Co. *v.* Ling, 18 S. C. 116; Railroad Co. *v.* Casey, 30 Gratt. 218; cp. *infra*, p. 660.

ence of such security or not; and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security" (*t*).[28] Not only an absolute parting with the security, but any dealing with it, such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect (*u*). For the same reason, if there be joint sureties, and the debtor releases one, it is a release to all; otherwise if the sureties are several (*x*).

(b) **Dealings by agent in the matter of the agency on his own account.** "If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction" (*y*).

(*t*) I. C. A. s. 141. *Mayhew* v. *Crickett* (1818) 2 Swanst. 185, 191, 19 R. R. 57, 61; *Wulff* v. *Jay* (1872) L. R. 7 Q. B. 756, 762, 41 L. J. Q. B. 322; *Bechervaise* v. *Lewis* (1872) L. R. 7 C. P. 372, 41 L. J. C. P. 161; securities now subsist notwithstanding payment of the debt for the benefit of a surety who has paid, Merc. Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5. [Such is the prevailing doctrine in this country independently of statute. See 1 Wh. & T. L. C., 4th Am. ed. 137; Brandt on Guaranty and Suretyship, § 270, sqq., Pace *v.* Pace's Adm. 95 Va. 792. As to dealings between creditor and debtor to the prejudice of a surety, see the very full notes to Deering *v.* Earl of Winchelsea, and Rees *v.* Berrington, C. in Eq.] A right to distrain for rent is not a security or remedy within this enactment: *Russell* v. *Shoolbred* (1885) 29 Ch. Div. 254, 53 L. T. 365. During the currency of a bill of exchange an indorser is not a surety for the acceptor. But after notice of dishonour he is entitled in like manner as if he were a surety to the benefit of all payments made and securities given by the acceptor to the holder: *Duncan, Fox & Co.* v. *North & South Wales Bank* (1880) 6 App. Ca. 1, revg. s. c. in C. A. 11 Ch. Div. 88, 50 L. J. Ch. 355.

(*u*) *Pledge* v. *Buss* (1860) Johns. 663.

(*x*) *Ward* v. *Bank of New Zealand* (1883) (J. C.) 8 App. Ca. 755, 52 L. J. P. C. 65.

(*y*) I. C. A. s. 215. The Indian Act goes on to add, "if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him," but these qualifications are not recognized in English law. See Story on Agency § 210; *Ex parte Lacey* (1802) 6 Ves. 625, 6 R. R. 9.

[28] Kirkpatrick *v.* Howck, 80 Ill. 122; Sterne *v.* McKinney, 79 Ind. 578; Sample *v.* Cochran, 84 Ind. 594; Sherraden *v.* Parker, 24 Ia. 28; Lucas Co. *v.* Roberts, 49 Ia. 159; Mingus *v.* Dougherty, 87 Ia. 56; Saulet *v.* Trepagnier, 2 La. Ann. 427; Springer *v.* Toothaker, 43 Me. 381; Cummings *v.* Little, 45 Me. 183; Baker *v.* Briggs, 8 Pick. 122; Guild *v.* Butler, 127 Mass. 386; Bank *v.* Torrey, 134 Mass. 239; Bank *v.* Thayer, 136 Mass. 459; Nelson *v.* Munch, 28 Minn. 314; Nettleton *v.* Land Co., 54 Minn. 395; Burr *v.* Boyer, 2 Neb. 265; Bank *v.* Young, 43 N. H. 457; Kidd *v.* Hurley, 54 N. J. Eq. 177; Bank *v.* Page, 44 N. Y. 453, 457; Grow *v.* Garlock, 97 N. Y. 81; Smith *v.* McLeod, 3 Jred. Eq. 390; Wharton *v.* Duncan, 83 Pa. 40; Fegley *v.* McDonald, 89 Pa. 128; Gillespie *v.* Darwin, 6 Heisk. 21, 27; Allen *v.* Henly, 2 Lea, 141; Hutton *v.* Campbell, 10 Lea, 170; Murrell *v.* Scott, 51 Tex. 520; Ashby *v.* Smith, 6 Leigh, 164; Morton *v.* Dillon, 90 Va. 592; Price Co. Bank *v.* McKenzie, 91 Wis. 658.

"If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled *to claim from the agent [286 any benefit which may have resulted to him from the transaction" (*z*).

These rules are well known and established and have been over and over again asserted in the most general terms. The commonest case is that of an agent for sale himself becoming the purchaser, or conversely: "He who undertakes to act for another in any matter shall not in the same matter act for himself.[29] Therefore a trustee for sale shall not gain any advantage by being himself the person to buy."[30] "An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with

(*z*) I. C. A. s. 216.

[29] Ringo *v.* Binns, 10 Pet. 269; Baker *v.* Humphrey, 101 U. S. 494; Baker *v.* Whiting, 3 Sumner, 475; Kinley *v.* Irvine, 13 Ala. 681; Rogers *v.* Lockett, 28 Ark. 290; Bowman *v.* Officer, 53 Ia. 640; Krutz *v.* Fisher, 8 Kan. 90; Murphy *v.* Sloan, 24 Miss. 658; Fulton *v.* Whitney, 66 N. Y. 548; Bennett *v.* Austin, 81 N. Y. 308, 332; Blount *v.* Robeson, 3 Jones Eq. 73; Pegram *v.* Railroad Co., 84 N. C. 696; Wade *v.* Pettibone, 11 Ohio, 570; Bartholomew *v.* Leech, 7 Watts, 472; Meyer's App., 2 Pa. St. 463; Smith *v.* Collins, 1 Head, 251, 256; Hendee *v.* Cleaveland, 54 Vt. 142; McMahon *v.* McGraw, 26 Wis. 614.

An agent to buy, buying for himself, holds in trust for his principal. Firestone *v.* Firestone, 49 Ala. 128; Church *v.* Sterling, 16 Conn. 388; Switzer *v.* Skiles, 8 Ill. 529; Rose *v.* Hayden, 35 Kan. 106; Bryan *v.* McNaughten, 38 Kan. 98; Matthews *v.* Light, 32 Me. 305; King *v.* Remington, 36 Minn. 15; Le Gendre *v.* Byrnes, 44 N. J. Eq. 372; Reed *v.* Warner, 5 Paige, 650; Noyes *v.* Landon, 59 Vt. 569; Welford *v.* Chancellor, 5 Gratt. 39.

[30] Michoud *v.* Girod, 4 How. 503; Marsh *v.* Whitmore, 21 Wall. 178; Walker *v.* Palmer, 24 Ala. 358; Kruse *v.* Steffens, 47 Ill. 112; Appleton *v.* Turnbull, 84 Me. 72; McKay *v.* Williams, 67 Mich. 547; Kimball *v.* Ranney, 122 Mich. 160; Staats *v.* Bergen, 17 N. J. Eq. 297, 554; Davoue *v.* Fanning, 2 Johns. Ch. 252; Moore *v.* Moore, 5 N. Y. 256; Gardner *v.* Ogden, 22 N. Y. 327; People *v.* O. B. of S. B. B. Co., 92 N. Y. 98; Piatt *v.* Longworth's Devisees, 27 Ohio St. 159, 195; Caldwell *v.* Caldwell, 45 Ohio St. 512; Shannon *v.* Marmaduke, 14 Tex. 217.

A purchase of the subject-matter of the trust by a trustee, although the purchase be at public auction, for an adequate price, and fair in all respects, will be set aside as of course, at the election of the *cestui que trust*, unless the latter forfeits his right to relief by laches or acquiescence. *Ib.;* Martin *v.* Martin, 12 Ind. 266; Mason *v.* Martin, 4 Md. 124; Scott *v.* Freeland, 7 S. & M. 409; Marshall *v.* Carson, 38 N. J. Eq. 250; Brothers *v.* Brothers, 7 Ired. Eq. 150; Patton *v.* Thompson, 2 Jones Eq. 285; Newcomb *v.* Brooks, 16 W. Va. 32. So of a purchase by the wife of a trustee. Tyler *v.* Sanborn, 128 Ill. 136; Frazier *v.* Jeakins, 64 Kan. 615; Bassett *v.* Shoemaker, 46 N. J. Eq. 538; Davoue *v.* Fanning, 2 Johns. Ch. 252; Dundas' Appeal, 64 Pa. 325. Cp. Miller *v.* Weinstein, 52 N. Y. App. Div. 533.

But where the trustee purchases from the *cestui que trust* himself, who is *sui juris*, and intends that the trustee should buy, and there is no deception, no concealment, and no advantage taken by the trustee, the sale will be upheld. Michoud *v.* Girod, 4 How. 503, 556; Jones *v.* Lloyd, 117 Ill. 597; Buell *v.* Buckingham, 16 Ia. 284; Keighler *v.* Savage Mfg. Co., 12 Md. 383, 417; Fisher's Appeal, 34 Pa. 29; Spencer's Appeal, 80 Pa. 317. See also Dougan *v.* Macpherson, [1902] A. C. 197.

all the knowledge which he himself possessed" (*a*).[31] "It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (*b*).[32] Similarly an agent for sale or purchase must not act for the other party at the same time or take a secret commission from him (*c*). If the local usage of a particular trade or market countervenes this axiom by "converting a broker employed to buy into a principal selling for himself," it cannot be treated as a custom so as to bind a principal

(*a*) *Whichcote* v. *Lawrence* (1798) 3 Ves. 740; *Lowther* v. *Lowther* (1806) 13 Ves. 95, 103; and see *Charter* v. *Trevelyan* (1844) 11 Cl. & F. 714. 732.

(*b*) Per Willes J. in *Mollett* v. *Robinson* (1870) L. R. 5 C. P. at p. 655, 39 L. J. C. P. 290. Cp. *Guest* v. *Smythe* (1870) L. R. 5 Ch. 551, per Giffard L.J. 39 L. J. Ch. 536; *Sharman* v. *Brandt* (1871) L. R. 6 Q. B. 720, 40 L. J. Q. B. 312.

(*c*) The latest case, which, if anything, increases the wholesome strictness of the law, is *Grant* v. *Gold Exploration &c. Syndicate of British Columbia* [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, C. A.

[31] Jeffries *v.* Wiester, 2 Sawyer, 135; Ingle *v.* Hartman, 37 Ia. 274; Keighler *v.* Savage Mfg. Co., 12 Md. 383.

An agent to sell cannot himself become the purchaser unless he is known to his principal to be such. Adams *v.* Sayre, 70 Ala. 318; Eldredge *v.* Walker, 60 Ill. 230; Copeland *v.* Insurance Co., 6 Pick. 198; Rennick *v.* Butterfield, 21 N. H. 70; Martin *v.* Moulton, 8 N. H. 504; Clendenning *v.* Hawks, 10 N. Dak. 90; Bank *v.* Farmers' L. & T. Co., 16 Wis. 629.

And the rule applies where the employment is to sell at a stipulated price. Porter *v.* Woodruff, 36 N. J. Eq. 174; Ruckman *v.* Bergholz, 37 N. J. L. 437; Iron Co. *v.* Harper, 46 Ohio St. 100. And see Bank *v.* Simons, 133 Mass. 415; Rich *v.* Black, 173 Pa. 92; De Bussche *v.* Alt, 8 Ch. D. 286, 317; 9 Harv. L. Rev. 349; 13 ib. 522.

A factor directed to procure insurance cannot himself become the insurer. Kean *v.* Brandon, 12 La. Ann. 20.

[32] Conkey *v.* Bond, 36 N. Y. 427; Taussig *v.* Hart, 49 N. Y. 301; 58 N. Y. 425; Stewart *v.* Mather, 32 Wis. 344. And see Levy *v.* Loeb, 85 N. Y. 365; 89 N. Y. 386.

A broker acting for both vendor and purchaser cannot recover for his services. Fritz *v.* Finnerty, 5 Col. 174; Young *v.* Trainor, 158 Ill. 428; Railroad Co. *v.* Pattison, 15 Ind. 70; Lloyd *v.* Colston, 5 Bush, 587; Rice *v.* Wood. 113 Mass. 133; Follansbee *v.* O'Reilly, 135 Mass. 80; Carpenter *v.* Fisher, 175 Mass. 9; Scribner *v.* Collar, 40 Mich. 375; Hannan *v.* Prentis, 124 Mich. 417; Everhardt *v.* Searle, 71 Pa. 256; Mayo *v.* Knowlton. 134 N. Y. 250; Carpenter *v.* Hogan, 40 Ohio St. 203; Lynch *v.* Fallon, 11 R. I. 311; Meyer *v.* Hanchett, 39 Wis. 419; 43 Wis. 246. Cp. Alexander *v.* N. W. C. University, 57 Ind. 466; Alvord *v.* Cook, 174 Mass. 120, unless the double agency was with the full knowledge and consent of both principals; *ib.*; Bell *v.* McConnell, 37 Ohio St. 396; Rowe *v.* Stevens, 53 N. Y. 621. Cp. Raisin *v.* Clark, 41 Md. 158; Pinney *v.* Hall, 101 Mich. 451.

A mere middleman to bring the parties together may contract for compensation from both. Clark *v.* Allen, 125 Cal. 276; Cox *v.* Haun, 127 Ind. 325; Mullen *v.* Keetzleb, 7 Bush, 253; Rupp *v.* Sampson, 16 Gray, 398; Friar *v.* Smith, 120 Mich. 411; Collins *v.* Fowler, 8 Mo. App. 588; Jarvis *v.* Schaefer, 105 N. Y. 289; Orton *v.* Scofield, 61 Wis. 382. And see Barry *v.* Schmidt, 57 Wis. 172; McKenzie *v.* Lego, 98 Wis. 364.

dealing in that trade or market through a broker, but himself ignorant of the usage (*d*).[33]

*The rule is not arbitrary or technical, but rests on the prin- [287
ciple that an agent cannot be allowed to put himself in a position in which his interest and his duty are in conflict, and the Court will not consider "whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."[34] It is a corollary from the main rule

(*d*) *Robinson* v. *Mollett* (1874-5) L. R. 7 H. L. 802, 838, 44 L. J. C. P. 362; and further as to alleged customs of this kind *De Bussche* v. *Alt* (1877) 8 Ch. Div. 286, 47 L. J. Ch. 386. For the special application of the rule to the duty of directors of companies, *Hay's case* (1875) L. R. 10 Ch. 593, 44 L. J. Ch. 721; *Albion Steel Wire Co.* v. *Martin* (1875) 1 Ch. D. at p. 585, per Jessel M.R. 45 L. J. Ch. 173; as to promoters, *New Sombrero Phosphate Co.* v. *Erlanger* (1877) 5 Ch. Div. 73, 46 L. J. Ch. 425.

[33] As to alleged customs of this kind, see Irwin *v.* Williar, 110 U. S. 499; Allen *v.* St. Louis Bank, 120 U. S. 20, 39; Terry *v.* Birmingham Bank, 99 Ala. 566; Skiff *v.* Stoddard, 63 Conn. 198; Raisin *v.* Clark, 41 Md. 458; Day *v.* Holmes, 103 Mass. 306; Commonwealth *v.* Cooper, 130 Mass. 285; Merchants' Ins. Co. *v.* Prince, 50 Minn. 53.

For the application of the rule to directors of corporations, see Wardell *v.* Railroad Co., 4 Dill. 330; affd., 103 U. S. 651; Bill *v.* W. U. Telegraph Co., 16 Fed. Rep. 14; Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48; Bensiek *v.* Thomas, 66 Fed. Rep. 104; Wilbur *v.* Hough, 49 Cal. 290; San Diego R. Co. *v.* Pacific Beach Co., 112 Cal. 53; Port *v.* Russell, 36 Ind. 60; Ryan *v.* Railway Co., 21 Kan. 365; Bank *v.* Drake, 29 Kan. 311; Railroad Co. *v.* Bowler, 9 Bush, 468; Railroad Co. *v.* Poor, 59 Me. 277; Hoffman Coal Co. *v.* Cumberland Coal Co., 16 Md. 456; Railway Co. *v.* Dewey, 14 Mich. 477; Miner *v.* Belle Isle Co., 93 Mich. 97; Manufacturers' Bank *v.* Iron Co., 97 Mo. 38; Blake *v.* Railroad Co., 56 N. Y. 485; Munson *v.* Magee, 161 N. Y. 182; Goodin *v.* Canal Co., 18 Ohio St. 169; Ashurst's Appeal, 60 Pa. 290; Parsons *v.* Tacoma Co., 25 Wash. 492. Cp. Rolling Stock Co. *v.* Railroad Co., 34 Ohio St. 450.

As to promoters, Wiser *v.* Lawler, 189 U. S. 260; Yeiser *v.* United States Board Co., 107 Fed. Rep. 340 (C. C. A.); Central Trust Co. *v.* East Tenn. Land Co., 116 Fed. Rep. 743; Burbank *v.* Dennis, 101 Cal. 90; Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101; Hayward *v.* Leeson, 176 Mass. 310; Cook *v.* South Columbia Co., 75 Miss. 121; Exter *v.* Sawyer, 146 Mo. 302; Woodbury, &c. Co. *v.* Loudenslager, 55 N. J. Eq. 78; Getty *v.* Devlin, 54 N. Y. 403; McElhenny *v.* Hubert Oil Co., 61 Pa. 188; Simons *v.* Vulcan Oil Co., 61 Pa. 202; Densmore Oil Co. *v.* Densmore, 64 Pa. 43. Cp. Blood *v.* La Serena Land Co., 134 Cal. 361.

[34] Humphrey *v.* Eddy Transportation Co., 107 Mich. 163; Porter *v.* Woodruff, 36 N. J. Eq. 174, 179, 180; Taussig *v.* Hart, 58 N. Y. 425; Rolling Stock Co. *v.* Railroad Co., 34 Ohio St. 450, 460; Everhardt *v.* Searle, 71 Pa. 256.

An agreement to pay a commission to the agent of another by one who is about to contract with that other, if the agent will use his influence to induce his principal to enter into the contract, is a corrupt agreement, and not enforceable at law, even though it does not induce the agent to act corruptly. It would be "most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged." Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549; Woodstock

that so long as a contract for sale made by an agent remains executory he cannot re-purchase the property from his own purchaser except for the benefit of his principal (*e*).[35] A like rule applies to the case of an executor purchasing any part of the assets for himself. But it is put in this somewhat more stringent form, that the burden of proof is on the executor to show that the transaction is a fair one. This brings it very near to the doctrine of Undue Influence, of which in a later chapter. It makes no difference that the legatee from whom the purchase was made was also co-executor (*f*). Another branch of the same principle is to be found in the rules against trustees and limited owners renewing leases or purchasing reversions for themselves (*g*).[36]

Again: "It may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers" (*h*).[37] "If a person makes any profit by being employed

(*e*) *Parker* v. *McKenna* (1874) 10 Ch. 96, 118, 124, 125, 44 L. J. Ch. 425.

(*f*) *Gray* v. *Warner* (1873) L. R. 16 Eq. 577, 42 L. J. Ch. 556.

(*g*) Notes to *Keech* v. *Sandford* (1726) in 1 Wb. & T. L. C. The last case on the subject is *Trumper* v. *Trumper* (1873) L. R. 14 Eq. 295, 8 Ch. 870, 42 L. J. Ch. 641. On the general rule see also *Marsh* v. *Whitmore* (1874) (Sup. Court, U. S.) 21 Wall. 178.

(*h*) Story on Agency, § 211, adopted by the Court in *Morison* v. *Thompson* (1874) L. R. 9 Q. B. 489, 485, 43 L. J. Q. B. 215, where several cases are collected.

Iron Co. *v.* Richmond Extension Co., 129 U. S. 643, 656; Alger *v.* Anderson, 78 Fed. Rep. 729, 738; Continental Trust Co. *v.* Toledo, &c. Ry. Co., 86 Fed. Rep. 929, 945; Union Ins. Co. *v.* Berlin, 90 Fed. Rep. 779 (C. C. A.); Bollman *v.* Loomis, 41 Conn. 581; Atlee *v.* Fink, 75 Mo. 100; Byrd *v.* Hughes, 84 Ill. 174; Holcomb *v.* Weaver, 136 Mass. 265. Cp. Dexter *v.* McClellan, 116 Ala. 37.

An agreement between two real estate agents representing different parties to divide commissions in case they could effect a sale or exchange between their principals was held void in Levy *v.* Spencer, 18 Col. 532; but in Alvord *v.* Cook, 174 Mass. 120, it was held that such an arrangement was not fraudulent as matter of law.

[35] Bain *v.* Brown, 56 N. Y. 285; Caldwell *v.* Caldwell, 45 Ohio St. 512; Cook *v.* Berlin W. M. Co., 43 Wis. 433. See also Williams *v.* Scott, [1900] A. C. 499.

[36] Gower *v.* Andrew, 59 Cal. 119; Davis *v.* Hamlin, 108 Ill. 39; Grumley *v.* Webb, 44 Mo. 444; Holdridge *v.* Gillespie, 2 Johns. Ch. 30; Mitchell *v.* Reed, 61 N. Y. 123; 84 N. Y. 556; Perry on Trusts, §§ 196, 538. See also Kimberly *v.* Arms, 129 U. S. 510; Turner *v.* Sawyer, 150 U. S. 578; Williamson *v.* Monroe, 101 Fed. Rep. 322; Snead *v.* Deal, 53 Ark. 152; Franklin Min. Co. *v.* O'Brien, 22 Col. 129; Larey *v.* Baker, 86 Ga. 468; Abrams *v.* Wingo, 9 Kan. App. 884; Robinson *v.* Jewett, 116 N. Y. 40; Lacy *v.* Hall, 37 Pa. 365; Johnson's Appeal, 114 Pa. 132.

[37] Railroad Co. *v.* Kindred, 3 McCrary, 627; Vallette *v.* Tedens, 122 Ill. 607; Helberg *v.* Nichol, 149 Ill. 249; Lafferty *v.* Jelly, 22 Ind. 471; Ackenburgh *v.* McCool, 36 Ind. 473; Love *v.* Hoss, 62 Ind. 255; Blanchard *v.* Jones, 101 Ind.

contrary to his trust, the employer has a right to call back *that [288 profit" (*i*). And it is not enough for an agent who is himself interested in the matter of the agency to tell his principal that he has some interest: he must give full information of all material facts (*k*).[38]

Even this is not all: an agent, or at any rate a professional adviser, cannot keep any benefit which may happen to result to him from his own ignorance or negligence in executing his duty. In such a case he is considered a trustee for the persons who would be entitled to the benefit if he had done his duty properly (*l*).[39]

Nature of remedies applicable. In this class of cases the rule seems to be that the transaction improperly entered into by the agent is voidable so far as the nature of the case admits. Where it cannot be

(*i*) *Massey* v. *Davies* (1794) 2 Ves. 317, 320, 2 R. R. 218.

(*k*) See authorities collected, and observations of the Court thereon, *Dunne* v. *English* (1874) L. R. 18 Eq. 524, 534. The developments of the principle in modern company law cannot be followed here. For a recent exposition of its limits, see *Costa Rica R. Co.* v. *Forwood* [1901] 1 Ch. 746, 70 L. J. Ch. 385, C. A.

(*l*) *Bulkley* v. *Wilford* (1834) 2 Cl. & F. 102. 37 R. R. 39. Cp. *Corley* v. *Lord Stafford* (1857) 1 De G. & J. 238. As to alternative remedies, see *Grant's case*, p. *286, above.

542; Thomas *v.* Sweet, 37 Kan. 183; McNutt *v.* Dix, 83 Mich. 328; Goodhue *v.* Davis, 46 Minn. 210; Seehorn *v.* Hale, 130 Mo. 257; Dodd *v.* Wakeman, 26 N. J. Eq. 484, 487; Dutton *v.* Willner, 52 N. Y. 312; Wilson *v.* Wilson, 4 Abb. App. Dec. 621; Noyes *v.* Landon, 59 Vt. 569. And see the cases in note 40.

Even though the agency is gratuitous the principle is applicable. Salsbury *v.* Ware, 183 Ill. 505.

Where an agent, in violation of his contract of agency, engaged in another business of similar character to that which he was conducting for his principal, the profits of his private venture were held to belong to the principal in James T. Hair Co. *v.* Daily, 161 Ill. 379.

"An agent cannot exact of his principal any advantage growing out of a contract made by the agent in his principal's name, unless the latter has expressly authorized or ratified it, with knowledge that such advantage would accrue." Vreeland *v.* Van Blarcom, 35 N. J. Eq. 530.

A director of a corporation is bound to account to the corporation for all profits secretly made by him out of his office. Bank *v.* Downey, 53 Cal. 466; Bent *v.* Priest, 86 Mo. 475; McClure *v.* Law, 161 N. Y. 78; Bird Coal Co. *v.* Hume, 157 Pa. 278; Rutland Electric Light Co. *v.* Bates, 68 Vt. 579. But in Bristol *v.* Scranton, 63 Fed. Rep. 218 (C. C. A.), it was held that where the president of a corporation contracted in good faith for the consolidation of his corporation with a rival, and where the latter would not consolidate unless the president would agree not to engage in the business personally for a term of years, and be made such an agreement for a consideration, the consideration could not be recovered.

A gift made to the plaintiff's agent by one from whom the agent had made a purchase on behalf of the plaintiff after the conclusion of the agency was sustained in Lamb Knit Goods Co. *v.* Lamb, 119 Mich. 568. Cp. Downard *v.* Hadley, 116 Ind. 131.

[38] Mulvane *v.* O'Brien, 58 Kan. 463.

[39] See Downard *v.* Hadley, 116 Ind. 131.

avoided as against third parties, the principal can recover the profit from the agent.[40] But where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal on discovering this has the option of rescinding the contract altogether. Thus when company A. contracted to make a telegraph cable for company B., and a term of the contract was that the work should be approved by C., the engineer of company B., and C. took an undisclosed sub-contract from company A. for doing the same work; and further it appeared that this arrangement was contemplated when the contract was entered into; it was held that company B. might rescind the contract (*m*).[41]

289] ***(c) Settlements in fraud of marital right.** The rule as to settlements "in fraud of marital right" was thus given by Lord Langdale (*n*) :—

"If a woman entitled to property enters into a treaty for marriage and during the treaty represents to her intended husband that she is so entitled that upon her marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband and he is entitled to relief" (o).[42]

Moreover—"If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as in the

(*m*) *Panama & S. Pacific Telegraph Co.* v. *India Rubber, &c. Co.* (1875) L. R. 10 Ch. 515, 45 L. J. Ch. 121.

(*n*) Cp. on this subject Dav. Conv. vol. 3, pt. 2, 707.

(o) *England* v. *Downs* (1840) 2 Beav. 522, 528, 50 R. R. 268, 272, 273.

[40] See De Bussche *v.* Alt, 8 Ch. D. 286; Perry *v.* Tuscaloosa Co., 93 Ala. 364; Kerfoot *v.* Hyman, 52 Ill. 512; Stoner *v.* Weiser, 24 Ia. 434; Moore *v.* Mandlebaum, 8 Mich. 433; Rutland Electric Light Co. *v.* Bates, 68 Vt. 579; Seegar *v.* Edwards, 11 Leigh, 213; Bell *v.* Bell, 3 W. Va. 183; Fountain Spring Co. *v.* Roberts, 92 Wis. 345.

The person who corrupts or conspires with an agent is liable to the principal. Mayor *v.* Lever, 25 Q. B. D. 363, [1891] 1 Q. B. 168; Lister *v.* Stubbs, 45 Ch. D. 1, 12; Grant *v.* Gold Syndicate, [1900] 1 Q. B. 233; Emmons *v.* Alvord, 177 Mass. 466; Stoney Creek Woolen Co. *v.* Smalley, 111 Mich. 321. Cp. Thorp *v.* Smith, 18 Wash. 277.

Nor can he recover from the agent his agreed share of the corrupt profits. Talbott *v.* Luckett (Md. App.), 30 Atl. Rep. 565.

[41] *Acc.* Smith *v.* Sorby, 3 Q. B. D. 552; Findlay *v.* Pertz, 66 Fed. Rep. 427; Alger *v.* Anderson, 78 Fed. Rep. 728; Young *v.* Hughes, 32 N. J. Eq. 372; Ritter *v.* Railroad Co., (S. C. Pa.) 7 W. N. Cas. 122. And see W. U. Tel. Co. *v.* U. P. Ry. Co., 1 McCrary, 581; Baltimore Sugar Co. *v.* Campbell & Zell Co., 83 Md. 36; Landis *v.* Saxton, 89 Mo. 375; Kelsey *v.* New England Co., 62 N. J. Eq. 742; Yeoman *v.* Lasley, 40 Ohio St. 190. Cp. Yellow Poplar Lumber Co. *v.* Daniel, 109 Fed. Rep. 39 (C. C. A.).

[42] See Green *v.* Green, 34 Kan. 740.

case of *Goddard* v. *Snow* (*p*), there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated" (*q*).[43]

The Married Women's Property Act, 1882, has made the subject obsolete in this country as regards all marriages contracted after its commencement, and there has been no reported decision for many years. It is now thought advisable to omit the details given in former editions.

[As the details thus referred to still have value in this country they are here reprinted from the Fourth English edition, the latest in which they appeared.

In order to have such a settlement set aside the husband must prove:

(i) That he was the intended husband at the date of the settlement—*i. e.* that there was then a complete contract to marry, which continued until the marriage (*o*).

(ii) That the settlement was not known to him till after the marriage (p^1).

What if the intended husband knows that some disposition has been or is to be made, but not its contents? The doctrine as far as it has gone seems to be that such knowledge makes it the duty of the husband to inform himself, and if he omits inquiry he cannot afterwards complain (q^1); but if he does inquire, and incorrect information is

(*p*) (1826) 1 Russ. 485. See the earlier authorities there discussed.

(*q*) *England* v. *Downs*, 2 Beav. 529; 50 R. R. 273. Cp. *Downes* v. *Jennings* (1863) 32 Beav. 290, 294. See further *St. George* v. *Wake* (1831–3) 1 My. & K. 610, 625, 36 R. R. 389; *Wrigley* v. *Swainson* (1849) 3 De G. & Sm. 458; *Prideaux* v. *Lonsdale* (1863) 4 Giff. 159, on appeal, 1 D. J. & S. 433, 438, no decision on this part of the case; *Taylor* v. *Pugh* (1842) 1 Hare 608.

(*o*) England *v.* Downs, *supra.* Cp. Downes *v.* Jennings, 32 Beav. 290, 294. [See Gainor *v.* Gainor, 26 Ia. 237; Butler *v.* Butler, 21 Kan. 521; Wilson *v.* Daniel, 13 B. Mon. 348; Williams *v.* Carle, 2 Stockt. Ch. 543, 552; Gregory *v.* Winston, 23 Gratt. 102.]

(p^1) St. George *v.* Wake, 1 My. & K. 610, 625 [Prather *v.* Burgess, 5 Cr. C. C. 376; Cheshire *v.* Payne, 16 B. Mon. 618; Cole *v.* O'Neill, 3 Md. Ch. 174; Murray *v.* Murray, 90 Ky. 1; Terry *v.* Hopkins, 1 Hill Ch. 1; McClure *v.* Miller, 1 Bailey Eq. 107; Fletcher *v.* Ashley, 6 Gratt. 332, per Brooke, J. But see Ferebee *v.* Pritchard, 112 N. C. 83.]

. . . (q^1) Wrigley *v.* Swainson, 3 De G. & Sm. 458. [Cp. Spencer *v.* Spencer, 3 Jones Eq. 404; Johnson *v.* Peterson, 6 Jones Eq. 12].

[43] Linker *v.* Smith, 4 Wash. C. C. 224; Chandler *v.* Hollingsworth, 3 Del. Ch. 99; Leary *v.* King, 6 Del. Ch. 108; McAfee *v.* Ferguson, 9 B. Mon. 475; Tucker *v.* Andrews, 13 Me. 124; Strong *v.* Menzies, 6 Ired. Eq. 544; Robinson *v.* Buck, 71 Pa. 386; Hall *v.* Carmichael, 8 Baxt. 211. This, notwithstanding the Married Women's Separate Property Acts. Freeman *v.* Hartman, 45 Ill. 57; Beere *v.* Beere, 79 Ia. 555; Baker *v.* Jordan, 73 N. C. 145; Belt *v.* Ferguson, 3 Grant's Cas. 289; Duncan's Appeal, 43 Pa. 67.

given, this is equivalent to total concealment (*r*). According to the modern doctrine no difference is made by collateral circumstances, "such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement [which is impeached], as in the case of a settlement upon the children of a former marriage" or the like.[44]

Nevertheless relief may be refused on the ground that the husband's conduct before the marriage has been such as to "put it out of the power of the wife effectually to make any stipulation for the settlement of her property:" as where there has been previous seduction (*s*).

It is said that if the husband discovers the settlement before the marriage takes place, he may rescind the contract to marry, and will have a good defense to an action for breach of promise of marriage (*t*). This seems only reasonable, but we do not know of any direct authority for it. Finally, we venture to suggest that the doctrine might well be put on a broader ground than appears in the cases.

The contract to marry gives rise to a new status between the parties, to which mutual duties are incident beyond the simple performance of the contract by marriage at the time expressed or contemplated (*u*). Among these may fairly be reckoned the observance of the utmost good faith in all things, and in particular the duty of not making without the other party's consent any disposition of property of such a permanent and considerable kind as might affect the order and condition of the future household. Such conduct shows a want of confidence which the other party is entitled to treat as incompatible with

(*r*) Prideaux *v.* Lonsdale, 4 Giff. 159. The Court of Appeals (1 D. J. S. 433, 438) declined to say any thing on this part of the case, affirming the decision on the ground that the settler herself did not understand the effect of her act.

(*s*) Taylor *v.* Pugh, 1 Ha. 608, 614–6. [Anonymous, 34 Ala. 430.] In Downes *v.* Jennings, 32 Beav. 290, no importance was attached to the parties having lived together before marriage. But the circumstances were such as to show that their conduct was deliberate. The husband's right to set aside the settlement, like all rights of setting aside or rescinding voidable transactions, may be lost by acquiescence or delay amounting to proof of acquiescence. Loader *v.* Clarke, 2 Mac & G. 382.

(*t*) By Sir John Leach, M. R. in St. George *v.* Wake, *supra*. [Cheshire *v.* Payne, 16 B. Mon. 618.]

(*u*) Frost *v.* Knight, L. R. 7 Ex. 111, 115, 118.

[44] Wilson *v.* Wilson, 23 Ky. L. Rep. 1229; Logan *v.* Simmons, 3 Ired. Eq. 487; Goodson *v.* Whitfield, 5 Ired. Eq. 163; Tisdale *v.* Bailey, 6 Ired. Eq. 358; Brinkley *v.* Brinkley, 128 N. C. 503; Ward *v.* Ward, 63 Ohio St. 125; Ramsay *v.* Joyce, 1 McMullan's Eq. 236; Manes *v.* Durant, 2 Rich. Eq. 404. *Contra*, Kinne *v.* Webb. 54 Fed. Rep. 34; Alkire *v.* Alkire, 134 Ind. 350; Hamilton *v.* Smith, 57 Ia. 15; Fennessey *v.* Fennessey, 84 Ky. 519; Champlin *v.* Champlin, 16 R. I. 314; Green *v.* Goodall, 1 Coldw. 404; Dudley *v.* Dudley, 76 Wis. 567. See also Ross's Appeal, 127 Pa. 4.

the marriage contract. Looking at it in this way, there seems no reason why the rule should not apply to both parties equally. The expectation of acquiring a marital right cannot be said really to exist in most cases. There is in truth a mutual expectation of acquiring what is practically a common interest. It is obvious, however, that as a rule the only motive for a clandestine settlement is the woman's desire to exclude the marital right of the future husband. Since no such motive can exist on the other side, the converse case of a clandestine settlement by the man is most unlikely to happen; there is little chance, therefore, that the correctness of the view here suggsted will ever be brought to a decisive test.[45] One reported case, however, supplies some analogy. By a marriage settlement the husband's father settled a jointure on the wife; by a secret bond of even date the husband indemnified his father against the payment of it; this indemnity was held void as "a fraud upon the faith of the marriage contract" (*x*).]

4. **Marriage within prohibited degrees.** Marriages within the prohibited degrees of kindred and affinity are another class of transactions

(*x*) Palmer *v.* Neave, 11 Ves. 165. Cp. the other similar cases cited in Story Eq. Jur. §§ 266–271. One or two of these, however, are really cases of estoppel.

[45] In this country it is well settled that a secret conveyance of his real estate by a man on the eve of his marriage is voidable as against his wife's right of dower. Kelly *v.* McGrath, 70 Ala. 75; Chandler *v.* Hollingsworth, 3 Del. Ch. 99; Petty *v.* Petty, 4 B. Mon. 215; Leach *v.* Duvall, 8 Bush, 201; Cranson *v.* Cranson, 4 Mich. 230; Brown *v.* Bronson, 35 Mich. 415; Hach *v.* Rollins, 158 Mo. 182; Rice *v.* Waddill, 168 Mo. 99; Brinkley *v.* Brinkley, 128 N. C. 503; Arnegaard *v.* Arnegaard, 7 N. Dak. 475; Ward *v.* Ward, 63 Ohio St. 125; Brooks *v.* Meekin, 37 S. C. 285; Dudley *v.* Dudley, 76 Wis. 567. See also Peek *v.* Peek, 77 Cal. 106; Fennessey *v.* Fennessey, 84 Ky. 519. Cp. Dearmond *v.* Dearmond, 10 Ind. 191; Butler *v.* Butler, 21 Kan. 521.

As to whether under our registry laws the record of the conveyance of real estate by the intended husband or wife should operate as constructive notice to the other party, see 2 Bishop on the Law of Married Women, § 345; Ferebee *v.* Pritchard, 112 N. C. 83; Brinkley *v.* Brinkley, 128 N. C. 503.

The doctrine has been extended to conveyances of land made after marriage in fraud of the wife's right of inheritance. Smith *v.* Smith, 22 Col. 480; Murray *v.* Murray, 90 Ky. 1; Brownell *v.* Briggs, 173 Mass. 529; Walker *v.* Walker, 66 N. H. 390, 392. But see Stewart *v.* Stewart, 5 Conn. 317.

That the same rule applies to transfers of personalty has been held in Wilson *v.* Wilson, 23 Ky. L. Rep. 1229; Manikee *v.* Boyd, 85 Ky. 20; Newton *v.* Newton, 162 Mo. 173; Rice *v.* Waddill, 168 Mo. 99; Thayer *v.* Thayer, 14 Vt. 107. See also Green *v.* Adams, 59 Vt. 602; but denied in Padfield *v.* Padfield, 78 Ill. 16; Small *v.* Small, 56 Kan. 1; Dunnock *v.* Dunnock, 3 Md. Ch. 140; Cranson *v.* Cranson. 3 Mich. 230; Holmes *v.* Holmes, 3 Paige, 363; Brodt *v.* Hickman, 7 Ohio N. P. 79; Pringle *v.* Pringle, 59 Pa. 281.

If the husband was to retain the benefit of the property during his life, the transaction clearly will not be allowed to prejudice the wife's rights. Hatcher *v.* Buford, 60 Ark. 169; Tyler *v.* Tyler, 126 Ill. 525; Potter *v.* Fidelity Co., 199 Pa. 369.

contrary to positive law. For although no direct temporal penalties are attached to them, they have been made the subject of express and definite statutory prohibition (*r*). They formerly could not be treated as void unless declared so by an ecclesiastical Court in the lifetime **290]** of the parties: but *by a modern statute (5 & 6 Wm. 4, c. 54) they are now absolutely void for all purposes. An executory contract to marry within the prohobited degrees is of course absolutely void also (*s*), and would indeed have been so before the statute. These rules are not local, like other rules of municipal law prescribing the solemnities of the marriage ceremony, requiring the consent of particular persons, or the like: the legislature has referred the prohibition to public grounds of a general nature (speaking of these marriages as "contrary to God's law") (*t*), and it concerns not the form but the substance of the contract; it therefore applies to the marriages of domiciled British subjects, in whatever part of the world the ceremony be performed, and whether the particular marriage is or is not of a kind allowed by the local law (*u*).[46]

(*r*) 32 H. 8, c. 38, and earlier repealed statutes of the same reign. It is the better supported opinion that 5 & 6 Wm. 4, c. 54, does not contain any new substantive prohibition. See *Brook* v. *Brook* (1861) 9 H. L. C. 193.

(*s*) It seems from *Millward* v. *Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2, that in the barely possible case of the relationship being known to only one of the parties, by whom it is fraudulently concealed from the other, the innocent party may sue as for a breach of contract, though the performance of the agreement would be unlawful. Here the ground of liability is really not contract but estoppel.

(*t*) The use of these particular words seems of little importance. It would certainly appear bold to apply them to marriages which are permissible by dispensation in the Canon law, and allowed unconditionally by the German Civil Code. [See the remarks of Gray, C.J., in Commonwealth *v.* Lane, 113 Mass. at pp. 470, 471.] The true reason is shortly put by Savigny, Syst. 8, 326: "die hier einschlagenden Gesetze, die auf sittlichen Rücksichten beruhen, haben eine streng positive Natur." Savigny's authority is perhaps sufficient to defend the doctrine of *Brook* v. *Brook* against the caustic criticism passed upon it by the Chief Justice of Massachusetts in *Commonwealth* v. *Lane* (1873) 113 Mass. at p. 473:—

"The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man but a conclusive declaration of the law of God; and the result is that the law of God, as declared by Act of Parliament, and expounded by the House of Lords, varies according to the time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure."

(*u*) *Brook* v. *Brook* (1861) 9 H. L. C. 193. See per Lord Campbell at p. 220. He also doubted whether a marriage allowed by the law of the place, but contracted by English subjects who had come there on purpose to evade the English law, would be recognized even by the local courts. Cp. *Sottomayor* v. *De Barros*, *infra*.

46 In the very learned opinion of Gray, C. J., in Commonwealth *v.* Lane, 113 Mass. 458, where the earlier Massachusetts and the English cases are collected, it is said: "A marriage which is prohibited here by statute because contrary to the policy of our law is yet valid if celebrated elsewhere accord-

Where a marriage has been contracted in England between foreigners domiciled abroad, English Courts will recognize disabilities, though not being *iuris gentium,* *imposed by the law of the domicil [291 of both parties (*x*) :[47] but a marriage celebrated in England is not held invalid by English Courts on the ground that one of the parties is subject by the law of his or her domicile to a prohibition not recognized by English law, at all events where the other party's domicile is English (*y*).

Royal Marriage Act. The "Act for the better regulating the future marriages of the Royal Family" (12 Geo. 3, c. 11) imposes on the persons within its operation disabilities (absolute before the age of 25, qualified after that age) to marry without the consent of the Sovereign; and this disability is personal, not local, so that a marriage without consent is equally invalid wherever celebrated (*z*).

Agreements illegal by statute. Moreover a great variety of dealings of which contracts form part, or to which they are incident in the ordinary course of affairs, are for extremely various reasons forbidden or restricted by statute. In the eighteenth century, in particular, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied. Most of these are now repealed, but the decisions upon them established principles on which our Courts still act in dealing with statutes of this kind.

(*x*) *Sottomayor* v. *De Barros* (1877) 3 P. Div. 1, 47 L. J. P. 23.

(*y*) *Sottomayor* v. *De Barros* (1879) 5 P. D. 94, dissenting from some dicta in the previous judgment of the C. A., which however went on a supposed different state of the facts. See further, on this perplexed topic, Sir Howard Elphinstone's "Notes on the English Law of Marriage" in L. Q. R. v. 44, and the chapter on Marriage in Dicey, "Conflict of Laws."

(*z*) The *Sussex Peerage case* (1844) 11 Cl. & F. 85.

ing to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the State shall have no validity here." Ponsford *v.* Johnson, 2 Blatchf. 51. And see Stevenson *v.* Gray, 17 B. Mon. 193; Whippen *v.* Whippen, 171 Mass. 560; Van Voorhis *v.* Brintnall, 86 N. Y. 18; Thorp *v.* Thorp, 90 N. Y. 602; Moore *v.* Hegeman, 92 N. Y. 521; State *v.* Shattuck, 69 Vt. 403. *Contra,* Norman *v.* Norman, 121 Cal. 620; Wilhite *v.* Wilhite, 41 Kan. 154; Williams *v.* Oates, 5 Ired. L. 535; State *v.* Kennedy, 76 N. C. 251; Pennegar *v.* State, 87 Tenn. 244; Newman *v.* Kimbrough, 59 S. W. Rep. 1061 (Tenn.); Kinney *v.* Commonwealth, 30 Gratt. 858. See also State *v.* Tutty, 41 Fed. Rep. 753; McLennan *v.* McLennan, 31 Oreg. 480.

[47] In Milliken *v.* Pratt, 125 Mass. 374, Gray, C. J., at p. 381, says of Sottomayor *v.* De Barros, 3 P. D. 1, that the decision "it is utterly opposed to our law; and consequently the dictum of Lord Justice Cotton, 'is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile' is entitled to little weight here."

Construction of prohibitory statutes. The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. So far as we have to do with it here, we have in each case to ask, Does the Act mean to forbid this agreement or not? And in each case the language of the particular Act must be considered on its own footing. Decisions on the same Act may of course afford direct authority. But decisions on more or
292] less similar enact*ments, and even on previous enactments on the same subject, cannot as a rule be regarded as giving more than analogies. Attempts have indeed been made at different times to lay down fixed rules, nominally of construction, but really amounting to rules of law which would control rather than ascertain the expressed intention of the legislature. But in recent times our Courts have fully and explicitly disclaimed any such powers of interpretation.

"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act;" provided that the words be "sufficient to accomplish the manifest purpose of the Act" (*a*).[48]

The effect of plain and unambiguous words is not to be limited by judicial construction even though anomalous results should follow (*b*).

Policy of statutes. On the other hand the general intention is to be regarded, and may if necessary prevail over particular expressions, no less than in the interpretation of private instruments. But it must also be an intention collected from what the legislature has said, not arrived at by conjectures of what the legislature might or ought to have meant (*c*). A transaction not in itself immoral is not to be held unlawful on a conjectural view of the policy of a statute (*d*). The true policy of a statute is for a court of justice neither more nor less than its true construction. The Courts no longer under-

(*a*) Opinion of the Judges in the *Sussex Peerage case* 11 Cl. & F. at p. 143, per Tindal C.J.: per Lord Brougham at p. 150. And see per Knight Bruce L.J. *Crofts* v. *Middleton* (1856) 8 D. M. & G. at p. 217; per Lord Blackburn, in *River Wear Commrs.* v. *Adamson* (1877) 2 App. Ca. at p. 764, 47 L. J. Q. B. 193.

(*b*) *Cargo ex Argos*, &c. (1872–3) L. R. 5 P. C. at pp. 152–3. The doctrine formerly current (in accordance with the prevailing speculative opinion on the Continent), that statutes might be disregarded if the Courts thought them contrary to reason, common right, or natural equity (all synonymous terms for this purpose), has long been repudiated: see per Willes J. *Lee* v. *Bude, &c. Ry Co.* (1871) L. R. 6 C. P. 576, 582, 40 L. J. C. P. 285; cp. Journ. Soc. Comp. Leg. N. S. ii. at p. 423.

(*c*) Cp. pp. *255, *256, above.

(*d*) *Barton* v. *Muir* (1874) L. R. 6 P. C. 134, 44 L. J. P. C. 19.

[48] Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction." Thornley *v.* United States, 113 U. S. 310, 313.

take either to cut short or to widen the effect of legislation according to their views of what ought to be the *law. "Before we can [293 make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so" (*e*).

The cases in which acts of corporate bodies created for special purposes have been held void as "contrary to the policy of the legislature" and tending to defeat the objects of the incorporation have already been considered in Ch. II.

These principles, when applied to the more limited subject-matter of prohibitory statutes, give the following corollaries:

(a) **No difference between malum prohibitum and malum in se.** When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita* (*i.e.* things which if not forbidden by positive law would not be immoral) and *mala in se* (*i.e.* things which are so forbidden as being immoral).[49]

(b) **Penalty prima facie imports prohibition.** The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.[50]

These rules are established by the case of *Bensley* v. *Bignold* (*f*), which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute (*g*). It was argued that the contract was good, as the Act contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best J. said that the distinction between *mala prohibita* and *mala in se* was long since

(*e*) Field, J., 4 Q. B. D. at p. 224. (*g*) See now 32 & 33 Vict. c. 24.
(*f*) (1822) 5 B. & Ald. 335, 24 R. R. 401.

[49] Bank *v.* Owens, 2 Pet. 527, 539; Gibbs *v.* Baltimore Gas Co., 130 U. S. 396; Penn *v.* Bornman, 102 Ill. 523, 530; Greenough *v.* Balch, 7 Me. 461; White *v.* Buss, 3 Cush. 448; Downing *v.* Ringer, 7 Mo. 585; Hill *v.* Spear, 50 N. H. 253, 277; Rossman *v.* McFarland, 9 Ohio St. 369, 379; Holt *v.* Green, 73 Pa. 198; Melchoir *v.* McCarty, 31 Wis. 252.

[50] Clarke *v.* Insurance Co., 1 Story, 109, 122; Swann *v.* Swann, 21 Fed. Rep. 299; Woods *v.* Armstrong, 54 Ala. 150; Harrison *v.* Jones, 80 Ala. 412; Campbell *v.* Segars, 81 Ala. 259; Youngblood *v.* Birmingham Trust Co., 95 Ala. 521; Berka *v.* Woodward, 125 Cal. 119; Funk *v.* Gallivan, 49 Conn. 124; Dillon *v.* Allen, 46 Ia. 299; Durgin *v.* Dyer, 68 Me. 143; Roby *v.* West, 4 N. H. 285; Brackett *v.* Hoyt, 29 N. H. 264; Gregory *v.* Wilson, 36 N. J. L. 315; Covington *v.* Threadgill, 88 N. C. 186; Bloom *v.* Richards, 2 Ohio St. 387, 395; Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333, 338; Connell *v.* Kitchens, 20 S. C. 430; Elkins *v.* Parkhurst, 17 Vt. 105; Bancroft *v.* Dumas, 21 Vt. 456.

exploded. The same doctrine has repeatedly been enounced in later cases.

294] *Thus, for example, by the Court of Exchequer:

"Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition" (*h*).

It is needless to discuss the "policy of the law" when it is distinctly enunciated by a statutory prohibition (*i*).[51]

(c) **But absence of penalty does not alter express prohibition.** Conversely, the absence of a penalty, or the failure of a penal clause in the particular instance, will not prevent the Court from giving effect to a substantive prohibition (*k*).[52]

(d) **What may not be done directly must not be done indirectly—Booth v. Bank of England.** What the law forbids to be done directly cannot be made lawful by being done indirectly.

In *Booth* v. *Bank of England* (*l*) a joint-stock bank procured its manager to accept certain bills on the understanding that the bank would find funds, these bills being such as the bank itself could not have accepted without violating the privileges of the Bank of England. It was held by the House of Lords, following the opinion of the judges, that this proceeding "must equally be a violation of the rights and privileges of the Bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance:" for the acceptor was merely nominal, and the bills were in fact meant to circulate on the credit of the bank.

Bank of U. S. v. Owens. In *Bank of United States* v. *Owens* (*m*)[53] (Supreme Court, U.S) the charter of the bank forbade the taking of

(*h*) *Cope* v. *Rowlands* (1836) 2 M. & W. 149, 157, 46 R. R. 532, 539. Cp. *Chambers* v. *Manchester & Milford Ry. Co.* (1864) 5 B. & S. 588, 33 L. J. Q. B. 268; *Re Cork & Youghal Ry. Co.* (1869) L. R. 4 Ch. 748, 758, 30 L. J. Ch. 277.

(*i*) See per Lord Cranworth, *Ex parte Neilson* (1853) 3 D. M. & G. 556, 566.

(*k*) *Sussex Peerage case* (1844) 11 Cl. & F. at pp. 148–9.

(*l*) (1840) 7 Cl. & F. 509, 540, 51 R. R. 36, upholding *Bank of England* v. *Anderson* (1836) 2 Keen 328, 3 Bing. N. C. 589, 44 R. R. 271.

(*m*) (1829) 2 Peters 527.

51 Bank *v.* Stegall, 41 Miss. 142, 183; Covington *v.* Threadgill, 88 N. C. 186.

52 Melchoir *v.* McCarty, 31 Wis. 252.

53 See also Workingmen's Bkg. Assoc. *v.* Rautenberg, 103 Ill. 460; Clarke *v.* Lincoln Lumber Co., 59 Wis. 655.

a *greater rate of interest than six per cent., but did not say [295 that a contract should be void in which such interest was taken. A note payable in gold was discounted by a branch of the bank in a depreciated local paper currency at its nominal value, so that the real discount was much more than six per cent. The Court held this transaction void, though there was no express prohibition of an *agreement to* take higher interest, and though the charter spoke only of *taking,* not of *reserving* interest. Parts of the judgment are as follows: "A fraud upon a statute is a violation of the statute." "It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict a penalty it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do."

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal . . . . there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*" (*n*).

The cases are similar in principle in which transactions have been held void as attempts to evade the bankruptcy law: thus, to take only one example, a stipulation that a security shall be increased in the event of the debtor's bankruptcy, or any provision designed for the like purpose and having the like effect, is void (*o*).

***Where conditions prescribed for conduct of particular trade, &c., non-observance of them.** [296 When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—

(e) **Avoids agreements if the conditions are for general public purposes.** Are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or

(*n*) 2 Peters 536, 539.

(*o*) *Ex parte Mackay* (1873) L. R. 8 Ch. 643, 42 L. J. Bk. 68; *Ex parte Williams* (1877) 7 Ch. Div. 138, where the device used was the attornment of the debtor to his mortgagee at an excessive rent; *Ex parte Jackson* (1880) 14 Ch. Div. 725. It must be shown, to vitiate a transaction on this ground, that the provision was inserted in contemplation of bankruptcy and for the purpose of defeating the bankruptcy law: *Ex parte Voisey* (1882) 21 Ch. Div. 442, 461, 52 L. J. Ch. 121.

safety or the protection of the persons dealing with those on whom the condition is imposed:[54]

(f) **Not if for merely administrative purposes.** Are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.* the convenient collection of the revenue.[55]

Illustrations. The following are instances illustrating this distinction:—

AGREEMENT VOID.

Ritchie v. *Smith* (1848) 6 C. B. 462, 18 L. J. C. P. 9. The owner of a licensed house underlet part of it to another person, in order that he might

[54] Law *v.* Hodson, 11 East, 300; Little *v.* Poole, 9 B. & C. 192; Forster *v.* Taylor, 5 B. & Ad. 887; Miller *v.* Ammon, 145 U. S. 421; Hawkins *v.* Smith, 2 Cr. C. C. 173; Thompson *v.* Milligan, 2 Cr. C. C. 173; Lang *v.* Lynch, 38 Fed. Rep. 489; Gunter *v.* Leckey, 30 Ala. 591; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Merriman *v.* Knox, 99 Ala. 93; Gardner *v.* Tatum, 81 Cal. 370; Kleckley *v.* Leyden, 63 Ga. 215; Johnston *v.* McConnell, 65 Ga. 129; Lorentz *v.* Conner, 69 Ga. 761; Tedrick *v.* Hiner, 61 Ill. 189; East St. Louis *v.* Freels, 17 Ill. App. 338; Hustis *v.* Picklands, 27 Ill. App. 270; Richardson *v.* Brix, 94 Ia. 626; Dolson *v.* Hope, 7 Kan. 161; Vannoy *v.* Patton, 5 B. Mon. 248; Mabry *v.* Bullock, 7 Dana, 337; Bull *v.* Harragan, 17 B. Mon. 349; Buxton *v.* Hamblen, 32 Me. 448; Durgin *v.* Dyer, 68 Me. 143; Richmond *v.* Foss, 77 Me. 590; Black *v.* Security Mut. Assoc., 95 Me. 35; Miller *v.* Post, 1 Allen, 434; Libby *v.* Downey, 5 Allen, 299; Wheeler *v.* Russell, 17 Mass. 257; Hewes *v.* Platts, 12 Gray, 143; Smith *v.* Arnold, 106 Mass. 269; Sawyer *v.* Smith, 109 Mass. 220; Eaton *v.* Kegan, 114 Mass. 433; Prescott *v.* Battersby, 119 Mass. 285; Loranger *v.* Jardine, 56 Mich. 518; Solomon *v.* Dreschler, 4 Minn. 278; Bisbee *v.* McAllen, 39 Minn. 143; Buckley *v.* Humason, 50 Minn. 195; Pray *v.* Burbank, 10 N. H. 377; Lewis *v.* Welch, 14 N. H. 294; Caldwell *v.* Wentworth, 14 N. H. 431; Doe *v.* Burnham, 31 N. H. 426; Griffith *v.* Wells, 3 Denio, 226; Covington *v.* Threadgill, 88 N. C. 186; Holt *v.* Green, 73 Pa. 198; Johnson *v.* Hulings, 103 Pa. 498; Swing *v.* Munson, 191 Pa. 582; McConnell *v.* Kitchens, 20 S. C. 430; Stephenson *v.* Ewing, 87 Tenn. 46; Bancroft *v.* Dumas, 21 Vt. 456; Gorsuth *v.* Butterfield, 2 Wis. 237. See also Singer Mfg. Co. *v.* Draper, 103 Tenn. 262.

Cp. Harris *v.* Runnels, 12 How. 79; The Manistee, 5 Biss. 381; The Charles E. Wisewall, 74 Fed. Rep. 802; Pangborn *v.* Westlake, 36 Ia. 547; Coombs *v.* Emery, 14 Me. 404; Ritchie *v.* Boynton, 114 Mass. 431; People's Bank *v.* Alabama R. Co., 65 Miss. 365; Houck *v.* Wright, 77 Miss. 476; Drake *v.* Siebold, 81 Hun, 178; Strong *v.* Darling, 9 Ohio 201; Niemeyer *v.* Wright, 75 Va. 239; National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352.

[55] In the following cases it was held to afford no defense to a contract that it was made in violation of a revenue law:

Johnson *v.* Hudson, 11 East. 180; Brown *v.* Duncan, 10 B. & C. 93; Smith *v.* Mawhood, 14 M. & W. 452; Larned *v.* Andrews, 106 Mass. 435; Mandlebaum *v.* Gregovitch, 17 Nev. 87; Corning *v.* Abbott, 54 N. H. 469; Ruckman *v.* Bergholz, 37 N. J. L. 437; Woodward *v.* Stearns, 10 Abb. Pr. N. S. 395 (see also Griffith *v.* Wells, 3 Denio, 226); Rahter *v.* First Nat. Bank, 92 Pa. 393 (see also Hertzler *v.* Geigley, 196 Pa. 419); Aiken *v.* Blaisdell, 41 Vt. 655. But see *contra*, Creekmore *v.* Chitwood, 7 Bush, 317; Harding *v.* Hagar, 60 Me. 340; 63 Me. 515 (but see Randall *v.* Tuell, 89 Me. 442, 448); Curran *v.* Downs, 3 Mo. App. 468; Hall *v.* Bishop, 3 Daly, 109; Best *v.* Bauder, 29 How. Pr. 489; Condon *v.* Walker, 1 Yeates, 483; Sewell *v.* Richmond, Taylor (U. C. K. B.) 423; Mullen *v.* Kerr, 6 U. C. Q. B. (O. S.) 171.

there deal in liquor on his own account under color of his lessor's licence and without obtaining a separate licence. This agreement was void, its purpose being to enable one of the parties to infringe an Act passed for the protection of public morals: (the licensing Acts are of this nature, and not merely for the benefit of the revenue, for this reason, that licenses are not to be had as a matter of right by paying for them). For the same reason and also because there is a specific penalty for each offence against the licensing law, it seems that a sale of liquor in an unlicensed house is void (*p*). *Hamilton* v. *Grainger* (1859) 5 H. & N. 40.

Taylor v. *Crowland Gas Co.* (1854) 10 Ex. 293, 23 L. J. Ex. 254. A penalty being imposed by statute on unqualified persons acting as conveyancers (*q*), the Court held that the object was not merely the gain to the revenue from the duties on certificates, but the protection of the public from unqualified practitioners; an unqualified person was therefore not allowed to recover for work of this nature. Cp. *Leman* v. *Houseley* (1874) L. R. 10 Q. B. 66, 44 L. J. Q. B. 22.

Fergusson v. *Norman* (1838) 5 Bing. N. C. 76, 50 R. R. 613. When a *pawnbroker lent money without complying with the requirements of the [297 statute, the loan was void and he had no lien on the pledge (*r*).

In *Stevens* v. *Gourley* (1859) 7 C. B. N. S. 99, 29 L. J. C. P. 1, a builder was not allowed to recover the price of putting up a wooden shed contrary to the regulations imposed by the Metropolitan Building Act, 18 & 19 Vict. c. 122. The only question in the case was whether the structure was a *building* within the Act. But note that here the prohibition was for a public purpose, namely, to guard against the risk of fire.

Barton v. *Piggott* (1874) L. R. 10 Q. B. 86. By 5 & 6 Wm. 4, c. 50, s. 46, a penalty is imposed on any surveyor of highways who shall have an interest in any contract, or sell materials, &c. for work on any highway under his care, unless he first obtain a licence from two justices. The effect of this is that an unlicensed contract by a surveyor to perform work or supply materials for any highway under his care is absolutely illegal, and there is no discretion to allow payments in respect of it.

Contract not Avoided.[56]

Bailey v. *Harris* (1849) 12 Q. B. 905, 18 L. J. Q. B. 115. A contract of sale is not void merely because the goods are liable to seizure and forfeiture to the Crown under the excise laws.

Smith v. *Mawhood* (1845) 14 M. & W. 452, 15 L. J. Ex. 149. The sale of an exciseable article is not avoided by the seller having omitted to

(*p*) For the penal enactments now in force see the Licensing Acts, 1872–1874.

(*q*) Now by 33 & 34 Vict. c. 97, s. 60.

(*r*) The present Pawnbrokers Act (1872; 35 & 36 Vict. c. 93, s. 51), enacts that an offence against the Act by a pawnbroker, not being an offence against any provision relating to licences, shall not avoid the contract or deprive him of his lien.

56 "The Revised Statutes of the United States respecting national banks provide that a bank shall not lend to any one person, corporation, or firm a sum exceeding one-tenth part of the capital stock actually paid in, and that national banks shall not take real estate as collateral security except for debts previously contracted; and it has been repeatedly held that contracts made in contravention of the statute are not void. Gold Mining Co. *v.* National Bank, 96 U. S. 640; National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99; Reynolds *v.* Crawfordsville National Bank, 112 U. S. 405.

"Where the officers of a saving bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment. Holden *v.* Upton, 134 Mass. 177." Bowditch *v.* New England Ins. Co., 141 Mass. 292, 294.

Similar decisions under various banking laws are: Savings Bank *v.* Burns,

paint up his name on the licensed premises as required by 6 Geo. 4, c. 18, s. 25. Probably this decision would govern the construction of the very similar enactment in the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 11.)

Smith v. *Lindo* (1858) 4 C. B. N. S. 395, in Ex. Ch. 5 C. B. N. S. 587, 27 L. J. C. P. 196, 335. One who acts as a broker in the City of London without being licensed under 6 Ann. c. 68 (Rev. Stat.: al. 16) and 57 Geo. 3, c. lx. (*s*) cannot recover any commission, but a purchase of shares made by him in the market is not void; and if he has to pay the purchase-money by the usage of the market, he can recover from his principal the money so paid.

And in general an agreement which the law forbids to be made is
298] void if made. But an agreement forbidden by *statute may be saved from being void by the statute itself, and on the other hand an agreement made void or not enforceable by statute is not necessarily illegal. An agreement may be forbidden without being void, or void without being forbidden.

(g) **Agreement not void though forbidden, if statute expressly so provides.** Where a statute forbids an agreement, but says that if made it shall not be void, then if made it is a contract which the Court must enforce.[57]

By 1 & 2 Vict. c. 106, it is unlawful for a spiritual person to engage in trade, and the ecclesiastical Court may inflict penalties for it. But by s. 31 a contract is not to be void by reason only of being entered into by a spiritual person contrary to the Act. It was contended without success in *Lewis* v. *Bright* (*t*) that this proviso could not apply when the other party knew with whom he was dealing. But the Court held that the knowledge of the other party was immaterial; the legislature meant to provide against the scandal of such a defence being set up. And Erle J. said that one main purpose of

(*s*) These Acts are repealed as to the power of the city court to make rules, &c., but not as to the necessity of brokers being admitted, by the somewhat obscurely framed London Brokers' Relief Act, 1870, 33 & 34 Vict. c. 60.

(*t*) (1875) 4 E. & B. 917, 24 L. J. Q. B. 191.

104 Cal. 473; Union Mining Co. *v.* Rocky Mountain Nat. Bank, 1 Col. 531; Voltz *v.* National Bank, 158 Ill. 532; Benton County Bank *v.* Boddicker, 105 Ia. 548; Lester *v.* Howard Bank, 33 Md. 556; Allen *v.* First Nat. Bank, 23 Ohio St. 97; First Nat. Bank *v.* Smith, 8 S. Dak. 7; Wroten's Assignee *v.* Armat, 31 Gratt. 228.

So in the case of insurance companies. Bowditch *v.* New England Ins. Co., 141 Mass. 292; Ohio Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. 1. See further, 2 Cook on Corporations (5th ed.), 1625 *et seq.*

In this connection may well be considered many decisions in regard to contracts of foreign corporations forbidden by law to enter into such contracts. See 2 Cook on Corporations (5th ed.), 1677.

[57] McMahon *v.* Borden, 39 Conn. 316; Pangborn *v.* Westlake, 36 Ia. 546; Vining *v.* Bricker, 14 Ohio St. 331.

the law was to make people perform their contracts, and in this case it fortunately could be carried out.

(h) Agreement may be simply not enforceable, but not otherwise unlawful. Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not be be enforced, there neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.[58]

Modern legislation has produced some very curious results of this kind. In several cases the agreement cannot even be called void, being good and recognizable by the law for some purposes or for every purpose other than that of creating a right of action. These cases are reserved for a special chapter (*u*).

***Wagers—Void, but not absolutely illegal—Fitch v. Jones.** In the [299 case of wagers the agreement is null and void by 8 & 9 Vict. c. 109, s. 18, and money won upon a wager cannot be recovered either from the loser or from a stake-holder (with a saving as to subscriptions or contributions for prizes or money to be awarded "to the winner of any lawful game, sport, pastime, or exercise"; the saving extends only to cases where there is a real competition between two or more persons (*x*),[59] and the "subscription or contribution" is not money

(*u*) See Ch. XIII., On Agreements of Imperfect Obligation. The distinction between an enactment which imposes a penalty without making the transaction void, and one which makes the forbidden transaction void, is expressed in Roman law by the terms *minus quam perfecta lex* and *perfecta lex*. Ulp. Reg. 1 § 2, cp. Sav. Syst. 4. 550. A constitution of Theodosius and Valentinian (Cod. 1. 14. de leg. 5) enjoined that all prohibitory enactments were to be construed as avoiding the transactions prohibited by them (that is, as *leges perfectae*) whether it were so expressed or not.

(*x*) *E.g.* a wager that a horse will trot eighteen miles in an hour is not within it, as there can be no winner in the true sense of the clause: *Batson* v. *Newman* (1876) 1 C. P. Div. 573. Nor a so-called competition where the event is determined by chance or by a choice so arbitrary as to be equivalent to chance: *Barclay* v. *Pearson* (the "missing word" case) [1893] 2 Ch. 154, 62 L. J. Ch. 636.

[58] Adopted by the court in Chapman *v.* County of Douglas, 107 U. S. 348, 356; Johnson *v.* Meeker, 1 Wis. 436.

[59] Contests of speed for "purses, prizes, or premiums," are not bets or wagers. Harris *v.* White, 81 N. Y. 532; Alvord *v.* Smith, 63 Ind. 58; Molk *v.* Daviess County Assoc., 12 Ind. App. 542; Delier *v.* Plymouth Soc., 57 Ia. 481; Wilkinson *v.* Stitt, 175 Mass. 581; Misner *v.* Knapp, 13 Oreg. 279; Ballard *v* Brown, 67 Vt. 586; Porter *v.* Day, 71 Wis. 296; Gates *v.* Tinning, 5 U. C. Q. B. 540. See also People *v.* Fallon, 152 N. Y. 12. *Contra*, Comly *v.* Hillegass, 94 Pa. 132. And see Stone *v.* Clay, 61 Fed. Rep. 889 (C. C. A.); West *v.* Carter, 129 Ill. 249; Morgan *v.* Beaumont, 121 Mass. 7.

Ferguson *v.* Coleman, 3 Rich. L. 99 was an action on an instrument, dated 31st January, 1843, whereby the defendant promised "to pay on the first of January, 1844, to W. S. Ferguson or bearer, nine hundred and two dollars,

deposited with a stake-holder by way of wager) (*y*). Wagers were not as such unlawful or unenforceable at common law:[60] and since the

(*y*) *Diggle* v. *Higgs* (1877) 2 Ex. Div. 422, 46 L. J. Ex. 721; *Trimble* v. *Hill* (1879) (J. C.) 5 App Ca. 342, 49 L. J. P. C. 49.

fifty-eight cents, if cotton should rise to eight cents by the first November next, and if not, to pay five hundred dollars, for value received." This instrument was given in part payment of a tract of land which the defendant had purchased of the plaintiff, and the condition happened. It was held that the contract was not a wager and the plaintiff recovered. *Acc.* Plumb *v.* Campbell, 129 Ill. 101; Wolf *v.* National Bank, 178 Ill. 85; Phillips *v.* Gifford, 104 Ia. 458; Kirkpatrick *v.* Bonsall, 72 Pa. 155. See also United States *v.* Olney, 1 Abb. (U. S.) 275; Lynch *v.* Rosenthal, 144 Ind. 86; Dion *v.* St. John Baptiste Soc., 82 Me. 319; Miller *v.* Eagle, &c. Ins. Co., 2 E. D. Smith, 268; Dunham *v.* St. Croix Mfg. Co., 34 N. Bruns. 243.

[60] Johnson *v.* Fall, 6 Cal. 359; Ross *v.* Green, 4 Harringt. 308; Dewees *v.* Miller, 5 Harringt. 347; Smith *v.* Smith, 21 Ill. 244; Beadles *v.* Bless, 27 Ill. 320; Flagg *v.* Baldwin, 38 N. J. Eq. 219, 223; Campbell *v.* Richardson, 10 Johns. 406; Harris *v.* White, 81 N. Y. 532, 544; Shepperd *v.* Sawyer, 2 Murphey, 26; McElroy *v.* Carmichael, 6 Tex. 454.

"In Irwin *v.* Williar, 110 U. S. 499, 510, the Supreme Court of the United States says of wagering contracts: 'In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (Thacker *v.* Hardy, *ubi supra*), while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. Dickson's Executor *v.* Thomas, 97 Pa. 278; Gregory *v.* Wendell, 40 Mich. 432; Lyon *v.* Culbertson, 83 Ill. 33; Melchert *v.* American Union Telegraph Co., 3 McCrary, 521; S. C., 11 Fed. Rep. 193 and note; Barnard *v.* Backhaus, 52 Wis. 593; Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Saloman, 71 N. Y. 420; Love *v.* Harvey, 114 Mass. 80.'" Harvey *v.* Merrill, 150 Mass. 1, 10. See also in accord, Edgell *v.* McLaughlin, 6 Whart. 176; Rice *v.* Gist, 1 Strobh. L. 82; Collamer *v.* Day, 2 Vt. 144.

"But when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." Irwin *v.* Williar, 110 U. S. 499, 510. In Harvey *v.* Merrill, 150 Mass. 1, 11, the court quoted this language with approval, and added "This was decided in Embrey *v.* Jemison, 131 U. S. 336. See also Kahn *v.* Walton, 46 Ohio St. 195; Cothran *v.* Ellis, 125 Ill. 496; Fareira *v.* Gabell, 89 Pa. 89; Crawford *v.* Spencer, 92 Mo. 498; Lowry *v.* Dillman, 59 Wis. 197; Whitesides *v.* Hunt, 97 Ind. 191; First Nat. Bank *v.* Oskaloosa Packing Co., 66 Ia. 41; Rumsey *v.* Berry, 65 Me. 570.

"It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. Bishop *v.* Palmer, 146 Mass. 469; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. Embrey *v.* Jemison, 131 U. S. 336, *ubi supra*, and the other cases there cited."

To the citations of the court may be added *Re* Green, 7 Biss. 338; Bartlett

statute does not create any offence or impose any penalty, a man may still without violating any law make a wager, and if he loses it pay the money or give a note for the amount (*z*). The consideration for a note so given is in point of law not an illegal consideration, but merely no consideration at all. The difference is important to the subsequent holder of such a note. If the transaction between the original parties were fraudulent or in the proper sense illegal, the burden of proof would be on the holder to show that he was in fact a holder for value;[61] but here the ordinary presumption in favour of the holder of a negotiable instrument is not excluded (*a*). At common law "if a party *loses a wager and requests another to pay it [300 for him, he is liable to the party so paying it for money paid at his request" (*b*);[62] but the Gaming Act, 1892, makes all such payments irrecoverable (*c*), as also a loan of money to be used for a wager, and to be repaid only if the borrower wins (*d*).

Attempts have been made to evade the operation of the principal Act in gambling transactions for "differences" in stocks by colourable provisions for the completion of purchase and delivery or receipt of the stocks. Whether the intention of the parties was really to buy and sell, or to wager on the price of the stocks, is a question of fact on which the verdict of a jury will not be disturbed if on the agree-

(*z*) As to British India see *Queen-Empress* v. *Narottamdás Motirám* (1889) I. L. R. 13 Bom. 681, a curious case on the common Indian sport of "rain-gambling."

(*a*) *Fitch* v. *Jones* (1885) 5 E. & B. 238, 24 L. J. Q. B. 293. see judgments of Lord Campbell C.J. and Erle J.

(*b*) *Rosewarne* v. *Billing* (1863) 15 C. B. N. S. 316, 33 L. J. C. P. 55.

(*c*) 55 Vict. c. 9, *Tatam* v. *Reeve*, [1893] 1 Q. B. 44, 62 L. J. Q. B. 30.

(*d*) *Carney* v. *Plimmer* [1897] 1 Q. B. 634, 66 L. J. Q. B. 415, C. A.

v. Smith, 4 McCrary, 388; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Ponder *v.* Jerome Hill Cotton Co., 100 Fed. Rep. 373 (C. C. A.); Hawley *v.* Bibb, 69 Ala. 52; Phelps *v.* Holderness, 56 Ark. 300; Nat. Bank of Augusta *v.* Cunningham, 75 Ga. 366; Samuels *v.* Oliver, 130 Ill. 73; Foss *v.* Cummings, 149 Ill. 353; Pope *v.* Hanke, 155 Ill. 617; Davis *v.* Davis, 119 Ind. 511; People's Savings Bank *v.* Gifford, 108 Ia. 277; Stewart *v.* Schall, 65 Md. 289; Mohr *v.* Miesen, 47 Minn. 228; Rogers *v.* Marriott. 59 Neb. 759; Baldwin *v.* Flagg, 38 N. J. Eq. 219; Fareira *v.* Gabell, 89 Pa. 89; Dickson's Exr. *v.* Thomas, 97 Pa. 278; Winward *v.* Lincoln, 23 R. I. 476; Barnard *v.* Backhaus, 52 Wis. 593; Everingham *v.* Meighan, 55 Wis. 354. Cp. Kent *v.* Miltenberger, 13 Mo. App. 503.

61 1 Daniel on Neg. Inst., §§ 166, 198, 815.

62 Thacker *v.* Hardy, 4 Q. B. D. 685. *Acc.* Jones *v.* Ames, 135 Mass. 431; Warren *v.* Hewitt, 45 Ga. 501, as to transactions unenforceable, but not unlawful by the laws of Massachusetts and Georgia respectively. Even where the transaction is unlawful, the broker may recover for money expended in payment of losses at the principal's request. Roundtree *v.* Smith, 108 U. S. 269; Lehman *v.* Strassberger, 2 Woods, 554, 563; Williams *v.* Carr, 80 N. C. 294; Marshall *v.* Thurston, 3 Lea, 740.

ment as a whole there is evidence of a gambling intention (*e*). Nor will provisions of this kind validate an agreement which is otherwise a gambling agreement on the face of it (*f*).[63]

(*e*) *Universal Stock Exchange, Ltd.* v. *Strachan* [1896] A. C. 166, 65 L. J. Q. B. 429.

(*f*) *Re Gieve* [1899] 1 Q. B. 794, 68 L. J. Q. B. 509, C. A.

[63] A purchase on margin is not necessarily a gambling transaction. Universal Stock Exchange *v.* Stevens, 66 L. T. N. S. 612; Forget *v.* Ostigny, [1895] A. C. 318; Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438; Clews *v.* Jamieson, 182 U. S. 461; Hatch *v.* Douglas, 48 Conn. 116; Skiff *v.* Stoddard, 63 Conn. 198; Corbett *v.* Underwood, 83 Ill. 324; Oldershaw *v.* Knowles, 101 Ill. 117; Perin *v.* Parker, 126 Ill. 201; Fisher *v.* Fisher, 113 Ind. 474; Sondheim *v.* Gilbert, 117 Ind. 71; Ball *v.* Campbell, 30 Kan. 177; Sawyer *v.* Taggart, 14 Bush, 727; Durant *v.* Burt, 98 Mass. 161; Bullard *v.* Smith, 139 Mass. 492; Bingham *v.* Scott, 177 Mass. 208; Clay *v.* Allen, 63 Miss. 426; Stenton *v.* Jerome, 54 N. Y. 480; Gruman *v.* Smith, 81 N. Y. 25; Minor *v.* Beveridge, 141 N. Y. 399; Hopkins *v.* O'Kane, 169 Pa. 478; Taylor's Estate, 192 Pa. 304, 309, 313; Smyth *v.* Field, 194 Pa. 550; Winward *v.* Lincoln, 23 R. I. 476.

But by statute *contra* in California, Cashman *v.* Root, 89 Cal. 373; Wetmore *v.* Barrett, 103 Cal. 246; Sheehy *v.* Shinn, 103 Cal. 325; Rued *v.* Cooper, 119 Cal. 463; Parker *v.* Otis, 130 Cal. 322.

Unless forbidden by statute a contract of option is valid. Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438; Hanna *v.* Ingram, 93 Ala. 482; Godman *v.* Meixsel, 65 Ind. 32; Mason *v.* Payne, 47 Mo. 517; Pieronnet *v.* Lull, 10 Neb. 457; Bigelow *v.* Benedict, 70 N. Y. 202; Harris *v.* Turnbridge, 83 N. Y. 93; Lester *v.* Buel, 49 Ohio St. 240, 252; Kirkpatrick *v.* Bonsall, 72 Pa. 155.

See as to the construction of the Illinois statute, Wolcott *v.* Heath, 78 Ill. 433; Logan *v.* Musick, 81 Ill. 415; Schneider *v.* Turner, 130 Ill. 28; Ames *v.* Moir, 130 Ill. 582; Corcoran *v.* Lehigh Coal Co., 138 Ill. 390; Preston *v.* Smith, 156 Ill. 359. Cp. Wolf *v.* National Bank of Illinois, 178 Ill. 85; Schlee *v.* Guckenheimer, 179 Ill. 593; Ubben *v.* Binnian, 182 Ill. 508; Loeb *v.* Stern, 198 Ill. 371.

"If, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract." Harvey *v.* Merrill, 150 Mass. 1, 6.

Numerous decisions to this effect are collected in 14 Am. & Eng. Encyc. of Law (2d ed.), 609–611. And see cases in this note *passim*. In some jurisdictions contracts to sell in the future stock or merchandise which the seller did not own at the time of the contract are made illegal without reference to any intention that there shall be no delivery. See Fortenbury *v.* State, 47 Ark. 188; Johnston *v.* Miller, 67 Ark. 172; Branch *v.* Palmer, 65 Ga. 210; Moss *v.* Exchange Bank, 102 Ga. 808; Singleton *v.* Bank of Monticello, 113 Ga. 527; Lemonius *v.* Mayer, 71 Miss. 514; Dillard *v.* Brenner, 73 Miss. 130; Violett *v.* Mangold, 27 So. Rep. (Miss.) 875; Connor *v.* Black, 119 Mo. 126; 132 Mo. 150; Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516; Staples *v.* Gould, 9 N. Y. 520; Gist *v.* Western Union Tel. Co., 45 S. C. 344; Riordan *v.* Doty, 50 S. C. 537; Saunders *v.* Phelps Co., 53 S. C. 173.

In Harvey *v.* Merrill, *supra*, the court continued: "If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that

Under another modern statute (5 & 6 Wm. 4, c. 41, s. 1) securities for money won at gaming or betting on games, or lent for gaming or betting, are treated as given for an illegal consideration (*g*).[64]

Lotteries are forbidden by penal statutes (*h*).

It would be inappropriate to the general purpose of this work, as well as impracticable within its limits, to enter in detail upon the contents or construction of the statutes which prohibit or affect various kinds of contracts by regulating particular professions and occupations or otherwise. *It has been attempted, however, to make [301 some collection of them in the appendix (*i*).

Agreements in derogation of private Acts of Parliament not necessarily bad. The rules and principles of law which disallow agreements whose

(*g*) The statute does not affect a loan of money to pay a bet previously lost: *Ex parte Pyke* (1878) 8 Ch. Div. 754, 47 L. J. Bk. 100. [Otherwise now in England under the Gaming Act of 1892. Tatam *v.* Reeve [1893] 1 Q. B. 44.] As to recovering money deposited with a stakeholder or agent, see pp.*382, *383, below

(*h*) See note G. in Appendix. Various innocent and not uncommon ways of raising money for charitable objects are probably within the letter of these Acts.

(*i*) See Note G.

time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract."

And the actual settlement of a contract by the payment of differences does not prove the contract to have been illegal. Tomblin *v.* Cullen, 69 Ia. 229. Cp. Boyd *v.* Hanson, 41 Fed. Rep. 174. It is at least certain that "if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party." Pixley *v.* Boynton, 79 Ill. 351, 354; Clews *v.* Jamieson, 182 U. S. 461; Clarke *v.* Foss, 7 Biss. 540; Bartlett *v.* Smith, 13 Fed. Rep. 263; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Hentz *v.* Jewell, 20 Fed. Rep. 592; Bennett *v.* Covington, 22 Fed. Rep. 816; Bangs *v.* Hornick, 30 Fed. Rep. 97; Lehman *v.* Feld, 37 Fed. Rep. 852; Hill *v.* Levy, 98 Fed. Rep. 94; Parker *v.* Moore, 125 Fed. Rep. 807; Johnston *v.* Miller, 67 Ark. 172; Logan *v.* Musick, 81 Ill. 415; Scanlon *v.* Warren, 169 Ill. 142; Vigel *v.* Gatton, 61 Ill. App. 98; Whitesides *v.* Hunt, 97 Ind. 191; Sondheim *v.* Gilbert, 117 Ind. 71; Murry *v.* Ocheltree, 59 Ia. 435; Sawyer *v.* Taggart, 14 Bush, 727; Rumsey *v.* Berry, 65 Me. 570, 573; Dillaway *v.* Alden, 88 Me. 230; Barnes *v.* Smith, 159 Mass. 344; Davy *v.* Bangs, 174 Mass. 238; Gregory *v.* Wendell, 40 Mich. 432; Donovan *v.* Daiber, 124 Mich. 49; Clay *v.* Allen, 63 Miss. 426; Cockrell *v.* Thompson, 85 Mo. 510; Crawford *v.* Spencer, 92 Mo. 498; Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516; Deierling *v.* Sloop, 67 Mo. App. 446; Rogers *v.* Marriott, 59 Neb. 759; Amsden *v.* Jacobs, 75 Hun, 311; affd. without opinion, 148 N. Y. 762; Dows *v.* Glaspel, 4 N. Dak. 251.

[64] Under similar statutes in this country it is generally held that a loan of money to pay a debt previously lost is not affected. Armstrong *v.* American Bank, 133 U. S. 433, 469; Sampson *v.* Camperdown Mills, 82 Fed. Rep. 833, 837; White *v.* Yarborough, 16 Ala. 109; Roberts *v.* Blair, 11 Col. 64; Bower *v.* Webber, 69 Ia. 286; Jones *v.* Sevier, 1 Litt. 50; English *v.* Young, 10 B. Mon. 141; Greathouse *v.* Throckmorton, 7 J. J. Marsh. 16; Ballard *v.* Green, 118 N. C. 390; Krake *v.* Alexander, 86 Va. 206. And see Poindexter *v.* Davis, 67 N. C. 112. Cp. Hanauer *v.* Doane, 12 Wall. 342, 345; White *v.* Wilson's Adm., 100 Ky. 367; Scollans *v.* Flynn, 120 Mass. 271; Schoenberg *v.* Adler, 105 Wis. 645. There is nothing unlawful in paying a claim void for illegality. Lauten *v.* Rowan, 59 N. H. 215.

object is to contravene or evade an Act of Parliament do not apply to private Acts, so far as these are in the nature of agreements between parties. If any of the persons interested make arrangements between themselves to waive or vary provisions in a private Act relating only to their own interests, it cannot be objected to such an agreement that it is in derogation of, or an attempt to repeal the Act (*k*).

B. *Agreements contrary to morals or good manners.*

Practically this means only sexual morality. It is not every kind of immoral object or intention that will vitiate an agreement in a court of justice. When we call a thing immoral in a legal sense we mean not only that it is morally wrong, but that according to the common understanding of reasonable men it would be a scandal for a court of justice to treat it as lawful or indifferent, though it may not come within any positive prohibition or penalty. What sort of things fall within this description is in a general way obvious enough. And the law might well stand substantially as it is, according to modern decisions at any rate, upon this ground alone. Some complication has been introduced, however, by the influence of ecclesiastical law, which on certain points has been very marked, and which has certainly brought in a tendency to treat these cases in a peculiar manner, to mix up the principles of ordinary social morality with considerations of a different kind, and with the help of those considerations to push them sometimes to extreme conclusions. Having regard to the large powers formerly exercised by spiritual Courts in
302] the control of opinions and conduct, *and even now technically not abolished, it seems certain that everything which our civil Courts recognize as immoral is an offence against ecclesiastical law. Perhaps, indeed, the converse proposition is theoretically true, so far as the ecclesiastical law is not directly contrary to the common law (*l*). But this last question may be left aside as merely curious.

As a matter of fact sexual immorality, which formerly was and in theory still is one of the chief subjects of ecclesiastical jurisdiction, is the only or almost the only kind of immorality of which the common law takes notice as such. Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a man who then and there avowed his intention of making

(*k*) *Sarin* v. *Hoylake Ry. Co.* (1865) L. R. 1 Ex. 9, 35 L. J. Ex. 52. Cp. and dist. *Shaw's claim* (1875) L. R. 10 Ch. 177, 44 L. J. Ch. 670.

(*l*) Cp. Lord Westbury's remarks in *Hunt* v. *Hunt* (1861–2) 4 D. F. & J. at pp. *226–8, *233.

himself or others drunk with it would be void at common law. The actual cases of sale of goods and the like for immoral purposes, on whose analogy this hypothetical one is put, depend on the principles applicable to unlawful transactions in general, and are accordingly reserved for the last part of this chapter. Putting apart for the present these cases of indirectly immoral agreements, as they may be called, we find that agreements are held directly immoral in the limited sense above mentioned, on one of two grounds: as providing for or tending to illicit cohabitation, or as tending to disturb or prejudice the status of lawful marriage ("in derogation of the marriage contract," as it is sometimes expressed).

Illicit cohabitation — If future, an illegal consideration: if past, no consideration. With regard to the first class, the main principle is this. The promise or expectation of future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void.[65] Past cohabitation is not an unlawful consideration; indeed, there may in some circumstances be a moral obligation on the man to provide for the woman; but the *general rule applies (*m*) that a past exe- [303 cuted consideration, whether such as to give rise to a moral duty or not, is equivalent in law to no consideration at all. An agreement made on no other consideration than past cohabitation is therefore in the same plight as any other merely voluntary agreement. If under seal it is binding and can be enforced (*n*),[66] otherwise not (*o*).[67] The existence of an express agreement to discontinue the illicit cohabitation, which is idle both in fact (as an agreement which neither party

(*m*) But the rule is modern (Ch. IV. p. *181 above), and the earlier cases on this subject belong to a time when a different doctrine prevailed; they therefore discuss matters which in the modern view are simply irrelevant, *e.g.* the previous character of the parties. The phrase *praemium pudicitiae* comes from this period. *Praemium pudoris*, however, was used in a perfectly innocent sense in the old law of dower: Co. Lit. 31a.

(*n*) *Gray* v. *Mathias* (1800) 5 Ves. 286, 5 R. R. 48.

(*o*) *Beaumont* v. *Reeve* (1846) 8 Q. B. 483, 15 L. J. Q. B. 141.

[65] Walker *v.* Gregory, 36 Ala. 180; Wallace *v.* Rappleye, 103 Ill. 229, 249; Wilson *v.* Ensworth, 85 Ind. 399; Massey *v.* Wallace, 32 S. C. 149. See also Brown *v.* Tuttle, 80 Me. 162. A promise of marriage made in consideration of the promisee's surrendering her person to the promisor is void. Hanks *v.* Nagles, 54 Cal. 51; Boigneres *v.* Boulon, 54 Cal. 146; Baldy *v.* Stratton, 11 Pa. 316; Goodall *v.* Thurman, 1 Head, 209; Burke *v.* Shaver, 92 Va. 345. Cp. Kurtz *v.* Frank, 76 Ind. 594.

[66] Brown *v.* Kinsey, 81 N. C. 245. See also Brightman *v.* Bates, 175 Mass. 105, 109.

[67] Drennan *v.* Douglas, 102 Ill. 341; Wallace *v.* Rappleye, 103 Ill. 229; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Singleton *v.* Bremar, Harper, 201. *Contra*, Shenk *v.* Mingle, 13 S. & R. 29.

could break alone) and in law—or the fact of the defendant having previously seduced the plaintiff, which "adds nothing but an executed consideration resting on moral grounds only,"—can make no difference in this respect (*o*).

Judgment of Lord Selborne, Ayerst v. Jenkins. The manner in which these principles are applied has been thus stated by Lord Selborne:—

"Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon* v. *Nettlefold* (*p*). Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous (*q*), incestuous, or simply immoral, are valid in law and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law (*r*), and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument (*s*). 4. If an illegal consideration does not appear on the face of the instrument the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at 304] *law (*t*), [this is of no consequence in England since the Judicature Acts]. 5. Under some (but not under all) circumstances when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity" (*u*).

The exception alluded to in the last sentence is probably this: that "where a party to the illegal or immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to" (*x*). He must not put his case on the ground of an immoral consideration having in fact failed, or complain that the instrument does not correctly express the terms of an immoral agreement (*y*).

Where a security is given on account of past cohabitation, and the illicit connection is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real con-

(*o*) *Beaumont* v. *Reeve* (1846) 8 Q. B 483, 15 L. J. Q. B. 141.

(*p*) (1850) 3 Mac. & G. 94, 100.

(*q*) *Knye* v. *Moore* (1822) 1 Sim. & St. 64.

(*r*) *Walker* v. *Perkins* (1764) 3 Burr. 1568.

(*s*) *Gray* v. *Mathias* (1800) 5 Ves. 286, 5 R. R. 48; *Smyth* v. *Griffin* (1842) 13 Sim. 245, 14 L. J. Ch. 28, appears to be really nothing else than an instance of the same rule. The rule is or was a general one: *Simpson* v. *Lord Howden* (1837) 3 My. & Cr. 97, 102, 45 R. R. 225, 226.

(*t*) *Benyon* v. *Nettlefold* (1850) 3 Mac. & G. 94.

(*u*) *Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275, 282, 42 L. J. Ch. 699.

(*x*) *Batty* v. *Chester* (1842) 5 Beav. 103, 109.

(*y*) *Semble*, relief will not be given if it appears that the immoral consideration has been executed: *Sismey* v. *Eley* (1849) 17 Sim. 1, 18 L. J. Ch. 350: but the case is hardly intelligible.

sideration was future as well as past cohabitation, nor therefore treat the deed as invalid (*z*).[68]

There existed a notion that in some cases the legal personal representative of a party to an immoral agreement might have it set aside, though no relief would have been given to the party himself in his lifetime: but this has been pronounced "erroneous and contrary to law" (*a*). An actual transfer of property, which is on the face of it "a completed voluntary gift, valid and irrevocable in law" and confers an absolute beneficial interest, cannot be afterwards impeached either by the settlor or by his representatives, though in fact made on an immoral consideration (*a*).[69] *But it by no means fol- [305
lows that the Court will enforce the trusts. It may have to direct the trustees whom to pay, and will then disregard any disposition which is in fact founded on an immoral consideration (*c*). Thus a settlement in the form of an ordinary marriage settlement in contemplation of a marriage (as with a deceased wife's sister) not allowed by English law is treated, as regards trusts for the so-called wife, as made on an immoral consideration, and the Court will pronounce such trusts invalid if applied to by the trustees for directions, though it would not set aside the settlement at the instance of the settlor (*d*).

Proviso for reconciliation in quasi separation deed is void. Where parties who have been living together in illicit cohabitation separate, and the man covenants to pay an annuity to the woman, with a proviso that the annuity shall cease or the deed shall be void if the parties live together again, there the covenant is valid as a simple voluntary covenant to pay an annuity, but the proviso is wholly void. It makes no difference, of course, if the parties, being within the prohibited degrees of affinity, have gone through the form of marriage, and the deed is in the ordinary form of a separation deed between husband and wife (*e*). When the parties are really married such a proviso is usual but superfluous, for the deed is in any case avoided by the

(*z*) *Gray* v. *Mathias* (1800) 5 Ves. 286, 5 R. R. 48; *Hall* v. *Palmer* 3 Ha. 532; *Vallance* v. *Blagden* (1884) 26 Ch. D. 353.

(*a*) *Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275, 281, 284, 42 L. J. Ch. 690.

(*c*) *Phillips* v. *Probyn* [1899] 1 Ch. 811, 68 L. J. Ch. 401.

(*d*) *Phillips* v. *Probyn*, last note.

(*e*) *Ex parte Naden* (1874) L. R. 9 Ch. 670, 43 L. J. Bk. 121.

[68] Brown *v.* Kinsey, 81 N. C. 245. Cp. Trovinger *v.* McBurney, 5 Cow. 253.

[69] Hill *v.* Freeman, 73 Ala. 200; Marksbury *v.* Taylor, 10 Bush, 519; Antoine *v.* Smith, 40 La. Ann. 560; White *v.* Hunter, 23 N. H. 128; Gisaf *v.* Neval, 81 Pa. 354; Denton *v.* English, 2 Nott & McC. 581; Bivins *v.* Jarnigan, 59 Tenn. 282; Fletcher *v.* Warren, 7 Gratt. 1, 16.

parties afterwards living together (*f*).[70] This brings us to the second branch of this topic, namely the validity of separation deeds and agreements for separation.

Separation deeds in general — Hunt v. Hunt. The history of the subject will be found very clearly set forth in Lord Westbury's judgment in *Hunt* v. *Hunt* (*g*).[71] From the ecclesiastical point of view marriage was a sacrament creating an indissoluble relation. The duties
306] *attaching to that relation were "of the highest possible religious obligation" and paramount to the will of the parties. In ecclesiastical Courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle, and therefore was illegal and void.

For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those courts. The sweeping character and the gradual decay of such claims have already been illustrated by cases we have had occasion to cite from the Year Books in other places. In later times the ecclesiastical view of marriage was still upheld, so far as the remaining ecclesiastical jurisdiction could uphold it (*h*), and continued to have much influence on the opinions of civil Courts; the amount of that influence is indeed somewhat understated in Lord Westbury's exposition. But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract, only the ordinary rule that the wife cannot contract with her husband without the intervention of a trustee is dispensed with in these cases (*i*). Being good and enforceable at law, the contract is also good and enforceable in

(*f*) *Westmeath* v. *Salisbury* or *Westmeath* (1820–1) 5 Bli. N. S. 339, 1 Dow. & Cl. 519, 35 R. R. 54.

(*g*) (1861–2) 4 D. F. & J. 221. The case was taken to the House of Lords, but the proceedings came to an end without any decision by the death of the husband: see per Lord Selborne, 8 App. Ca. at p. 421.

(*h*) See 4 D. F. & J. 235–8.

(*i*) P. *84, above, *McGregor* v. *McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 268.

[70] Wells *v.* Stout, 9 Cal. 479, 498; Chapman *v.* Gray, 8 Ga. 341, 349; Garland *v.* Garland, 50 Miss. 694; Shethar *v.* Gregory, 2 Wend. 422; Carson *v.* Murray, 3 Paige, 483. See also Kehr *v.* Smith, 20 Wall. 31; Zimmer *v.* Settle, 124 N. Y. 37. Cp. Rowell *v.* Rowell, [1900] 1 Q. B. 9.

But not if the agreement for separation itself provides to the contrary. Walker *v.* Walker, 9 Wall. 743; Walker *v.* Beal, 3 Cliff. 155; Daniels *v.* Benedict, 97 Fed. Rep. 367 (C. C. A.). And see Hitner's Appeal, 54 Pa. 110.

[71] See also 15 Harv. L. Rev. 638.

equity, nor is there any reason for refusing to enforce it by any of the peculiar remedies of equity. In *Hunt* v. *Hunt* the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a separation deed (*k*), on the authority of the decision of the House of Lords (*l*), which had already established *that the Court may order specific performance of [307 an agreement to execute a separation deed containing such a covenant. The case may be taken as having put the law on a consistent and intelligible footing, though not without overruling a great number of pretty strong dicta of various judges in the Court of Chancery and even in the House of Lords (*m*); and it has been repeatedly followed (*n*).[72] But an agreement by the wife not to oppose proceed-

(*k*) This covenant could not then be pleaded in the Divorce Court, which held itself bound by the former ecclesiastical practice to take no notice of separation deeds.

(*l*) *Wilson* v. *Wilson* (1854) 1 H. L. C. 538.

(*m*) In *St. John* v. *St. John* (1803–5) 11 Ves. 526, &c., *Westmeath* v. *Westmeath* (1820–1) 1 Jac. 142 (Lord Eldon); *Worrall* v. *Jacob*, (1816–7) 3 Mer. 268 (Sir W. Grant); *Warrender* v. *Warrender* (1835) 2 Cl. & F. 527 (Lord Brougham), 561–2 (Lord Lyndhurst). Most of these are to be found cited in the argument in *Wilson* v. *Wilson*. And even since that case *Vansittart* v. *Vansittart* (1858) 2 De G. & J. at p. 255 (Lord Chelmsford).

(*n*) *Besant* v. *Wood* (1879) 12 Ch. D. at p. 623; *Sweet* v. *Sweet* [1895] 1 Q. B. 12, 64 L. J. Q. B. 108; *Marshall* v. *Marshall* (1879) 5 P. D. 19, 48 L. J. P. 49. A like covenant on the wife's behalf by a trustee is binding on her, *Clark* v. *Clark*, 10 P. Div. 188.

72 That agreements for separation are not void as being against public policy is generally held in this country. Walker *v.* Walker, 9 Wall. 743; Bowers *v.* Hutchinson, 67 Ark. 15; Wells *v.* Stout, 9 Cal. 479; Nichols *v.* Palmer, 5 Day, 47; Boland *v.* O'Neil, 72 Conn. 217; Chapman *v.* Gray, 8 Ga. 341; Reed *v.* Beazley, 1 Blackf. 97; Goddard *v.* Beebe, 4 Greene (Ia.) 126; Loud *v.* Loud, 4 Bush. 453; Helms *v.* Franciscus, 2 Bland's Ch. 544; Fox *v.* Davis, 113 Mass. 255; Grime *v.* Borden, 166 Mass. 198; Bailey *v.* Dillon, 186 Mass. 244; Carson *v.* Murray, 3 Paige, 483; Galusha *v.* Galusha, 116 N. Y. 635; Clark *v.* Fosdick, 118 N. Y. 7; Duryea *v.* Bliven, 122 N. Y. 567; Hungerford *v.* Hungerford, 161 N. Y. 550, 553; Bettle *v.* Wilson, 14 Ohio, 257; Henderson *v.* Henderson, 37 Oreg. 141; Dillinger's Appeal, 35 Pa. 357; Biery *v.* Steckel, 194 Pa. 445; Squires *v.* Squires, 53 Vt. 208. But see Foote *v.* Nickerson, 70 N. H. 496; Friedman *v.* Bierman, 43 Hun, 387; Whitney *v.* Whitney, 4 N. Y. App. Div. 597; Poillon *v.* Poillon, 49 N. Y. App. Div. 341; Baum *v.* Baum, 109 Wis. 47. See especially the careful opinion in Foote *v.* Nickerson.

Although in some states an agreement for separation, made directly between husband and wife, without the intervention of a trustee, is void (Phillips *v.* Meyers, 82 Ill. 67; Scherer *v.* Scherer, 23 Ind. App. 384; Simpson *v.* Simpson, 4 Dana, 140; Rogers *v.* Rogers, 4 Paige, 516; Carter *v.* Carter, 14 S. & M. 59; Buchner *v.* Ruth, 13 Rich. 157, 160), the law of many states has so far removed the incapacity of the parties as to make such agreements valid. Jones *v.* Clifton, 101 U. S. 225, 229; Daniels *v.* Benedict, 97 Fed. Rep. 367, 376; Dutton *v.* Dutton, 30 Ind. 452; Hutchins *v.* Dixon, 11 Md. 29, 40; Randall *v.* Randall, 37 Mich. 563; Roll *v.* Roll, 51 Minn. 353; Stebbins *v.* Morris, 19 Mont. 115; Carpenter *v.* Osborn, 102 N. Y. 552; Thomas *v.*

ings for a divorce pending at the suit of the husband is void, being not only in derogation of the marriage contract, but a collusive agreement to evade the due administration of justice (*o*).

Consideration for agreements for separation deeds. We have seen that when it is sought to obtain the specific performance of a contract the question of consideration is always material, even if the instrument is under seal. Generally it is part of the arrangement in these cases that the trustees shall indemnify the husband against the wife's debts, and this is an ample consideration for a promise on the husband's part to make provision for the wife, and of course also for his undertaking to let her live apart from him, enjoy her property separately, &c. (*p*). But this particular consideration is by no means necessary. The trustee's undertaking to pay part of the costs of the agreement will do as well.[73] But if the agreement is to execute a separation deed containing all usual and proper clauses, this includes, it seems, the usual covenant for indemnifying the husband, so that the usual con-
308] sideration is *in fact present (*q*). In the earlier cases, no doubt, it was supposed that the contract was made valid in substance as well as in form only by the distinct covenants between the husband and the trustee as to indemnity and payment, or rather that these were the only valid parts of the contract. But since *Wilson* v. *Wilson* (*r*) and *Hunt* v. *Hunt* such a view is no longer tenable: in Lord Westbury's words "the theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely the trustees, and the husband's contract for the benefit of the wife is supported by the contract of the trustees on her behalf" (*s*).

Minor points as to separation deeds. A covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of

(*o*) *Hope* v. *Hope* (1857) 8 D. M. & G. 731, 745, 26 L. J. Ch. 417.

(*p*) See Dav. Conv. 5, pt. 2, 1079.

(*q*) *Gibbs* v. *Harding* (1870) L. R. 5 Ch. 336, 39 L. J. Ch. 374.

(*r*) On the effect of that case see the remarks in the House of Lords in a subsequent appeal as to the frame of the deed, *Wilson* v. *Wilson* (1854) 5 H. L. C. 40; and by Lord Westbury, 4 D. F. & J. 234.

(*s*) 4 D. F. & J. 240.

Brown, 10 Ohio St. 247; Garver *v.* Miller, 16 Ohio St. 527; Hutton *v.* Hutton's Admr., 3 Pa. 100.

The fact that husband and wife are living apart, pursuant to an agreement for separation, is not a bar to a suit for divorce. J. G. *v.* H. G., 33 Md. 401; Kremelberg *v.* Kremelberg, 52 Md. 553; Franklin *v.* Franklin, 154 Mass. 515; Anderson *v.* Anderson, 1 Edw. Ch. 380; Fosdick *v.* Fosdick, 15 R. I. 130.

[73] The wife's release of her right to claim alimony is a sufficient consideration. Bratton *v.* Massey, 15 S. C. 277.

such a covenant the institution of such a suit does not discharge the other party's obligations under the separation deed (*t*). Subsequent adultery does not of itself avoid a separation deed unless the other party's covenants are expressly qualified to that effect (*u*).[74] A covenant by the husband to pay an annuity to trustees for the wife so long as they shall live apart—or, since the Married Women's Property Act, to the wife herself—remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the wife's adultery (*x*);[75] but it seems it would be void if future adultery were contemplated at the time (*y*). The concealment of past misconduct between the marriage and the separation may render the arrangement voidable, and so may subsequent misconduct, if the circumstances show that the separation *was fraudulently procured with the [309 present intention of obtaining greater facilities for such misconduct (*z*).

A separation, or the terms of a separation, between husband and wife cannot lawfully be the subject of an agreement for pecuniary consideration between the husband and a third person. But in the case of *Jones* v. *Waite* (*a*) it was decided by the Exchequer Chamber and the House of Lords that the husband's execution of a separation deed already drawn up is a good and lawful consideration for a promise by a third person.

A separation deed, as we have above said, is avoided by subsequent reconciliation and cohabitation (*b*). If it were not so, but could remain suspended in order to be revived in the event of a renewed separation, it might become equivalent to a contract providing for a

(*t*) *Jee* v. *Thurlow* (1824) 2 B. & C. 547, 26 R. R. 453.

(*u*) *Ib.*; *Evans* v. *Carrington* (1860) 2 D. F. & J. 481, 30 L. J. Ch. 364.

(*x*) *Charlesworth* v. *Holt* (1873) L. R. 9 Ex. 38, 43 L. J. Ex. 25; *Sweet* v. *Sweet* [1895] 1 Q. B. 12, 64 L. J. Q. B. 108.

(*y*) *Fearon* v. *Earl of Aylesford* (1884) 14 Q. B. Div. 792, 53 L. J. Q. B. 410.

(*z*) *Evans* v. *Carrington*, note (*u*), and per Cotton L.J. 14 Q. B. D. at p. 795.

(*a*) (1842) 1 Bing. N. C. 656, in Ex. Ch. 5 Bing. N. C. 341, in H. L. 9 Cl. & F. 101, 50 R. R. 705. In the Ex Ch. both Lord Abinger and Lord Denman dissented.

(*b*) See also *Westmeath* v. *Salisbury* (1831) 5 Bli. N. S. 339, 35 R. R. 54. Questions may arise whether particular terms are part of the agreement for separation, and therefore subject to be so avoided, or are of a permanent and independent nature: see *Nicol* v. *Nicol* (1886) 31 Ch. Div. 524, 55 L. J. Ch. 437.

[74] Sweet *v.* Sweet, [1895] 1 Q. B. 12; Dixon *v.* Dixon, 23 N. J. Eq. 316; 24 N. J. Eq. 133; Lister *v.* Lister, 35 N. J. Eq. 49, 57. Nor does the divorce and subsequent marriage of the wife. Baker *v.* Cooper, 7 S. & R. 500. Cp. Albee *v.* Wyman, 10 Gray, 222. And see Galusha *v.* Galusha, 116 N. Y. 635.

[75] Kremelberg *v.* Kremelberg, 52 Md. 553.

contingent separation at a future time: and such a contract, as will immediately be seen, is not allowable. However, a substantive and absolute declaration of trust by a third person contained in a separation deed has been held not to be avoided by a reconciliation (*c*).

Agreements for future separation void. As to all agreements or provisions for a *future* separation, whether post-nuptial (*d*) or ante-nuptial (*e*) (*f*), and whether proceeding from the parties themselves or from another person (*f*),[76] it remains the rule of law that
310] *they can have no effect. If a husband and wife who have been separated are reconciled, and agree that in case of a future separation the provisions of a former separation deed shall be revived, this agreement is void (*f*). A condition in a marriage settlement varying the disposition of the income in the event of a separation is void (*g*). So is a limitation over (being in substance a forfeiture of the wife's life interest) in the event of her living separate from her husband through any fault of her own: though it might be good, it seems, if the event were limited to misconduct such as would be a ground for divorce or judicial separation (*h*).

Likewise a deed purporting to provide for an immediate separation is void if the separation does not in fact take place: for this shows that an immediate separation was not intended, but the thing was in truth a device to provide for a future separation (*i*). Nor can such a deed be supported as a voluntary settlement (*k*).

Reason of the distinction. The distinction rests on the following ground:—An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. "It is forbidden to provide for the

(*c*) *Ruffles* v. *Alston* (1875) L. R. 19 Eq. 539, 44 L. J. Ch. 388.

(*d*) *Marquis of Westmeath* v. *Marchioness of Westmeath* (1820–1) 1 Dow. & Cl. 519, 541; *Westmeath* v. *Salisbury* (1831) 5 Bli. N. S. 339, 35 R. R. 54.

(*e*) *H.* v. *W.* (1857) 3 K. & J. 382. Some of the reasons given in this case (at p. 386) cannot since *Hunt* v. *Hunt* be supported.

(*f*) *Cartwright* v. *Cartwright* (1853) 3 D. M. & G. 982, 22 L. J. Ch. 841; note that this and the case last cited were after *Wilson* v. *Wilson*.

(*f*) See note (*d*), last *page.

(*g*) See note (*f*), last *page.

(*h*) See note (*e*) last *page.

(*i*) *Hindley* v. *Marquis of Westmeath* (1827) 6 B. & C. 200, 30 R. R. 290; confirmed by *Westmeath* v. *Salisbury* (1831) 5 Bli. N. S. 339, 395–7, 35 R. R. 54, 55.

(*k*) *Bindley* v. *Mulloney* (1869) L. R. 7 Eq. 343.

[76] People *v.* Mercein, 8 Paige, 47, 68; Gaines' Admrx. *v.* Poor, 3 Met. (Ky.) 503, 506–507.

possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate" (*l*). Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves (*m*).

***Immoral publications: Being criminal offences, these are contrary to positive law.** [311 It is a well-established rule that no enforceable right can be acquired by a blasphemous, seditious, or indecent publication, whether in words or in writing, or by any contract in relation thereto (*n*); but it does not really belong to the present head. The ground on which the cases proceed is that the publication is or would be a criminal offence; not merely immoral, but illegal in the strict sense. The criminal law prohibits it as *malum in se,* and the civil law takes it from the criminal law as *malum prohibitum,* and refuses to recognize it as the origin of any right (*o*). Then the decisions in equity profess simply to follow the law by refusing in a doubtful case to give the aid of equitable remedies to alleged legal rights until the existence of the legal right is ascertained (*p*). It would perhaps be difficult to assert as an abstract proposition that a Court administering civil justice might not conceivably pronounce a writing or discourse immoral which yet could not be the subject of criminal proceedings. But we do not know of such a jurisdiction having ever in

(*l*) 3 K. & J. 382.

(*m*) Agreements between husband and wife contemplating a future judicial separation (séparation de corps) are void in French law: Sirey & Gilbert on Code Nap. art. 1133, no. 55.

(*n*) A somewhat analogous question is raised by deceptive trade marks. A trade mark likely to deceive the public will not be registered: *Eno* v. *Dunn* (1890) 15 App. Ca. 252, 63 L. T. 6. [Nor protected by a court of equity. See Manhattan Medicine Co. *v.* Wood, 108 U. S. 218; Holzapfel's Co. *v.* Rahtjen's Co. 183 U. S. 1; Alaska Packing Assoc. *v.* Alaska Imp. Co. 60 Fed. Rep. 103; California Fig Syrup Co. *v.* Putnam, 69 Fed. Rep. 740 (C. C. A.); (cp. Worden *v.* California Fig Syrup Co. 102 Fed. Rep. 334 (C. C. A.)); Raymond *v.* Royal Baking Powder Co. 85 Fed. Rep. 231; Dadirrian *v.* Yacubian, 98 Fed. Rep. 872, 876; Wrisley Co. *v.* Iowa Soap Co. 104 Fed. Rep. 548; Joseph *v.* McCowsky, 96 Cal. 518; Laird *v.* Wilder, 9 Bush, 131; Siegert *v.* Abbott, 61 Md. 276; McConnell *v.* Reed, 128 Mass. 477; Koehler *v.* Saunders, 122 N. Y. 73; Prince's Mfg. Co. *v.* Prince's Paint Co. 135 N. Y. 24; Buckland *v.* Rice, 40 Ohio St. 526; Palmer *v.* Harris, 60 Pa. 156; Simmons Medicine Co. *v.* Mansfield Drug Co. 93 Tenn. 84. Nor will a contract be enforced which has for its object the sale of articles innocent in themselves but intended to be used in such a way as to deceive or defraud the public. Church *v.* Proctor, 66 Fed. Rep. 240 (C. C. A.); Materne *v.* Horwitz, 101 N. Y. 469.]

(*o*) *E.g. Stockdale* v. *Onwhyn* (1826) 5 B. & C. 173, 29 R. R. 207.

(*p*) *Southey* v. *Sherwood* (1817) 2 Mer. 435; *Lawrence* v. *Smith* (1822) Jac. 471, 23 R. R. 123. For a full account of the cases see Shortt on the Law relating to Works of Literature and Art, pp. 3–11, 2nd ed. 1884.

fact been exercised; and considering the very wide scope of the criminal law in this behalf (*q*), it seems unlikely that there should arise any occasion for it. Some expressions are to be found which look like claims on the part of purely civil Courts to exercise a general moral censorship apart from any reference to the criminal law. But these are overruled by modern authority. At the present day it is not true that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing 312] any that contained reflections on religion *or morality," as was once laid down by Lord Macclesfield; or that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," as was laid down by Lord Ellenborough (*r*). On the whole it seems that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters: the question in a given case is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral.

Contracts as to slaves in U. S. held void in some States though lawful when made. A very curious doctrine of legal morality was started in some of the United States after the abolition of slavery. It was held that the sale of slaves being against natural right could be made valid only by positive law, and that no right of action arising from it could subsist after the determination of that law.[77] The Supreme Court of Louisiana in particular adjudged that contracts for the sale of persons, though made in the State while slavery was lawful, must be treated as void: but the Supreme Court of the U. S. did not hold itself bound by this view on appeal from the Circuit Court, and distinctly refused to adopt it, thinking that neither the Constitutional Amendment of

(*q*) See Russell on Crimes, Bk. 2, c. 24, and Stephen's Digest of the Criminal Law, artt. 91–95, 161, 172.

(*r*) *Emperor of Austria* v. *Day & Kossuth* (1861) 3 D. F. & J. 217, 238, 30 L. J. Ch. 690. As to blasphemous or quasi-blasphemous publications something like the older view seems to be involved in *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230, 36 L. J. Ex. 124, but see *contra* the summing up of Lord Coleridge C.J. in *Reg.* v. *Ramsey & Foote*, 15 Cox, C. C. 231, 484, 489.

77 Osborn *v.* Nicholson, 1 Dill. 219; Buckner *v.* Street, 1 Dill. 248; Shorter *v.* Cobb, 39 Ga. 285; Wainwright *v.* Bridges, 19 La. Ann. 234; Rodriguez *v.* Bienvenu, 22 La. Ann. 300. Where the highest court of a State so decides on general principles of public policy or morality, the Supreme Court of the United States has no power of review. Palmer *v.* Marston, 14 Wall. 10; Delaware Navigation Co. *v.* Reybold, 142 U. S. 636. But it has power where the decision of the State court is based upon a constitutional or legislative enactment, passed after the contract was made. Delmas *v.* Insurance Co., 14 Wall. 661.

1865, nor anything that had happened since, avoided a contract good in its inception (*s*).[78]

C. *Agreements contrary to public policy.*

Of the doctrine of public policy in general. Before we go through the different classes of agreements which are void as being of mischievous tendency in some one of certain different ways, something must be said on the more general question of the judicial meaning of "public *policy." That question is, in effect, whether it is at the [313 present time open to courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced, although the grounds of that judgment may be novel. The general tendency of modern ideas is no doubt against the continuance of such a jurisdiction. On the other hand there is a good deal of modern and even recent authority which makes it difficult to deny its continued existence.

Its extension by anxiety of Courts to discourage wagers, while wagers as such were valid contracts. As a matter of history, there seems to be little doubt that the doctrine of public policy, so far as regards its assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at common law. Their validity was assumed without discussion until the judges repented of it too late. Regretting that wagers could be sued on at all (*t*), they were forced to admit that wagering contracts as such were not invalid, but set to work to discourage them so far as they could. This they did by becoming "astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them" in particular cases (*u*).

Thus a wager on the future amount of hop duty was held void, because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion

(*s*) *Boyce* v. *Tabb* (1873) 18 Wall. 546. Cp. *White* v. *Hart*, 13 Wall. 646; *Osborn* v. *Nicholson*, *ib.* 654 (1871).

(*t*) *Good* v. *Elliott* (1790) 3 T. R. 693, 1 R. R. 803, where Buller J. proposed (without success) to hold void all wagers on events in which the parties had no interest.

(*u*) Per Parke B. *Egerton* v. *Earl Brownlow* (1853) 4 H. L. C. at p. 124; per Williams J. *ib.* 77; per Alderson B. *ib.* 109.

[78] White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, 13 Wall. 654; Roundtree *v.* Baker, 52 Ill. 241; Bradford *v.* Jenkins, 41 Miss. 328; Calhoun *v.* Calhoun, 2 S. C. 283; Taylor *v.* Mayhew, 11 Heisk. 596. See also Sterling Remedy Co. *v.* Wyckoff, 154 Ind. 437.

of such matters (*x*). Where one proprietor of carriages for hire in a town had made a bet with another that a particular person would go to the assembly rooms in his carriage, and not the other's, it was thought that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to ex-
314] pose him to "the inconvenience of being impor*tuned by rival coachmen" (*y*). A wager on the duration of the life of Napoleon was void, because it gave the plaintiff an interest in keeping the king's enemy alive, and also because it gave the defendant an interest in compassing his death by means other than lawful warfare (*z*).

Later remarks on these decisions. This was probably the extreme case, and has been remarked on as of doubtful authority (*a*). But the Judicial Committee held in 1848, on an Indian appeal (the Act 8 & 9 Vict. c. 109, not extending to British India), that a wager on the price of opium at the next Government sale of opium was not illegal (*b*). The common law was thus stated by Lord Campbell in delivering the judgment:—

"I regret to say that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which judges in England long resorted in struggling against this rule" (*c*).

It may surely be thought doubtful whether decisions so produced and so reflected upon can in our own time be entitled to any regard at all. But it has been said that they establish a distinction of importance between cases where the parties "have a real interest in the matter, and an apparent right to deal with it" and where they "have no interest but what they themselves create by the contract;" that in the former case the agreement is void only if "directly opposed to public welfare," but in the latter "any tendency whatever
315] to public mischief" will *render it void (*d*). It is difficult to

(*x*) *Atherfold* v. *Beard* (1788) 2 T. R. 610, 1 R. R. 556.

(*y*) *Eltham* v. *Kingsman* (1818) 1 B. & Ald. 683, 19 R. R. 417: this, however, was not strictly necessary to the decision.

(*z*) *Gilbert* v. *Sykes* (1812) 16 East. 150, 14 R. R. 327.

(*a*) By Alderson B. in *Egerton* v. *Earl Brownlow*, 4 H. L. C. 109, and in the Privy Council in the case next cited, 6 Moo. P. C. 312.

(*b*) By the Indian Contract Act, s. 30, agreements by way of wager are now void, with an exception in favour of prizes for horse-racing of the value of Rs. 500 or upwards.

(*c*) *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull* (1848) 6 Moo. P. C. 300, 310.

(*d*) (1853) 4 H. L. C. 148.

accept this distinction, or at any rate to see to what class of contracts other than wagers it applies. In the case of a lease for lives (to take an instance often used) the parties "have no interest but what they themselves create by the contract" in the lives named in the lease: they have not any "apparent right to deal with" the length of the Sovereign's or other illustrious persons' lives as a term of their contract: yet it has never been doubted that the contract is perfectly good.

Egerton v. Brownlow. The leading modern authority on the general doctrine of "public policy" is the great case of *Egerton* v. *Earl Brownlow* (*e*). By the will of the seventh Earl of Bridgewater a series of life interests (*f*) were limited, subject to provisoes which were generally called conditions, but were really conditional limitations by way of shifting uses upon the preceding estates (*g*). The effect of these was that if the possessor for the time being of the estates did not acquire the title of Marquis or Duke of Bridgewater, or did accept any inferior title, the estates were to go over. The House of Lords held by four to one, in accordance with the opinion of two judges (*h*) against eight (*i*), that the limitations were void as being against public policy.

Opinions of judges. The whole subject was much discussed in the opinions on both sides. The greater part of the judges insisted on such considerations as the danger of limiting dispositions of property on speculative notions of impolicy (*k*); the vague and unsatisfactory character of a jurisdiction founded on general opinions of political expedience, as distinguished *from a legitimate use of [316 the policy, or rather general intention, of a particular law as the key to its construction, and the confusion of judicial and legislative functions to which the exercise of such a jurisdiction would lead (*l*); and the fallacy of supposing an object unlawful because it might possibly be sought by unlawful means, when no intention to use such means appeared (*m*). On the other hand it was pointed out that these

(*e*) 4 H. L. C. 1–250.

(*f*) Not estates of freehold with remainder to first and other sons in tail in the usual way, but a chattel interest for 99 years, if the taker should so long live, remainder to the heirs male of his body. See Dav. Conv. 3, pt. 1, 351.

(*g*) See Lord St. Leonards' judgment, 4 H. L. C. at p. 208.

(*h*) Pollock C.B. and Platt B.

(*i*) Crompton, Williams, Creswell, Talfourd, Wightman, and Erle J.J., Alderson and Parke BB. Coleridge J. thought the limitations good in part only.

(*k*) Crompton J. at p. 68.

(*l*) Alderson B. 4 H. L. C. at p. 106; Parke B. at p. 123.

(*m*) Williams J. at p. 77; Parke B. at p. 124.

limitations held out "a direct and powerful temptation to the exercise of corrupt means of obtaining the particular dignity" (*n*); that besides this the restraint on accepting any other dignity, even if it did not amount to forbidding a subject to obey the lawful commands of the Sovereign (*o*), tended in possible events to set private interest in opposition to public duty (*p*); and that the provisoes as a whole were fitted to bias the political and public conduct of the persons interested, and introduce improper motives into it (*q*), and also to embarrass the advisers of the Crown, and influence them to recommend the grant of a peerage or of promotion in the peerage for reasons other than merit (*r*).

Opinions in House of Lords. Lord Lyndhurst, Lord Brougham, Lord Truro, and Lord St. Leonards adopted this view. Lord Cranworth dissented, adhering to his opinion in the Court below (*s*), and made the remark (which is certainly difficult to answer) that the Thellusson will, which the Courts had felt bound to uphold, was much more clearly against public policy than this. The fullest reasons on the side of the actual decision are those of Pollock C.B. and Lord St. **317]** Leonards. Their *language is very general, and they go far in the direction of claiming an almost unlimited right of deciding cases according to the judge's view of public policy for the time being. Lord St. Leonards mentioned the fluctuations of the decisions on agreements in restraint of trade as showing that rules of common law have been both created and modified by notions of public policy (*t*). He also said that each case was to be decided upon principle, but abstract rules were not to be laid down (*u*). If this means only that the Court is to be guided by recognized principles, but will not and cannot bind itself by verbal definition, and in the application of constant principles must have due regard to any new or special facts, the proposition is correct and important, though by no means confined to this topic; but if it means to say that the court may lay down

(*n*) Platt B. at p. 99; Lord St. Leonards at p. 232; Lord Brougham at p. 172.

(*o*) On this point the prevailing opinion, on the whole, was that a subject cannot refuse a peerage [cp. 5 Ric. 2. St. 2, c. 4], but cannot be compelled to accept it by any particular title, or at all events cannot be compelled to accept promotion by any particular new title if he is a peer already.

(*p*) Pollock C.B. at p. 151.

(*q*) Lord Lyndhurst at p. 163.

(*r*) Pollock C.B. and Lord St. Leonards, *supra*.

(*s*) 1 Sim. N. S. 464.

(*t*) See as to the variation of the "policy of the law" in general, *Evanturel* v. *Evanturel* (1874) L. R. 6 P. C. at p. 29, 43 L. J. P. C. 58.

(*u*) At pp. 238–9.

new principles of public policy without any warrant even of analogy, it seems unwarranted.

Effect of the decision itself. But the *ratio decidendi* of the case does not in truth seem to require any of these wide assertions of judicial discretion. The limitations in question were held bad because they amounted in effect to a gift of pecuniary means to be used in obtaining a peerage, and offered a direct temptation to the improper use of such means, and the improper admission of private motives of interest in political conduct: in short, because in the opinion of the Court they had a manifest tendency to the prejudice of good government and the administration of public affairs. But it is perfectly well recognized that transactions which have this character are all alike void, however different in other respects. Such are champerty and maintenance, the compounding of offences, and the sale of offices. The question in the particular case was whether there was an apparent tendency to mischiefs of this kind, or only a remote possibility of inconvenient consequences. The decision did not *create [318 a new kind of prohibition, but affirmed the substantial likeness of a very peculiar and unexampled disposition of property to other dispositions and transactions already known to belong to a forbidden class.

Egerton v. *Earl Brownlow,* however, is certainly a cardinal authority for one rule which applies in all cases of "public policy": namely that the tendency of the transaction at the time, not its actual result, must be looked to.[79] It was urged in vain that the will of the seventh Earl of Bridgewater had in fact been in existence for thirty years without producing any visible ill effects (*x*).

The prevailing modern view is expressed by the following remarks of the late Sir G. Jessel:—

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when en-

(*x*) Cp. *Da Costa* v. *Jones* (1778) Cowp. 729. Wager on sex of third person void, as offensive to that person and tending to indecent evidence: notwithstanding it did not appear that the person had made any objection, and the cause had in fact been tried without any indecent evidence.

79 See United States *v.* Knight Co., 156 U. S. 16; More *v.* Bennett, 140 Ill. 69; Chapin *v.* Brown, 83 Ia. 156; Anderson *v.* Jett, 89 Ky. 375; Fuller *v.* Dame. 18 Pick. 472; Richardson *v.* Crandall, 48 N. Y. 348, 362; Judd *v.* Harrington, 139 N. Y. 110; People *v.* Sheldon, 139 N. Y. 251; People *v.* Milk Exch., 145 N. Y. 267; Central Salt Co. *v.* Guthrie, 35 Ohio St. 672; Holladay *v.* Patterson, 5 Oreg. 177, 180.

tered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract" (*y*).[80]

The wide discretion formerly claimed by the judges in the somewhat analogous field of the law of conspiracy has been finally discredited by the House of Lords as well as the Court of Appeal in the *Mogul Steamship Co.'s case* (*z*).

We now proceed to the several heads of the subject.

(a.) Public policy as touching external relations of the State. First, as to matters concerning the commonwealth in its relations with foreign powers.

319] "On the principles of the English law it is not com*petent to any" domiciled British (*a*) "subject to enter into a contract to do anything which may be detrimental to the interests of his own country" (*b*).

An agreement may be void for reasons of this kind either when it is for the benefit of an enemy, or when the enforcement of it would be an affront to a friendly State.

Trading with enemy. As to the first and more important branch of this rule: "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal" (*c*).[81]

(*y*) *Printing and Numerical Registering Co.* v. *Sampson* (1875) L. R. 19 Eq. 462, 44 L. J. Ch. 705.

(*z*) *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. 295.

(*a*) The rule does not apply to British subjects domiciled abroad: *Bell* v. *Reid* (1813) 1 M. & S. 726, 14 R. R. 557.

(*b*) 7 E. & B. 782.

(*c*) *Esposito* v. *Bowden* (1857) (in Ex. Ch.) 7 E. & B. 763, 779, 24 L. J. Q. B. 210; *Kershaw* v. *Kelsey*, 100 Mass. 561.

[80] Approved in Tullis *v.* Jacson, [1892] 3 Ch. 441, 445; Badische Co. *v.* Schott, [1892] 3 Ch. 447, 452; Underwood *v.* Barker, [1899] 1 Ch. 300, 305, 308; Baltimore Ry. Co. *v.* Voigt, 176 U. S. 498, 505; United States *v.* Trans-Missouri Assoc., 58 Fed. Rep. 58, 59; United States Co. *v.* Provident Co., 64 Fed. Rep. 946, 949; National Co. *v.* Union Hospital Co., 45 Minn. 272; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 482; Reece *v.* Kyle, 49 Ohio St. 475, 487; McCandless *v.* Allegheny Steel Co., 152 Pa. 139, 151.

[81] "The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or

Potts v. Bell. The case of *Potts* v. *Bell* (*d*), decided by the Exchequer Chamber in 1800, is the leading authority on this subject. The following points were there decided:

It is a principle of the common law (*e*) that trading with an enemy without licence from the Crown is illegal.

Purchase of goods in an enemy's country during the war is trading with the enemy, though it be not shown that they were actually purchased from an enemy:[82] and an insurance of goods so purchased is void.

As to insurances originally effected in time of peace: "When a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country" (*f*). There is no rule of public policy to prevent insurance of a subject of a foreign State against "arrests of all kings, princes, and peoples" from including seizure by that *State before, though shortly before, the outbreak of war with [320 Great Britain, where the policy is sued on after the war is over (*g*).

Effect of war on subsisting contracts. The effect of the outbreak of war upon subsisting contracts between subjects of the hostile states varies according to the nature of the case. It may be that the contract can be lawfully performed by reason of the belligerent governments or one of them having waived their strict rights: and in such case it remains valid. In *Clementson* v. *Blessig* (*h*) goods had been

(*d*) (1800) 8 T. R. 548, 5 R. R. 452.

(*e*) In the Admiralty it was already beyond question: see the series of precedents cited in *Potts* v. *Bell*.

(*f*) *Furtado* v. *Rodgers* (1802) 3 B. & P. 191, 200, 6 R. R. 752; *Ex parte Lee* (1806) 13 Ves. 64.

(*g*) *Driefontein Consolidated Gold Mines* v. *Janson* [1901] 2 K. B. 419, 70 L. J. K. B. 881, C. A., *diss.* Vaughan Williams, L.J.

(*h*) (1855) 11 Ex. 135, and on the subject generally see the reporters' note, pp. 141–5.

commercial dealing or intercourse, whether by transmission of money or goods or orders for the delivery of either, between the two countries, whether directly or indirectly, or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy." Kershaw *v.* Kelsey, 100 Mass. 561, 572–3; Scholfield *v.* Eichelberger, 7 Pet. 586; Cappell *v.* Hall, 7 Wall. 542, 554; United States *v.* Grossmayer, 9 Wall. 72; Montgomery *v.* United States, 15 Wall. 395; United States *v.* Quigley, 103 U. S. 595; Carson *v.* Dunham, 121 U. S. 421; The Rapid, 8 Cr. 155; Phillips *v.* Hatch, 1 Dill. 571; Habricht *v.* Alexander's Exrs., 1 Woods, 413; Perkins *v.* Rogers, 35 Ind. 124; Hill *v.* Baker, 32 Ia. 302; Hennen *v.* Gilman, 20 La. Ann. 241; Shaklett *v.* Polk, 51 Miss. 378, 391; Rhodes *v.* Summerhill, 4 Heisk. 204; 1 Kent. 66. The particular contracts, however, relating to real estate, in Kershaw *v.* Kelsey, 100 Mass. 561, and Brown *v.* Gardner, 4 Lea, 145, were held to be lawful. See also Williams *v.* Paine, 169 U. S. 55, 72.

[82] *Contra*, Briggs *v.* United States, 143 U. S. 346. See also Briggs *v.* Walker, 171 U. S. 466.

ordered of the plaintiff in England by a firm at Odessa before the declaration of war with Russia. By an Order in Council six weeks were given after the declaration of war for Russian merchant vessels to load and depart, and the plaintiff forwarded the goods for shipment in time to be lawfully shipped under this order: it was held that the sale remained good.[83]

If the contract cannot at once be lawfully performed, then it is suspended during hostilities (*i*) unless the nature or objects of the contract be inconsistent with a suspension, in which case "the effect is to dissolve the contract and to absolve both parties from further performance of it" (*k*).[84] The outbreak of a war dissolves a partner-

(*i*) *Ex parte Boussmaker* (1806) 13 Ves. 71, 9 R. R. 142.

(*k*) *Esposito* v. *Bowden* (1857) 7 E. & B. 763, 783, 27 L. J. Q. B. 17 (in Ex. Ch.) revg. s. c. 4 E. & B. 963, 24 L. J. Q. B. 210. For a later application of the same reason of convenience, cp. *Geipel* v. *Smith* (1872) L. R. 7 Q. B. 404, 41 L. J. Q. B. 153. [Hanger *v.* Abbott, 6 Wall. 532, 536.] A contract to carry goods has been held to be only suspended by a temporary embargo, though it lasted two years: *Hadley* v. *Clarke* (1799) 8 T. R. 259, 4 R. R. 641. *Sed qu.* is not this virtually overruled by *Esposito* v. *Bowden?*

[83] Although a state of war actually existed before April 23, 1861, yet a partnership between a resident of New York, and other parties, residents of Louisiana, was not dissolved by the late Civil War as early as that date, and all the members of the firm were bound by its acceptance of a bill of exchange bearing date and accepted on that day, and payable one year thereafter; the Act of Congress of July 13, 1861, and the President's proclamation of August 16, 1861, issued under its authority, exhibiting "a clear implication that before the first was enacted, and the second was issued, commercial intercourse was not unlawful; that it had been permitted." Matthews *v.* McStea, 91 U. S. 7.

[84] See Odlin *v.* Insurance Co., 2 Wash. C. C. 312; Baylies *v.* Fettyplace, 7 Mass. 325; McBride *v.* Insurance Co., 5 Johns. 299; Palmer *v.* Lorillard, 16 Johns. 348. In Statham *v.* Insurance Co., 93 U. S. 24, the court was called upon to pass upon the effect of the non-payment of the stipulated annual premium in a policy of life insurance conditioned to be void on non-payment of the premium, where the failure to pay was caused by the intervention of war between the territories in which the insurance company and the assured, respectively, resided, which made it unlawful for them to hold intercourse. A majority of the court held: 1. That such a policy "is not an insurance from year to year like a common fire policy, but the premiums constitute an annuity, the whole of which is the consideration for the entire insurance for life; and the condition is a condition subsequent, making by its non-performance the policy void." 2. That time is of the essence of the contract, and a failure to pay involves an absolute forfeiture, but that, under the circumstances, if the company insisted on a forfeiture the assured was entitled to the equitable value of the policy arising from the premiums actually paid, *i. e.*, the difference between the cost of a new policy, and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred. Cp. Crawford *v.* Insurance Co., S. C. Tenn. 5 C. L. J. 100; Abell *v.* Insurance Co., 18 W. Va. 400. 3. That the doctrine of revival of contracts suspended during the war "cannot be invoked to revive a contract which it would be unjust or inequitable to revive—as where (as here), time is of the essence of the contract, or the parties cannot be made equal." Waite, C. J., and Strong, J., dissented, holding that failure to pay the annual premium, when it matured, put an end to the policy, notwithstanding the default was occasioned by the war. Acc. Tait *v.* Insurance Co., 1 Flipp. 288; Worthington *v.* Insurance Co., 41 Conn. 372; Dillard *v.*

ship previously existing between subjects of the two hostile countries (*l*).[85]

*In *Esposito* v. *Bowden* (*k*), a neutral ship was chartered to [321 proceed to Odessa, and there load a cargo for an English freighter, and before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place: here the contract could not be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end, or its otherwise becoming possible to perform the contract lawfully.

Bills of exchange between England and hostile country. Questions have arisen on the validity of bills of exchange drawn on England in a hostile country in time of war. Here the substance of the transaction has to be looked at, not merely the nationality of the persons who are ultimately parties to an action on the bill. Where a bill was drawn on England by an English prisoner in a hostile country, this was held a lawful contract, being made between English subjects; and by the necessity of the case an indorsement to an alien enemy was further held good, so that he might well sue on it after the return of peace (*m*). But a bill drawn by an alien enemy on a domiciled

(*l*) *Griswold* v. *Waddington* (1818) 15 Johns. (Sup. Ct. N. Y.) 57, in error 16 *ib.* 438. In *New York Life Insurance Co.* v. *Statham* (1876) 93 U. S. 24, a curious question arose as to the effect of the Civil War on life policies effected by residents in the Southern States with a company in the North. It was held by the majority of the Court that, the premiums having been unpaid during the war, the policies were avoided; but that in the circumstances the assured were entitled to the surrender value of their policies at the date of the first default. But the opinions that the contract was avoided without compensation, and that it revived at the end of the war, also found support.

(*k*) See note (*k*) last page.

(*m*) *Antoine* v. *Morshead* (1815) 6 Taunt. 237, 16 R. R. 610; cp. *Daubuz* v. *Morshead* (1815) *ib.* 332, 16 R. R. 623.

Insurance Co., 44 Ga. 119. Clifford and Hunt, JJ., dissenting, held that the contract was only suspended during the war, and revived when peace ensued. Acc. Hamilton *v.* Insurance Co., 9 Blatchf. 234; Insurance Co. *v.* Clopton, 7 Bush, 179; Statham *v.* Insurance Co., 45 Miss. 581; Insurance Co. *v.* Hilliard, 37 N. J. L. 444; Cohen *v.* Insurance Co., 50 N. Y. 610; Sands *v.* Insurance Co., 50 N. Y. 626; Insurance Co. *v.* Warwick, 20 Gratt. 614; Insurance Co. *v.* Atwood's Admx., 24 Gratt. 497; Insurance Co. *v.* Duerson, 28 Gratt. 630.

[85] The William Bagaley, 5 Wall. 377; Matthews *v.* McStea, 91 U. S. 7, 9; Hubbard *v.* Matthews, 54 N. Y. 43, 407; Taylor *v.* Hutchins, 25 Gratt. 536. If a creditor has an agent in the country of the enemy payment by the debtor resident there to the agent is lawful. Ward *v.* Smith, 7 Wall. 447; Kershaw *v.* Kelsey, 100 Mass. 561, 573; Buchanan *v.* Curry, 19 Johns. 137; Rodgers *v.* Bass, 46 Tex. 505; Hale *v.* Wall, 22 Gratt. 424. And so is the investment there by the agent of money in his hands. Barton Co. Commrs. *v.* Newell, 64 Ga. 699.

British subject, and indorsed to a British subject residing in the enemy's country, was held to give no right of action even after the end of the war: for this was a direct trading with the enemy on the part of the acceptor (*n*).[86] It seems proper to observe that these cases must be carefully distinguished from those which relate only to the personal disability of an alien enemy to sue in our Courts during the war (*o*).[87]

322] ***Hostilities against friendly nation cannot be subject of lawful contract.** On the other hand, an agreement cannot be enforced in England which has for its object the conduct of hostilities against a power at peace with the English government, at all events by rebellious subjects of that power who are endeavouring to establish their independence, but have not yet been recognised as independent by England. This was laid down in cases arising out of loans contracted in this country on behalf of some of the South American Republics before they had been officially recognized.

"It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country, for persons in England to enter into engagements to raise money to support the subjects of a government in amity with out own in hostilities against their government, and no right of action can arise out of such a transaction" (*p*).[88]

(*n*) *Willison* v. *Patteson* (1817) 7 Taunt. 439, 18 R. R. 525. The circumstances of the indorsement seem immaterial.

(*o*) Such are *McConnell* v. *Hector* 3 B. & P. 113, 6 R. R. 724; *Brandon* v. *Nesbitt* (1794) 6 T. R. 23, 3 R. R. 109. As to prisoners of war here, *Sparenburgh* v. *Bannatyne* (1797) 1 B. & P. 163, 4 R. R. 772.

(*p*) Best C.J. *De Wütz* v. *Hendricks* (1824) 2 Bing. 314, 27 R. R. 660. Cp. *Thompson* v. *Powles* (1828) 2 Sim. 194, where the language seems unnecessarily wide.

[86] Williams *v.* Bank, 2 Woods, 501; Tarleton *v.* Bank, 49 Ala. 229; Woods *v.* Wilder, 43 N. Y. 164; Lacy *v.* Sugarman, 12 Heisk. 354; Bilgerry *v.* Branch 19 Gratt. 393, 418; Moon *v.* Foster, 19 Gratt. 433, n. Cp. United States *v.* Barker, 1 Paine C. C. 156; Haggard *v.* Conkwright, 7 Bush, 16. A bill drawn by an alien enemy upon the subject or citizen of the adverse country, in favor of a neutral, will, if no illegal use of it be intended, be good in favor of the neutral against the drawer, and against the drawee if he become acceptor. Story on Bills, § 104.

[87] That during a war, foreign or civil, an action cannot be prosecuted by an enemy, residing in the enemy's territory, but must be stayed until the return of peace, see Lamar *v.* Micou, 112 U. S. 452, 464; Perkins *v.* Rogers, 35 Ind. 124; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Wheelan *v.* Cook, 29 Md. 1; Kershaw *v.* Kelsey, 100 Mass. 561, 563; Bell *v.* Chapman, 10 Johns. 183, Sanderson *v.* Morgan, 39 N. Y. 231. But, if sued, he may defend in the forum in which he is assailed. McVeigh *v.* United States, 11 Wall. 259; Windsor *v.* McVeigh, 93 U. S. 274, 277; Seymour *v.* Bailey, 66 Ill. 288; Buford *v.* Speed, 11 Bush, 338; Haymond *v.* Camden, 22 W. Va. 180.

[88] Kennett *v.* Chambers, 14 How. 38; Pond *v.* Smith, 4 Conn. 297.

A covenant in a deed not to convey or lease land to a Chinaman has been held void, as contrary to the public policy of the government and in contravention of its treaty with China. Gandolfo *v.* Hartman, 49 Fed. Rep. 181.

The Supreme Court of the United States has held, however, that an assignment of shares in a company originally formed for a purpose of this kind was so remotely connected with the original illegality of the loan as not to be invalid between the parties to it (*q*).

Neutral trade with belligerents is at risk of capture only, not unlawful. It is not a "municipal offence by the law of nations" for citizens of a neutral country to carry on trade with a blockaded port — that is, the courts of their own country cannot be expected to treat it as illegal (though of course it is done at the risk of seizure, of which seizure, if made, the neutral trader or his government cannot complain): and agreements having such trade for their object—*e. g.* a joint adventure in blockade running—are accordingly valid and enforceable in the courts of the neutral state (*r*).

*There were decisions on this topic of aiding or trading with [323 enemies in the American Supreme Court in cases arising out of the Civil War (*s*).[89]

Exceptional treatment of foreign revenue laws. It is admtted as a thing required by the comity of nations that an agreement to con-

(*q*) *McBlair* v. *Gibbes* (1854) 17 Howard, 232.

(*r*) *Ex parte Chavasse* (1865) 4 D. J. & S. 655, see Lord Westbury's judgment: *The Helen* (1875) L. R. 1 Ad. & Ecc. 1, 34 L. J. Ad. 2, and American authorities there cited; Kent, Comm. 3, 267. [1 *ib.* 142 and n. 1.]

(*s*) See *Texas* v. *White* (1868) 7 Wallace, 700 (where, however, the chief points are of constitutional law); *Hanauer* v. *Doane* (1870) 12 *ib.* 342. *Sprott* v. *U. S.* (1874) 20 Wall. 459 [and see also, Walker's Exrs. *v.* United States, 106 U. S. 413] goes beyond anything in our books, and the dissent of Field J. seems well founded.

[89] Contracts made during the late Civil War, in one of the Confederate States, payable in Confederate money, if not made for the purpose of giving it currency, or otherwise aiding the rebellion, are not, because thus payable, invalid. Thorington *v.* Smith, 8 Wall. 1; The Confederate Note Case, 19 Wall. 548, 556; Railroad Co. *v.* King, 91 U. S. 3; Effinger *v.* Kenney, 115 U. S. 566; Baldy *v.* Hunter, 171 U. S. 388; Houston, &c. R. Co. *v.* Texas, 177 U. S. 66, 95; Whitfield *v.* Riddle, 52 Ala. 467; Young *v.* Mitchell, 33 Ark. 222; Forchheimer *v.* Holly, 14 Fla. 239; Rodes *v.* Patillo, 5 Bush, 271; Rivers *v.* Moss' Assignee, 6 Bush, 600; White *v.* White, 50 La. Ann. 104; Green *v.* Sizer, 40 Miss. 530; Rodgers *v.* Bass, 46 Tex. 505; Naff *v.* Crawford, 1 Heisk. 111; Sherfy *v.* Argenbright, 1 Heisk. 128. See also Massie *v.* Byrd, 87 Ala. 672. *Contra*, Denney *v.* Johnson, 26 La. Ann. 55.

As to the revisory power of the Supreme Court of the United States over the decision of a State court on this question, see Delmas *v.* Insurance Co., 14 Wall. 661; Dugger *v.* Bocock, 104 U. S. 596; *supra*, p. *311, n. 77.

But bonds issued for the purpose of supporting the war levied by the Confederate States do not constitute a lawful consideration for a promissory note, although they were used as a circulating medium in the common and ordinary business transactions of the people. Hanauer *v.* Woodruff, 15 Wall. 439.

And in Branch *v.* Haas, 16 Fed. Rep. 53, it was decided that an agreement long after the war to buy and sell such bonds was void; *sed quaere*.

travene the laws of a foreign country would in general be unlawful.[90] But it is said that revenue laws (in practice the most important cases) are excepted, and that "no country ever takes notice of the revenue laws of another" (*t*).

As a general proposition, however, this is disapproved by most modern writers as contrary to reason and justice (*u*). It should be

(*t*) Lord Mansfield in *Holman* v. *Johnson* (1775) 1 Cowp. 341.

(*u*) *E.g.* Kent, Comm. 3, 263–266; Dicey, Conflict of Laws, 562.

[90] Graves *v.* Johnson, 156 Mass. 211 (again before the court in 179 Mass. 53) was an action for the price of intoxicating liquors, which were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel-keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. Holmes, J., delivering the opinion of the court, said:

"The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman *v.* Johnson, 1 Cowp. 341; Pollock, Con. (5th ed.), 308. See also M'Intyre *v.* Parks, 3 Met. 207.

"The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat *v.* Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 257, 264, note 3, Kent Com. 265, 266, and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See Hodgson *v.* Temple, 5 Taunt. 181; Brown *v.* Duncan, 10 B. & C. 93, 98, 99; Harris *v.* Runnels, 12 How. 79, 83, 84.

"Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Con. (5th ed.), 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. Waymell *v.* Reed, 5 T. R. 599; Gaylord *v.* Soragen, 32 Vt. 110; Fisher *v.* Lord, 63 N. H. 514; Hull *v.* Ruggles, 56 N. Y. 424, 429. [See also Cambioso *v.* Maffitt, 2 Wash. C. C. 98; Kohn *v.* Renaisance, 5 La. Ann. 25; Ivey *v.* Lalland, 42 Miss. 444; Rocco *v.* Frapoli, 50 Neb. 665; Rosenbaum *v.* United States Co., 60 N. J. L. 294, 64 N. J. L. 34, 65 N. J. L. 255; Marshall *v.* Sherman, 148 N. Y. 9, 25.]

"On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. Finch *v.* Mansfield, 97 Mass. 89, 92; Adams *v.* Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes *v.* Hyde Park, 153 Mass. 514, 515, 516."

noted that our Courts, so far as they have acted upon it, have done so to the prejudice of our own revenue quite as much as to that of foreign states. Thus a complete sale of goods abroad by a foreign vendor is valid, and the price may be recovered in an English Court, though he knew of the buyer's intention to smuggle the goods into England. "The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this" (*x*). But it is admitted that an agreement to be performed in England in violation of English revenue laws would be void—as if, for example, the goods were to be smuggled by the seller and so delivered in England. And a subject, domiciled in the British dominions (though not in England or within the operation of English revenue laws) cannot recover in an English Court the price of goods sold by him to be smuggled into England (*y*); and even a foreign vendor cannot recover *if [324 he has himself actively contributed to the breach of English revenue laws, as by packing the goods in a manner suitable and to his knowledge intended for the purpose of smuggling (*z*).

The cases upholding contracts of this kind, whether as against our own or as against foreign laws, would probably not be now extended beyond the points specifically decided by them, and perhaps not altogether upheld (*a*). There is one modern case which looks at first sight like an authority for saying that our Courts pay no regard to foreign shipping registration laws: but it really goes upon a different principle, and, besides, the law of the United States was not properly brought before the Court (*b*).

Foreign stamp laws. As to instruments which cannot be used in their own country for want of a stamp, it is now settled that regard will be paid by the Courts of other States to the law which regulates them, and the only question is as to the real effect of that law. If it is a mere rule of local procedure, requiring the stamp to make the instrument admissible in evidence, a foreign Court, not being bound by such rules of procedure, will not reject the instrument as evidence: it is otherwise if the local law "makes a stamp necessary to

(*x*) *Holman* v. *Johnson* (1775) 1 Cowp. 341; *Pellecat* v. *Angell* (1835) 2 C. M. & R. 311–3, 41 R. R. 723, per Lord Abinger C.B.

(*y*) *Clugas* v. *Penaluna* (1791) 4 T. R. 466, 2 R. R. 442. It seems, but it is not quite certain, from this case, that mere knowledge of the buyer's intention would disentitle him.

(*z*) *Waymell* v. *Reed* (1794) 5 T. R. 599, 2 R. R. 675.

(*a*) It must be remembered that the general law as to sale of goods, &c., which the seller knows will be used for an unlawful purpose, was not fully settled at the date of these authorities. [See *infra*, p. *369, note 42.]

(*b*) *Sharp* v. *Taylor* (1849) 2 Ph. 801, see Lindley on Partnership, 115.

the validity of the instrument," *i. e.* a condition precedent to its having any legal effect at all (*c*).[91]

(b.) **Public policy as touching internal government.** As to matters touching good government and the administration of justice.

Corrupt or improper influence on public officers or legislature. It is needless to produce authorities to show that an agreement whose object is to induce any officer of the State, whether judicial or executive, **325]** to act partially or *corruptly in his office, must in any civilized country be void. But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void.[92] The case of *Egerton* v. *Earl Brownlow,* of which an account has been given a few pages above, was decided on the principle that all transactions are void which create contingent interests of a nature to put the pressure of extraneous and improper motives upon the counsels of the Crown or the political conduct of legislators.

Marshall v. Baltimore, &c., Co. A decision in the American Supreme Court which happens to be of nearly the same date shows that an agreement is void which contemplates the use of underhand means to influence legislation. In *Marshall* v. *Baltimore and Ohio Railroad Co.* (*d*) the nature of the agreement sued on appeared by a letter from the plaintiff to the president of the railway board, in which he proposed a plan for obtaining a right of way through Virginia for the company and offered himself as agent for the purpose. The letter pointed (though not in express terms) to the use of secret

(*c*) See Dicey, Conflict of Laws, 716, 717; *Bristow* v. *Secqueville* (1850) 5 Ex. 275, 19 L. J. Ex. 289.

(*d*) (1853) 16 Howard, 314.

91 See Fant *v.* Miller, 17 Gratt. 47.

92 McMullen *v.* Hoffman, 174 U. S. 639, 647; Brown *v.* First Bank, 137 Ind. 655, 668; Lucas *v.* Allen, 80 Ky. 681; Womack *v.* Loran, Ct. App. Ky. 8 C. L. J. 332; O'Hara *v.* Carpenter, 23 Mich. 410; Caton *v.* Stewart, 76 N. C. 357; Weber *v.* Shay, 56 Ohio St. 116; Spalding *v.* Ewing, 149 Pa. 375. An agreement to pay for services in soliciting and procuring the discharge of one drafted into the army (Bowman *v.* Coffroth, 59 Pa. St. 19. Cp. O'Hara *v.* Carpenter, 23 Mich. 410), or a pardon for a convict is unlawful and void. State *v.* Johnson, 52 Ind. 197, 205; Deering *v.* Cunningham, 63 Kan. 174; Wildey *v.* Collier, 7 Md. 273; Kribben *v.* Haycraft, 26 Mo. 396; Hatzfield *v.* Gulden, 7 Watts, 152. See also Haines *v.* Lewis, 54 Ia. 301, stated *infra*, p. *329, n. 1. *Contra,* Formby *v.* Pryor, 15 Ga. 258; Bird *v.* Breedlove, 24 Ga. 623; Thompson *v.* Wharton, 7 Bush. 563; Moyer *v.* Cantieny, 41 Minn. 242; Chadwick *v.* Knox, 31 N. H. 226. The case of Thompson *v.* Wharton was, however, put on the ground that the conviction was by a court unauthorized by law.

influence on particular members of the legislature: and it referred to an accompanying document which explained the nature of the plan in more detail. This document contained the following passage:—"I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable agents, whose persuasive arguments may influence the members to do you a naked justice. This is all I require—secrecy from motives of policy alone—because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make." The arrangement was to be as secret as practicable: the company was to have but one ostensible agent, who was to choose such *and so many sub-agents as he [326 thought proper: and the payment was to be contingent on success. The actual contract was made by a resolution of the directors, according to which agents were to be employed to "superintend and further" the contemplated application to the legislature of Virginia "and to take all proper measures for that purpose;" and their right to any compensation was to be contingent on the passing of the law. The Supreme Court held, first, that it was sufficiently clear that the contract was in fact made on the footing of the previous communications, and was to be carried out in the manner there proposed; and secondly, that being so made it was against public policy and void.

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate [*qu.* immediate?] or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." [The judgment then points out that persons interested in the results of pending legislation have a right to urge their claims either in person or by agents, but in the latter case the agency must be open and acknowledged.] "Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind, have all the effects of a direct fraud on the public" (*e*).

And the result of the previous authorities was stated to be—

"1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators are (*f*) void by the policy of the law.[93]

(*e*) (1853) 16 Howard, at pp. 334–5.

(*f*) "*Is*" by a clerical error in the report.

[93] On the other hand, as stated in Trist *v.* Child, 21 Wall. 441, "an agreement express or implied for purely professional services is valid.

"2nd. Secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent, and where the 327] *agent contracts to use secret influences, or voluntarily without contract with his principal uses such means, he cannot have the assistance of a court to recover compensation.

"3rd. That what in the technical vocabulary of politicians is termed 'log-rolling' (*g*) is a misdemeanor at common law punishable by indictment" (*h*).

So in a later case (*i*) an agreement to prosecute a claim before Congress by means of personal influence and solicitations of the kind known as "lobby service" has been held void.[94]

(*g*) Arrangements between members for the barter of votes on private bills.

(*h*) 16 Howard, 336.

(*i*) *Trist* v. *Child* (1874) 21 Wall. 441. See, too, *Meguire* v. *Corwine* (1879) 101 U. S. 108.

Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional."

Salinas *v.* Stillman, 66 Fed. Rep. 677 (C. C. A.); Bergen *v.* Frisbie, 125 Cal. 168; Barry *v.* Capen, 151 Mass. 99; Chesebrough *v.* Conover, 140 N. Y. 382; Yates *v.* Robertson, 80 Va. 475; Houlton *v.* Nichol, 93 Wis. 393. See also Davis *v.* Commonwealth, 164 Mass. 241.

94 Providence Tool Co. *v.* Norris, 2 Wall. 45; Oscanyan *v.* Arms Co., 103 U. S. 261; Findlay *v.* Pertz, 66 Fed. Rep. 427 (C. C. A.); Hayward *v.* Nordberg Mfg. Co., 85 Fed. Rep. 4 (C. C. A.); Hunt *v.* Test, 8 Ala. 713; Weed *v.* Black, 2 McArthur (D. C.), 268; Doane *v.* Chicago City R. R. Co., 160 Ill. 22; Bermudez Co. *v.* Crichfield, 62 Ill. App. 221; 174 Ill. 466; Elkhart County Lodge *v.* Crary, 98 Ind. 238; Kansas, &c. Ry. Co. *v.* McCoy, 8 Kan. 543; McBratney *v.* Chandler, 22 Kan. 692; Deering *v.* Cunningham, 63 Kan. 174; Wood *v.* McCann, 9 Dana, 366; Wildey *v.* Collier, 7 Md. 273; Houlton *v.* Dunn, 60 Minn. 26; Richardson *v.* Scott's Bluff County, 59 Neb. 400; Lyon *v.* Mitchell, 36 N. Y. 235; Mills *v.* Mills, 40 N. Y. 546; Veazey *v.* Allen, 173 N. Y. 359; Winpenny *v.* French, 18 Ohio St. 469; Sweeney *v.* McLeod, 15 Oreg. 330; Clippinger *v.* Hepbaugh, 5 W. & S. 315; Spalding *v.* Ewing, 149 Pa. 375; Powers *v.* Skinner, 34 Vt. 274; Bryan *v.* Reynolds, 5 Wis. 200; Chippewa Valley Co. *v.* Chicago, &c. Co., 75 Wis. 224; Houlton *v.* Nichol, 93 Wis. 393, *accord*. See also Washington Irrigation Co. *v.* Krutz, 119 Fed. Rep. 279 (C. C. A.); Brown *v.* First Nat. Bank, 137 Ind. 655; Thompson *v.* Wharton, 7 Bush, 563; Buck *v.* First Nat. Bank, 27 Mich. 293; McDonald *v.* Buckstaff, 56 Neb. 88; 28 Am. L. Rev. 211; 38 Cent. L. J. 123.

Cp. B. S. Green Co. *v.* Blodgett, 159 Ill. 169; Beal *v.* Polhemus, 67 Mich. 130; Southard *v.* Boyd, 51 N. Y. 177.

An agreement among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by promising to pay a consideration therefor, is contrary to public policy. Doane *v.* Chicago Ry. Co., 160 Ill. 22 (see also Farson *v.* Fogg, 205 Ill. 326); Maguire *v.* Smock, 42 Ind. 1; Howard *v.* F. I. Church of Baltimore, 18 Md. 451. Cp. Makemson *v.* Kauffman, 34 Ohio St. 444, 455.

An agreement, the consideration of which is a stipulated opposition to public improvements, is illegal. Corns *v.* Clouser, 137 Ind. 201; Slocum *v.* Wooley, 43 N. J. Eq. 451.

An agreement of neighbors to pay owners of a building a sum of money

Otherwise of contract by person interested to withdraw opposition. But as it is open to a landowner or other interested person to defend his interest by all lawful means against proposed legislation from which he apprehends injury, so it is open to him to withdraw or compromise his claims on any terms he thinks fit. There is no reason against bargains of this kind any more than against a compromise of disputed civil rights in ordinary litigation. And the lawfulness of such an agreement is not altered if it so happens that the party is himself a member of the legislature. In the absence of anything to show the contrary, he is presumed to make the agreement solely in his character of a person having a valuable interest of his own in the matter, and he is not to be deprived of his rights in that character merely because he is also a legislator (*k*). "A landowner cannot be restricted of his rights because he happens to be a member of Parliament" (*l*). This may seem anomalous: but it must be remembered that in practice there is little chance of a conflict between duty and

(*k*) *Simpson* v. *Lord Howden* (1839-42) 2 P. & D. 714, 10 A. & E. 793, 9 Cl. & F. 61, 50 R. R. 555.

(*l*) Kindersley V.-C. in *Earl of Shrewsbury* v. *N. Staffordshire Ry. Co.* (1865) L. R. 1 Eq. 593, 613, 35 L. J. Ch. 156.

in consideration of the renting of the building by the owners to the government at a nominal rent for a post-office was held not illegal in Fearnley *v.* De Mainville, 5 Col. App. 441. See also Beal *v.* Polhemus, 67 Mich. 130. *Contra,* Woodman *v.* Innes, 47 Kan. 26.

"A promise to pay money to one through whose land a road has been laid out, for withdrawing his opposition to opening it, is a valid consideration on which an action may be sustained." Weeks *v.* Lippencott, 42 Pa. 474. *Contra,* Smith *v.* Applegate, 3 Zabr. 352. And see Pingry *v.* Washburn, 1 Aiken, 264.

A contract by which the directors of a railroad company agree not to establish a station or freight depot within a certain distance of a point on its line is against public policy and unlawful. Beasly *v.* Texas, &c. Ry. Co., 191 U. S. 492; Railroad Co. *v.* Taylor, 6 Col. 1; Railroad Co. *v.* Mathers, 71 Ill. 592; 104 Ill. 257; Williamson *v.* Railroad Co., 53 Ia. 126; Railroad Co. *v.* Ryan, 11 Kan. 602. And so also is an agreement in consideration of money or property paid, or given, to a shareholder or director, to procure the establishment of a station at a particular place. Bestor *v.* Wathen, 60 Ill. 138; Fuller *v.* Dame, 18 Pick. 472. Cp. Railroad Co. *v.* Seeley, 45 Mo. 212.

But a promise by the railway company, for a benefit conferred upon it, to build its line to, or through, a particular point is not *per se* unlawful. Davis *v.* Williams, 121 Ala. 542; First Bank *v.* Hendrie, 49 Ia. 402; Berryman *v.* Trustees, 14 Bush, 755; Griswold *v.* Minneapolis, &c. Ry. Co., 97 N. W. Rep. 538 (N. Dak.); Railroad Co. *v.* Ralston, 41 Ohio St. 573. Cp. Holladay *v.* Patterson, 5 Oreg. 177.

See also Woodstock Iron Co. *v.* Richmond Extension Co., 129 U. S. 643; New Haven *v.* New Haven R. Co., 62 Conn. 252; Florida Central Co. *v.* State, 31 Fla. 482; Doane *v.* Chicago Ry. Co., 160 Ill. 22; Gray *v.* Chicago Ry. Co., 189 Ill. 400; Lyman *v.* Suburban R. Co., 190 Ill. 320; Chicago Ry. Co. *v.* Coburn, 91 Ind. 557; Louisville Ry. Co. *v.* Sumner, 106 Ind. 55; Heirs of Burney *v.* Ludeling, 47 La. Ann. 73, 96; Lum *v.* McEwen, 56 Minn. 278; Montclair Academy *v.* North Jersey Ry. Co., 65 N. J. L. 328; Levy *v.* Tatum, 43 S. W. Rep. 940 (Tex. Civ. App.); Horner *v.* Chicago Ry. Co., 38 Wis. 165.

interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course it would be improper for a member personally interested to sit on such a committee.

328] *Sale of offices, &c., at common law. On similar grounds it is said that the sale of offices (which is forbidden by statutes extending to almost every case) is also void at common law (*m*). However, there may be a lawful partnership in the emoluments of offices, although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful (*n*).[95] The same principles are applied to other appointments which though not exactly public offices are concerned with matters of public interest. "Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested:[96] the public will be better served by having persons best qualified to fill offices appointed to them; but

(*m*) *Hanington* v. *Du Chastel* (1781) 2 Swanst. 159, *n.*; *Hopkins* v. *Prescott* (1847) 4 C. B. 578, 16 L. J. C. P. 259, per Coltman J.

(*n*) *Sterry* v. *Clifton* (1850) 9 C. B. 110, 19 L. J. C. P. 237.

[95] Outen *v.* Rodes, 3 A. K. Marsh. 432; Lewis *v.* Knox, 2 Bibb, 453; Stroud *v.* Smith, 4 Houst. 448; Robertson *v.* Robinson, 65 Ala. 610; Groton *v.* Waldborough, 11 Me. 306; Eddy *v.* Capron, 4 R. I. 394; Meredith *v.* Ladd, 2 N. H. 517; Carleton *v.* Whitcher, 5 N. H. 196; Filson's Trustees *v.* Himes, 5 Pa. 452; Bowers *v.* Bowers, 26 Pa. 74; Ferris *v.* Adams, 23 Vt. 136.

[96] An agreement by which a candidate for office receives from another money to aid in securing his election, and in consideration thereof promises to share with him a portion of the emoluments of the office, is against public policy and void. Martin *v.* Wade, 37 Cal. 168. And see Gaston *v.* Drake, 14 Nev. 175.

So also is an agreement between two candidates for the same office, that one shall withdraw and the other, if successful in the attempt to obtain the office, shall divide the fees with him. Gray *v.* Hook, 4 N. Y. 449; Hunter *v.* Nolf, 71 Pa. 282.

Where a candidate for public office pledged himself, if elected, to perform the duties of the office for a sum less than half the fees allowed by law, whereby voters were induced to vote for him, and he received a majority of the votes cast, his election was declared invalid as against public policy. State *v.* Collier, 72 Mo. 13; Carrothers *v.* Russell, 53 Ia. 346; State *v.* Elting, 29 Kan. 397, 399; State *v.* Purdy, 36 Wis. 213. See also Foley *v.* Speir, 100 N. Y. 552.

An agreement by an officer whose compensation is fixed by law to accept smaller compensation was held illegal in Brown *v.* First Bank, 137 Ind. 655; Peters *v.* Davenport, 104 Ia. 625; Willemin *v.* Bateson, 63 Mich. 309; Gallaher *v.* Lincoln, 63 Neb. 339.

A note executed in consideration of the payee's agreement to resign a public office in favor of the maker and use his influence to secure the latter's appointment as his successor is void. Meacham *v.* Dow, 32 Vt. 721. See also Edwards *v.* Randle, 63 Ark. 318.

A promise of reward for using influence to procure the promisor's election or appointment to public office is void. Conner *v.* Canter, 15 Ind. App. 690; Faurie *v.* Morin's Syndics, 4 Mart. 39; Nichols *v.* Mudgett, 32 Vt. 546.

In Meguire *v.* Corwine, 101 U. S. 108, a contract was held illegal in which

if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." Therefore the practice which had grown up in the last century of purchasing commands of ships in the East India Company's service was held unlawful, no less on this ground than because it was against the Company's regulations(*o*).

In like manner a secret agreement to hand over to another person the profits of a contract made for the public service, such as a Post Office contract for the conveyance of mails, is void (*p*).[97]

Nevertheless many particular offices, and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times. But the commission of an officer in the army could not be the subject of a valid pledge even under the old system of purchase (*q*.)

Assignments of salaries. For like reasons certain assignments of salaries and pensions have been held void, as tending to defeat the public objects for which the original grant was intended.[98] Thus

(*o*) *Blachford* v. *Preston* (1799) 8 T. R. 89, 93, 4 R. R. 598.

(*p*) *Osborne* v. *Williams* (1811) 18 Ves. 379, 11 R. R. 218.

(*q*) *Collyer* v. *Fallon* (1823) T. & R. 459.

the defendant's testator in consideration of assistance rendered by the plaintiff in securing the testator's appointment as special counsel of the United States in certain litigations agree to divide his fees with the plaintiff. See also Schloss *v.* Hewlett, 81 Ala. 266; Edwards *v.* Randle, 63 Ark. 318; Martin *v.* Wade, 37 Cal. 168; Conner *v.* Canter, 15 Ind. App. 690; Glover *v.* Taylor, 38 La. Ann. 634; Harris *v.* Chamberlain, 126 Mich. 280; Dickson *v.* Kittson, 75 Minn. 168; Gray *v.* Hook, 4 N. Y. 449; Basket *v.* Moss, 115 N. C. 448; Hunter *v.* Nolf, 71 Pa. 282; Whitman *v.* Ewin, 39 S. W. Rep. 742 (Tenn. Ch.); Willis *v.* Compress Co., 66 S. W. Rep. 472 (Tex. Civ. App.); Meacham *v.* Dow, 32 Vt. 71.

A promise by a shareholder or director of a corporation for a pecuniary consideration to procure one to be appointed an officer of the corporation, West *v.* Camden, 135 U. S. 507; Noel *v.* Drake, 28 Kan. 265; Guernsey *v.* Cook, 120 Mass. 501; Cone *v.* Russell, 48 N. J. Eq. 208. Cp. Greenwell *v.* Porter, [1902] 1 Ch. 530; Flaherty *v.* Cary, 62 N. Y. App. Div. 116, affd., without opinion, 172 N. Y. 646; or to vote for a particular person as manager, Woodruff *v.* Wentworth, 133 Mass. 309. Cp. Jones *v.* Williams, 139 Mo. 1; or a promise to pay a director to resign, Forbes *v.* McDonald, 54 Cal. 98, is void. But see Barnes *v.* Brown, 80 N. Y. 527.

A contract with a director or manager of a corporation to induce the corporation to take a certain line of conduct is illegal. Lum *v.* McEwen, 56 Minn. 278; Attaway *v.* Third Bank, 93 Mo. 485.

[97] See Ashburner *v.* Parrish, 81 Pa. 52. Cp. Gordon *v.* Dalby, 30 Ia. 223.

[98] The assignment by a public officer of a portion of his salary not yet due is void. Shannon *v.* Bruner, 36 Fed. Rep. 147; Schloss *v.* Hewlett, 81 Ala. 266; King *v.* Hawkins, 16 Pac. Rep. 434 (Ariz.); Bangs *v.* Dunn, 66 Cal. 72; Lewis *v.* Denver, 9 Col. App. 328; Holt *v.* Thurman, 111 Ky. 84; State *v.* Williamson, 118 Mo. 146; Beal *v.* McVicker, 8 Mo. App. 202; Swenk *v.* Wykoff, 46 N. J. Eq. 560; Bliss *v.* Lawrence, 58 N. Y. 442; Bowery Bank *v.* Wilson, 122 N. Y. 478; Billings *v.* O'Brien, 14 Abb. Pr. N. S. 238; National Bank *v.* Fink, 86 Tex. 303. And see Field *v.* Chipley, 79 Ky. 260; Sandwich

329] *military pay and judicial salaries are not assignable. The rule is that "a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable": and therefore a pension given not only as a reward for past services, but for the support of a dignity created at the same time and for the same reason, is inalienable (*r*). But an assignment by the holder of a public office of a sum equivalent to a proportionate part of salary, and secured to his legal personal representatives on his death by the terms of his appointment, is not invalid, such a sum being simply a part of his personal estate like money secured by life insurance (*s*).[99] A clergyman having cure of souls is not, as such, a public officer for the purpose of this rule (*t*). A mortgage by an officer of the Customs of his disposable share in the "Customs Annuity and Benevolent Fund" created by a special Act has been unsuccessfully disputed as contrary to the policy of the Act (*u*).

"Stifling prosecutions" — Williams v. Bayley. Agreements for the purpose of "stifling a criminal prosecution" are void as tending to obstruct the course of public justice.[1] An agreement made in considera-

(*r*) *Davis* v. *Duke of Marlborough* (1818) 1 Swanst. 74, 79, 53 R. R. 29, 31. Cp. *Arbuthnot* v. *Norton* (1846) 5 Moo. P. C. 219. And see authorities collected in the notes to *Ryall* v. *Rowles* (1749) in 2 Wh. & T. L. C.

(*s*) *Arbuthnot* v. *Norton* (1846) 5 Moo. P. C. 219.

(*t*) *Re Mirams* [1891] 1 Q. B. 594, 60 L. J. Q. B. 397.

(*u*) *Maclean's trusts* (1874) L. R. 19 Eq. 274.

Mfg. Co. *v.* Krake, 66 Minn. 110; Spencer *v.* Morris, 67 N. J. L. 500, 54 L. R. A. 566, n. *Contra*, State *r.* Hastings, 15 Wis. 75.

The principle has been applied to private trusts; hence the commissions of an executor until liquidated in the manner prescribed by law are not assignable. *Re* King's Est., 110 Mich. 203; *Re* Worthington, 141 N. Y. 9.

[99] In this country the pensions of soldiers and sailors cannot be assigned. U. S. Rev. Stat., § 4745. Nor attached. Ib., § 4747. But this exemption protects the money only until transmitted to the pensioner. When once in his hands it is liable to seizure. McIntosh *v.* Aubrey, 185 U. S. 122; Johnson *v.* Elkins, 90 Ky. 163. See further, 31 Cent. L. J. 324.

[1] Lound *r.* Grimwade, 39 Ch. D. 605; Windhill Board of Health *r.* Vint, 45 Ch. D. 351; Jones *v.* Merioneth Building Soc., [1891] 2 Ch. 587, [1892] 1 Ch. 173; United States Fidelity Co. *v.* Charles, 131 Ala. 658; Kirkland *r.* Benjamin, 67 Ark. 480; McMahon *v.* Smith, 47 Conn. 221; Chandler *r.* Johnson, 39 Ga. 85; Goodwin *r.* Crowell, 56 Ga. 566; Jones *r.* Dannenberg Co., 112 Ga. 426; Henderson *r.* Palmer, 71 Ill. 579; Reed *v.* McKee, 42 Ia. 689; Smith *r.* Steely, 80 Ia. 738; Friend *v.* Miller, 52 Kan. 139; Kimbrough *r.* Lane, 11 Bush, 556; Shaw *r.* Reed, 30 Me. 105; Taylor *r.* Jaques, 106 Mass. 291; Gorham *v.* Keyes, S. C. Mass.; Snider *r.* Willey, 33 Mich. 483; Sumner *r.* Sumner, 54 Mo. 340; Baker *r.* Farris, 61 Mo. 389; Shaw *v.* Spooner, 9 N. H. 197; Haynes *v.* Rudd, 102 N. Y. 372; Buffalo Press Club *r.* Greene, 26 N. Y. Supp. 525; 33 N. Y. Supp. 286; Lindsay *r.* Smith, 78 N. C. 328; Insurance Co. *r.* Hull, 51 Ohio St. 270; Riddle *v.* Hall, 99 Pa. 115; Roll *r.* Raguet, 4 Ohio, 400; Raguet *r.* Roll, 7 Ohio (pt. 1), 76; Wright *v.* Rindskopf, 43 Wis. 344. See

tion ostensibly of the giving up of certain promissory notes, the notes in fact having forged indorsements upon them, and the real consideration appearing by the circumstances to be the forbearance of the other party to prosecute, was held void on this ground in the House of Lords. The principle of the law as there laid down by Lord Westbury is "That you shall not make a trade of a felony" (*x*).

(*x*) *Williams* v. *Bayley* (1866) L. R. 1 H. L. 200, 220, 35 L. J. Ch. 717.

also Weber *v.* Shay, 56 Ohio St. 116; City National Bank *v.* Kusworm, 88 Wis. 188; Mack *v.* Prang, 104 Wis. 1, 26 L. R. A. 48.

Cp. Allen *v.* Dunham, 92 Tenn. 257, 269; Loud *v.* Hamilton, 45 L. R. A. 400 (Tenn.).

If a prosecution is pending when the agreement was made it is immaterial that no crime had in fact been committed, Manning *v.* Columbian Lodge, 57 N. J. Eq. 338, 340; Koons *v.* Vauconsant, 129 Mich. 260; but if no prosecution had been begun the weight of authority is that the agreement is not illegal. Plant *v.* Gunn, 2 Woods, 372; Manning *v.* Columbian Lodge, 57 N. J. Eq. 338; Steuben Co. Bank *v.* Mathewson, 5 Hill, 249; Catlin *v.* Henton, 9 Wis. 476. But see *contra*, Koons *v.* Vauconsant, 129 Mich. 260.

A promise to pay one for using his influence to have criminal proceedings dismissed is void. Rhodes *v.* Neal, 64 Ga. 704; Ricketts *v.* Harvey, 78 Ind. 152; Averbeck *v.* Hall, 14 Bush, 505; Ormerod *v.* Dearman, 100 Pa. 561; Barron *v.* Tucker, 53 Vt. 338. So is an agreement to indemnify another for becoming bail for one arrested for a crime so as to enable the latter to flee from justice; Dunkin *v.* Hodge, 46 Ala. 523; Baehr *v.* Wolff, 59 Ill. 470. Or an agreement by a fugitive from justice about to be surrendered for extradition, to pay money in consideration of forbearance to prosecute the proceedings against him. Dixon *v.* Olmstead, 9 Vt. 310; Fay *v.* Oatley, 6 Wis. 42. Or a promise to pay money in consideration of not searching the house of a thief for stolen goods until the next day. Merrill *v.* Carr, 60 N. H. 114. Or in consideration of a promise to sign a petition to the judge for clemency in the sentence of a prisoner. Buck *v.* Bank, 27 Mich. 293.

"A contract conditioned for the execution and deposit of certain promissory notes by one under sentence for the commission of a crime, to be delivered to the prosecuting witness upon certain conditions, one of which was that the maker should receive a pardon, or be acquitted on a new trial, is illegal and void, as against public policy." Haines *v.* Lewis, 54 Ia. 301. And see Commrs. of Guilford Co. *v.* March, 89 N. C. 268.

A promise to pay one wanted as a witness in a criminal proceeding for keeping out of the jurisdiction of the court, so as to evade service of process upon him, is void. Bierbauer *v.* Wirth, 10 Biss. 60; Valentine *v.* Stewart, 15 Cal. 387. So is a promise to pay an attorney for procuring the release from jail of a witness against the promisor in order that he might be removed and his testimony not obtained. Crisup *v.* Grosslight, 79 Mich. 380.

But "in all offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." Keir *v.* Leeman, 9 Q. B. 371, 375; Flower *v.* Sadler, 10 Q. B. D. 572; McClatchie *v.* Haslam, 65 L. T. 691; Paige *v.* Hieronymus, 192 Ill. 546; Powell *v.* Flanary, 109 Ky. 342; Thorn *v.* Pinkham, 84 Me. 101; Beath *v.* Chapoton, 115 Mich. 506; Cass County Bank *v.* Brickner, 34 Neb. 516; Barrett *v.* Weber, 125 N. Y. 18; Portner *v.* Kirschner, 169 Pa. 472.

And an agreement on the part of a prosecuting officer in consideration of testimony by one jointly charged with a crime to recommend a *nol. pros.* to the court is not illegal. Nickelson *v.* Wilson, 60 N. Y. 362; Rogers *v.* Hill, 22 R. I. 496.

Keir v. Leeman. However the principal direct authority must still **330]** be *sought in the earlier case of *Keir* v. *Leeman* (*y*). The Court of Queen's Bench there said:—

"The principle of law is laid down by Wilmot C.J. in *Collins* v. *Blantern* (*z*) that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused is founded on an unlawful consideration and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. [The cases are then reviewed.] We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it" (*a*).

Accordingly the Court held that an indictment for offences including riot and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise. The judgment of the Exchequer Chamber (*b*) affirmed this, but showed some dissatisfaction even with the limited right of compromise admitted in the Court below. The Court of Appeal has since held that the compromise of any public misdemeanor, from whatever motive, is illegal (*c*), though where there is a choice of a civil or criminal remedy a compromise of criminal as well as civil proceedings may be lawful (*d*).[2]

There need not be an express agreement not to prosecute. An understanding to that effect, shown by the circumstances to be part **331]** of the transaction, will be enough. *And, since the defence of illegality in cases of this kind is allowed on public grounds, it must

(*y*) (1844) 6 Q. B. 308, 13 L. J. Q. B. 259, in Ex. Ch. 9 Q. B. 371, 15 L. J. Q. B. 360.

(*z*) 1 Sm. L. C. 369, 382 (355, 365, 10th ed.).

(*a*) Acc. in *Clubb* v. *Hutson* (1865) 18 C. B. N. S. 414, held that forbearance to prosecute a charge of obtaining money by false pretences is an illegal consideration. What if there is no real ground for a prosecution, the supposed offence being an act not criminally punishable? See per Fry J. 8 Ch. D. at p. 477. It is submitted that the agreement would be void for want of consideration.

(*b*) 9 Q. B. at p. 392.

(*c*) *Windhill Local Board* v. *Vint* (1890) 45 Ch. Div. 351, 59 L. J. Ch. 608.

(*d*) *Fisher & Co.* v. *Apollinaris Co.* (1875) 10 Ch. 297, 44 L. J. Ch. 500.

2 Price *v.* Summers, 2 South. 578; Geier *v.* Shade, 109 Pa. 180; Fay *v.* Oatley, 6 Wis. 42, 59 (*obiter*). But see *contra*, Jones *v.* Rice, 18 Pick. 440; Partridge *v.* Hood, 120 Mass. 403; Lindsay *v.* Smith, 78 N. C. 328; Gray *v.* Seigler, 2 Strobh. 117; Corley *v.* Williams, 1 Bailey, 588; Vincent *v.* Groom, 1 Yerg. 430; Bowen *v.* Buck, 28 Vt. 308. See also State *v.* Carver, 69 N. H. 216; Pearce *v.* Wilson, 111 Pa. 14; Brown *v.* McCreight, 187 Pa. 181.

be allowed even if the Court thinks it discreditable to the party setting it up (*e*).

It is not compounding felony for a person whose name has been forged to a bill to adopt the forged signature[3] and advance money to the forger to enable him to take up the bill. It is doubtful whether a security given by the forger for such advance is valid: but he cannot himself actively dispute it (on the principle *potior est conditio defendentis,* of which afterwards) nor can his trustee in bankruptcy, who for this purpose is in no better position than himself, as there is in any case no offence against the bankrupt laws (*f*).[4]

An agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail (*g*):[5] and so is the like agreement of a third person (*h*).[6]

18 Eliz. c. 5. The compounding of offences under penal statutes is expressly forbidden by 18 Eliz. c. 5, s. 5.

Compromise of election petition. An election petition, though not a criminal proceeding, is a proceeding of a public character and in-

(*e*) *Jones* v. *Merionethshire Building Society* [1892] 1 Ch. 173, 61 L. J. Ch. 138, C. A.

(*f*) Otherwise where, after an act of bankruptcy, the bankrupt's money has been paid for stifling a prosecution: there the trustee can recover it: *Ex parte Wolverhampton Banking Co.* (1884) 14 Q. B. D. 32; *Ex parte Caldecott* (1876) 4 Ch. Div. 150, 46 L. J. Bk. 14.

(*g*) *Herman* v. *Jeuchner* (1885) 15 Q. B. Div. 561, 54 L. J. Q. B. 340.

(*h*) *Consolidated Exploration and Finance Co.* v. *Musgrave* [1900] 1 Ch. 37, 69 L. J. Ch. 11.

[3] That one may adopt and ratify his forged signature, see Bank *v.* Mott, 33 Conn. 95; Livings *v.* Wiler, 32 Ill. 387; Hefner *v.* Vandolah, 62 Ill. 483; Fay *v.* Slaughter, 194 Ill. 157, 167; Bank *v.* Keene, 53 Me. 103; Bank *v.* Crafts, 4 Allen, 477; Wellington *v.* Jackson, 121 Mass. 157; Fitzpatrick *v.* School Commrs., 7 Humph. 224. See also Campbell *v.* Campbell, 133 Cal. 33; Ofenstein *v.* Bryan, 20 App. D. C. 1; Smith *v.* Tramel, 68 Ia. 488; Myer *v.* Wegener, 114 Ia. 74; Carthage Bank *v.* Butterbaugh, 116 Ia. 657; Forsythe *v.* Bonta, 5 Bush, 547. *Contra,* that public policy forbids sanctioning a ratification of a forged signature. Brook *v.* Hook, L. R. 6 Ex. 89; Barry *v.* Kirkland, 52 Pac. Rep. 771 (Ariz.); Henry *v.* Heeb, 114 Ind. 275 (but see Neal *v.* First Bank, 26 Ind. App. 503); Workman *v.* Wright, 33 Ohio St. 405; McHugh *v.* County of Schuylkill, 67 Pa. 391; Shisler *v.* Vandike, 92 Pa. 447; Henry, etc., Assn. *v.* Walton, 181 Pa. 201; Marks *v.* Schram, 109 Wis. 452. See also Crawford, Neg. Inst. Act, § 42. See also *infra,* p. 856, n. 18.

[4] See on the other hand, Laing *v.* McCall, 50 Vt. 657, which, it is submitted, was wrongly decided. Cp. Ward *v.* Allen, 2 Met. 53.

[5] United States *v.* Simmons, 47 Fed. Rep. 577. See also United States *v.* Ryder, 110 U. S. 729. But see *contra,* Simpson *v.* Roberts, 35 Ga. 180; Maloney *v.* Nelson, 144 N. Y. 182, 12 N. Y. App. Div. 545, 158 N. Y. 351; Reynolds *v.* Harrell, 2 Strob. 87.

In Bing *v.* Willey, 146 Pa. 381, an agreement to pay a bondsman for becoming surety on a bond given to obtain a liquor license was held valid.

[6] *Contra,* Maloney *v.* Nelson, 12 N. Y. App. Div. 545, 158 N. Y. 351.

terest which may have penal consequences; and an agreement for pecuniary consideration not to proceed with an election petition is void at common law, as its effect would be to deprive the public of the benefit which would result from the investigation (*i*).

In like manner an agreement for the collusive conduct of a divorce
332] suit is void (*k*),[7] and agreements not to expose *immoral con-

(*i*) *Coppock* v. *Bower* (1838) 4 M. & W. 361, 51 R. R. 627.

(*k*) *Hope* v. *Hope* (1857) 8 D. M. G. 731. 26 L. J. Ch. 417.

[7] Viser *v.* Bertrand, 14 Ark. 267; Beard *v.* Beard, 65 Cal. 354; Loveren *v.* Loveren, 106 Cal. 509; Smutzer *v.* Stimson, 9 Col. App. 326; Goodwin *v.* Goodwin, 4 Day, 343; Stilson *v.* Stilson, 46 Conn. 15; Birch *v.* Anthony, 109 Ga. 349; Everhart *v.* Puckett, 73 Ind. 409; Stokes *v.* Anderson, 118 Ind. 533; Polson *v.* Stewart, 167 Mass. 211; Belden *v.* Munger, 5 Minn. 211; Adams *v.* Adams, 25 Minn. 72; Sayles *v.* Sayles, 21 N. H. 312; Cross *v.* Cross, 58 N. H. 373; Phillips *v.* Thorp, 10 Oreg. 494; Stoutenburgh *v.* Lybrand, 13 Ohio St. 228; Kilborn *v.* Field, 78 Pa. 194; Irvin *v.* Irvin, 169 Pa. 529; James *v.* Steere, 16 R. I. 367; Palmer *v.* Palmer, 72 Pac. Rep. (Utah) 3; Baum *v.* Baum, 109 Wis. 47. Compare Greenhood, 484 *et seq.*; Gibbons *v.* Gibbons, 54 S. W. Rep. (Ky.) 710; Parsons *v.* Parsons, 62 S. W. Rep. (Ky.) 719. Where a divorce has been fraudulently obtained, a subsequent agreement between the parties that it shall not be disturbed is against public policy and void. Comstock *v.* Adams, 23 Kan. 513. See also Evans *v.* Evans, 93 Ky. 510; Blank *v.* Nohl, 112 Mo. 159. So also is an agreement between the overseers of the poor and a husband whose wife is supported as a town charge that they will refrain from making opposition to a libel for divorce filed by the husband against the wife. Weeks *v.* Hill, 38 N. H. 199. But a promise made in consideration of a wife's dismissing a suit for divorce begun by her is lawful. McClure *v.* McClure, 100 Cal. 339; Barbour *v.* Barbour, 49 N. J. Eq. 429; Phillips *v.* Meyers, 82 Ill. 67; Adams *v.* Adams, 91 N. Y. 381; cp. Fisher *v.* Koontz, 110 Ia. 498; Merrill *v.* Peaslee, 146 Mass. 460; Copeland *v.* Boaz, 9 Baxt. 223; Oppenheimer *v.* Collins, 115 Wis. 283. See also 60 L. R. A. n. "An action may be maintained by a woman upon a promissory note given to her by her former husband, after she has obtained a divorce from him, in pursuance of a written agreement made before the divorce, and conditioned upon the divorce being decreed, and which was called to the attention of the court granting the divorce, by the terms of which agreement, which were carried out by each party, she was to convey her land to him, and give a release of all her rights of dower and homestead, and he was to give her a sum of money and the note in suit, which were to be accepted instead of alimony." Chapin *v.* Chapin, 135 Mass. 393. But as to analogous agreements made before divorce obtained, and not called to the attention of the court, see Speck *v.* Dausman, 7 Mo. App. 165; Hamilton *v.* Hamilton, 89 Ill. 349.

An agreement by a woman with her counsel in a suit for divorce to allow them for compensation for their services in the suit a portion of the alimony which might be awarded is void. Newman *v.* Freitas, 129 Cal. 283; Lynde *v.* Lynde, 64 N. J. Eq. 736; Jordan *v.* Westerman, 62 Mich. 170.

An agreement by a wife to support her husband, in consideration of a conveyance by him to her, is void. Corcoran *v.* Corcoran, 119 Ind. 138. As is an agreement to pay a wife for performing duties as a wife. Miller *v.* Miller, 78 Ia. 177; Randall *v.* Randall, 37 Mich. 564; Michigan Trust Co. *v.* Chapin, 106 Mich. 384.

A contract to marry a woman when the promisor's present wife is divorced is void. Leupert *v.* Shields, 14 Col. App. 404. Or when his present wife is dead. Noice *v.* Brown, 38 N. J. L. 228. See also Paddock *v.* Robinson, 63 Ill. 99. Cp. Brown *v.* Odill, 104 Tenn. 250.

duct (*l*),[8] and to conduct criminal proceedings against a third person in such a way that the name of a party who was in fact involved in the transaction should not be mentioned (*m*) have been held void as against public policy.[9]

Secret agreement as to conduct of winding-up. A shareholder in a company which was in course of compulsory winding-up agreed with other shareholders, who were also creditors, in consideration of being indemnified by them against all future calls on his shares, that he would help them to get an expected call postponed and also support their claim; it was held that "such an agreement amounts to an interference with the course of public justice": for the clear intention of the Winding-up Acts is that the proceedings should be taken with reasonable speed so that the company's affairs may be settled and the shareholders relieved; and therefore any secret agreement to delay proceedings to the prejudice of the other shareholders and creditors is void (*n*). This comes near to the cases of secret agreements with particular creditors in bankruptcy or composition: and those cases do in fact rest partly on this ground. But the direct fraud on the other creditors is the chief element in them, and we have therefore spoken of them under an earlier head (p. *279).

Agreements for reference to arbitration, how far valid at common law. Agreements to refer disputes to arbitration are, or rather were, to a certain extent regarded as encroachments on the proper authority of courts of justice by the substitution of a "domestic forum" of the parties' own making. At common law such an agreement, though so far valid that an action can be maintained for a breach of it (*o*),[10]

(*l*) *Brown* v. *Brine* (1875) 1 Ex. D. 5, 45 L. J. Ex. 129.

(*m*) *Lound* v. *Grimwade* (1888) 39 Ch. D. 605, 57 L. J. Ch. 725.

(*n*) *Elliott* v. *Richardson* (1870) L. R. 5 C. P. 744, 748–9, per Willes J. 39 L. J. C. P. 340.

(*o*) *Livingston* v. *Ralli* (1855) 5 E. & B. 132, 24 L. J. Q. B. 269.

8 Case *v.* Smith, 107 Mich. 416.

9 An agreement to pay a witness, who could not be required by subpœna to attend a trial, a certain sum to be present at the trial, which was to be reduced one-half if the party promising lost the case is unlawful. Dawkins *v.* Gill, 10 Ala. 206. And see Brown *v.* First Bank, 137 Ind. 655; Thomas *v.* Caulkett, 57 Mich. 392. An agreement to procure witnesses to swear to a certain state of facts is against public policy. Patterson *v.* Donner, 48 Cal. 369; Goodrich *v.* Tenney, 144 Ill. 422; Quirk *v.* Muller, 14 Mont. 467. But see Casserleigh *v.* Wood, 14 Col. App. 265; Wellington *v.* Kelly, 84 N. Y. 543.

A contract for the sale of bonds on condition that the purchaser shall bring a feigned suit to test their validity is void. Van Horn *v.* Kitteltas County, 112 Fed. Rep. 1.

10 Donegal *v.* Verner, 6 Ir. Rep. C. L. 504; Hamilton *v.* Home Ins. Co., 137 U. S. 370, 385; Hill *v.* More, 40 Me. 515, 523, *acc.* See also Nute *v.* Hamilton

does not "oust the ordinary jurisdiction of the Court"—that is, **333]** cannot be set up as a bar to an action brought in *the ordinary way to determine the very dispute which it was agreed to refer.[11] Nor could such an agreement be specifically enforced (*p*),[12] or used as a bar to a suit in equity (*q*).[13] It is said however "that a special covenant not to sue *may* make a difference" (*q*).

Practically enforceable under Arbitration Act. And the law has not been directly altered (*q*); but the Common Law Procedure Act, 1854, now superseded by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), gave the Courts a discretion to stay proceedings in actions or suits on the subject-matter of an agreement to refer, which amounts in practice to enabling them to enforce the agreement: and this discretion has as a rule been exercised by Courts both of law (*r*) and of equity (*s*) in the absence of special circumstances, such a case where

(*p*) *Street* v. *Rigby* (1802) 6 Ves. 815, 818.

(*q*) *Cooke* v. *Cooke* (1867) L. R. 4 Eq. 77, 867, 30 L. J. Ch. 480. By Scots law a reference excludes the jurisdiction only if it is to named arbitrators, see *Hamlyn & Co.* v. *Talisker Distillery* [1894] A. C. 202.

(*r*) *Randegger* v. *Holmes* (1866) L. R. 1 C. P. 679; *Seligmann* v. *Le Boutillier* (1866) *ib.* 681.

(*s*) *Willesford* v. *Watson* (1873) L. R. 14 Eq. 572, 8 Ch. 473, 42 L. J. Ch. 447; *Plews* v. *Baker* (1873) L. R. 16 Eq. 564, 43 L. J. Ch. 212.

Mut. Ins. Co., 6 Gray, 174, 181; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633; Gray *v.* Wilson, 4 Watts, 39, 41. Cp. Myers *v.* Jenkins, 63 Ohio St. 101, 102. But only nominal damages are recoverable. Leake on Contracts (4th ed.), 676; Munson *v.* Straits of Dover S. S. Co., 99 Fed. Rep. 787; 102 Fed. Rep. (C. C. A.) 926.

[11] See cases cited *infra*, n. 15.

On this principle it was held that an agreement by a foreign insurance company, in pursuance of a State statute, exacting the promise as a condition of the right to do business in the State, that if sued in a State court it would not remove the suit into the Federal court was void. Insurance Co. *v.* Morse, 20 Wall. 445. See also Southern Pac. Co. *v.* Denton, 146 U. S. 202; Mutual Reserve Assn. *v.* Cleveland Woolen Mills, 82 Fed. Rep. 508; Hobbs *v.* Insurance Co., 56 Me. 417; Nute *v.* Insurance Co., 6 Gray, 174; Quimby *v.* Insurance Co., 58 N. H. 494; Railroad Co. v. Cary, 28 Ohio St. 208; Needy *v.* German Ins. Co., 197 Pa. 460.

A provision in a contract made in Italy that suit upon it should be brought only in Italy was, however, held valid in Mittenthal *v.* Mascagni, 183 Mass. 19. See further, 58 Cent. L. J. 66.

A stipulation in a policy on which one hundred underwriters were severally liable that the assured should not sue more than one at one time, and that the decision in such an action should be decisive as to the liability of all, was upheld, and a plea held good which set forth that the action was brought in violation of the agreement. New Jersey Works *v.* Ackerman, 39 N. Y. Supp. 585.

[12] Tobey *v.* County of Bristol, 3 Story, 800; Grievance Committee *v.* Brown, 61 Fed. Rep. 541, 543; King *v.* Howard, 27 Mo. 21; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 104; Smith *v.* Railroad Co., 36 N. H. 458, 487; Greason *v.* Keteltas, 17 N. Y. 491, 496; Conner *v.* Drake, 1 Ohio St. 166; Grosvenor *v.* Flint, 20 R. I. 21.

[13] Miles *v.* Schmidt, 168 Mass. 339.

a charge of fraud is made, and the party charged with it desires the inquiry to be public (*t*), or where the defendant appeals to an arbitration clause not in good faith, but merely for the sake of vexation or delay (*u*), or is otherwise not really ready and willing to arbitrate (*x*). A question whether on the true construction of an arbitration clause the subject-matter of a particular dispute falls within it is itself to be dealt with by the arbitrator, if it appears from the nature of the case and the terms of the provisions for arbitration that such was *the intention of the parties. Otherwise it must [334 be decided by the Court (*y*).[14]

And when the question is whether an agreement containing an arbitration clause is or is not determined, that question is not one for arbitration, since the arbitration clause itself must stand or fall with the whole agreement (*z*).

Special statutory arbitration clauses. Certain statutory provisions for the reference to arbitration of internal disputes in friendly and building societies have been decided (after some conflict) to be compulsory and to exclude the ordinary jurisdiction of the Courts (*a*). The Railway Companies Arbitration Act, 1859, is also compulsory (*b*).

(*t*) *Russell* v. *Russell* (1880) 14 Ch. D. at p. 476 (Jessel M.R.).

(*u*) L. R. 14 Eq. 578; *Witt* v. *Corcoran* (1871) L. R. 8 Ch. 476, *n.*, L. R. 16 Eq. 571. The enactment applies only where there is at the time of action brought an existing agreement for reference which can be carried into effect: *Randell, Saunders & Co.* v. *Thompson* (1876) 1 Q. B. Div. 748, 45 L. J. Q. B. 713. Not where the arbitration clause does not cover the whole subject-matter: *Turnock* v. *Sartoris* (1889) 43 Ch. Div. 150, 62 L. T. 209. Nor when the matter in difference is a question of pure law: *Clegg* v. *Clegg* (1890) 44 Ch. Div. 200, 59 L. J. Ch. 520.

(*x*) See the principle and limits of the exception explained in the C. A.: *Parry* v. *Liverpool Malt Co.* [1900] 1 Q. B. 339, 69 L. J. Q. B. 161.

(*y*) *Piercy* v. *Young* (1879) 14 Ch. Div. 200, 208, per Jessel M.R. qualifying the apparent effect of *Willesford* v. *Watson* (1873) L. R. 8 Ch. 473.

(*z*) Per James L.J. in *Llanelly Ry. & Dock Co.* v. *L. & N. W. Ry. Co.* (1873) L. R. 8 Ch. at p. 948.

(*a*) *Wright* v. *Monarch Investment Building Society* (1877) 5 Ch. D. 726, 46 L. J. Ch. 649; *Hack* v. *London Provident Building Society* (1883) 23 Ch. Div. 103, 52 L. J. Ch. 542; *Municipal Building Society* v. *Kent* (1884) 9 App. Ca. 260, 53 L. J. Q. B. 290; *Bache* v. *Billingham* [1894] 1 Q. B. 107, 63 L. J. M. C. 1, C. A. (an improper award, otherwise within the Act, cannot be treated as a mere nullity). Not so where the real question is whether a party claiming against the society is a member of the society at all: *Prentice* v. *London* (1875) L. R. 10 C. P. 679, 44 L. J. C. P. 353. See the Building Societies Act, 1884, 47 & 48 Vict. c. 41, and *Western Suburban, &c. Co.* v. *Martin* (1886) 17 Q. B. Div. 609, 55 L. J. Q. B. 382.

(*b*) *Watford & Rickmansworth Ry. Co.* v. *L. & N. W. Ry. Co.* (1869) L. R. 8 Eq. 231, 38 L. J. Ch. 449.

[14] Knickerbocker Ice Co. *v.* Smith, 147 Pa. 248.

Agreement of parties may make right of action conditional on arbitration. Moreover parties may if they choose make arbitration a condition precedent to any right arising at all, and in that case the foregoing rules are inapplicable: as where the contract is to pay such an amount as shall be determined by arbitration or found due by the certificate of a particular person (*c*).[15] Whether this is in fact the contract,

(*c*) *Scott* v. *Avery* (1855–6) 5 H. L. C. 811, 25 L. J. Ex. 303, which does not overrule the former general law on the subject, see the judgments of Brett J. and Kelly C.B. in Ex. Ch. in *Edwards* v. *Aberayron, &c. Society* (1875–6) 1 Q. B. D. 563; *Scott* v. *Corporation of Liverpool* (1858) 3 De G. & J. 334, 28 L. J. Ch. 236. Cp. *Collins* v. *Locke* (1879) (J. C.) 4 App. Ca. 674, 689, 48 L. J. P. C. 68.

[15] In Viney *v.* Bignold, 20 Q. B. D. 172, Wills, J., said: "The principle on which cases such as the present ought to be decided is very clear, and it is this. The court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover." Elliott *v.* Royal Ex. Ass., L. R. 2 Ex. 237; Dawson *v.* Fitzgerald, 1 Ex. D. 257; Collins *v.* Locke, 4 A. C. 674; Babbage *v.* Coulburn, 9 Q. B. D. 235; Caledonian Ins. Co. *v.* Gilmour, [1893] A. C. 85; Trainor *v.* Phœnix Fire Ass. Co., 65 L. T. 825; Manchester Ship Canal Co. *v.* Pearson, [1900] 2 Q. B. 606; Spurrier *v.* La Cloche, [1902] A. C. 446 *acc.* Compare Edwards *v.* Aberayron Ins. Soc., 1 Q. B. D. 563.

A test apparently intended to be similar to that adopted by the English courts was adopted in the following cases: Hamilton *v.* Home Ins. Co., 137 U. S. 370; Crossley *v.* Conn. Ins. Co., 27 Fed. Rep. 30; Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. Rep. 562; 67 Fed. Rep. 486; Connecticut Ins. Co. *v.* Hamilton, 59 Fed. Rep. 258; Mutual Ins. Co. *v.* Alvord, 61 Fed. Rep. 755; Old Saucelito Co. *v.* Commercial Ass. Co., 66 Cal. 253; Adams *v.* South British Ins. Co., 70 Cal. 198; Carroll *v.* Girard Ins. Co., 72 Cal. 297; Denver, &c. R. R. Co. *v.* Riley, 7 Col. 494; Denver, &c. Co. *v.* Stout, 8 Col. 61; Union Pac. Co. *v.* Anderson, 11 Col. 293; Hanover Fire Ins. Co. *v.* Lewis, 28 Fla. 209; Liverpool Ins. Co. *v.* Creighton, 51 Ga. 95; Southern Ins. Co. *v.* Turnley, 100 Ga. 296; Birmingham Ins. Co. *v.* Pulver, 126 Ill. 329, 338; Lesure Lumber Co. *v.* Mutual Fire Ins. Co., 101 Iowa, 514; Zalesky *v.* Home Ins. Co., 102 Iowa, 613; Read *v.* State Ins. Co., 103 Iowa, 307; Dee *v.* Key City Ins. Co., 104 Iowa, 167; Fisher *v.* Merchants' Ins. Co., 95 Me. 486; Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116; Guthat *v.* Gow, 95 Mich. 527; Boots *v.* Steinberg, 100 Mich. 134; Weggner *v.* Greenstine, 114 Mich. 310; Gasser *v.* Sun Fire Office, 42 Minn. 315; Mosness *v.* German-American Ins. Co., 50 Minn. 341; Levine *v.* Lancashire Ins. Co., 66 Minn. 138; Wolff *v.* Liverpool Ins. Co., 50 N. J. L. 453; Delaware & H. C. Co. *v.* Penn. Coal Co., 50 N. Y. 250; Seward *v.* Rochester, 109 N. Y. 169; National Co. *v.* Hudson River Co., 170 N. Y. 439; Keefe *v.* National Soc., 4 N. Y. App. Div. 392; Spink *v.* Co-operative Ins. Co., 25 N. Y. App. Div. 484; Van Note *v.* Cook, 55 N. Y. App. Div. 55; Pioneer Mfg. Co. *v.* Phœnix Ass. Co., 106 N. C. 28 (see, however, Pioneer Mfg. *v.* Phœnix Ass. Co., 110 N. C. 176; Uhrig *v.* Williamsburg Ins. Co., 116 N. C. 491); Monongahela Nav. Co. *v.* Fenlon, 4 W. & S. 205; Reynolds *v.* Caldwell, 51 Pa. 298; Gowen *v.* Pierson, 166 Pa. 258; Chandley *v.* Cambridge Springs, 200 Pa. 230, 232; Scottish Ins. Co. *v.* Clancy, 71 Tex. 5; American Ins. Co. *v.* Bass Bros., 90 Tex. 380, 382; Van Horne *v.* Watrous, 10 Wash. 525; Zindorf Co. *v.* Western Co., 27 Wash. 31 (*conf.* Winsor *v.* German Soc., 72 Pac. Rep. 66); Chapman *v.* Rockford Ins. Co., 89 Wis. 572. See also Randall *v.* Phœnix

or it is an absolute contract to pay in the first instance, with a collateral provision for reference in case of difference *as to the [335 amount, is a question of construction on which there have been more or less conflicting opinions (*d*).

Maintenance and champerty. We now come to a class of transactions which are specially discouraged, as tending to pervert the due course of justice in civil suits.

These are the dealings which are held void as amounting to or being in the nature of champerty or maintenance. The principle of the law on this head has been defined to be "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (*e*). Maintenance is properly a general term of which champerty is a species. Their most usual meanings (together with certain additions and distinctions now obsolete) are thus given by Coke:—

"First, to maintain to have part of the land or anything out of

(*d*) *Elliott* v. *Royal Exchange Assurance Co.* (1867) L. R. 2 Ex. 237, 36 L. J. Ex. 129; *Dawson* v. *Fitzgerald* (1876) 1 Ex. Div. 257, revg. s. c. L. R. 9 Ex. 7, 45 L. J. Ex. 893.

(*e*) By Lord Abinger in *Prosser* v. *Edmonds* (1835) 1 Y. & C. Ex. 481, 497, 41 R. R. 322, 334.

Ins. Co., 10 Mont. 362; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419. In many of these cases, however, the court considered not only the question whether the provision for arbitration was expressed as a condition precedent or as a collateral promise, but also the question whether the agreement for arbitration related to the liability under the contract or to the amount of damages.

In a number of jurisdictions an agreement to arbitrate, though expressed in the form of a condition precedent, is void if it concerns more than the amount of damages recoverable, as distinguished from the existence of a right of action. Dickson Mfg. Co. *v.* American Locomotive Co., 119 Fed. Rep. 488; Meaher *v.* Cox, 37 Ala. 201; Western Ass. Co. *v.* Hall, 112 Ala. 318; Bauer *v.* Samson Lodge, 102 Ind. 262; Supreme Council *v.* Garrigus, 104 Ind. 133; Louisville, &c. Ry. Co. *v.* Donnegan, 111 Ind. 179; Supreme Council *v.* Forsinger, 125 Ind. 52; McCoy *v.* Able, 131 Ind. 417; Ison *v.* Wright, 55 S. W. Rep. (Ky.) 202; Robinson *v.* Georges Ins. Co., 17 Me. 131; Stephenson *v.* Piscataqua Ins. Co., 56 Me. 419 (but see Fisher *v.* Merchants' Ins. Co., 95 Me. 486); White *v.* Middlesex R. Co., 135 Mass. 216; Miles *v.* Schmidt, 168 Mass. 339 (cp. Lamson Co. *v.* Prudential Ins. Co., 171 Mass. 433); Phœnix Ins. Co. *v.* Zlotky, 92 N. W. Rep. (Neb.) 736; Hartford Ins. Co. *v.* Hon, 92 N. W. Rep. (Neb.) 742; Leach *v.* Republic Ins. Co., 58 N. H. 245; Baltimore, &c. R. R. Co. *v.* Stankard, 56 Ohio St. 224; Myers *v.* Jenkins, 63 Ohio St. 101; Ball *v.* Doud, 26 Oreg. 14; Gray *v.* Wilson, 4 Watts, 39; Commercial Union Ass. Co. *v.* Hocking, 115 Pa. 407; Yost *v.* Dwelling-House Ins. Co., 179 Pa. 381; Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. 255; Needy *v.* German-American Ins. Co., 197 Pa. 460; Peyin *v.* Société St. Jean Baptiste, 21 R. I. 81; Daniher *v.* Grand Lodge, 10 Utah, 110; Kinney *v.* Baltimore, &c. Association, 35 W. Va. 385 (*conf.* Baer's Sons Co. *v.* Cutting Fruit Packing Co., 43 W. Va. 359). See also Edwards *v.* Aberayron Ins. Co., 1 Q. B. D. 563, and the Michigan, Minnesota, and New York decisions cited in the first part of this note; also Greenhood on Public Policy, 467 *et seq.* and cases cited; 11 Harv. L. Rev. 234.

the land or part of the debt, or any other thing in plea or suit; and this is called *cambipartia* [*champart, campi partitio*], champertie."

The second is "when one maintaineth the one side without having any part of the thing in plea or suit" (*f*). Champerty may accordingly be described as "maintenance aggravated by an agreement to have a part of the thing in dispute" (*g*).

Agreements falling distinctly within these descriptions are punishable under certain statutes (*h*). It has always been considered, how-
336] ever, that champerty and maintenance *are offences at common law, and that the statutes only declare the common law with additional penalties (*i*).[16]

Relation of the statutes to the common law, and modern policy of the law. Whether by way of abundant caution or for other reasons, the law was in early times applied or at any rate asserted with extreme and almost absurd severity (*k*). It was even contended, as we had occasion to see in the last chapter, that the absolute beneficial assignment of a contract was bad for maintenance. The modern cases, however, proceed not upon the letter of the statutes or of the definitions given by early writers, but upon the real object and policy of the law, which is to repress that which Knight Bruce L.J. spoke of as "the traffic of merchandising in quarrels, of huckstering in litigious discord," which decent people hardly require legal knowledge to warn them from, and which makes the business and profit of "breedbates, barretors, counsel whom no Inn will own, and solicitors estranged from every roll" (*l*). On the other hand the Courts have not deemed themselves bound to permit things clearly within the mischief aimed at any more than to forbid things clearly without it. They have in fact taken advantage of the doctrine that the statutes are only in affirmance of the common law to treat them as giving indications rather than definitions; as bearing witness to the general

(*f*) Co. Lit. 368 *b*. Every champerty is maintenance, 2 Ro. Ab. 119 R.

(*g*) Bovill, *arg.* in *Sprye* v. *Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64.

(*h*) 3 Ed. 1 (Stat. Westm. 1) c. 25; 13 Ed. 1 (Stat. Westm. 2), c. 49; 28 Ed. 1, st. 1, c. 11; Stat. de Conspiratoribus, temp. incert; 20 Ed. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; and 32 H. 8, c. 9, of which more presently.

(*i*) *Pechell* v. *Watson* (1841) 8 M. & W. 691, 700; 2 Ro. Ab. 114 D.

(*k*) See Bacon's Abridgement. Maintenance, A. (5, 250).

(*l*) *Reynell* v. *Sprye* (1852) 1 D. M. & G. at pp. 680, 686.

[16] Gilman *v.* Jones, 87 Ala. 691; Thompson *v.* Reynolds, 73 Ill. 11; Brown *v.* Beauchamp, 5 T. B. Mon. 413, 416; Thurston *v.* Percival, 1 Pick. 415; Backus *v.* Byron, 4 Mich. 535; Sedgwick *v.* Stanton, 14 N. Y. 289, 295; Key *v.* Vattier, 1 Ohio, 132; Martin *v.* Clarke, 8 R. I. 389. But see p. 451, *ad. fin.*, note 17.

"policy of the law" but not exhausting or restricting it. It is not considered necessary to decide that a particular transaction amounts to the actual offence of champerty or maintenance in order to disallow it as a ground of civil rights: it will be void as "savouring of maintenance" if it clearly tends to the same kind of mischief.

Of maintenance pure and simple, an important head in the old books, there are very few modern examples (*m*); *almost all [337 the decisions illustrate the more special rule against champerty, namely that "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal" (*m*[1]). On this head the rules now established appear to be as follows:[17]

(*m*) One is *Bradlaugh* v. *Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454. More lately it has been decided that charity is excuse enough for maintaining a stranger's action even without reasonable ground. *Harris* v. *Brisco* (1886) 17 Q. B. Div. 504.

(*m*[1]) Per Blackburn J. *Hutley* v. *Hutley* (1873) L. R. 8 Q. B. 112. Champerty is apt to be complicated with undue influence, see *Reynell* v. *Sprye*, next page, and *James* v. *Kerr* (1889) 40 Ch. D. 449.

[17] In Massachusetts and New Hampshire, at least, a contract of an attorney for a share of the proceeds of litigation as a fee is illegal. Ackert *v.* Barker, 131 Mass. 436; Blaisdell *v.* Ahern, 144 Mass. 393; Joy *v.* Metcalf, 161 Mass. 514; Davis *v.* Commonwealth, 164 Mass. 241; Hadlock *v.* Brooks, 178 Mass. 425; Butler *v.* Legro, 62 N. H. 350. But in most jurisdictions such a contract is not illegal unless the attorney also agrees to prosecute the litigation at his own expense. McPherson *v.* Cox, 96 U. S. 404; Jeffries *v.* Mutual Ins. Co., 110 U. S. 305; Peck *v.* Heurich, 167 U. S. 624; Muller *v.* Kelly, 116 Fed. Rep. 545; Keiper *v.* Miller, 68 Fed. Rep. 627; Swanston *v.* Morning Star Mining Co., 13 Fed. Rep. 215; Wheeler *v.* Pounds, 24 Ala. 472; Stanton *v.* Haskin, 1 McArthur (D. C.), 558; Johnson *v.* Van Wyck, 4 D. C. App. 294; Moses *v.* Bagley, 55 Ga. 283; Meeks *v.* Dewberry, 57 Ga. 263; Taylor *v.* Hinton, 66 Ga. 743; Johnson *v.* Hilton, 96 Ga. 577; Coleman *v.* Billings, 89 Ill. 183; Phillips *v.* South Park Ins. Co., 119 Ill. 626; Geer *v.* Frank, 179 Ill. 570; Coquillard *v.* Bearss, 21 Ind. 479; Hart *v.* State, 120 Ind. 83; Jewel *v.* Neidy, 61 Ia. 299; Wallace *v.* Chicago, &c. Ry. Co., 112 Ia. 565; Atchison, &c. Railroad Co. *v.* Johnson, 29 Kan. 218, 227; Aultman *v.* Waddle, 40 Kan. 195; Million *v.* Ohnsorg, 10 Mo. App. 432; Duke *v.* Harper, 66 Mo. 51; Coughlin *v.* Railroad Co., 71 N. Y. 443; Weakly *v.* Hall, 13 Ohio, 167; Brown *v.* Ginn, 66 Ohio St. 316; Chester Co. *v.* Barber, 97 Pa. 455; Perry *v.* Dicken, 105 Pa. 83; Martin *v.* Clarke, 8 R. I. 389; Hayney *v.* Coyne, 10 Heisk. 339; Nelson *v.* Evans, 21 Utah, 202; Hamilton *v.* Gray, 67 Vt. 233; Nickels *v.* Kane's Adm., 82 Va. 309; Stearns *v.* Felker, 28 Wis. 594; Allard *v.* Lamirande, 29 Wis. 502; Dockery *v.* McLellan, 93 Wis. 381. See also Casserleigh *v.* Wood, 119 Fed. Rep. 308 (C. C. A.)

If the agreement provides that the owner of the right of action shall not compromise or settle the claim, the provision has been held in some cases to make the contract illegal. Foster *v.* Jacks, 4 Wall. 334; North Chicago R. R. Co. *v.* Ackley, 171 Ill. 100; Elwood *v.* Wilson, 21 Ia. 523; Boardman *v.* Thompson, 25 Ia. 487; Huber *v.* Johnson, 68 Minn. 74. But see Hoffman *v.* Vallejo, 45 Cal. 564; P., C., C. & St. L. Ry. Co. *v.* Volkert, 58 Ohio St. 363; Ryan *v.* Martin, 16 Wis. 57; Kusterer *v.* Beaver Dam, 56 Wis. 471.

In some jurisdictions even though the attorney contracts for a share of the proceeds of litigation and also to prosecute the litigation at his own expense

(*a*.) **Rules as to champerty.** An agreement to advance funds or supply evidence with or without professional assistance (or, it seems, professional assistance only) (*n*) for the recovery of property in con-

(*n*) Per Jessel M.R. *Re Attorneys and Solicitors Act* (1875) 1 Ch. D. 573, 44 L. J. Ch. 47, where the agreement was to pay the solicitors in the event of success a percentage of the property recovered; but probably the real meaning of it was that the solicitors should find the funds. Cp. *Grell* v. *Levy* (1864) 16 C. B. N. S. 73, and *Strange* v. *Brennan* (1846) cited p. 339, below.

the contract is not therefore illegal. Taylor *v.* Bemiss, 110 U. S. 42; Hoffman *v.* Vallejo, 45 Cal. 564; Richardson *v.* Rowland, 40 Conn. 565; Metropolitan Ins. Co. *v.* Fuller, 61 Conn. 252; Fowler *v.* Collan, 102 N. Y. 395; Browne *v.* West, 9 N. Y. App. Div. 135; Brown *v.* Bigne, 21 Oreg. 260; Bentinck *v.* Franklin, 38 Tex. 458; Stewart *v.* H. & T. C. Ry. Co., 62 Tex. 246. See also Bayard *v.* McLane, 3 Har. (Del.) 139; Schomp *v.* Schenck, 40 N. J. L. 195. Compare Huber *v.* Johnson, 68 Minn. 74; Van Vleck *v.* Van Vleck, 21 N. Y. App. Div. 272; Badger *v.* Celler, 41 N. Y. App. Div. 599.

Compensation on the basis of *quantum meruit* has sometimes been allowed an attorney who has rendered services under a champertous agreement. Holloway *v.* Lowe, 1 Ala. 246; Elliott *v.* McClelland, 17 Ala. 206; Goodman *v.* Walker, 30 Ala. 482, 500; Rust *v.* Larue, 4 Litt. 411; Caldwell *v.* Shepherd, 6 T. B. Mon. 389; Gammons *v.* Johnson, 69 Minn. 488; Stearns *v.* Felker, 28 Wis. 594. See also Merritt *v.* Lambert, 10 Paige, 352; affd., 2 Denio, 607. But see, involving a contrary principle, Ackert *v.* Barker, 131 Mass. 436; Gammons *v.* Johnson, 76 Minn. 76; Butler *v.* Legro, 62 N. H. 350; Munday *v.* Whissenhurst, 90 N. C. 458. See also Pince *v.* Beattie, 32 L. J. Ch. 734; Grell *v.* Levy, 16 C. B. N. S. 73; Willemin *v.* Bateson, 63 Mich. 309.

It seems anomalous that one should be allowed to recover for the value of services rendered under an unlawful agreement.

That an action is being prosecuted under a champertous agreement with counsel is no defense to the suit. Hilton *v.* Woods, 4 Eq. 432; Burnes *v.* Scott, 117 U. S. 582; Courtright *v.* Burnes, 3 McCrary, 60; Sibley *v.* Alba, 95 Ala. 191; Missouri Pac. Ry. Co. *v.* Smith, 60 Ark. 221; Gage *v.* Downey, 79 Cal. 140; Robinson *v.* Beall, 26 Ga. 17; Ellis *v.* Smith, 112 Ga. 480; Torrence *v.* Shedd, 112 Ill. 466; Stearns *v.* Reidy, 135 Ill. 119; Gage *v.* Du Puy, 137 Ill. 652; Burton *v.* Perry, 146 Ill. 71; Allen *v.* Frazee, 85 Ind. 283; Zeigler *v.* Mize, 132 Ind. 403; Small *v.* Railroad Co., 55 Ia. 582; Bowser *v.* Patrick, 65 S. W. Rep. (Ky.) 824; Gilkeson Co. *v.* Bond, 44 La. Ann. 481; Brinley *v.* Whiting, 5 Pick. 348; Robertson *v.* Blewett, 71 Miss. 409; Bent *v.* Priest, 86 Mo. 475; Bick *v.* Overfelt, 88 Mo. App. 139; Chamberlain *v.* Grimes, 42 Neb. 701; Taylor *v.* Gilman, 58 N. H. 417; Connecticut Ins. Co. *v.* Way, 62 N. H. 622; Whitney *v.* Kirtland, 27 N. J. Eq. 333; Hall *v.* Gird, 7 Hill, 586; Pennsylvania Co. *v.* Lombardo, 49 Ohio St. 1; Potter *v.* Ajax Mining Co., 22 Utah, 273; Davis *v.* Settle, 43 W. Va. 17. See also Euneau *v.* Rieger, 105 Mo. 682; Cooke *v.* Pool, 25 S. C. 593.

Contra, Keiper *v.* Miller, 63 Fed. Rep. 627; 70 Fed. Rep. 128; Greenman *v.* Cohee, 61 Ind. 201; Stewart *v.* Welch, 41 Ohio St. 483; Webb *v.* Armstrong, 5 Humph. 379; Barker *v.* Barker, 14 Wis. 131; Kelly *v.* Kelly, 86 Wis. 170. See also Brown *v.* Ginn, 66 Ohio St. 316.

A scheme to work up a large number of cases against a railroad company for its failure to fence and to take in payment for services a share of the proceeds of the litigation was held illegal in Gammons *v.* Johnson, 76 Minn. 76, and Gammons *v.* Gulbranson, 78 Minn. 21, though a similar agreement with a single litigant would not have been held champertous. See also Alpers *v.* Hunt, 86 Cal. 78; Hirschbach *v.* Ketchum, 5 N. Y. App. Div. 324. Compare Metropolitan Ins. Co. *v.* Fuller, 61 Conn. 252; Vocke *v.* Peters, 58 Ill. App. 338; Wheeler *v.* Harrison, 94 Md. 147.

sideration of a remuneration contingent on success and proportional to or be paid out of the property recovered is void (*o*).

(*β*.) A solicitor cannot purchase the subject-matter of a pending suit from his client in that suit (*p*) ;[18] but he may take a security upon it for advances already made and costs already due in the suit (*q*).[19]

(*γ*.) Except in the case last mentioned, the purchase of property the title to which is disputed, or which is the subject of a pending suit, or an agreement for such purchase, is not in itself unlawful (*r*) : but such an agreement is unlawful and void if the real object of it is only to enable the purchaser to maintain the suit (*s*).

*We proceed to deal shortly with these propositions in order. [338

a. **Agreement to furnish money or evidence for litigation for share of property recovered is void.** This rule was laid down in very clear terms by Tindal C.J. in *Stanley* v. *Jones* (*t*), which seems to be the first of the modern cases at law.

"A bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties, at the price of the evidence which he so possesses or can procure, a share of the sum of money which shall be recovered by means of the production of that very evidence, cannot be enforced in a Court of law." [20]

It is quite immaterial for this purpose whether any litigation is already pending or not, although the *offence* of maintenance is prop-

(*o*) *Stanley* v. *Jones* (1831) 7 Bing. 369, 33 R. R. 513; *Reynell* v. *Sprye* (1852) 1 D. M. G. 660, 21 L. J. Ch. 633; *Sprye* v. *Porter* (1852) 7 E. & B. 58, 26 L. J. Q. B. 64; *Hutley* v. *Hutley* (1873) L. R. 8 Q. B. 112, 42 L. J. Q. B. 52.

(*p*) *Wood* v. *Downes* (1811) 18 Ves. 120, 11 R. R. 160; *Simpson* v. *Lamb* (1857) 7 E. & B. 84, 20 L. J. Q. B. 121.

(*q*) *Anderson* v. *Radcliffe* (1858) (Ex. Ch.) E. B. & E. 806, 29 L. J. Q. B. 128.

(*r*) *Hunter* v. *Daniel* (1845) 4 Ha. 420; *Knight* v. *Bowyer* (1858) 2 De G. & J. 421. 444, 27 L. J. Ch. 521.

(*s*) *Prosser* v. *Edmonds* (1835) 1 Y. & C. Ex. Eq. 481, 41 R. R. 322; *Harrington* v. *Long* (1833–4) 2 My. & K. 590, 39 R. R. 304; *De Hoghton* v. *Money* (1866) L. R. 2 Ch. 164; *Seear* v. *Lawson* (1880) 15 Ch. D. 426, 49 L. J. Bk. 69, where the precise extent of the doctrine is treated as doubtful; *Guy* v. *Churchill* (1888) 40 Ch. D. 481, 58 L. J. Ch. 345.

(*t*) (1831) 7 Bing. 369, 377, 33 R. R. 513, 520.

[18] Elmore *v.* Johnson, 143 Ill. 513; West *v.* Raymond, 21 Ind. 305; Colgan *v.* Jones, 44 N. J. Eq. 274; Berrien *v.* McLane, 1 Hoffm. Ch. 421, 424. See also Herr *v.* Payson, 157 Ill. 244; Cunningham *v.* Jones, 37 Kan. 477; Olson *v.* Lamb, 56 Neb. 104. *Contra*, Mitchell *v.* Colby, 95 Ia. 202; Yeamans *v.* James, 27 Kan. 195; Dunn *v.* Record, 63 Me. 17; Vanasse *v.* Reid, 111 Wis. 303. The question was left open in Rogers *v.* Marshall, 3 McCrary, 76.

[19] Mott *v.* Harrington, 12 Vt. 199.

[20] A promise of remuneration contingent upon success, made to one not a stranger in interest to the litigation for furnishing evidence to sustain a defense, was enforced in Wellington *v.* Kelly, 84 N. Y. 543. Cp. *infra*, p. 445, n. 9.

erly maintaining an existing suit, not procuring one to be commenced. It is obvious that the mischief is even greater in the case where a person is instigated by the promise of indemnity in the event of failure to undertake litigation which otherwise he would have not thought of. If a person who is in actual possession of certain definite evidences of title proposes to deliver them to the person whose title they support on the terms of having a certain share of any property that may be recovered by means of these evidences, there being no suit depending, and no stipulation for the commencement of any, this is not unlawful; for litigation is not necessarily contemplated at all, and in any case there is no provision for maintaining any litigation there may be (*u*).

Verbal evasions ineffectual. But it is in vain to put the agreement in such a form if these terms are only colourable (*x*), and the real agree-
339] ment is to supply evidence *generally for the maintenance of an intended suit: the illegal intention may be shown, and the transaction will be held void (*y*). Still less can the law be evaded by slighter variations in the form or manner of the transaction: for instance, an agreement between solicitor and client that the solicitor shall advance funds for carrying on a suit to recover possession of an estate, and in the event of success shall receive a sum above his regular costs "according to the interest and benefit" acquired by the possession of the estate, is as much void as a bargain for a specific part of the property (*z*). So where a solicitor was to have a percentage of the fund recovered in a suit, it was held to be not the less champerty because he was not himself (and in fact could not be) the solicitor in the suit, but employed another (*a*). A solicitor cannot refuse to account to his client and submit to taxation of his costs on the ground that the business for which he was retained involved champerty or maintenance (*b*).

An agreement by a solicitor with a client simply to charge nothing for costs in a particular action is not champerty (*c*).

(*u*) *Sprye* v. *Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64.

(*x*) As a matter of fact, it is difficult to suppose that they could ever be otherwise.

(*y*) *Sprye* v. *Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64; cp. *Rees* v. *De Bernardy* [1896] 2 Ch. 437, 65 L. J. Ch. 656, where there was a deliberate endeavour to conceal the real intention.

(*z*) *Earle* v. *Hopwood* (1861) 9 C. B. N. S. 566, 30 L. J. C. P. 217.

(*a*) *Strange* v. *Brennan* (1846) 15 Sim. 346, 2 C. P. Cooper (temp. Cottenham) 1, 15 L. J. Ch. 389. The agreement was made with a solicitor in Ireland, not being a solicitor of the English Court of Chancery, and the fund to be recovered was in England.

(*b*) *Re Thomas, Jaquess* v. *Thomas* [1894] 1 Q. B. 747.

(*c*) *Jennings* v. *Johnson* (1873) L. R. 8 C. P. 425.

β. **Solicitor in suit cannot purchase subject-matter of the suit from his client.** This rule came to be laid down in a somewhat curious way. In *Wood* v. *Downes* (*d*) Lord Eldon set aside a purchase by a solicitor from his client of the *res litigiosa,* partly on the ground of maintenance. But it is to be noted as to this ground that the agreement for sale was in substitution for a previous agreement which clearly amounted, and which the parties had discovered to amount, *to [340 maintenance: and the Court appears to have inferred as a fact that it was all one illegal transaction, and the sale merely colourable (*e*). The other ground, which alone would have been enough, was the presumption of undue influence in such a transaction, arising from the fiduciary relation of solicitor and client (of which we shall speak in a subsequent chapter). The Court of Queen's Bench, however, in *Simpson* v. *Lamb* (*f*) followed *Wood* v. *Downes,* as having laid down as a matter of the "policy of the law" the positive rule above stated. In *Anderson* v. *Radcliffe* (*g*), unanimous judgments in both the Q. B. and the Ex. Ch. added the qualification that a conveyance by way of security for past expenses is nevertheless good. The Court of Exchequer Chamber showed a decided opinion that *Simpson* v. *Lamb* had gone too far, but without positively disapproving it. In *Knight* v. *Bowyer,* again, Turner L.J. said: "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject, of course, if he purchases from a client, to the consequences of that relation" (*h*). But the case before the Court was not the purchase by a solicitor from his client of the subject-matter of a suit *in which he was solicitor; Simpson* v. *Lamb,* therefore, was only treated as distinguishable (*h*). The case must at present be considered a subsisting authority, but anomalous, and not likely to be at all extended.

γ. **Purchase of subject-matter of litigation not in itself unlawful.** As to the purchase of things in litigation in general, the authorities cannot all be reconciled in detail. But the distinction which runs through them all is to this effect. The question in every case is whether the real object be *to acquire an interest in property for [341

(*d*) (1811) 18 Ves. 120, 11 R. R. 160.

(*e*) Cp. *Sprye* v. *Porter*, last page. In *Wood* v. *Downes* the parties do not seem to have even kept the original and real agreement off the face of the transaction in its ultimate shape. See 18 Ves. p. 123, 11 R. R. 162. It is to be regretted that the reporter did not preserve the full statement of the facts (18 Ves. p. 122) with which the judgment opened.

(*f*) (1857) 7 E. & B. 84, 20 L. J. Q. B. 121.

(*g*) (1858) E. B. & E. 806, 28 L. J. Q. B. 32, 29 *ib.* 128.

(*h*) (1858) 2 De G. & J. at p. 445.

the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing that interest:

But is unlawful if the real intention is to acquire a mere right to sue. But it is unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident is good (*i*) ;[21] but the sale of a mere right to sue is bad (*k*).

A man who has conveyed property by a deed voidable in equity retains an interest not only transmissible by descent or devise, but disposable *inter vivos,* without such disposition being champerty. But "the right to complain of a fraud is not a marketable commodity," and an agreement whose real object is the acquisition of such a right cannot be enforced (*l*).[22] In like manner, a creditor of a company may well assign his debt, but he cannot sell as incident to it the right to proceed with a winding-up petition (*m*).

The payment of the price being made contingent on the recovery of the property is probably under any circumstances a sufficient, but is by no means a necessary, condition of the Court being satisfied that the real object is to traffic in litigation. If the purchase is made while a suit is actually pending, the circumstance of the purchaser indem-
342] nifying the vendor against costs may be material, *but is not

(*i*) *Dickinson* v. *Burrell* (1866) L. R. 1 Eq. 337, 342, 35 L. J. Ch. 371.

(*k*) *Ib.; Prosser* v. *Edmonds* (1835) 1 Y. & C. Ex. 481, 41 R. R. 322. Dist. *Guy* v. *Churchill* (1888) 40 Ch. D. 481, 56 L. J. Ch. 670; bankrupt's right of action assigned by the trustee to one creditor (in fact acting for himself and others), who was to keep three-fourths of the proceeds; held justifiable as a beneficial arrangement for the creditors.

(*l*) *Prosser* v. *Edmonds,* last note; *De Hoghton* v. *Money* (1866) L. R. 2 Ch. 164, 169. Cp. *Hill* v. *Boyle* (1867) L. R. 4 Eq. 260, and *qu.* whether the right to cut down an absolute conveyance to a mortgage be saleable: *Seear* v. *Lawson* (1880) 15 Ch. Div. 426, 49 L. J. Bk. 69.

(*m*) *Paris Skating Rink Co.* (1877) 5 Ch. Div. 959.

[21] Traer *v.* Clews, 115 U. S. 528; Edmunds *v.* Illinois Central R. Co., 80 Fed. Rep. 78; National Bank *v.* Hancock, 100 Va. 101.

[22] Hinchman *v.* Kelley, 49 Fed. Rep. 492; Marshall *v.* Means, 12 Ga. 61; Norton *v.* Tuttle, 60 Ill. 130; Illinois Land Co. *v.* Speyer, 138 Ill. 137; Storrs *v.* St. Luke's Hospital, 180 Ill. 368, 374; Brush *v.* Sweet, 38 Mich. 574; Dickinson *v.* Seaver, 44 Mich. 624; Smith *v.* Thompson, 94 Mich. 381; Morrison *v.* Deadrick, 10 Humph. 342; Crocker *v.* Bellange, 6 Wis. 645; M. & M. Railroad Co. *v.* M. & W. Railroad Co., 20 Wis. 174; J. V. Farwell Co. *v.* Wolf, 96 Wis. 10. A right of action for damages from deceit is not assignable. Dayton *v.* Fargo, 45 Mich. 153; Zabriskie *v.* Smith, 13 N. Y. 322. See further 44 L. R. A. 177.

alone enough to show that the bargain is in truth for maintenance (*n*). But the only view which on the whole seems tenable is that it is a question of the real intention to be collected from the facts of each case, for arriving at which few or no positive rules can be laid down.

There is no champerty in an agreement to enable the *bona fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (*o*).

Purchase of shares in company with intention to sue company or directors at one's own risk not maintenance. It has been decided in several modern cases that the purchase of shares in a company for the purpose of instituting a suit at one's own risk to restrain the governing body of the company from acts unwarranted by its constitution cannot be impeached as savouring of maintenance (*p*). It was recognized as long ago as 21 Ed. III., that a purchase of property pending a suit affecting the title to it is not of itself champerty: "If pending a real action a stranger purchases the land of tenant in fee for good consideration and not to maintain the plea, this is no champerty" (*q*).

Stat. 32 H. VIII. c. 9. None shall buy, sell, or bargain for any right in lands unless the seller hath been in possession or taken the profits for one year. The statute 32 H. VIII. c. 9, "Against maintenance and embracery, buying of titles, &c." after reciting the mischiefs of "maintenance embracery champerty subornation of witnesses sinister labour buying of titles and pretensed rights of persons not being in possession," and confirming all existing statutes against maintenance, enacts that:

"No person or persons, of what estate degree or condition so ever he or *they be, shall from henceforth bargain buy or sell, or by any ways or [343 means obtain get or have, any pretensed rights or titles, or take promise grant or covenant to have any right or title of any person or persons in or to any manors lands tenements or hereditaments, but if such person or persons which shall so bargain sell give grant covenant or promise the same their antecessors or they by whom he or they claim the same have been in possession of the same or of the reversion or remainder thereof or taken the rents or profits thereof by the space of one whole year next before the said bargain covenant grant or promise made."

Penalty and saving. The penalty is forfeiture of the whole value of the lands (s. 2), saving the right of persons in lawful possession to

(*n*) *Harrington* v. *Long* (1833–4) 2 M. & K. 590, 39 R. R. 304, as corrected by *Knight* v. *Bowyer*, note (*r*) p. *337, and see *Hunter* v. *Daniel* (1845) 4 Ha. at p. 430. But the true ground of the case seems the same as in *Prosser* v. *Edmonds* and *De Hoghton* v. *Money*, namely. that the real object was to give the purchaser a *locus standi* to set aside a deed for fraud.

(*o*) Per Cur. (Ex. Ch.) *Williams* v. *Protheroe* (1829) 5 Bing. 309, 314, 30 R. R. 608, 613.

(*p*) See *Bloxam* v. *Metrop. Ry. Co.* (1868) L. R. 3 Ch. at p. 353.

(*q*) 2 Ro. Ab. 113 B.; Y. B. 21 E. III., 10, pl. 33 [cited as 52 in Rolle];

buy in adverse claims (s. 4).[23] There is no express saving of grants or leases by persons in actual possession who have been so for less than a year: but either the condition as to time applies only to receipt of rents or profits without actual possession, or at all events the intention not to touch the acts of owners in possession is obvious (*r*).

Dealings held within the statute — Agreement to recover and divide property. This, like the other statutes against maintenance and champerty, is said to be in affirmance of the common law (*s*). It "is formed on the view that possession should remain undisturbed. Dealings with property by a person out of possession tend to disturb the actual possession to the injury of the public at large" (*t*). It is immaterial whether the vendor out of possession has in truth a good title or not (*s*). An agreement between two persons out of possession of lands, and both claiming title in them, to recover and share the lands, is contrary to the policy of this statute, if not champerty at common law; therefore where co-plaintiffs had in fact conflicting **344]** interests, and it *was sought to avoid the resulting difficulty as to the frame of the suit by stating an agreement to divide the property in suit between them, this device (which now would in any case be disallowed on more general grounds) (*u*) was unavailing; for such an agreement, had it really existed, would have been unlawful, and would have subjected the parties to the penalties of the statute (*x*).

Sale of term by administrator out of possession. Where after the death of a lessee a stranger had entered, and remained many years in posses-

but in 50 Ass. 323, pl. 3, the general opinion of the Serjeants is *contra*. Cp. 4 Kent, Comm. 449.

(*r*) By Mountague C.J. *Partridge* v. *Strange*, Plowd. 88, cited in *Doe* d. *Williams* v. *Evans* (1845) 1 C. B. 717, *ib.* 89, 14 L. J. C. P. 237. See further *Jenkins* v. *Jones* (1882) 9 Q. B. Div. 128, 51 L. J. Q. B. 438, as to the meaning of "pretensed rights" and the limited application of the statute at the present time. A right or title which is grantable under 8 & 9 Vict. c. 106, is not now "pretensed" merely because the grantor has never been in possession. To enforce a forfeiture under the statute the plaintiff must show that the purchaser knew the title to be "pretensed". *Kennedy* v. *Lyell* (1885) 15 Q. B. D. 491, 53 L. T. 466.

(*s*) See last note.

(*t*) Per Lord Redesdale, *Cholmondeley* v. *Clinton* (1821) 4 Bligh, at p. 75.

(*u*) See *Cooke* v. *Cooke* (1864) 4 D. J. & S. 704; *Pryse* v. *Pryse* (1872) L. R. 15 Eq. 86, 42 L. J. Ch. 253.

(*x*) *Cholmondeley* v. *Clinton* (1821) 4 Bligh, 1, 43, 82, per Lord Eldon and Lord Redesdale.

[23] In most of the States of this country a conveyance by one who has a lawful claim to land held adversely by another is valid; for the decisions in those States where such conveyances are prohibited, see the notes to Ryall *v.* Rowles, 2 L. C. Eq. (4th Am. ed.) 1631 *et seq.*; Chevalier *v.* Carter, 124 Ala. 520.

sion, a sale of the term by the administrator of the lessee was held void as contrary to the statute, although in terms it only forbids sales of pretended rights, &c., under penalties, without expressly making them void (*y*).

Sale of non-litigious expectancy. But the sale of a contingent right or a mere expectancy, not being in the nature of a claim adverse to any existing possession, is not forbidden. The sale of a man's possible interest as the devisee of a living owner, on the terms that he shall return the purchase-money if he does not become the devisee, is not bad either at common law as creating an unlawful interest in the present owner's death, or as a bargain for a pretended title under the statute (*z*).[24]

(*y*) *Doe* d. *Williams* v. *Evans* (1845) 1 C. B. 717, 14 L. J. C. P. 237. Cp. above as to the construction of prohibitory statutes in general, p. 296.

(*z*) *Cook* v. *Field* (1850) 15 Q. B. 460, 19 L. J. Q. B. 441. [Cp. Lowry *v.* Spear, 7 Bush, 451.] By the civil law, however, such contracts are regarded as *contra bonos mores*. "Huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus," we read in a rescript of Justinian on an agreement between expectant co-heirs as to the disposal of the inheritance. The rescript goes on, quite in the spirit of our own statute, to forbid in general terms all dealings "in alienis rebus contra domini voluntatem": C. 2. 3, *de pactis*, 30. By the Code Napoléon, art. 1600 (followed by the Italian Civil Code, art. 1460). "On ne peut vendre la succession d'une personne vivante, *même de son consentement:*" cp. 791, 1130. In Roman law the rule that the inheritance of a living person could not be sold is put only on the technical ground "quia in rerum natura non sit quod venierit": D. 18. 4. de hered. vel actione vendita, 1, and see *eod. tit.* 7–11.

24 The conveyance by one of his possible interest as devisee of a living owner, or heir of his ancestor, is the conveyance of a naked possibility, and ineffectual to pass any interest at law. Wheeler's Exrs. *v.* Wheeler, 2 Met. (Ky.) 474; Needles' Exr. *v.* Needles, 7 Ohio St. 432; Hart *v.* Gregg, 32 Ohio St. 502; *Re* Lennig's Est., 182 Pa. 485. But if the conveyance was with warranty it will operate by way of estoppel. Rosenthal *v.* Mayhugh, 33 Ohio St. 155, 158. And equity will give effect to the conveyance as an agreement to convey, which will be specifically enforced as soon as the grantor has acquired power to perform it, if the consideration given was fair and no undue advantage was taken. Parsons *v.* Ely, 45 Ill. 232; Galbraith *v.* McLain, 84 Ill. 379; Kershaw *v.* Kershaw, 102 Ill. 307; Longshore *v.* Longshore, 200 Ill. 470; Gary *v.* Newton, 201 Ill. 170; Clendenning *v.* Wyatt, 54 Kan. 523; Bacon *v.* Bonham, 33 N. J. Eq. 614; Stover *v.* Eyclesheimer, 4 Abb. App. Dec. 309; Martin *v.* Marlow, 65 N. C. 695; McDonald *v.* McDonald, 5 Jones Eq. 211; Bayler *v.* Commonwealth, 40 Pa. 37; Power's Appeal, 63 Pa. 443; *Re* Fritz's Est., 160 Pa. 156; *Re* Kuhn's Est., 163 Pa. 438; Fitzgerald *v.* Vestal, 4 Sneed, 258; Steele *v.* Frierson, 85 Tenn. 430; Hale *v.* Hollon, 90 Tex. 427; Fuller *v.* Parmenter, 72 Vt. 362. In Abel *v.* Boynton, 7 Mass. 112, it was held that "a contract made by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity." In Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Curtis *v.* Curtis, 40 Me. 24, and Jenkins *v.* Stetson, 9 Allen, 128, it was held that such a contract is valid if made with the consent of the ancestor. See also McClure *v.* Raben,

Proceedings in lunacy not within the rules against champerty. Proceedings in lunacy seem not to be within the general rules as to champerty, **345]** as they are not analogous to ordinary *litigation, and their object is the protection of the person and property of the lunatic, which is in itself to be encouraged; and "this object would in many cases be impeded rather than promoted by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void" (*a*).

Maintenance in general. As to maintenance in general, maintenance in the strict and proper sense is understood to mean only the maintenance of an existing suit, not procuring the commencement of a new one. But the distinction is in practice immaterial even in the criminal law (*b*). It is of more importance that a transaction cannot be void for champerty or maintenance unless it be "something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (*c*). Therefore, for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name (*c*). Nor is it maintenance for several persons to agree to prosecute or defend a suit in the result of which they have, or reasonably believe they have, a common inter- **346]** est (*d*).[25] But a bargain to have a share of *property to be

(*a*) *Persse* v. *Persse* (1840) 7 Cl. & F. 279, 316, 51 R. R. 22, 29, per Lord Cottenham.

(*b*) See *Wood* v. *Downes* (1811) 18 Ves. at p. 125, 11 R. R. 164.

(*c*) *Fischer* v. *Kamala Naicker* (1860) 8 Moo. Ind. App. 170, 187. This is not necessarily applicable in England, being said with reference to the law of British India, where the English laws against maintenance and champerty are not specifically in force: see *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) 2 App. Ca. 186, 207–9, and the later judgment cited below. But it fairly represents the principles on which English judges have acted in the modern cases. "The English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy; but such documents should be jealously scanned, and, when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them": *Kunwar Ram Lal* v. *Nil Kanth* (1893) L. R. 20 Ind. App. 112, 115.

(*d*) *Findon* v. *Parker* (1843) 11 M. & W. 675, 12 L. J. Ex. 444; *Plating Co.* v. *Farquharson* (1881) 17 Ch. Div. 49. Cp. 2 Ro. Ab. 115 G.

125 Ind. 439, 133 Ind. 507; Alves *v.* Schlesinger, 81 Ky. 290; McCall's Adm. *v.* Hampton, 98 Ky. 166; Fuller *v.* Parmenter, 72 Vt. 362. See 13 Yale L. J. 228.

25 Thompson *v.* Marshall, 36 Ala. 504; Vaughn *v.* Marable, 64 Ala. 60; Allen *v.* Frazee, 85 Ind. 283; Bartholomew Co. Commrs. *v.* Jameson, 86 Ind. 154; Jewel *v.* Neidy, 61 Ia. 299; Call *v.* Calef, 13 Met. 362; Tillman *v.* Searcy, 7 Humph. 337; Dorwin *v.* Smith, 35 Vt. 69; Lewis *v.* Brown, 36 W. Va. 1; Davies *v.* Stowell, 78 Wis. 334; Gilbert-Arnold Co. *v.* Superior, 93 Wis. 194.

recovered in a suit in consideration of maintaining the suit by the supply of money and evidence is not saved from being champerty by the party's having a mere collateral interest in the result of the suit (*e*). Where a person sues for a statutory penalty as a common informer, it is maintenance to indemnify him against costs (*f*).

Certain relations will justify maintenance, but not champerty. Lineal kinship in the first degree or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which as between strangers would be maintenance:[26] but blood relationship will not justify champerty (*g*).

(c) **Public policy as to legal duties of individuals.** As to matters touching legal (and possibly moral) duties of individuals in the performance of which the public have an interest.

Agreements as to custody or education of children. Certain kinds of agreements are or have been considered unlawful and void as providing for or tending to the omission of duties which are indeed duties towards individuals, but such that their performance is of public importance. To this head must be referred the rule of law that a father cannot by contract deprive himself of the right to the custody of his children (*h*)[27] or of his discretion as to their education. He "cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own." And an agreement to that effect—such as an agreement made before marriage between a husband and wife of different religions that boys shall be edu-

(*e*) *Hutley* v. *Hutley* (1873) L. R. 8 Q. B. 112, 42 L. J. Q. B. 52. But the interest of a bankrupt's creditors is more than "collateral": *Guy* v. *Churchill* (1888) 40 Ch. D. 481, 56 L. J. Ch. 670.

(*f*) *Bradlaugh* v. *Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454.

(*g*) *Hutley* v. *Hutley, supra.* See 2 Ro. Ab. 115, 116.

(*h*) *Re Andrews* (1873) L. R. 8 Q. B. 153, *sub nom. Re Edwards*, 42 L. J. Q. B. 99, and authorities there collected.

[26] Proctor *v.* Cole, 104 Ind. 373; Perrine *v.* Dunn, 3 Johns. Ch. 508, 519; Thallhimer *v.* Brinkerhoff, 3 Cow. 623, 647; Gilleland *v.* Failing, 5 Den. 308; Barnes *v.* Strong, 1 Jones Eq. 100; Wright *v.* Cain, 93 N. C. 296; *Re* Evans, 22 Utah, 366; Barker *v.* Barker, 14 Wis. 131. And one may lawfully give money to a poor man to enable him to carry on his suit. Harris *v.* Brisco, 17 Q. B. D. 504; Perrine *v.* Dunn, *supra*; State *v.* Chitty, 1 Bailey, 379, 401; Sherley *v.* Riggs, 11 Humph. 53, 57.

[27] *In re* Besant, 11 Ch. D. 508, 519; Queen *v.* Bernardo. 23 Q. B. D. 305; Johnson *v.* Terry, 34 Conn. 259, 263; Brooke *v.* Logan, 112 Ind. 183; Chapsky *v.* Wood. 26 Kan. 650; Gates *v.* Renfroe, 7 La. Ann. 569; Matter of Scarritt, 76 Mo. 565; Albert *v.* Perry, 1 McCarter, 540.

347] cated *in the religion of the father, and girls in the religion of the mother—cannot be enforced as a contract (*i*).[28]

After the father's death the Court has a certain discretion. The children are indeed to be brought up in his religion, unless it is distinctly shown by special circumstances that it would be contrary to the infant's benefit (*k*). When such circumstances are in question, however, the Court may inquire "whether the father has so acted that he ought to be held to have waived or abandoned his right to have his children educated in his own religion"; and in determining this the existence of such an agreement as above mentioned is material (*l*). The father's conduct in giving up the maintenance, control, or education of his children to others may not only leave the Court free to make after his death such provision as seems in itself best; it may preclude him even from asserting his rights in his lifetime (*m*).[29]

Such agreements in separation deeds. Clauses in separation deeds or agreements for separation purporting to bind the father to give up the general custody of his children or some of them, have for the like reasons been held void; and specific performance of an agreement to execute a separation deed containing such clauses has been refused (*n*). In one case, however, such a contract can be enforced; namely, where there has been such misconduct on the father's part that the Court would have interfered to take the custody of the children from him in the exercise of the appropriate jurisdiction and on grounds independent of contract. The general rule is only that the custody of children cannot be made a mere matter of bargain, **348]** not *that the husband can in no circumstances bind himself not to set up his paternal rights (*o*).

(*i*) *Andrews* v. *Salt* (1873) L. R. 8 Ch. 622, 636.

(*k*) *Hawksworth* v. *Hawksworth* (1871) L. R. 6 Ch. 539, 40 L. J. Ch. 534.

(*l*) *Andrews* v. *Salt* (1873) L. R. 8 Ch. at p. 637.

(*m*) *Lyons* v. *Blenkin* (1820–1) Jac. 245, 255, 263, 23 R. R. 38.

(*n*) *Vansittart* v. *Vansittart* (1858) 2 De G. & J. 249, 259, 27 L. J. Ch. 222. As to the validity of *partial* restrictions of the husband's right, *Hamilton* v. *Hector* (1871) L. R. 6 Ch. 701, L. R. 13 Eq. 511, 40 L. J. Ch. 692.

(*o*) *Swift* v. *Swift* (1865) 4 D. F. & J. 710, 714, 34 L. J. Ch. 209, 394, and see the remarks in L. R. 6 Ch. 705, L. R. 13 Eq. 520.

[28] *Re* Nevin, [1891] 2 Ch. 299.

[29] See Smart *v.* Smart, [1892] A. C. 425; United States *v.* Sauvage, 91 Fed. Rep. 490; Bonnett *v.* Bonnett, 61 Ia. 199; Chapsky *v.* Wood, 26 Kan. 650; Matter of O'Neal, 3 A. L. Rev. 578; Pool *v.* Gott, 14 Law Rep. 269; Sturtevant *v.* State, 15 Neb. 459; Clark *v.* Bayer, 32 Ohio St. 299; Enders *v.* Enders, 164 Pa. 266; Hoxie *v.* Potter, 16 R. I. 374; Merritt *v.* Swimley, 82 Va. 433; Stringfellow *v.* Somerville, 95 Va. 701; Green *v.* Campbell, 35 W. Va. 698;

36 & 37 Vict. c. 12, s. 2. The law on this point is now modified by the Act 36 & 37 Vict. c. 12, which enacts (s. 2) that

"No agreement contained in any separation deed between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

This Act does not enable a father to delegate his general rights and powers as regards his infant children (*p*).

Mother of illegitimate child. The mother of an illegitimate child has parental duties and rights recognized by the law (*q*), and cannot deprive herself of them by contract (*r*).

Doctrine as to separation deeds in general based on same ground. The objections formerly entertained (as we have seen) first against separation deeds in general, and afterwards down to quite recent times against giving full effect to them in courts of equity, were based in part upon the same sort of grounds: and so are the reasons for which agreements providing for a future separation have always been held invalid. For not the parties alone, but society at large is interested in the observance of the duties incident to the marriage contract, as a matter of public example and general welfare.

So as to sale of offices. Considerations of the same kind enter into the policy of the law with respect to the sale of offices, also spoken of above. Such transactions clearly involve the abandonment or evasion of distinct legal duties.

Insurance of seamen's wages. On similar grounds, again, seamen's wages, or any *remuneration in lieu of such wages, cannot be [349 the subject of insurance at common law (*s*). The reason of this is said to be "that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and danger" (*t*). This reason, however, is removed in England by the Merchant Ship-

(*p*) *Re Besant* (1879) 11 Ch. Div. 508, 518, 48 L. J. Ch. 497.

(*q*) *Barnardo* v. *McHugh* [1891] A. C. 388, 61 L. J. Q. B. 721.

(*r*) *Humphrys* v. *Polak* [1901] 2 K. B. 385, 70 L. J. K. B. 752, C. A.

(*s*) *Webster* v. *De Tastet* (1797) 7 T. R. 157, 4 R. R. 402.

(*t*) Kent, Comm. 3. 269.

Cunningham *v.* Barnes, 37 W. Va. 746; Fletcher *v.* Hickman, 50 W. Va. 244; *Re* Goodenough, 19 Wis. 274; Sheers *v.* Stein, 75 Wis. 44. The right of the father is the secondary, the best interest and welfare of the child, the paramount question. See further, 27 L. R. A. 56, n.

ping Act, 1894 (57 & 58 Vict. c. 60, s. 157), which makes the right to wages independent of freight being earned. The question has not yet presented itself for decision whether the rule founded upon it is to be considered as removed also.

Agreements against social duty. It has never been decided, but it seems highly probable, that agreements are void which directly tend to discourage the performance of social and moral duties. Such would be a covenant by a landowner to let all his cultivable land lie waste, or a clause in a charter-party prohibiting deviation even to save life (*u*).

(d) **Public policy as to freedom of individual action.** As to agreements unduly limiting the freedom of individual action.

There are certain points in which it is considered that the choice and free action of individuals should be as unfettered as possible. As a rule a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are:—

(α) Marriage.
(β) Testamentary dispositions.
(γ) Trade.

(α) **Marriage.** Marriage is a thing in itself encouraged by the law; the marriage contract is moreover that which of all others
350] *should be the result of full and free consent.

"Marriage brokage" agreements void. Certain agreements are therefore treated as against public policy either for tending to impede this freedom of consent and introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward, which are known as marriage brokage contracts. All such agreements are void (*x*),[30] and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely *no* consider-

(*u*) Per Cockburn C.J. 5 C. P. D. at p. 305.

(*x*) *E.g. Cole* v. *Gibson* (1756) 1 Ves. Sr. 503. See Story, Eq. Jur. § 260 sqq.

[30] Morrison *v.* Rogers, 115 Cal. 252; Hellen *v.* Anderson, 83 Ill. App. 506; Johnson *v.* Hunt, 81 Ky. 321; State *v.* Towle, 80 Me. 287; Boynton *v.* Hubbard, 7 Mass. 112, 118; Fuller *v.* Dame, 18 Pick. 472, 481; Ancliff *v.* June, 81 Mich. 477; Duval *v.* Wellman, 124 N. Y. 156; Crawford *v.* Russell, 62 Barb. 92; Jangraw *v.* Perkins, 56 Atl. Rep. 532 (Vt.).

ation, but an *illegal* consideration, for a subsequent promise of reward, which promise, even if under seal, is therefore void (*y*). The law is said to be comparatively modern on this head: but it has already ceased to be of any practical importance (*z*).

Agreement in general restraint of marriage void. We pass on to the second class, agreements "in restraint of marriage" as they are called. An agreement by a bachelor or spinster not to marry at all is clearly void (*a*); so, it seems, would be a bare agreement not to marry within a particular time (*b*).[31] In *Lowe* v. *Peers* (*c*) a covenant not to marry any person other than the covenantee was held void. A promise to marry nobody but A. B. cannot be construed as a promise to marry A. B. and is thus in mere restraint of marriage: and even if it could, it was thought doubtful whether an unilateral covenant to marry A. B. would be valid, A. B. not being bound by any reciprocal promise (*d*). Lord Mansfield threw out the *opinion [351 (not without followers in our own time) (*e*), that even the ordinary contract by mutual promises of marriage is not free from mischievous consequences. The decision was affirmed in the Exchequer Chamber, where it was observed that:—

"Both ladies and gentlemen . . . frequently are induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements they would become prisoners for life at the will of most inexorable jailors—disappointed lovers" (*f*).[32]

(*y*) *Williamson* v. *Gihon* (1805) 2 Sch. & L. 357.

(*z*) In the Roman law these contracts were good apart from special legislation: they were limited as to amount (though with an expression of general disapproval) by a constitution preserved only in a Greek epitome: C. 5. 1. de sponsalibus, &c. 6. The Austrian Code agrees with our law (§ 879).

(*a*) *Lowe* v. *Peers* (1768) Wilmot, 371: where it is said that it is a contract to omit a moral duty, and "tends to depopulation, the greatest of all political sins."

(*b*) *Hartley* v. *Rice* (1808) 10 East, 22, 10 R. R. 228 (a wager).

(*c*) (1768) 4 Burr. 2225, in Ex. Ch. Wilm. 364.

(*d*) But of this *qu.*: for a refusal by A. B. to marry on request within a reasonable time would surely discharge the promisor on general principles. Cp. *Cock* v. *Richards* (1805) 10 Ves. 429. 8 R. R. 23.

(*e*) 4 Burr. 2230; per Martin B. *Hall* v. *Wright* (1858) E. B. & E. at p. 788, 29 L. J. Q. B. at p. 49.

(*f*) Wilm. 371.

[31] State *v.* Towle, 80 Me. 287; Sterling *v.* Sinnickson, 2 South. 756. A contract to pay a sum of money on condition that the payee do not marry within a given time, and if he do, then to pay a certain sum per day during the time he shall have remained unmarried is illegal and void. White *v.* Equitable Nuptial Benefit Union, 76 Ala. 251; Chalfant *v.* Payton, 91 Ind. 202. Cp. Jones *v.* Jones, 1 Col. App. 28.

In King *v.* King, 63 Ohio St. 363, it was held that a promise not to marry though void was not illegal, and having been performed entitled the promisor to the agreed consideration.

[32] Conrad *v.* Williams, 6 Hill, 444. But see Brown *v.* Odill, 104 Tenn. 250.

Covenant not to revoke will. A covenant not to revoke a will is not void as being a covenant not to marry, though the party's subsequent marriage would revoke the will by operation of law. As a covenant not to revoke the will in any other way it is good; but the party's marriage gives no ground of action as for a breach (*g*).[33]

As to conditions in restraint of marriage. In the absence of any known express decision, it may be gathered from the analogy of the cases on *conditions* in restraint of marriage (which hardly occur except in wills) that a contract not to marry some particular person, or any person of some particular class, would be good unless the real intention appeared to be to restrain marriage altogether; and that a contract by a widow or widower not to marry at all would probably be good (*h*).

The rule against such conditions, at first adopted from the ecclesiastical courts on grounds of public policy, has been so modified in its application by courts of equity that it can now be treated only as an arbitrary rule of construction (*i*). By the law of France promises of
352] marriage are *invalid, "comme portant atteinte à la liberté illimitée qui doit exister dans les mariages": nevertheless if actual special damage (préjudice) can be shown to have resulted from non-fulfilment of the promise, the amount of it can be recovered, it would seem as due *ex delicto* rather than *ex contractu* (*k*).

(*β.*) **Agreement to influence testator.** An agreement to use influence with a testator in favour of a particular person or object is void (*l*).[34] On the other hand, it is well established that a man may validly bind himself or his estate by contract to make any particular disposition (if in itself lawful) by his own will (*m*).[35] Such contracts were not

(*g*) *Robinson* v. *Ommanney* (1883) 21 Ch. D. 780, 23 Ch. Div. 285, 52 L. J. Ch. 440.

(*h*) See *Scott* v. *Tyler* (1788) in 2 Wh. & T. L. C. and notes; and, as to a supposed difference between the rules applicable to real and personal estate, Mr. Cyprian Williams in L. Q. R. xii. 36.

(*i*) See per Jessel M. R. *Bellairs* v. *Bellairs* (1874) L. R. 18 Eq. 510, 516, 43 L. J. Ch. 669. The last case on the subject is *In re Nourse* [1899] 1 Ch. 63, 68 L. J. Ch. 15.

(*k*) See notes in Sirey and Gilbert on Code Civ. art. 1142. Nos. 11–19.

(*l*) *Debenham* v. *Ox* (1749) 1 Ves. Sr. 276.

(*m*) *De Beil* v. *Thomson* (1841) 3 Beav. 469, s. c. nom. *Hammersley* v. *Baron de Beil* (1845) 12 Cl. & F. 45; *Brookman's trusts* (1869) L. R. 5 Ch. 182, 39 L. J. Ch. 138. Whether a covenant to exercise a power of testamentary appointment in a particular way be valid, *quære: Thacker* v. *Key* (1869) L. R. 8 Eq. 408; *Bulteel* v. *Plummer* (1870) 6 Ch. D. 160; per Brett L.J. *Palmer* v. *Locke* (1880) 15 Ch. Div. at p. 300.

33 Gall *v.* Gall, 64 Hun, 600.

34 Fuller *v.* Dame, 18 Pick. 472, 481.

35 Robinson *v.* Mandell, 3 Cliff. 169; Bolman *v.* Overall, 80 Ala. 457; Hudson *v.* Hudson, 87 Ga. 678; Vanvactor *v.* State, 113 Ind. 276; Bird *v.* Jacobus,

recognized by Roman law (*n*), and even a gift *inter vivos* of all the donor's after-acquired property would have been bad as an evasion of the rule: but in the modern law of Germany, as with us, a contract of this sort (Erbvertrag) is good (*o*).

(γ.) Agreements in restraint of trade.

General principle: Restrictive agreements allowed if reasonable in interest of parties, and not injurious to public. This class of cases presents a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce. The original principle is that a man ought not to be allowed to restrain himself by contract from exercising any lawful *craft or business at his own dis- [353 cretion and in his own way. It is still true that "all interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void." So the rule is expressed by Lord Macnaghten in what is now the governing decision (*p*). "But," he continues, "there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case." The exceptions were introduced with much hesitation, and were long supposed to be confined within inflexible limits. But the former attempts at strict definition have

(*n*) Stipulatio hoc modo concepta: Si heredem me non feceris, tantum dare spondes? inutilis est, quia contra bonos mores est haec stipulatio. D. 45. 1. de v. o. 61.

(*o*) Savigny, Syst. 4, 142–5; and now by German Civil Code, s. 2274 *sqq.*, subject to requirements of form.

(*p*) *Nordenfelt* v. *Maxim-Nordenfelt, &c. Co.* [1894] A. C. 535, 565.

113 Ia. 194; McGuire *v.* McGuire, 11 Bush, 142; Wellington *v.* Apthorp, 145 Mass. 73; Carmichael *v.* Carmichael, 72 Mich. 76; Newton *v.* Newton, 46 Minn. 33; Wright *v.* Tinsley, 30 Mo. 389; Gupton *v.* Gupton, 47 Mo. 37; Sutton *v.* Hayden, 62 Mo. 101; Johnson *v.* Hubbell, 2 Stockt. 332; Schutt *v.* Missionary Soc., 41 N. J. Eq. 115; Pflugar *v.* Pultz, 43 N. J. Eq. 440; Parsell *v.* Stryker, 41 N. Y. 480; Hall *v.* Gilman, 77 N. Y. App. Div. 458; Logan *v.* McGinnis, 12 Pa. 27; Rivers *v.* Rivers' Exrs., 3 Desaus. 190; Smith *v.* Pierce, 65 Vt. 200; Bryson *v.* McShane, 48 W. Va. 126. Cp. Brewer *v.* Hieronymus, 19 Ky. L. Rep. 645.

Such a promise may be specifically enforced. See Barrett *v.* Geisinger, 179 Ill. 240; Bolman *v.* Overall, 80 Ala. 457; Hall *v.* Gilman, 77 N. Y. App. Div. 458; Emery *v.* Darling, 50 Ohio St. 160; Fogel *v.* Church, 48 S. C. 86. And see 1 Ames, Eq. Jur. 146, n.

If a contract is made to devise particular real estate and afterwards the promisor conveys it away, the promisee may sue at once. Synge *v.* Synge, [1894] 1 Q. B. 467; Whitney *v.* Hay, 181 U. S. 77.

A voluntary covenant that the covenantor's executors shall pay a certain sum on the death of the covenantor is valid. Krell *v.* Codman, 154 Mass. 454.

proved inapplicable. As the law is now laid down, "it is a sufficient justification, and indeed the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." [36]

[36] Recent American cases on the question of covenants by the seller of a business or by an employee not to engage in the same business generally follow the modern English rule that the validity of the covenant depends upon the reasonableness of the restraint, in view of what was fairly necessary to protect the covenantee. Fisheries Co. *v.* Lennen, 116 Fed. Rep. 217; Harrison *v.* Glucose Co., 116 Fed. Rep. 304 (C. C. A.); National Co. *v.* Haberman, 120 Fed. Rep. 415; S. Jarvis Adams Co. *v.* Knapp, 121 Fed. Rep. 34; Thibodeau *v.* Hildreth, 124 Fed. Rep. 892 (C. C. A.); Gregory *v.* Spieker, 110 Cal. 150; Ryan *v.* Hamilton, 205 Ill. 191; Eisel *v.* Hayes, 141 Ind. 41; Swigert *v.* Tilden, 121 Ia. 650; Davis *v.* Brown, 98 Ky. 475; Anchor Electric Co. *v.* Hawkes, 171 Mass. 101 (modifying earlier Massachusetts decisions); Buck *v.* Coward, 122 Mich. 530; Kronschnabel-Smith Co. *v.* Kronschnabel, 87 Minn. 230; Bancroft *v.* Union Embossing Co., 72 N. H. 402; Althen *v.* Vreeland, (N. J. Eq.) 36 Atl. Rep. 479; Diamond Match Co. *v.* Roeber, 106 N. Y. 473; Tode *v.* Gross, 127 N. Y. 480; Magnolia Metal Co. *v.* Price, 65 N. Y. App. Div. 276; Cowan *v.* Fairbrother, 118 N. C. 406; Shute *v.* Heath, 131 N. C. 281; Hulen *v.* Earel, (Okl.) 73 Pac. Rep. 927; Herreshoff *v.* Boutineau, 17 R. I. 3; Tillinghast *v.* Boothby, 20 R. I. 59.

But in Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, the court held that a covenant by the seller of a business that he will not engage in the same business in the United States for a period of twenty-five years was invalid as necessarily tending to create a monopoly whether it was necessary or not to the reasonable enjoyment of the good-will purchased. See also Lanzit *v.* J. W. Sefton Mfg. Co., 184 Ill. 326; Union Strawboard Co. *v.* Bonfield, 193 Ill. 420; United States *v.* Mallinckrodt Works, 83 Mo. App. 6; Mallinckrodt Works *v.* Nemnich, 169 Mo. 388; Berlin Works *v.* Perry, 71 Wis. 495.

An agreement between competitors to restrict production, maintain prices, or limit competition in any other way than by the purchase of the business of one of the competitors is illegal. Urmston *v.* Whitelegg, 63 L. T. N. S. 455; Gibbs *v.* Baltimore Gas Co., 130 U. S. 408; United States *v.* Joint Traffic Assoc., 171 U. S. 505; Oliver *v.* Gilmore, 52 Fed. Rep. 562; United States *v.* Trans-Missouri Freight Assoc., 58 Fed. Rep. 58, 166 U. S. 290; National Harrow Co. *v.* Quick, 67 Fed. Rep. 130; National Harrow Co. *v.* Hench, 76 Fed. Rep. 667; Santa Clara Co. *v.* Hayes, 76 Cal. 387; Pacific Co. *v.* Adler, 90 Cal. 110; Craft *v.* McConoughy, 79 Ill. 346; People *v.* Chicago Gas Co., 130 Ill. 268; Bishop *v.* American Preservers' Co., 157 Ill. 284; Anderson *v.* Jett, 89 Ky. 375; Houston *v.* Kentlinger, 91 Ky. 333; Ætna Ins. Co. *v.* Commonwealth, 106 Ky. 864, 879; India Association *v.* Kock, 14 La. Ann. 168; Fabacker *v.* Bryant, 46 La. Ann. 820; Richardson *v.* Buhl, 77 Mich. 632; Lovejoy *v.* Michels, 88 Mich. 15; Clark *v.* Needham, 125 Mich. 130; Mobile R. Co. *v.* Postal Tel. Co., 76 Miss. 731; State *v.* Nebraska Distilling Co., 29 Neb. 700; De Witt Co. *v.* New Jersey Co., 14 N. Y. Supp. 277; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Leonard *v.* Poole, 114 N. Y. 371; People *v.* North River Sugar Refg. Co., 121 N. Y. 582; Judd *v.* Harrington, 139 N. Y. 105; Cummings *v.* Union Stone Co., 164 N. Y. 401; Cohen *v.* Berlin Envelope Co., 166 N. Y. 292; Culp *v.* Love, 127 N. C. 457; Central Salt Co. *v.* Guthrie, 35 Ohio St. 666; Emery *v.* Ohio Candle Co., 47 Ohio St. 320; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173; Nester *v.* Continental Brewing Co., 161 Pa. 473; Mal-

No universal test can be assigned for ascertaining what is reasonable, not even the rule formerly accepted that the restraint contracted for must be limited in space, or in some sense not in "general restraint of trade." The precise object of the contract, and the nature and extent of the business interest to be protected, must be considered in every case. The kinds of contracts involving restraint of trade which usually occur in modern practice are agreements

lory *v.* Hanaur Oil Works, 86 Tenn. 598; Texas Oil Co. *v.* Adoue, 83 Tex. 650; Queen Ins. Co. *v.* Texas, 86 Tex. 250; Milwaukee Assoc. *v.* Niezerowski, 95 Wis. 129.

Cp. Herriman *v.* Menzies, 115 Cal. 16; Stovall *v.* McCutchen, (Ky. App.) 54 S. W. Rep. 969; Central Shade Roller Co. *v.* Cushman, 143 Mass. 353; Gloucester Glue Co. *v.* Russia Cement Co., 154 Mass. 92; Star Publishing Co. *v.* Associated Press, 159 Mo. 410; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484.

An agreement by a railway company to give a single telegraph company the exclusive right of establishing a line of telegraphic communication along its road is void, being both in restraint of trade, and contrary to the policy of § 5263, Rev. Stat. U. S. United States *v.* Union Pac. Ry. Co., 160 U. S. 1; W. U. Tel. Co. *v.* B. & S. Ry. Co., 3 McCrary, 130; W. U. Tel. Co. *v.* A. U. Tel. Co., 9 Biss. 72; W. U. Tel. Co. *v.* Nat. Tel. Co., 19 Fed. Rep. 660; W. U. Tel. Co. *v.* Balto., etc., Tel. Co., 23 Fed. Rep. 12; Mobile R. Co. *v.* Postal Tel. Co., 76 Miss. 731. And see W. Va. Transp. Co. *v.* Pipe Line Co., 22 W. Va. 600; W. U. Tel. Co. *v.* A. U. Tel. Co., 65 Ga. 160; St. Louis, &c. R. Co. *v.* Postal Tel. Co., 173 Ill. 508.

But a railroad company may grant a sleeping-car company the exclusive right for a number of years to furnish drawing-room and sleeping cars on its line. Chicago, &c. R. Co. *v.* Pullman Co., 139 U. S. 79.

A covenant in a lease that the lessee will sell on the leased premises no beer except that manufactured by a certain brewing company was held not illegal in Ferris *v.* American Brewing Co., 155 Ind. 539. See also Clay *v.* Powell, 85 Ala. 538; Sutton *v.* Head, 86 Ky. 156; Herpolsheimer *v.* Funke, 95 N. W. Rep. 687 (Neb.). Cp. Crawford *v.* Wick, 18 Ohio St. 190; Fuqua *v.* Pabst Co., 90 Tex. 298.

An agreement between parties to deal exclusively with one another may also be valid. Donnell *v.* Bennett, 22 Ch. D. 835; Chesapeake Fuel Co. *v.* United States, 115 Fed. Rep. 610 (C. C. A.); Keith *v.* Herschberg Co., 48 Ark. 138; Schwalm *v.* Holmes, 49 Cal. 665; Brown *v.* Rounsavell, 78 Ill. 589; Trentman *v.* Wahrenberg, 30 Ind. App. 304; Roller *v.* Ott, 14 Kan. 609; Saddlery Mfg. Co. *v.* Hillsborough Mills, 68 N. H. 216; New York Rock Co. *v.* Brown, 61 N. J. L. 536; George *v.* East Tenn. Co., 15 Lea, 455. Cp. Walsh *v.* Association, 97 Mo. App. 280.

And many agreements in regard to articles manufactured under a patent or a secret process are sustained though their object is to keep up prices or maintain a monopoly. Fowle *v.* Park, 131 U. S. 88; Bement *v.* National Harrow Co., 186 U. S. 70; United States Raisin Co. *v.* Griffin, 126 Fed. Rep. 364; Garst *v.* Harris, 177 Mass. 72; Standard Co. *v.* St. Louis Co., 177 Mo. 559; Tode *v.* Gross, 127 N. Y. 480; Walsh *v.* Dwight, 40 N. Y. App. Div. 513; Park *v.* National Assoc., 175 N. Y. 1. Cp. Merz Capsule Co. *v.* Capsule Co., 67 Fed. Rep. 414.

The Federal Congress and a number of States have passed statutes reinforcing and extending the common law rules against restraint of trade, and frequently making it a criminal offense to enter into such contracts. These statutes and the decisions upon them are collected in 64 L. R. A. 689, n.

The objection to contracts in restraint of trade seems applicable to combinations of workers to raise the price for their services. Moore *v.* Bennett, 140 Ill. 69; Milwaukee Masons' Assoc. *v.* Niezerowski, 95 Wis. 129. But the contest in such matters has generally been whether such bargains and the

by the seller of a business not to compete with the buyer, by a partner or retiring partner not to compete with the firm, and by a servant or agent not to compete with his master or employer after the termination of the service or employment. Obviously the measure of reasonable restrictions to protect the buyer, continuing partners, or em-
354] ployer *in the case of a business with national or world-wide connections will be larger than in the case of a merely local trade

means used to carry them out are tortious or criminal, a question entirely distinct from the validity of the contract.

"An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced. Gibbs *v.* Smith, 115 Mass. 592, 593; Kearney *v.* Taylor, 15 How. 494, 519; Jenkins *v.* Frink, 30 Cal. 586; Switzer *v.* Skiles, 8 Ill. 529; Hunt *v.* Elliott, 80 Ind. 245; Smith *v.* Ullman, 58 Md. 183; Phippen *v.* Stickney, 3 Met. 384; Stillwell *v.* Glasscock, 91 Mo. 658; Murphy *v.* De France, 105 Mo. 53; Whalen *v.* Brennan, 34 Neb. 129; Gulick *v.* Webb, 41 Neb. 706; Olson *v.* Lamb, 56 Neb. 104; Bellows *v.* Russell, 20 N. H. 427; Huntington *v.* Bardwell, 46 N. H. 492; National Bank *v.* Sprague, 20 N. J. Eq. 159, 168; De Baun *v.* Brand, 61 N. J. L. 624; Marsh *v.* Russell, 66 N. Y. 228; Marie *v.* Garrison, 83 N. Y. 14; Smith *v.* Greenlee, 2 Dev. L. 126; Goode *v.* Hawkins, 2 Dev. Eq. 393; Breslin *v.* Brown, 24 Ohio St. 565; Smull *v.* Jones, 6 W. & S. 122; Maffet *v.* Ijams, 103 Pa. 266; McMinn's Legatees *v.* Phipps, 3 Sneed, 196; James *v.* Fulcrod, 5 Tex. 512; Flanders *v.* Wood, 83 Tex. 277; Dailey *v.* Hollis, 27 Tex. Civ. App. 570; Barnes *v.* Morrison, 97 Va. 372. Compare Woodruff *v.* Berry, 40 Ark. 251; Marshalltown Stone Co. *v.* Des Moines Brick Co., 114 Ia. 574. "But such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and therefore illegal." Gibbs *v.* Smith, 115 Mass. 592, 593; Hyer *v.* Richmond Traction Co., 80 Fed. Rep. (C. C. A.) 839; 168 U. S. 471; McMullen *v.* Hoffman, 174 U. S. 639; Atlas Nat. Bank *v.* Holm, 71 Fed. Rep. 489; Swan *v.* Chorpenning, 20 Cal. 182; Ray *v.* Mackin, 100 Ill. 246; Devine *v.* Harkness, 117 Ill. 145; Conway *v.* Garden City Co., 190 Ill. 89; Hunter *v.* Pfeiffer, 108 Ind. 197; Clark *v.* Stanhope, 109 Ky. 521; Gardiner *v.* Morse, 25 Me. 140; Weld *v.* Lancaster, 56 Me. 453; Hanna *v.* Fife, 27 Mich. 172; Boyle *v.* Adams, 50 Minn. 255; Wooton *v.* Hinkle, 20 Mo. 290; Miltenberger *v.* Morrison, 39 Mo. 71; Pendleton *v.* Asbury, 104 Mo. App. 723; Goble *v.* O'Connor, 43 Neb. 49; McClellan *v.* Citizens' Bank, 60 Neb. 90; Gulick *v.* Ward, 5 Halst. 87; Brooks *v.* Cooper, 50 N. J. Eq. 761; Kenny *v.* Lembeck, 53 N. J. Eq. 20; Jones *v.* Caswell, 3 Johns. Cas. 29; Doolin *v.* Ward, 6 Johns. 194; Wilbur *v.* How, 8 Johns. 444; Thompson *v.* Davies, 13 Johns. 112; People *v.* Stephens, 71 N. Y. 527; Hopkins *v.* Ensign, 122 N. Y. 144; Baird *v.* Sheehan, 166 N. Y. 631; Coverly *v.* Terminal Warehouse Co., 83 N. Y. Supp. (App. Div.) 369; Ingram *v.* Ingram, 4 Jones L. 188; King *v.* Winants, 71 N. C. 469; Kine *v.* Turner, 27 Oreg. 356; Saxton *v.* Seiberling, 48 Ohio St. 554, 562; Barton *v.* Benson, 126 Pa. 431; Hay's Estate, 159 Pa. 381; Dudley *v.* Odom, 5 S. C. 131; Wilson *v.* Wall, 99 Va. 353, 356; Ralphsnyder *v.* Shaw, 45 W. Va. 680, *acc.* See also Fenner *v.* Tucker, 6 R. I. 551; Herndon *v.* Gibson, 38 S. C. 357, 20 L. R. A. 545, n. Compare Breslin *v.* Brown, 24 Ohio St. 565. The English authorities, however, seem opposed to the American decisions. Galton *v.* Emuss, 1 Coll. Ch. 243; *Re* Carew's Estate, 26 Beav. 187; Heffer *v.* Martyn, 36 L. J. Ch. 372; Chattock *v.* Muller, 8 Ch. D. 177. Compare Levi *v.* Levi, 6 C. & P. 239.

or practice. What is reasonable in the particular case is a question of law for the Court. Examples will be given presently. Meanwhile something must be said of the early history and intermediate forms of the doctrine.

Medieval feeling: The Chandlers of Norwich, 1299–1300. In the middle ages there was a general feeling, apparently popular and not derived from learned sources, against all agreements which tended to monopoly or keeping up prices. At the end of the thirteenth century all the chandlers of Norwich were presented by the court leet "pro quadam convencione inter eos facta videlicet quod nullus eorum venderet libram candele minus quam alter" (*q*).

The Dyer's case, 1415. In the well-known *Dyer's case* in 2 H. V. 5, pl. 26, the action was debt on a bond conditioned that the defendant should not use his craft of a dyer in the same town with the plaintiff for half a year: a contract which would now be clearly good if made upon valuable consideration. The defence was that the condition had been performed. To this Hull J. said: "To my mind you might have demurred to him that the obligation is void, because the condition is against the common law; and *per Dieu* if the plaintiff were here he should go to prison till he had made fine to the King" (*r*). This was not and could not be more than a dictum, and the parties proceeded to issue on the question whether the condition had in fact been performed or not.

The Blacksmith's case, 1587–1588. Hull's opinion, however, was approved by all the Justices of the C. P. in a blacksmith's case in 29 Eliz., of which we have two reports (*s*). It does not appear in either case what was the real occasion or consideration of the contract. *For aught the reports show it may have been the ordinary [355 transaction of a sale of goodwill or the like (*t*).

Historical connection of the doctrine with medieval regulation of trade. It has been plausibly suggested by a learned American writer that the medieval doctrine is connected with the rules and customs for-

(*q*) Leet Jurisdiction of the City of Norwich, Seld. Soc. 1892, p. 52.

(*r*) This Hill or Hull, Justice of C. P., is to be distinguished from Huls, who sat in K. B. till 3 H. V. His expletive has been wrongly supposed to be unique in the reports. In the earlier Year Books it is not uncommon.

(*s*) Moore, 242, pl. 379, fuller in 2 Leo. 210. Moore's report makes the odd mistake of putting South Mimms in Surrey.

(*t*) The explanations offered by Lord Macclesfield in *Mitchel* v. *Reynolds*, 1 Sm. L. C. at p. 399, and Sir W. Follett *arg.* in *Hitchcock* v. *Coker*, 6 A. & E. at p. 447, 45 R. R. at p. 529, are merely conjectural attempts to find in the Year Book a modern point of view which is not there.

bidding a man to exercise any trade to which he had not been duly apprenticed and admitted: so that if he covenanted not to exercise his own trade, he practically covenanted to exercise none—in other words not to earn his living at all (*u*). Indeed, by the statute 5 Eliz. c. 4, which consolidated earlier Acts of the same kind, not only the common labourer, but the artificer in any one of various trades, was compellable to serve in his trade if unmarried or under the age of 30 years, and not a forty-shilling freeholder or copyholder or "worth of his own goods the clear value of ten pounds." An agreement by a person within the statute not to exercise his own trade might therefore be deemed, at any rate if unlimited, to amount to an agreement to omit a legal duty.

Absolute freedom of trade asserted by Coke as old common law. At the same time absolute freedom of trade is positively asserted as the normal state of things always assumed and upheld by the common law. It was resolved in the *Ipswich Tailors' case* (*x*) that at the common law no man could be prohibited from working in *any* lawful trade: and it was said that

"The statute of 5 Eliz. c. 4, which prohibits every person from using or exercising any craft mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades; and thereby it appears, that without an act of parliament (*y*) none can be prohibited from working in any lawful trade."

356] And certain ordinances, by which the tailors of Ipswich *forbade any one to exercise the trade of a tailor there until he had presented himself to the master and wardens and satisfied them of his qualification, were held void, inasmuch as

"Ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery."

Modern applications: Hilton v. Eckersley. This principle is still in force as regards agreements and combinations among members of trades not made for the protection of purchasers for value, but by way of systematic denial of each contracting party's ordinary discretion in managing his affairs.

An agreement between several master manufacturers to regulate their wages and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishments,

(*u*) Parsons on Contracts, 2. 255.
(*x*) (1615) 11 Co. Rep. 53 *a*, 54 *b*.
(*y*) So again in the case of *Monopolies* (1602) 11 Co. Rep. 87 *b*.

by the decision of a majority of their number, is in general restraint of trade as depriving each one of them of the control of his own business, and is therefore not enforceable (*z*). It makes no difference that the object of the combination is alleged to be mutual defence against a similar combination of workmen. The case decides on the whole that neither an agreement for a strike nor an agreement for a lock-out is enforceable by law. The Court of Exchequer Chamber thus expressed the general principle in the course of their judgment:—

"Primâ facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion" (*a*).

On like grounds a restrictive agreement between the *inem- [357 bers of a trade society as to the employment by any one member of travellers and other persons who had left the service of any other has been disallowed (*b*).

It is not an unlawful restraint of trade for several persons carrying on the same business in the same place to agree to divide the business among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid because they may operate in partial restraint of the parties' freedom to exercise their trade. But a provision that if other persons, strangers to the contract, do not employ in particular cases that one of the contracting parties to whom as between themselves the business is assigned by the agreement, then none of the others will accept the employment, is bad (*c*).

Reasons for not allowing unqualified restraint. The reasons for the rule are set forth at large in the leading case of *Mitchel* v. *Reynolds* (*d*),

(*z*) *Hilton* v. *Eckersley* (1855–6) 6 E. & B. 47, in Exch. Ch. *ib.* 66, 24 L. J. Q. B. 353, 25 *ib.* 199. The dicta there, so far as they suggest that the agreement would be a criminal offence at common law, are overruled by *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. 295.

(*a*) 6 E. & B. at pp. 74–5.

(*b*) *Mineral Water Bottle, &c. Society* v. *Booth* (1887) 36 Ch. Div. 465. The terms were: "No member of the society shall employ any traveller, carman, or outdoor *employé*, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service."

(*c*) *Collins* v. *Locke* (1879) (J. C.) 4 App. Ca. 674, 688, 48 L. J. P. C. 68; *Jones* v. *North* (1875) L. R. 19 Eq. 426, 44 L. J. Ch. 388, a case not free from difficulties on other grounds, and apparently not fully argued or considered on this point.

(*d*) (1711) 1 P. Wms. 181, and in 1 Sm. L. C.

and at a more recent date (1837) were put more concisely by the Supreme Court of Massachusetts, who held a bond void which was conditioned that the obligor should never carry on or be concerned in iron founding:—

"1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

358] *3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly" (*e*).

For allowing particular restraint. The qualified admission of restraints has been commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labour, skill or talent; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons (*f*).

Admission of restrictive covenants on sale of business in 17th century. In the early part of the seventeenth century the majority of the judges concluded that the policy of the law was not opposed to the seller of a business making the sale effectual by undertaking not to compete with the buyer. For that purpose, "for a time certain and in a place certain a man may be well bound and restrained from using of his trade" (*g*), provided that it is upon a valuable consideration (*h*). Restrictions extending to Newgate Market, in London, and the whole of country towns, such as Basingstoke and Newport (Isle

(*e*) *Alger* v. *Thacker* (1837) 19 Pick. 51, 54. Agreements which aim at creating a monopoly, or raising the price of either goods or labour, have been constantly held void in the U. S. See Frank J. Goodnow, Trade Combinations at Common Law, Pol. Sci. Quart. xii. 212.

(*f*) James V.-C. *Leather Cloth Co.* v. *Lorsont* (1869) L. R. 9 Eq. 345, at p. 353.

(*g*) *Rogers* v. *Parry* (1614) 2 Bulst. 136, Coke's opinion adopted by the Court.

(*h*) To same effect, *Broad* v. *Jollyfe*, Cro. Jac. 596; *Bragg* v. *Stanner*, Palm. 172, and see Parker C.J.'s observation on the report of *Rogers* v. *Parry*, 1 Sm. L. C. at p. 394.

of Wight), were allowed, but it was said that such a promise cannot be good "if the *restraint be general throughout England" (*i*). [359

Mitchel v. Reynolds: Limit in space thought necessary. These authorities were confirmed in 1711 by *Mitchel* v. *Reynolds* (*k*), the earliest case usually referred to, and it was settled that if a particular restrictive contract, on the circumstances brought before the Court, "appears to be a just and honest contract," it will be upheld. At that time, however, and long afterwards, it was taken for granted that such a contract could in no case be reasonable unless limited, at any rate, in space. "Where the restraint is general, not to exercise a trade throughout the kingdom," it was thought that it must be bad as matter of law. "What does it signify to a tradesman in London what another does at Newcastle?" (*l*).

Fixed rule of limits now held unsuitable to modern conditions. At this day we have no difficulty in seeing that it may signify very much to a merchant in London what another is doing, not only at Newcastle, but at Singapore or San Francisco. Fortunately no positive and direct decision stood in the way of the law being authoritatively declared by the House of Lords in a form suited to the conditions of modern trade and communications.

Before the middle of the nineteenth century it was settled that, although a valuable and not merely colourable consideration there must be, even if the contract is under seal, the Court will not attempt to estimate the adequacy of the consideration in this more than in any other class of cases (*m*).

Gradually the question whether the restriction imposed was on the whole commensurate, in point of law, with the benefit conferred, became the only question seriously discussed.

And now the dicta which apparently bound contracts of *this [360 kind within hard and fast rules must be taken not as general propositions of law, but as applications of the general principle of reasonableness to conditions of fact which at the time might well seem to be permanent, but which have passed away.

In the leading case before the House of Lords, an inventor and manufacturer of guns and ammunition, doing business with military authorities in various parts of the world, sold his business to a com-

(*i*) *Prugnell* v. *Gosse*, Aleyn, 67.
(*k*) 1 Sm. L. C. 391.
(*l*) 1 Sm. L. C. at pp. 391, 397.
(*m*) *Hitchcock* v. *Coker* (1837) 6 A. & E. 438, 45 R. R. 522 (Ex. Ch.); *Gravely* v. *Barnard* (1874) L. R. 18 Eq. 518, 43 L. J. Ch. 659. Formerly it was thought (it would seem from some expressions in the earlier cases) that where the contract was by deed the consideration must appear on the face of the deed.

pany, and covenanted not to compete with the company in that part of the business for twenty-five years: this was held not too wide in the circumstances, though a distinct covenant not to engage in any business competing with that for the time being carried on by the company was disallowed (*n*).

Detailed examples (formerly treated as special exceptions). Meanwhile various relaxations of the supposed fixed rule as to limits had been sanctioned. These are now nothing else than special illustrations of the broader principle; but as such they are still useful and instructive. A limit of time is not necessary to make an agreement in restraint of trade valid, and it is not of itself sufficient (*o*). It has never been doubted that a partner may bind himself absolutely not to compete **361]** with the firm during the partner*ship: so may a servant in a trade bind himself absolutely not to compete with the master during his time of service (*p*). A contract not to divulge a trade secret need not be qualified, and a man who enters into such a contract may to the same extent bind himself not to carry on a manufacture which would involve disclosure of the process intended to be kept secret (*q*). Indeed it has been said that "sales of secret processes are not within the principle or the mischief of restraints of trade at all" (*r*). An undertaking by a tradesman purchasing goods from the manufacturers not to sell them below specified prices, and not to sell to any retail trader without taking a similar agreement from him, is not in restraint of trade; for the manufacturers, not being bound to make or

(*n*) *Nordenfelt* v. *Maxim-Nordenfelt, &c. Co.* [1894] A. C. 535, 63 L. J. Ch. 908, affirming S. C. *nom. Maxim-Nordenfelt, &c. Co.* v. *Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. 273. In the C. A. Bowen L.J. endeavoured, in an elaborate judgment, to show that the common law rule in its old form was still in force, though the exceptions were extended. In the H. L. Lord Herschell, thinking this historically correct, concluded on the whole that the old rule had become "inapplicable to the altered conditions which now prevail." [1894] A. C. at p. 548. Lord Macnaghten thought Lord Bowen's distinctions too refined, justified the decisions in equity which Lord Bowen had criticized for disregarding the common law rule, and denied that there had ever really been a hard and fast rule of law. Down to a recent time there was a strong presumption in fact against a restriction without limit of space being reasonably required for the protection of the promisee, but there was no decision or principle to make that presumption applicable to the different state of facts produced by the nature of modern trade and traffic. Lord Watson, Lord Ashbourne, and Lord Morris, without precisely concurring in this, appear to have agreed in substance with Lord Macnaghten.

(*o*) *Hitchcock* v. *Coker* (1837) 6 A. & E. 438, 45 R. R. 522, Ex. Ch.

(*p*) *Wallis* v. *Day* (1837) 2 M. & W. 273, 46 R. R. 602.

(*q*) *Leather Cloth Co.* v. *Lorsont* (1869) L. R. 9 Eq. 345, at p. 353.

(*r*) Bowen L.J. *Maxim-Nordenfelt Co.* v. *Nordenfelt* [1893] 1 Ch. 630, 660: but *qu.* whether this distinction be now necessary.

sell their goods at all, or to sell to this or that person, are entitled to sell on their own terms (*s*).

General reasonableness of restriction in particular cases. Whether the restriction contracted for in any particular case be reasonable is a question not of fact but of law, and evidence of persons in the trade as to what they think reasonable is not admissible (*t*). A covenant not to carry on "any business whatsoever," within however narrow limits of time and space, is manifestly unreasonable. Nor will the Court construe it as if limited to the particular business which is really in question (*u*). But a covenant not to "deal or transact business" with customers of the covenantees or of their successors may be confined by the context to business of the same kind as that carried on by them at the date of the agreement (*x*). A covenant to retire, without expressed limit in space or time, from a partnership, and "so far as the law allows, from the trade *or business thereof in all [362 its branches," is bad for unreasonableness if the words "so far as the law allows" are surplusage, and bad for uncertainty if they are not; the parties cannot throw on the Court the task of settling their agreement for them (*y*). A restrictive clause is not reasonable if it has the effect of making the covenantee the sole judge whether a new business undertaken by the covenantor competes with his own or not (*z*). A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject-matter, may be good as to part and bad as to part (*a*). There is not any such rule as that a covenant in restraint of trade is presumed to be bad, and the party relying on it must justify it. "You are to construe the contract and then see whether it is legal" (*b*).

What amounts of restriction have been held reasonable or not for the circumstances of different kinds of business is best seen in the tabular statement of cases (down to 1854) subjoined to the report of *Avery* v. *Langford* (*c*). It may be convenient to add the later decisions in the same form.

(*s*) *Elliman, Sons & Co.* v. *Carrington & Son* [1901] 2 Ch. 275.

(*t*) *Haynes* v. *Doman* [1899] 2 Ch. 13, 68 L. J. Ch. 419, C. A.

(*u*) *Baker* v. *Hedgecock* (1888) 39 Ch. D. 520, 57 L. J. Ch. 889; *Perls* v. *Saalfeld* [1892] 2 Ch. 149, 61 L. J. Ch. 409, C. A.

(*x*) *Mills* v. *Dunham* [1891] 1 Ch. 576. 60 L. J. Ch. 362, C. A.

(*y*) *Davies* v. *Davies* (1887) 36 Ch. Div. 359, 56 L. J. Ch. 962.

(*z*) *Perls* v. *Saalfeld* [1892] 2 Ch. 149, 61 L. J. Ch. 409, C. A.

(*a*) See *Baines* v. *Geary* (1887) 35 Ch. D. 154, and authorities there collected; *Maxim-Nordenfelt Co.* v. *Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. 273, C. A. (no further appeal on this point).

(*b*) *Mills* v. *Dunham* [1891] 1 Ch. 576, 587, per Lindley L.J.; *Badische Anilin, &c. Fabrik* v. *Schott* [1892] 3 Ch. 447, 61 L. J. Ch. 698.

(*c*) (1854) Kay, 667, 23 L. J. Ch. 837.

363] **Restriction held Reasonable.*

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1855. *Dendy* v. *Henderson* (*d*), 11 Ex. 194, 24 L. J. Ex. 324.	Solicitor.	21 years from determination of defendant's employment as managing clerk to plaintiff.	21 miles from parish of Tormoham, Torquay.
1856. *Jones* v. *Lees*, 1 H. & N. 189, 26 L. J. Ex. 9.	Manufacture or sale of slubbing and roving frames not fitted with plaintiff's patent invention.	Continuance of defendant's licence from plaintiff to use and sell the patented invention.	England? (not limited in terms).
1857. *Benwell* v. *Inns*, 24 Beav. 307, 26 L. J. Ch. 663.	Cowkeeper, milkman, milk-seller, or milk-carrier.	Continuance of defendant's service with plaintiff and 24 months after.	Three miles from Charles Street, Grosvenor Sq.
1859. *Mumford* v. *Gething*, 7 C. B. N. S. 305, 29 L. J. C. P. 105.	Travelling in lace trade for any house other than plaintiffs'.	Unlimited.	"Any part of the same ground," *i.e.*, the district in which defendant was employed as traveller for plaintiffs.
1861. *Harms* v. *Parsons*, 32 Beav. 328, 32 L. J. Ch. 247.	Horse-hair manufacturer.	Unlimited.	200 miles from Birmingham (*e*).
1863. *Clarkson* v. *Edge*, 33 Beav. 227, 33 L. J. Ch. 443.	Gas meter manufacturer and gas engineer.	Ten years.	20 miles from Great Peter St., Westminster.
1869. *Catt* v. *Tourle*, L. R. 4 Ch. 654, 38 L. J. Ch. 665.	Covenant by purchaser of land that vendor should have exclusive right of supplying beer.	Unlimited.	Any public house erected on the land.
1869. *Leather Cloth Co.* v. *Lorsont* (*f*), L. R. 9 Eq. 345, 39 L. J. Ch. 86.	Manufacture or sale of patent leather cloth.	Unlimited.	Europe; but to be construed as = Great Britain, or United Kingdom, *semble*, see L. R. 9 Eq. at p. 351 (*g*).
1874. *Gravely* v. *Barnard*, L. R. 18 Eq. 518, 43 L. J. Ch. 659.	Surgeon.	So long as plaintiff or his assigns should carry on business.	Parish of Newick and ten miles round, excepting the town of Lewes.
1875. *Printing and Numerical Registering Co.* v. *Sampson*, L. R. 19 Eq. 462, 44 L. J. Ch. 705.	Agreement by vendor of patent to assign to purchaser all after-acquired patent rights of like nature.	Lifetime of vendors.	Europe (*h*).

(*d*) Whether an agreement, not to *reside* at a given place as well as not to carry on business be good, *quære*.

(*e*) In Leake on Contracts, 3rd ed. 637, the words "not reasonable," used with reference to this case, must be a clerical error for "not unreasonable."

(*f*) See p. *361, above.

(*g*) Cp. *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473, 60 Am. Rep. 464, where a restriction covering the whole territory of the United States except Montana and Nevada was held not too wide. "The boundaries of the States [*i.e.* the municipal jurisdictions of New York or other individual States] are not those of trade and commerce, and business is restrained within no such limit."

(*h*) See last note.

*Restriction held Reasonable. [364

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1875. *May* v. *O'Neill*, W. N. 179, 44 L. J. Ch. 660.	Solicitor (covenant in clerk's articles).	Unlimited.	London, Middlesex and Essex; and unlimited as to acting for clients of plaintiff's firm, or any one who had been such client during the term of the articles.
1879. *Davey* v. *Shannon*, 4 Ex. D. 81, 48 L. J. Ex. 459 (no objection taken).	Outfitter and tailor.	Unlimited (taken by the Court as for joint lives of plaintiff and defendant).	Five miles from Devonport.
1880. *Rousillon* v. *Rousillon*, 14 Ch. D. 351, 49 L. J. Ch. 339.	Travelling in champagne trade: setting up or entering into partnership in same trade.	Two years after leaving plaintiff's service as to travelling: ten as to dealing on own account.	Unlimited.
1891. *Mills* v. *Dunham*, [1891] 1 Ch. 576, 60 L. J. Ch. 362, C. A.	Travelling in food, antiseptic business.	Unlimited.	Unlimited. (= England and Wales, see per Lindley L. J. [1891] 1 Ch. 585).
1892. *Rogers* v. *Maddocks*, [1892] 3 Ch. 346, 62 L. J. Ch. 219, 67 L. T. 329, C. A.	Travelling in beer, &c.	Two years.	100 miles from Cardiff.
1892. *Nordenfelt* v. *Maxim - Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535.	Manufacture of guns, gun mountings and carriages, gunpowder, explosives and ammunition [and, with certain exceptions, any other business carried on by the company: *semble*, this was too wide].	25 years from the incorporation of the company.	Unlimited: the breach assigned was in Belgium.
1896. *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478, 65 L. J. Q. B. 397.	Dairymen.	Indefinite time: continuance of service and *after*.	No definition of space, but held limited by context to actual locality of business.
1898. *W. Robinson & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, 67 L. J. Ch. 644, C. A.	Enamelled hollow-ware dealers.	Three years from time of dismissal from company's service.	150 miles from Wolverhampton.
1899. *Underwood & Son* v. *Barber*, [1899] 1 Ch. 300, 68 L. J. Ch. 201, C. A.	Hay and straw merchants.	One year: carrying on, serving, or being agent in business.	United Kingdom, France, Belgium, Holland, Canada.
1899. *Haynes* v. *Doman*, [1899] 2 Ch. 13, 68 L. J. Ch. 419, C. A.	Hardware manufacturer.	Unlimited: working or serving in same kind of business.	Radius of 25 miles.

365] **Restriction held Unreasonable.*

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1872. *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59, 42 L. J. Ch. 12 (*i*).	"Shall not directly or indirectly sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation . . of any Burton ale, &c., or of any ale, &c., brewed at Burton or offered for sale as such," other than ale, &c., brewed by plaintiffs.	During defendant's service with plaintiffs and two years after.	Unlimited.
1898. *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671, 67 L. J. Ch. 319.	Traveller for wine merchant.	Terms as to time and place not in question: the undertaking was not to "engage or employ himself in any other business" during the continuance of the agreement, which was not necessarily confined to the continuance of the service.	

Measurement of distances. It is now settled, after some little uncertainty, that distances specified in contracts of this kind are to be measured as the crow flies, *i. e.*, in a straight line on the map, neglecting curvature and inequalities of surface. This is only a rule of construction, and the parties may prescribe another measurement if they think fit, such as the nearest mode of access (*k*).

A certain number of recent decisions are only on the construction of words describing the business to be restricted (*l*).

366] *** Indian Contract Act.** In British India the language of the Contract Act (*m*) has been literally construed by the Courts so as to make

(*i*) This appears to be in direct conflict with *Rousillon* v. *Rousillon*, last page, which seems to stand confirmed by the decision of the H. L. in *Nordenfelt's case*, or rather (the subject-matter being very different) by the reasons given for it.

(*k*) *Mouflet* v. *Cole* (1872) L. R. 7 Ex. 70, in Ex. Ch. 8 Ex. 32, 42 L. J. Ex. 8. As to what amounts to a breach of covenant not to carry on business within certain limits, see *Brampton* v. *Beddoes* (1863) 13 C. B. N. S. 538.

(*l*) Such are *Stuart* v. *Diplock* (1889) 43 Ch. Div. 343, 59 L. J. Ch. 142; *Fitz* v. *Iles* [1893] 1 Ch. 77, 62 L. J. Ch. 258.

(*m*) "Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void":

the rule much more stringent than in England, and agreements not to compete with former employers, or the like, have been disallowed, notwithstanding that they would certainly have been upheld at common law (*n*). It seems very doubtful whether any such result was contemplated by the framers of the Act, and amendment may be desirable.

Contract to serve for life not invalid. It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy (*o*). It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction, or over the servant's property (*p*).[37]

Contract for exclusive service must be mutual. It is undisputed that an agreement by A. to work for nobody but B. in A.'s particular trade, even for a limited time, would be void in the absence of a reciprocal obligation upon B. to employ A. (*q*). But a promise by B. to employ A. may be collected from the whole tenor of the agreement between them, and so make the agreement good, without any express words to that effect (*r*).[38]

*D. *The judicial treatment of unlawful agreements in general.* [367

Thus far of the various specific grounds on which agreements are held unlawful. It remains for us to give as briefly as may be the rules which govern our Courts in dealing with them, and which are almost without exception independent of the particular ground of illegality. The general principle that an unlawful agreement cannot

s. 27: express exceptions follow as to agreements on the sale of the goodwill and agreements between partners.

(*n*) *Madhub Chunder Poramanick* v. *Rajcoomar Das* (1874) 14 B. L. R. 76; *Brahmaputra Tea Co.* v. *Scarth* (1885) I. L. R. 11 Cal. 545.

(*o*) *Wallis* v. *Day* (1837) 2 M. & W. 273, 46 R. R. 602. The law of Scotland is apparently the same according to the modern authorities.

(*p*) See Hargrave's argument in *Sommersett's case* (1771–2) 20 St. Tr. 49, 66, and Bowen L.J. 36 Ch. Div. at p. 393. By the French law indefinite contracts of service are not allowed: Cod. Nap. 1780: On ne peut engager ses services qu' à temps, ou pour une entreprise déterminée: so the Italian Code, 1628. The German Civil Code recognizes them, s. 624; but a contract for personal service for any term over five years may after the first five years be determined by the employer by six months' notice.

(*q*) See next note, and cp. the similar doctrine as to promises of marriage, *supra*.

(*r*) *Pilkington* v. *Scott* (1846) 15 M. & W. 657, 15 L. J. Ex. 329. Cp. *Hartley* v. *Cummings* (1847) 5 C. B. 247, 17 L. J. C. P. 84.

37 Davies *v.* Davies, 36 Ch. D. 359, 393: Parsons *v.* Trask, 7 Gray, 473.
38 Cp. Palmer *v.* Stebbins, 3 Pick. 188.

be enforced is not a sufficient guide. We still have to settle more fully what is meant by an unlawful agreement. For an agreement is the complex result of distinct elements, and the illegality must attach to one or more of those elements in particular. It is material whether it be found in the promise, the consideration, or the ultimate purpose. There are questions of evidence and procedure for which auxiliary rules are needed within the bounds of purely municipal law. Moreover, when the jurisdictions within which a contract is made, is to be performed, and is sued upon, do not coincide, it has to be ascertained by what local law the validity of the contract shall be determined, or there may be a "conflict of laws in space": again, if the law be changed between the time of making the contract and the time of performance there may be "conflict of laws in time."

This general division is a rough one, but will serve to guide the arrangement of the following statement.

Unlawfulness of agreement as determined by particular elements.

1. **Independent promises, some lawful and some unlawful.** A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration.

In *Pigot's case* (*s*) it was resolved that if some of the covenants of
368] an indenture or of the conditions indorsed *upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void *ab initio* and the others stand good. Accordingly "from *Pigot's case* (*t*) to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot" (*u*).[29] And

(*s*) (1615) 11 Co. Rep. 27*b*.

(*t*) Referred to in the report as 6 Co. Rep. 26; it is really in *vol.* 6, ed. 1826, which contains *parts* 11, 12, and 13.

(*u*) *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. 152, 201.

[29] Gelpcke *v.* Dubuque, 1 Wall. 221; McCullough *v.* Virginia, 172 U. S. 102, 115; W. U. Tel. Co. *v.* B. & S. W. Ry. Co., 3 McCrary, 130; Sims *v.* Alabama Brewing Co., 132 Ala. 311; Osgood *v.* Bander, 75 Ia. 550; Presbury *v.* Fisher, 18 Mo. 50; Erie Ry. Co. *ads.* Union L. & E. Co., 35 N. J. L. 240; Leavitt *v.* Palmer, 3 N. Y. 19, 37; Ohio *v.* Board of Education, 35 Ohio St. 519, 527; Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333, 339. *Contra*, Santa Clara Co. *v.* Hayes, 76 Cal. 387; Lindsay *v.* Smith, 78 N. C. 328.

In the case of an alternative promise, one branch of which is lawful, and the

where a transaction partly valid and partly not is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part; there a party who is called upon to perform his part of that agreement which is on the face of it valid cannot be heard to say that the transaction as a whole is unlawful and void (*x*).

It was formerly supposed that where a deed is void in part by statute it is void altogether: but this is not so. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (*y*).

2. Unlawful consideration or part of consideration avoids the whole agreement. If any part of a single consideration for a promise or set of promises is unlawful, the whole agreement is void.[40]

(*x*) *Odessa Tramways Co.* v. *Mendel* (1878) 8 Ch. Div. 235, 47 L. J. Ch. 505.

(*y*) Per Willes J. *Pickering* v. *Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. at p. 250; and see *Royal Exchange Assurance Corporation* v. *Sjorforsakrings Aktiebolaget Vega* [1901] 2 K. B. 567, 573, 70 L. J. K. B. 874.

other unlawful, the lawful branch can be enforced. Hanauer *v.* Gray, 25 Ark. 350.

A contract in restraint of trade may be divisible, and hence valid in part, and void in part. Price *v.* Greene, 16 M. & W. 346; Dubowski *v.* Goldstein, [1896] 1 Q. B. 478; Haynes *v.* Doman, [1899] 2 Ch. 13, 24; Oregon S. N. Co. *v.* Winsor, 20 Wall. 64; W. U. Tel. Co. *v.* B. & S. W. Ry. Co., 3 McCrary, 130; Dean *v.* Emerson, 102 Mass. 480; Peltz *v.* Eichele, 62 Mo. 171; Lange *v.* Werk, 2 Ohio St. 520; Smith's Appeal, 113 Pa. 579. Cp. More *v.* Bonnet, 40 Cal. 251; Franz *v.* Bieler, 126 Cal. 176; Fishell *v.* Gray, 60 N. J. L. 5.

[40] Pettit's Adm'r *v.* Pettit's Distributees, 32 Ala. 288; Railroad Co. *v.* Taylor, 6 Col. 1; Chandler *v.* Johnson, 39 Ga. 85; Ramsey's Est. *v.* Whitbeck, 183 Ill. 550; James *v.* Jellison, 94 Ind. 292; Baird *v.* Boehmer, 77 Ia. 622; Koster *v.* Seney, 99 Ia. 584; Gerlach *v.* Skinner, 34 Kan. 86; Collins *v.* Murrell, 2 Met. (Ky.) 163; Kimbrough *v.* Lane, 11 Bush, 556; Perkins *v.* Cummings, 2 Gray, 258; Bishop *v.* Palmer, 146 Mass. 469; Stewart *v.* Thayer, 168 Mass. 519, 170 Mass. 560; Snider *v.* Willey, 33 Mich. 483; Carleton *v.* Whitcher, 5 N. H. 196; Bixby *v.* Moore, 51 N. H. 402; Bank *v.* King, 44 N. Y. 87; Filson's Trustees *v.* Himes, 5 Pa. 452; Pearce *v.* Wilson, 111 Pa. 14; Sullivan *v.* Horgan, 17 R. I. 109; Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120; Foley *v.* Speir, 100 N. Y. 552; Woodruff *v.* Hinman, 11 Vt. 592; Covington *v.* Threadgill, 88 N. C. 186; McQuade *v.* Rosecrans, 36 Ohio St. 442. Cp. Pierce *v.* Pierce, 17 Ind. App. 107.

When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would still lie for so much of the account as is made up of lawful items, the note itself is entirely void. That the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful, see Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Deering *v.* Chapman, 22 Me. 488; Cotton *v.* McKenzie, 57 Miss. 418; Carleton *v.* Woods, 28 N. H. 290; Widoe *v.* Webb, 20 Ohio St. 431.

This rule assumes the consideration not to be severable, and in such a case it is impossible to assign a lawful consideration to the 369] promise or any of the promises induced *by it (*z*). In other words, where independent promises are in part lawful and in part unlawful, those which are lawful can be enforced; but where any part of an entire consideration is unlawful, all promises founded upon it are void.[41]

3. **Agreement is void whose immediate object is unlawful.** When the immediate object of an agreement is unlawful the agreement is void.

This is an elementary proposition, for which it is nevertheless rather difficult to find unexceptionable words. We mean it to cover only those cases where either the agreement could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, but on grounds of public policy is not allowed to be made a matter of contract. The statement is material chiefly for the sake of the contrasted class of cases under the next rule.

(*z*) See *Jones* v. *Waite*, 5 Bing. N. C. 341, 356, 50 R. R. at p. 707.

The contrary was decided in Shaw *v.* Carpenter, 54 Vt. 155, and Hynds *v.* Hays, 25 Ind. 31. Yundt *v.* Roberts, 5 S. & R. 139, and Frazier *v.* Thompson, 2 W. & S. 235, which are also frequently cited as having decided that a recovery *pro tanto* may be had on the note, did not really involve any question of illegality.

It is no defense to an action on a note given in part payment of an account that part of the account is for goods sold in violation of law, if the items for goods lawfully sold exceed the amount of the note. Warren *v.* Chapman, 105 Mass. 87.

If one of two considerations be void for insufficiency only, the other will support the contract. Pierce *v.* Pierce, 17 Ind. App. 107; King *v.* King, 63 Ohio St. 363, 369.

[41] A puzzle arising as to bilateral contracts in the application of the first two rules stated in the text may be thus stated: If A. promise to give B. $100, and B. promise in consideration thereof to do two acts, one lawful and the other unlawful, by rule 1, if A. sue it might seem that he could enforce so much of B.'s promise as is lawful; but by rule 2, if B. sue, he could not recover at all, and A.'s promise is declared void. But in such an agreement the sole consideration of the promise or promises on one side is the promise or promises on the other; if, then, A.'s promise is void, there is no consideration for either part of B.'s promise. The agreement therefore is totally void for lack of consideration as distinguished from illegal consideration. If, however, A. performed his promise by paying the money he could sue on B.'s lawful promise, while if B. performed and A. did not, B. could not recover anything. It may be further that if A. elected to sue on B.'s lawful promise and to take a judgment upon it alone, this should operate as an assent on A.'s part to an agreement to pay the $100 for B.'s lawful promise, and thereby both parties become bound, A. to pay $100 and B. to perform his lawful promise only. See Kearney *v.* Whitehead Colliery Co., [1893] 1 Q. B. 700; More *v.* Bonnet, 40 Cal. 251; Sidall *v.* Clark, 89 Cal. 321; Hynds *v.* Hays, 25 Ind. 31; Bishop *v.* Palmer, 146 Mass. 469; Fishell *v.* Gray, 60 N. J. L. 5; Lindsay *v.* Smith, 78 N. C. 328; 12 Harv. L. Rev. 424.

4. Where immediate object not unlawful, effect of unlawful intention of one or both parties. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party if he discovers that intention at any time before the contract is executed.

What constitutes unlawful intention in such cases. Here it is necessary to consider what sort of connection of the subject-matter of the agreement with an unlawful plan or purpose is enough to show an unlawful intention that will vitiate the agreement itself. This is not always *easy to determine. In the words of the Supreme Court of the United States:— [370

"Questions upon illegal contracts have arisen very often both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy" (*a*).

Intention to put property purchased, &c., to unlawful use. We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not (*b*). The later authorities show that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement (*c*).[42] Thus money lent to

(*a*) *Armstrong* v. *Toler* (1826) 11 Wheat. at p. 272.

(*b*) *Gas Light and Coke Co.* v. *Turner* (1839) 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324.

(*c*) *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 213, 35 L. J. Ex. 134.

42 The weight of authority in this country does not support so severe a rule. In Graves *v.* Johnson, 179 Mass. 53, Holmes, C. J., delivering the opinion of the court, said:

"In our opinion a sale otherwise lawful is not connected with subsequent

unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful."

"It may be that, as in the case of attempts (Commonwealth *v.* Peaslee, 177 Mass. 267; Commonwealth *v.* Kennedy, 170 Mass. 18, 22), the line of proximity will vary somewhat according to the gravity of the evil apprehended, Steele *v.* Curle, 4 Dana, 381, 385–388; Hananer *v.* Doane, 12 Wall. 342, 446; Bickel *v.* Sheets, 24 Ind. 1, 4. [See also Green *v.* Collins, 3 Cliff. 494; Tracy *v.* Talmage, 14 N. Y. 162, 215], and in different courts with regard to the same or similar matters. Compare Hubbard *v.* Moore, 24 La. Ann. 591; Michael *v.* Bacon, 49 Mo. 474, with Pearee *v.* Brooks, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. M'Intyre *v.* Parks, 3 Met. 207; Sortwell *v.* Hughes, 1 Curt. C. C. 244, 247; Green *v.* Collins, 3 Cliff. 494; Hill *v.* Spear, 50 N. H. 253; Tracy *v.* Talmage, 14 N. Y. 162; Distilling Co. *v.* Nutt, 34 Kan. 724, 729; Webber *v.* Donnelly, 33 Mich. 469; Tuttle *v.* Holland, 43 Vt. 542; Braunn *v.* Keally, 146 Pa. 519, 524; Wallace *v.* Lark, 12 S. C. 576, 578; Rose *v.* Mitchell, 6 Col. 102; Jameson *v.* Gregory, 4 Met. (Ky.) 363, 370; Bickel *v.* Sheets, Hubbard *v.* Moore, and Michael *v.* Bacon, *ubi supra.*"

In accord with the view thus expressed that mere knowledge of an illegal purpose does not bar recovery, see Longnecker *v.* Shields, 1 Col. App. 264; Eager Co. *v.* Burke, 74 Conn. 534; Singleton *v.* Bank of Monticello, 113 Ga. 527; Sondheim *v.* Gilbert, 117 Ind. 71; Jackson *v.* City Bank, 125 Ind. 347; Brunswick *v.* Valleau, 50 Ia. 120; Feineman *v.* Saehs, 33 Kan. 621; Tyler *v.* Carlisle, 79 Me. 210; Gambs *v.* Sutherland's Est., 101 Mich. 355; Chamberlin *v.* Fisher, 117 Mich. 428; Anheuser-Busch Assoc. *v.* Mason, 44 Minn. 318; Wagner *v.* Breed, 29 Neb. 720; Delavina *v.* Hill, 65 N. H. 94; Bryson *v.* Haley, 68 N. H. 337; Amey *v.* Granite State Ins. Co., 68 N. H. 446; Waugh *v.* Beck, 114 Pa. 422; Bishop *v.* Honey, 34 Tex. 252; McKinney *v.* Andrews, 41 Tex. 363; Gaylord *v.* Soragen, 32 Vt. 110. See also Corbin *v.* Wachhorst, 73 Cal. 411.

But see *contra*, Milner *v.* Patton, 49 Ala. 423; Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Ware *v.* Jones, 61 Ala. 288; Lewis *v.* Latham, 74 N. C. 283. And compare Lang v. Lynch, 38 Fed. Rep. 489; Plank *v.* Jackson, 128 Ind. 424; Williamson *v.* Baley, 78 Mo. 636; Fisher *v.* Lord, 63 N. H. 514; Jones *v.* Surprise, 64 N. H. 243 (cp. Durkee *v.* Moses, 67 N. H. 115); Hull *v.* Ruggles, 56 N. Y. 424; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Materne *v.* Horwitz, 101 N. Y. 469; Spurgeon *v.* McElwain, 6 Ohio, 442; Mordecai *v.* Dawkins, 9 Rich. L. 262; Oliphant *v.* Markham, 79 Tex. 543; Aiken *v.* Blaisdell, 41 Vt. 655; Mound *v.* Barker, 71 Vt. 253.

At all events mere reasonable cause of belief without actual knowledge, on the part of the seller of the goods, that the purchaser buys for an unlawful use, does not prevent recovery of the price. See Ramsey *v.* Smith, 138 Ala. 333; Brunswick *v.* Valleau, 50 Ia. 120; Ely *v.* Webster, 102 Mass. 304; Adams *v.* Coulliard, 102 Mass. 167.

But if the vendor does anything beyond making the sale to aid the unlawful purpose of the vendee, he cannot recover. Kohn *v.* Melcher, 43 Fed. Rep. 641; Feineman *v.* Saehs, 33 Kan. 621; Banehor *v.* Mansel, 47 Me. 58; Foster *v.* Thurston, 11 Cush. 322; Storz *v.* Finklestein, 48 Neb. 27; Skiff *v.* Johnson, 57 N. H. 475; Fisher *v.* Lord, 63 N. H. 514; Hull *v.* Ruggles, 56 N. Y. 425; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Chimene *v.* Pennington, 79 S. W. Rep. 63 (Tex. Civ. App.); Gaylord *v.* Soragen, 32 Vt. 110; Aiken *v.* Blaisdell, 41 Vt. 655.

A common application of this principle is in regard to leases and sales to proprietors of houses of prostitution. See Ramsey *v.* Smith, 138 Ala. 333; Postelle *v.* Rivers, 112 Ga. 850; Hubbard *v.* Moore, 24 La. Ann. 591; Sampson *v.* Townsend, 25 La. Ann. 78; Mahood *v.* Tealza, 26 La. Ann. 108; McDonald *v.* Born (Mich.), 97 N. W. Rep. 693; Anheuser-Busch Brewing Assoc. *v.* Mason, 44 Minn. 318; Spragne *v.* Rooney, 82 Mo. 493, 104 Mo. 349; Ernst *v.* Crosby, 140 N. Y. 364; Bishop *v.* Honey, 34 Tex. 245; Reed *v.* Brewer, 90 Tex. 144; Hunstock *v.* Palmer, 4 Tex. Civ. App. 459; Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670.

be used in an unlawful manner cannot be recovered (*d*).[43] It is true that money lent to pay bets can be recovered, but that, as we have seen, is because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced.[44] If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price: it is the same of letting goods on hire (*e*). If a building is demised in order to be used in a manner forbidden by a Building Act, the lessor cannot recover on any covenant in the lease (*f*).[45] And in like manner if the lessee of a house *which to his knowledge is [371 used by the occupiers for immoral purposes assigns the lease, knowing that the assignee means to continue the same use, he cannot recover on the assignee's covenant to indemnify him against the covenants of the original lease (*g*).[46] It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property (*h*).

Option of party innocent in the first instance to avoid the contract on discovering such intention. An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose, is entitled (if not bound) to rescind the contract; nor is he bound to give his reason at the time of refusing to

(*d*) *Cannan* v. *Bryce* (1819) 3 B. & Ald. 179, 22 R. R. 342.

(*e*) *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 213, 35 L. J. Ex. 134.

(*f*) *Gas Light and Coke Co.* v. *Turner* (1839) 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324.

(*g*) *Smith* v. *White* (1866) L. R. 1 Eq. 626, 35 L. J. Ch. 454.

(*h*) See note (*e*), *ante*.

[43] If loaned for the purpose of furthering the illegal transaction. Insurance Co. *v.* Spradley, 46 Ala. 98; Plank *v.* Jackson, 128 Ind. 424; Tyler *v.* Carlisle, 79 Me. 210; White *v.* Buss, 3 Cush. 448; Virden *v.* Murphy, 78 Miss. 515; Plumer *v.* Smith, 5 N. H. 553; Cutler *v.* Welsh, 43 N. H. 497; Ruckman *v.* Bryan, 3 Den. 340; Critcher *v.* Holloway, 64 N. C. 526; Waugh *v.* Beck, 114 Pa. 422. Cp. Hanover Bank *v.* First Bank, 109 Fed. Rep. 421 (C. C. A.). But that mere knowledge by the lender of the borrower's illegal purpose will not prevent a recovery is held in Jackson *v.* City Bank, 125 Ind. 347; Tyler *v.* Carlisle, 79 Me. 210; Walker *v.* Jeffries, 45 Miss. 160; Howell *v.* Stewart, 54 Mo. 400; Jones *v.* Bank, 9 Heisk. 455; McGavock *v.* Puryear, 6 Coldw. 34; Henderson *v.* Waggoner, 2 Lea, 133; Lewis *v.* Alexander, 51 Tex. 578.

[44] But see *ante*, p. 406, n. 60.

[45] If a building be let with intent that it should be used for an unlawful purpose, the lessor cannot recover the rent. Dougherty *v.* Seymour, 16 Col. 289; Ralston *v.* Boady, 20 Ga. 449; Edelmuth *v.* McGarren, 4 Daly, 467; Ernst *v.* Crosby, 140 N. Y. 364; Hunstock *v.* Palmer, 4 Tex. Civ. App. 459.

Bare knowledge by the lessor of the lessee's intended unlawful use of the premises will not prevent his recovering rent. Taylor *v.* Levy, 24 Atl. Rep. 608 (Md. C. A.); Updike *v.* Campbell, 4 E. D. Smith, 570; Miller *v.* Maguire, 18 R. I. 770. Cp. Lyman *v.* Townsend, 24 La. Ann. 625; Ernst *v.* Crosby, 140 N. Y. 364; Burton *v.* Dupree, 19 Tex. Civ. App. 275 (statutory).

[46] See Riley *v.* Jordan, 122 Mass. 231.

perform it. He may justify the refusal afterwards by showing the unlawful purpose, though he originally gave no reason at all, or even a different reason (*i*).[47]

An executed transfer of possession remains good. But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, it is conceived, for an unlawful purpose known to both parties, is valid, and cannot afterwards be set aside (*j*).[48] And an innocent party who discovers the unlawful intention of the other after the contract has been executed is not entitled to treat the transaction as void and resume possession (*k*). As with contracts voidable on other grounds, this rule applies, it is conceived, only where an interest in possession has been given by conveyance or delivery. The vendor who has sold goods so as to pass the general property, but without delivery, or the lessor who has executed a demise to take effect at a future day, might rescind the con-
372] tract and stand remitted to his *original right of possession on

(*i*) *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230, 36 L. J. Ex. 124; see per Bramwell B. *ad fin.*

(*j*) *Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275, 42 L. J. Ch. 690. As to chattels, *contra* per Martin B. in *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 217; but this seems unsupported: see L. R. 4 Q. B. 311, 315.

(*k*) *Feret* v. *Hill* (1854) 15 C. B. 207, 23 L. J. C. P. 185, where an interest in realty had passed and the re-entry was forcible; but *semble*, the lease was voidable in equity.

[47] Church *v.* Proctor, 66 Fed. Rep. 240, 244 (C. C. A.). But see O'Brien *v.* Bricteubach, 1 Hilt. 304.

[48] St. Louis, &c. R. Co. *v.* Terre Haute, &c. R. Co., 145 U. S. 393, 407; Trust Co. *v.* Bear Valley Co., 112 Fed. Rep. 690, 702; Hubbard *v.* Sayre, 105 Ala. 440; Johnston *v.* Allen, 22 Fla. 224; Adams *v.* Barrett, 5 Ga. 404, 414; Railroad Co. *v.* Mathers, 71 Ill. 592, 598; Dumont *v.* Dufore, 27 Ind. 263; Corns *v.* Clouser, 137 Ind. 201; Setter *v.* Alvey, 15 Kan. 157; Ratcliffe *v.* Smith, 13 Bush, 172; Levet *v.* His Creditors, 22 La. Ann. 105; Worcester *v.* Eaton, 11 Mass. 368; Atwood *v.* Fisk, 101 Mass. 363; Bryant *v.* Peck, 154 Mass. 460; Traders' Bank *v.* Steere, 165 Mass. 389; Reed *v.* Bond, 96 Mich. 134; Brower *v.* Fass, 60 Neb. 590; Thompson *v.* Williams, 58 N. H. 248; Rosenbaum *v.* Hayes, 10 N. Dak. 311; Moore *v.* Adams, 8 Ohio, 372; Thomas *v.* Cronise, 16 Ohio, 54; Booker *v.* Wingo, 29 S. C. 116; Beer *v.* Landman, 88 Tex. 450; Dixon *v.* Olmstead, 9 Vt. 310; Cohn *v.* Heimbauch, 86 Wis. 176. But see Savings Bank *v.* National Bank, 38 Fed. Rep. 800; Harrison *v.* Hatcher, 44 Ga. 638; Kirkpatrick *v.* Clark, 132 Ill. 342; Lockren *v.* Rustan, 9 N. Dak. 43; Drinkall *v.* Movius Bank, 11 N. Dak. 10; Still *v.* Buzzell, 60 Vt. 478; Heckman *v.* Swartz, 50 Wis. 267.

In a series of cases in Ohio growing out of a note, secured by mortgage of real estate, given to stifle a prosecution, the decisions were as follows: In an action on the note the payee was held not entitled to recover on account of the illegality of the consideration. Roll *v.* Raguet, 4 Ohio, 400. The same result was reached in a proceeding by *scire facias* on the mortgage. Raguet *v.* Roll, 7 Ohio, pt. 1, 76. The mortgagee then brought ejectment on the mortgage, the condition having been broken, and recovered a judgment for possession of the land. Raguet *v.* Roll, 7 Ohio, pt. 2, 70; (*acc.* Williams *v.* Englebrecht, 37 Ohio St. 383). Subsequently the mortgagor was allowed to redeem. Cowles *v.* Raguet, 14 Ohio, 38.

learning the unlawful use of the property designed by the purchaser or lessee (*l*).

Insurance void where voyage illegal to knowledge of owner. On the same principle an insurance on a ship or goods is void if the voyage covered by the insurance is to the knowledge of the owner unlawful (which may happen by the omission of the statutory requirements enacted for the protection of seamen and passengers, as well as in the case of trading with enemies or the like). "Where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering the voyage," if the illegality be known to the assured. But acts of the master or other persons not known to the owner do not vitiate the policy, though they may be such as to render the voyage illegal (*m*).[49]

Agreements connected with but subsequent to an unlawful transaction. An agreement may be made void by its connexion with an unlawful purpose, though subsequent to the execution of it.

To have that effect, however, the connexion must be something more than a mere conjunction of circumstances into which the unlawful transaction enters so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States, and spreading over a considerable time. They are the more *worth special notice as [373 they are unlike anything in our own books.

Cases in United States Supreme Court. In *Armstrong* v. *Toler* (*n*) the point, as put by the Court in a slightly simplified form, was this: "A. during a war contrives a plan for importing goods on his own ac-

(*l*) Cp. *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230; 36 L. J. Ex. 124.

(*m*) *Wilson* v. *Rankin* (1865) L. R. 1 Q. B. 162, 35 L. J. Q. B. 203 (Ex. Ch.); *Dudgeon* v. *Pembroke* (1874) L. R. 9 Q. B. 581, at p. 585, 43 L. J. Q. B. 220, per Quain J. and authorities there referred to. Cp. further, on the general head of agreements made with an unlawful purpose, *Hanauer* v. *Doane* (1870) 2 Wallace, 342. In *Sprott* v. *U. S.* (1874) 20 *ib.* 459 [see also Walker's Exrs. *v.* U. S., 106 U. S. 413], it was held that a buyer of cotton from the Confederate Government, knowing that the purchase-money would be applied in support of the rebellion, could not be recognized by the U. S. courts as owner of the cotton: *diss.* Field J. on the grounds (which seem right) that it was a question not of contract but of ownership, and that in deciding on title to personal property the *de facto* government existing at the time and place of the transaction must be regarded.

(*n*) (1826) 11 Wheaton, 258, 269.

[49] 3 Kent, 262. And see Kelly *v.* Insurance Co., 97 Mass. 288; Johnson *v.* Insurance Co., 127 Mass. 555, cases of contracts of insurance against fire.

count from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact a commuted payment in lieu of confiscation of the goods themselves] which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation." [50] But it would be otherwise if the goods had been imported on a joint adventure by A. and B. In *McBlair* v. *Gibbes* (*o*) an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger* v. *Cooke* (*p*) the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin in hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the Federal government, it was open to the government alone to take any objection to it.

Fisher v. Bridges. We return to our own Courts for a case where on **374]** the *other hand the close connexion with an illegal design was established and the agreement held bad. In *Fisher* v. *Bridges* (*q*) the plaintiff sued the defendant on a simple covenant to pay money. The defence was that the covenant was in fact given to secure payment of part of the purchase-money of certain leasehold property

(*o*) (1854) 17 Howard, 232.
(*p*) (1873) 18 Wallace, 421.
(*q*) (1853) 2 E. & B. 118, 22 L. J. Q. B. 270; in Ex. Ch. 3 E. & B. 642, 23 L. J. Q. B. 276.

[50] Though a corporation is an unlawful combination or is carrying on some illegal business it may recover on its lawful contracts. Dickerman *v.* Northern Trust Co., 176 U. S. 181; Connolly *v.* Union Pipe Co., 184 U. S. 540; The Charles E. Wiswall, 86 Fed. Rep. 671 (C. C. A.); Dennehy *v.* McNulta, 86 Fed. Rep. 825 (C. C. A.); Willey *v.* National Paper Co., 70 Ill. App. 543; Barton *v.* Mulvane, 59 Kan. 313; Globe Tobacco Warehouse Co. *v.* Leach, 19 Ky. L. Rep. 1287; Houck *v.* Wright, 77 Miss. 476; Taylor *v.* Bell Soap Co., 45 N. Y. Supp. 939; National Distilling Co. *v.* Cream City Co., 86 Wis. 352. See also General Electric Co. *v.* Wise, 119 Fed. Rep. 922. *Contra*, National Lead Co. *v.* S. E. Grote Co., 89 Mo. App. 247 (statutory); Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232 (statutory). Cp. Delaware, &c. R. Co. *v.* Frank, 110 Fed. Rep. 689; Sinsheimer *v.* Garment Workers, 77 Hun, 215.

assigned by the plaintiff to the defendant in pursuance of an unlawful agreement that the land should be resold by lottery contrary to the statute (*r*). The Court of Queen's Bench held unanimously that the covenant was good, as there was nothing wrong in paying the money, even if the unlawful purpose of the original agreement had in fact been executed: and the case was likened to a bond given in consideration of past cohabitation. But the Court of Exchequer Chamber unanimously reversed this judgment, holding that the covenant was in substance part of an illegal transaction, whether actually given in pursuance of the first agreement or not. "It is clear that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement; and as the law would not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase-money which by the original bargain was tainted with illegality." They further pointed out that the case of a bond given for past cohabitation was not analogous, inasmuch as past cohabitation is not an illegal consideration but no consideration at all. But "if an agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced."

Principle of the judgment. Some of the language used may have been "vague in itself and dangerous as a precedent" (*s*). The decision, *however, does not appear to require anything wider [375 than this—that where a claim for the payment of money as on a simple contract would be bad on the ground of illegality, a subsequent security for the same payment, whether given in pursuance of the original agreement or not, is likewise not enforceable: or, more shortly—

5. **Security for payments under unlawful agreement is equally void with the original agreement.** Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.

To this extent at least the principle of *Fisher* v. *Bridges* has been repeatedly acted on (*t*).[51] In *Geere* v. *Mare* (*t*) a policy of assurance

(*r*) 12 Geo. 2, c. 28, s. 1.
(*s*) 1 Sm. L. C. 377.
(*t*) *Græme* v. *Wroughton* (1855) 11 Ex. 146, 24 L. J. Ex. 265; *Geere* v. *Mare* (1863) 2 H. & C. 339, 33 L. J. Ex. 50; *Clay* v. *Ray* (1864) 17 C. B. N. S. 188.

[51] Morris *v.* Norton, 75 Fed. Rep. 912, 927; Marden *v.* Phillips, 103 Fed. Rep. 196; Clement's Appeal, 52 Conn. 464; Blasdel *v.* Fowle, 120 Mass. 447; Coul-

was assigned by deed as a further security for the payment of a bill of exchange. The bill itself was given to secure a payment by way of fraudulent preference to a particular creditor, and accepted not by the debtor himself but by a third person. It was held, both on principle and on the authority of *Fisher* v. *Bridges,* that the deed could not be enforced. Again in *Clay* v. *Ray* (*u*) two promissory notes were secretly given by a compounding debtor to a creditor for a sum in excess of the amount of the composition. Judgment was obtained in an action on one of these notes. In consideration of proceedings being stayed and the notes given up a third person gave a guaranty to the creditor for the amount: it was held that on this guaranty no action could be maintained.

It seems doubtful whether this principle would apply to a security for money payable under an agreement of which the performance was not unlawful, though the agreement, on grounds of public policy, were not enforceable.

This is a convenient place to state a rule of a more special kind **376]** which has already been assumed in the discussion of *various instances of illegality, and the necessity of which is obvious: namely:—

5*a*. **Bond with unlawful condition void.** If the condition of a bond is unlawful, the whole bond is void (*x*).

Rules of Evidence and Procedure touching Unlawful Agreements.

6. **Illegality may be shown by extrinsic evidence.** Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal.

(*u*) 17 C. B. N. S. 188.

(*x*) Co. Lit. 206 *b*, Shepp. Touch. 372: where it is said that if the matter of the condition be only *malum prohibitum,* the obligation is absolute (as if the condition were merely impossible): but this distinction is now clearly not law: see *Duvergier* v. *Fellows* (1830) 10 B. & C. 826.

ter *v.* Robinson, 14 S. & M. 18; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394; Griffiths *v.* Sears, 112 Pa. 523; Given's Appeal, 121 Pa. 260; Edwards *v.* Skirving, 1 Brev. 548. Cp. Hoyt *v.* Cross, 108 N. Y. 76; Swan *v.* Scott, 11 S. & R. 155; Bly *v.* Bank, 79 Pa. 453.

An award on an illegal contract was held void in Hall *v.* Kimmer, 61 Mich. 269. And a judgment was held void and execution enjoined in Emmerson *v.* Townsend, 73 Md. 224. But this decision seems inconsistent with the established principle that equity will aid neither party to an illegal contract if both are *in pari delicto*. Sample *v.* Barnes, 14 How. 70; Garrison *v.* Burns, 98 Ga. 762; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394; Sharp *v.* Stalker, 63 N. J. Eq. 596; Lawton *v.* Estes, 167 Mass. 181; Beer *v.* Landman, 88 Tex. 450; Rock *v.* Matthews, 35 W. Va. 531. Where the parties are not *in pari delicto* relief is granted. See *infra,* p. *384. Equitable relief in Hulhorst *v.* Scharner, 15 Neb. 57; James *v.* Roberts, 18 Ohio, 548. See also Insurance Co. *v.* Hull, 51 Ohio St. 270, 280.

This is an elementary rule established by decisions both at law (*y*) and in equity (*z*). Even a document which for want of a stamp would not be available to establish any right is admissible to prove the illegal nature of the transaction to which it belongs (*a*).

6*a*. Where unlawful intention is alleged it must be shown to have existed at date of agreement. But where the immediate object of the agreement (in the sense explained above) is not unlawful, we have to bear in mind a qualifying rule which has been thus stated:

"When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement" (*b*).[52]

Evidence of unlawful intention. The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful (*c*).[53] This or other subsequent conduct of the *par- [377
ties in the matter of the agreement may be evidence, but evidence only, that a violation of the law was part of their original intention, and whether it was so is a pure question of fact (*d*). The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction (*e*). Again, it is no answer to a claim for an

(*y*) *Collins* v. *Blantern* (1767) 1 Sm. L. C.

(*z*) *Reynell* v. *Sprye* (1852) 1 D. M. & G. 660, 672, 21 L. J. Ch. 633, per Knight-Bruce L.J.

(*a*) *Coppock* v. *Bower* (1838) 4 M. & W. 361, 51 R. R. 627.

(*b*) *Lord Howden* v. *Simpson* (1839) 10 A. & E. 793, 818, 50 R. R. 555, 573.

(*c*) A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force: *City of Memphis* v. *Brown* (1873) 20 Wallace (Sup. Ct. U. S.) 289.

(*d*) *Fraser* v. *Hill* (1853) 1 McQu. 392.

(*e*) *Armstrong* v. *Armstrong* (1834) 3 M. & K. 45, 64, 13 L. J. Ch. 101, 41 R. R. 10; *S. C. nom. Armstrong* v. *Lewis* (1834) in Ex. Ch. 2 Cr. & M. 274, 297.

[52] Church *v.* Proctor, 66 Fed. Rep. 240 (C. C. A.); Pape *v.* Wright, 116 Ind. 502, 507; Sawyer *v.* Taggart, 14 Bush, 727, 734; Wall *v.* Schneider, 59 Wis. 352, 359.

The correctness of this rule seems, however, questionable. Public policy certainly requires that the illegal intent whenever conceived should not be carried into execution. According to the rule stated in the text, an innocent party may be bound to aid the execution of an illegal purpose or be liable for breach of contract. There seems no theoretical difficulty in saying that the change of purpose subsequent to the formation of the contract gives rise to a defence which did not previously exist. See *infra*, p. 514.

[53] Barry *v.* Capen, 151 Mass. 99, 100; Fox *v.* Rogers, 171 Mass. 546; Drake *v.* Lauer, 93 N. Y. App. Div. 86.

account of partnership profits that there was some collateral breach of the law in the particular transaction in which they were earned (*f*). Where a duly enrolled deed *inter vivos* purported to create a rent-charge for charitable purposes, but the deed remained in the grantor's keeping, no payment was made during his lifetime, nor was the existence of the deed communicated to the persons interested, and the conduct of the parties otherwise showed an understanding that the deed should not take effect till after the grantor's death, it was set aside as an evasion of the Mortmain Act (*g*). Again, an agreement is not unlawful merely because something remains to be done by one of the parties in order to make the performance of the agreement or of some part of it lawful, such as obtaining a licence from the Crown (*h*). On the same principle it is not illegal for a highway board to give a licence to a gas company to open a highway within
378] the board's jurisdiction, for it must *be taken to mean that they are to do it so as not to create a nuisance (*i*).

Waugh v. Morris—Materiality of ignorance of the law. In *Waugh* v. *Morris* (*k*) it was agreed by charter-party that a ship then at Trouville should go thence with a cargo of hay to London, and all cargo was to be brought and taken from the ship alongside. Before the date of the charter-party an Order in Council had been made and published under the Contagious Diseases (Animals) Act, 1869, prohibiting the landing of hay from France in this country. The parties did not know of this, and the master learnt it for the first time on arriving in the Thames. In the result the charterer took the cargo from alongside the ship in the river into another vessel and exported it, as he lawfully might, but after considerable delay. The ship-owner sued him for demurrage, and he contended that the contract was illegal (though it had in fact been lawfully performed), as the parties had intended it to be performed by means which at the time of the contract were unlawful, *viz.* landing the hay in the port of London. The Court however refused to take this view. It was true

(*f*) *Sharp* v. *Taylor* (1849) 2 Ph. 801. Still less where the illegal acts were done by the partner against whom the account is sought, without the sanction or knowledge of the other: *Thwaites* v. *Coulthwaite* [1896] 1 Ch. 496, 65 L. J. Ch. 238.

(*g*) *Way* v. *East*, 2 Drew. 44, 23 L. J. Ch. 109.

(*h*) *Sewell* v. *Royal Exch. Assurance Co.* (1813) 4 Taunt. 856; *Haines* v. *Busk* (1814) 5 *ib.* 521; cp. *Porter's case*, 1 Co. Rep. 25 *a*, the like as to a condition in a devise.

(*i*) *Edgware Highway Board* v. *Harrow Gas Co.* (1874) L. R. 10 Q. B. 92, 44 L. J. Q. B. 1.

(*k*) (1873) L. R. 8 Q. B. 202, 42 L. J. Q. B. 57.

that the plaintiff contemplated and expected that the hay would be landed, as that would be the natural course of things. But the landing was no part of the contract, and if the plaintiff had had before him the possibility of the landing being forbidden, he would probably have expected the defendant not to break the law; as in fact he did not, for no attempt was made to land the goods.

"We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance" (*l*).[54]

(*l*) (1873) L. R. 8 Q. B. 207–8.

[54] An agreement to marry will sustain an action, though the defendant at the time of the agreement was married to a third person, if the plaintiff was ignorant of that fact. Wild *v.* Harris, 7 C. B. 999; Daniel *v.* Bowles, 2 C. & P. 553; Millward *v.* Littlewood, 5 Ex. 552; Paddock *v.* Robinson, 63 Ill. 99, 100; Davis *v.* Pryor, 3 Ind. Ty. 396; Kelley *v.* Riley, 106 Mass. 339; Stevenson *v.* Pettis, 12 Phila. 468; Coover *v.* Davenport, 1 Heisk. 368, *acc.* In Blattmacher *v.* Saal, 29 Barb. 22, and Pollock *v.* Sullivan, 53 Vt. 507, it was held that an action of tort for deceit would lie, but not an action for breach of contract.

In other cases where the illegality of a contract results from facts unknown to the plaintiff, he is allowed relief. Hotchkiss *v.* Dickson, 2 Bligh, 348; Congress Spring Co. *v.* Knowlton, 103 U. S. 49; Pullman Palace Car Co. *v.* Central Transportation Co., 65 Fed. Rep. 158; Mobile, &c. R. R. Co. *v.* Dismukes, 94 Ala. 131 (but see Gulf, &c. Ry. Co. *v.* Hefley, 158 U. S. 98; Southern Ry. Co. *v.* Harrison, 119 Ala. 539; Gerber *v.* Wabash R. R. Co., 63 Mo. App. 145; Wyrick *v.* Missouri, &c. Ry. Co., 74 Mo. App. 406); Musson *v.* Fales, 16 Mass. 332; Emery *v.* Kempton, 2 Gray, 257; Beram *v.* Kruscal, 18 N. Y. Misc. 479; Rosenbaum *v.* United States Credit Co., 65 N. J. L. 255; Burkholder *v.* Beetem's Adm., 65 Pa. 496. See also Harse *v.* Pearl Life Ass. Co., [1903] 2 K. B. 92; Cranson *v.* Goss, 107 Mass. 439; Fox *v.* Rogers, 171 Mass. 546; Miller *v.* Hirschberg, 27 Oreg. 522. Compare Webster *v.* Sanborn, 47 Me. 471; Rocco *v.* Frapoli, 50 Neb. 665.

On the same principle, though a promise to indemnify one from the consequences of doing an act which is necessarily illegal is unenforceable, Greenhood on Public Policy, 210 *et seq.*, where the legality of the act depends on extrinsic facts unknown to the promisee, the promise will be enforced. Arundel *v.* Gardiner, Cro. Jac. 652; Fletcher *v.* Harcot, Winch, 48; Merriweather *v.* Nixon, 8 T. R. 186; Betts *v.* Gibbons, 2 A. & E. 57; Elliston *v.* Berryman, 15 Q. B. 205; Moore *v.* Appleton, 26 Ala. 633; Stark *v.* Raney, 18 Cal. 622; Lerch *v.* Gallup, 67 Cal. 595; Marcy *v.* Crawford, 16 Conn. 549; Higgins *v.* Russo, 72 Conn. 238; Wolfe *v.* McClure, 79 Ill. 564; Marsh *v.* Gold, 2 Pick. 284; Train *v.* Gold, 5 Pick. 379; Avery *v.* Halsey, 14 Pick. 174; C. F. Jewett Co. *v.* Butler, 159 Mass. 532; Shotwell *v.* Hamblin, 23 Miss. 156; Forinquet *v.* Tegarden, 24 Miss. 96; Moore *v.* Allen, 25 Miss. 363; McCartney *v.* Shepard, 21 Mo. 573; Harrington's Adm. *v.* Crawford, 136 Mo. 467, 472; Allaire *v.* Ouland, 2 Johns. Cas. 54; Coventry *v.* Barton, 17 Johns. 142; Trustees *v.* Galatian, 4 Cow. 346; Chamberlain *v.* Beller, 18 N. Y. 115; Ives *v.* Jones, 3 Ired. 538; Miller *v.* Rhodes, 20 Ohio St. 494; Mays *v.* Joseph, 34 Ohio St. 22; Comm. *v.* Vandyke, 57 Pa. 34; Jamison *v.* Calhoun, 2 Speer. 19; Davis *v.* Arledge, 3 Hill, 170; Hunter *v.* Agee, 5 Humph. 57; Ballard *v.* Pope, 3 U. C. Q. B. 317; Robertson *v.* Broadfoot, 11 U. C. Q. B. 407. See also

379] * **Where agreement prima facie unlawful, not enough to show mere possibility of lawful performance.** But on the other hand where an agreement is *prima facie* illegal, it lies on the party seeking to enforce it to show that the intention was not illegal. It is not enough to show a mere possibility of the agreement being lawfully performed in particular contingent events. "If there be on the face of the agreement an illegal intention, the burden lies on the party who uses expressions *prima facie* importing an illegal purpose to show that the intention was legal" (*m*).

As to recovering back money or property. We now come to the rule, which we will first state provisionally in a general form, that money or property paid or delivered under an unlawful agreement cannot be recovered back.[55]

This rule (which is subject to exceptions to be presently stated) is the chief part, though not quite the whole, of what is meant by the maxim *In pari delicto potior est condicio defendentis* (*n*). To some extent it coincides with the more general rule that money voluntarily paid with full knowledge of all material facts cannot be recovered back. However the principle proper to this class of cases is that persons who have entered into dealings forbidden by the law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the

(*m*) *Holland* v. *Hall* (1817) 1 B. & Ald. 53, 18 R. R. 428, per Abbott J.; *Allkins* v. *Jupe* (1877) 2 C. P. D. 375, 46 L. J. C. P. 824. The same principle is expressed in a different form by Paulus: "Item quod leges fieri prohibent, si perpetuam causam servaturum est, cessat obligatio . . . quamquam etiam so non sit perpetua causa . . idem dicendum est, quia statim contra mores sit": D. 45, 1 de v. o. 35 § 1.

(*n*) Cp. D. 50, 17, de reg. iuris, 154, C. 4, 7, de condict. ob turpem causam, 2.

Vandiver *v.* Pollak, 97 Ala. 467; 107 Ala. 547; Union Stave Co. *v.* Smith, 116 Ala. 416; Griffiths *v.* Hardenbergh, 41 N. Y. 464.

55 Dent *v.* Ferguson, 132 U. S. 50; Dunkin *v.* Hodge, 46 Ala. 523; Branham *v.* Stallings, 21 Col. 211; Thompson *v.* Cummings, 68 Ga. 124; Tobey *v.* Robinson, 99 Ill. 224; Winchester Co. *v.* Veal, 145 Ind. 506; Myers *v.* Meinrath, 101 Mass. 366; Hooker *v.* De Palos, 28 Ohio St. 251; Perkins *v.* Savage, 15 Wend. 412; Singer Co. *v.* Draper, 103 Tenn. 262; Miller *v.* Larson, 19 Wis. 463.

One who has given his negotiable note to compound a crime, and has been compelled to pay the note to a *bona fide* purchaser thereof, cannot recover the money so paid from him to whom the note was given. Haynes *v.* Rudd, 83 N. Y. 251.

One of several cotenants who has participated in an attempted fraud whereby the estate was sold to another cotenant for the non-payment of taxes cannot obtain the aid of a court of equity to recover from the purchaser what he has lost. Lawton *v.* Estes, 167 Mass. 181.

party sued upon it. As it is sometimes expressed, the Court is neutral between the parties. The matter is thus put by Lord Mansfield:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it *is founded in general principles of policy, which the defendant has the ad- [380 vantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*" (*o*).

Plaintiff can't recover where his own unlawful conduct is part of his own case. The test for the application of the rule is whether the plaintiff can make out his case otherwise than "through the medium and by the act of an illegal transaction to which he was himself a party" (*p*).[56] It is not confined to the case of actual money payments, though that is the most common. Where the plaintiff had deposited the half of a bank note with the defendant by way of pledge to secure the repayment of money due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant for the purpose of being consumed there in a debauch, and for money lent for similar purposes, it was held that the plaintiff could not recover, as it was necessary to his case to show the true character of the deposit (*q*). The Court inclined also to think, but did not decide, that the plaintiff's case must fail on the more general ground that the delivery of the note was an executed contract by

(*o*) *Holman* v. *Johnson* (1775) Cowp. 341, 343.

(*p*) *Taylor* v. *Chester* (1869) L. R. 4 Q. B. 309, 314, 38 L. J. Q. B. 225.

(*q*) This is apparent by the course of the pleadings; the declaration was on a bailment of the half-note to be re-delivered on request, and in detinue. Pleas, in effect, that it was deposited by way of pledge to secure money due. Replication, the immoral character of the debt as above.

56 This test "is too narrow in its terms, and excludes many cases where the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction." Hanauer *v.* Woodruff. 15 Wall. 439, 443. See also Coppell *v.* Hall, 7 Wall. 542; Jefferson *v.* Burhans, 85 Fed. Rep. 949; Sampson *v.* Shaw, 101 Mass. 145, 152; Baltimore & Ohio R. Co. *v.* Diamond Coal Co., 61 Ohio St. 242, 252; Johnson *v.* Hulings, 103 Pa. 498.

which a special property passed, and that such property must remain (*r*).[57]

381] *The rule is not even confined to causes of action *ex contractu*. An action in tort cannot be maintained when the cause of action springs from an illegal transaction to which the plaintiff was a party, and that transaction is a necessary part of his case (*s*).

Independently of the special grounds of this rule, a completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable (*t*).

The rule is not applicable in the following classes of cases, most of which however cannot properly be called exceptions.

Duty of agents and trustees to account to principals notwithstanding collateral illegality. An agent is not discharged from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. If A. pays money to B. for the use of C., B. cannot justify a refusal to pay over to C. by showing that it was paid under an unlawful agreement between A. and C. (*u*).[58] Again, if A. and B. make bets at a horse-race on a joint

(*r*) Compare *Ex parte Caldecott* (1876) 4 Ch. Div. 150, 46 L. J. Bk. 14, p. *331, above; *Begbie* v. *Phosphate Sewage Co.* (1875) L. R. 10 Q. B. 491, 500, affd. in C. A. 1 Q. B. D. iv. 679.

(*s*) *Fivaz* v. *Nicholls* (1846) 2 C. B. 501, 513, 15 L. J. C. P. 125, a peculiar and apparently solitary example.

(*t*) *Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275, 42 L. J. Ch. 690. Cp. *M'Callan* v. *Mortimer* (1842) (Ex. Ch.) 9 M. & W. 636.

(*u*) *Tenant* v. *Elliott* (1797) 1 B. & P. 3, 4 R. R. 755.

57 "One who has voluntarily made a pledge to secure the payment of an illegal demand against him is not afterwards entitled to reclaim the same without payment of the demand." King *v.* Green, 6 Allen, 139; Harris *v.* Woodruff, 124 Mass. 205. Cp. Marden *v.* Phillips, 103 Fed. Rep. 196; Dempsey *v.* Harm, 12 Atl. Rep. 27, 20 W. N. C. 266 (Pa.).

58 Kinsman *v.* Parkhurst, 18 How. 289, 293; McMullen *v.* Hoffman, 174 U. S. 639, 660, 669; Caldwell *v.* Harding, 1 Lowell, 326; Barker *v.* Parker, 23 Ark. 390; First Bank *v.* Leppel, 9 Col. 594; Brady *v.* Horvath, 167 Ill. 610; Willson *v.* Owen, 30 Mich. 474; Roselle *v.* Beckemeier, 134 Mo. 380; Porter *v.* Sherman County Banking Co., 40 Neb. 274; Evans *v.* Trenton, 24 N. J. L. 764; Merritt *v.* Millard, 4 Keyes, 208; Woodworth *v.* Bennett, 43 N. Y. 273; Norton *v.* Blinn, 39 Ohio St. 145; Geurinck *v.* Alcott, 66 Ohio St. 94; Floyd *v.* Patterson, 72 Tex. 202; Lovejoy *v.* Kaufman, 16 Tex. Civ. App. 377; Lemon *v.* Grosskopf, 22 Wis. 447; Kiewert *v.* Rindskopf, 46 Wis. 481; Heckman *v.* Doty, 86 Wis. 1, 14. Cp. Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46; Emery *v.* Ohio Candle Co., 47 Ohio St. 320. An agent cannot retain against his principal the proceeds of goods sold in an unlawful traffic. Planter's Bank *v.* Union Bank, 16 Wall. 483; Bibb *v.* Miller, 11 Bush, 306, 310; Gilliam *v.* Brown, 43 Miss. 641; Lestapies *v.* Ingraham, 5 Pa. 71; Hertzler *v.* Geigley, 196 Pa. 419; Anderson *v.* Moncrief, 3 Desaus. 124; Tate *v.* Pegues, 28 S. C. 463; Lovejoy *v.* Kaufman, 16 Tex. Civ. App. 377; Baldwin *v.* Potter, 46 Vt. 402. See also Taylor *v.* Pells, 113 Ill. 145; Andrew *v.* Brewing Assoc., 74 Miss. 362. But

account and B. receives the winnings, A. can recover his share of the money or sue on a bill given to him by B. for it:[59] here indeed there is no illegality in the proper sense (*x*). *For the same reason [382 an agent employed to bet and collect winnings is bound to account to his principal for what he collects, though the losers could not have been compelled to pay (*y*). But, by statute, such an agent cannot recover from his principal either any money paid by him in respect of losses or any reward or commission for his services; nor can one who pays bets at the loser's request recover the money, whether he was employed in making the bets or not (*z*). In like manner the

(*x*) *Johnson* v. *Lansley* (1852) 12 C. B. 468. And where B. uses moneys of his own and A.'s in betting, on the terms of dividing winnings in certain proportions, A. can sue B. on a cheque given for his share of winnings: *Beeston* v. *Beeston* (1875) 1 Ex. D. 13, 45 L. J. Ex. 230. Cp. and dist. *Higginson* v. *Simpson* (1877) 2 C. P. D. 76, 46 L. J. C. P. 192, where the transaction in question was held to be in substance a mere wager. A fine distinction has been taken in two cases of purchase of bank shares through brokers, where the contract note omitted to specify the numbers of the shares as required by Leeman's Act, 30 & 31 Vict. c. 29, s. 1. The brokers, if they had not completed the contracts, might have been declared defaulters and expelled from the Stock Exchange. In *Seymour* v. *Bridge* (1885) 14 Q. B. D. 460, Mathew J. held that the principal could not repudiate; in *Perry* v. *Barnett* (1885) 15 Q. B. Div. 388, 54 L. J. Q. B. 466, it was held that, if he did not know the usage of the Stock Exchange, he could.

(*y*) *Bridger* v. *Savage* (1884) 15 Q. B. Div. 363, 54 L. J. Q. B. 464: the contract of agency is not a gaming or wagering contract. This does not seem to be affected by the Gaming Act, 1892. But he cannot be liable for failing to make bets or collect winnings, for the collection is precarious: *Cohen* v. *Kittell* (1889) 22 Q. B. D. 681, 58 L. J. Q. B. 241.

(*z*) The Gaming Act, 1892, 55 Vict. c. 9, amending 8 and 9 Vict. c. 109, as interpreted (*qu.* whether rightly) by *Read* v. *Anderson* (1884) 13 Q. B. Div. 779, 53 L. J. Q. B. 532; *Tatam* v. *Reeve* [1893] 1 Q. B. 44, 62 L. J. Q. B. 30. *Semble*, the plaintiff could not re-

see Lanahan *v.* Patterson, 1 Flippin, 410; O'Bryan *v.* Fitzpatrick, 48 Ark. 487; Nave *v.* Wilson, 12 Ind. App. 38; Udall *v.* Metcalf, 5 N. H. 396; Kirk *v.* Morrow, 6 Heisk. 445; Mexican Banking Co. *v.* Lichtenstein, 10 Utah, 338; Buck *v.* Albee, 26 Vt. 184; Lemon *v.* Grosskopf, 22 Wis. 447. Where the defendant was employed by the plaintiffs to draw an illegal lottery, and fraudulently induced the plaintiffs to believe that a certain ticket had drawn a prize, and to pay the amount of such prize to one who held the ticket and received the money for the defendant, it was held that the illegality of the lottery was not a defense to an action for money had and received; Catts *v.* Phalen, 2 How. 376. And see Martin *v.* Hodge, 47 Ark. 378; Phalen *v.* Clark, 19 Conn. 421; Martin *v.* Richardson, 94 Ky. 183. Cp. Kitchen *v.* Greenabaum, 61 Mo. 110. Where the beneficiary in an unlawful policy of life insurance, by fraudulently representing that he whose life was insured had died, induces the insurer to pay him the amount of the policy, the unlawfulness of the contract of insurance will not prevent a recovery by the insurer of the money thus fraudulently obtained. Insurance Co. *v.* Elliott, 7 Sawyer, 17, 5 Fed. Rep. 225. Where the president of a bank fraudulently induced a purchaser to buy bonds of the bank, the purchaser was allowed to recover the money paid though the sale of the bonds by the bank was illegal. National Bank *v.* Petrie, 189 U. S. 423. See also Webb *v.* Fulchire, 3 Ired. L. 485.

[59] Owen *v.* Davis, 1 Bailey, 315. But see Northrup *v.* Buffington, 171 Mass. 468, 471.

right to an account of partnership profits is not lost by the particular transaction in which they were earned having involved a breach of the law (*a*).[60] Nor can a trustee of property refuse to account to his *cestui que trust* on grounds of this kind:[61] a trust was enforced where the persons interested were the members of an unincorporated trading association, though it was doubtful whether the association itself was not illegal (*b*). So, if A. with B.'s consent effects a policy for his own benefit on the life and in the name of B., having himself no insurable interest, the policy and the value of it belong, as between them, to A. (*c*).[62] If a man entrusts another as his agent with money

cover even if he did not know that the payments he made at the defendant's request were for bets. The Act is not retrospective: *Knight* v. *Lee* [1893] 1 Q. B. 41, 62 L. J. Q. B. 28.

(*a*) *Sharp* v. *Taylor* (1849) 2 Ph. 801. Of course it is not so where the main object of the partnership is unlawful: *Thwaites* v. *Coulthwaite* [1896] 1 Ch. 496, 65 L. J. Ch. 238.

(*b*) *Sheppard* v. *Oxenford* (1855) 1 K. & J. 491.

(*c*) *Worthington* v. *Curtis* (1875) 1 Ch. Div. 419, 45 L. J. Ch. 259.

[60] In Brooks *v.* Martin, 2 Wall. 70, it was held that after the objects of a partnership, formed for the purpose of engaging in a traffic, confessedly illegal, have been fully accomplished a partner in whose hands the profits are cannot refuse to account for and divide them. The court relied mainly on the authority of Sharp *v.* Taylor, saying: "It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other." *Acc.* Wann *v.* Kelly, 5 Fed. Rep. 584; Cook *v.* Sherman, 20 Fed. Rep. 167; Robison *v.* M'Cracken, 52 Fed. Rep. 730; Crescent Co. *v.* Bear, 23 Fla. 50; Willson *v.* Owen, 30 Mich. 474; Gilliam *v.* Brown, 43 Mis. 641; Hatch *v.* Hanson, 46 Mo. App. 323; Manchester Ry. Co. *v.* Concord Ry. Co., 66 N. H. 600; Pfeuffer *v.* Maltby, 54 Tex. 454; Patty *v.* City Bank, 15 Tex. Civ. App. 475; McDonald *v.* Lund, 13 Wash. 412. It is submitted that this is unpleasantly analogous to Everet *v.* Williams, *supra*, p. *275. Brooks *v.* Martin is now practically overruled. McMullen *v.* Hoffman, 174 U. S. 639, 668. And see the observations of Jessel, M. R., upon Sharp *v.* Taylor, in Sykes *v.* Beadon, 11 Ch. D. 170, 195; also Cambioso *v.* Maffitt, 2 Wash. C. C. 98; Chicago Ry. Co. *v.* Wabash Ry. Co., 61 Fed. Rep. 993 (C. C. A.); Craft *v.* McConoughy, 79 Ill. 346; Northrup *v.* Phillips, 99 Ill. 449; Hunter *v.* Pfeiffer, 108 Ind. 197; Central Trust Co. *v.* Respass, 23 Ky. L. Rep. 1905; Snell *v.* Dwight, 120 Mass. 9; Roselle *v.* McAuliffe, 141 Mo. 36; Morrison *v.* Bennett, 20 Mont. 560; Gould *v.* Kendall, 15 Neb. 549; Todd *v.* Rafferty's Admrs., 30 N. J. Eq. 254; Watson *v.* Murray, 23 N. J. Eq. 257; Woodworth *v.* Bennett, 43 N. Y. 273; Leonard *v.* Poole, 114 N. Y. 371; King *v.* Winants, 71 N. C. 469; Emery *v.* Ohio Candle Co., 47 Ohio St. 320; Patterson's Appeal (S. C., Pa.) 13 W. N. Cas. 154; Read *v.* Smith, 60 Tex. 379; Wiggins *v.* Bisso, 92 Tex. 219; Watson *v.* Fletcher, 7 Gratt. 1; Atwater *v.* Manville, 106 Wis. 64.

If a partnership carries on a legal and also an illegal business, equity will adjust the affairs of the legal business. Anderson *v.* Powell, 44 Ia. 20; Central Trust Co. *v.* Respass, 23 Ky. L. Rep. 1905.

In Jackson *v.* Brick Assoc., 53 Ohio St. 303, it was held that in contemplation of law an association formed for an illegal purpose is not a partnership, and therefore cannot sue in its associate name, as partnerships in Ohio are allowed to do by statute. Cp. Taylor *v.* Bell Soap Co., 45 N. Y. Supp. 939.

[61] Hazard *v.* Dillon, 34 Fed. Rep. 485.

[62] Cp. Ruth *v.* Katterman, 112 Pa. 251.

to be paid for an unlawful purpose, he may recover it at any time before it is actually so paid; or even if the agent does pay it after having been warned not to do so (*d*); the reason is that *whether [383 the intended payment be lawful or not an authority may always be countermanded as between the principal and agent so long as it is not executed (*e*).[63] It is the same where the agent is authorized to apply in an unlawful manner any part of the moneys to be received by him on account of the principal; he must account for so much of that part as he has not actually paid over (*e*). The language of the statute 8 & 9 Vict. c. 109, s. 18, which says that no money can be recovered "which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made" does not prevent either party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stakeholder (*f*).[64] Also

(*d*) *Hastelow* v. *Jackson* (1828) 8 B. & C. 221, 226, 32 R. R. 369, 373.

(*e*) *Bone* v. *Ekless* (1860) 5 H. & N. 925, 29 L. J. Ex. 438.

(*f*) *Diggle* v. *Higgs* (1877) 2 Ex. Div. 422, 46 L. J. Ex. 721; *Hampden* v. *Walsh* (1876) 1 Q. B. D. 189; 45 L. J. Q. B. 238, where former authorities are collected and considered: *Trimble* v. *Hill* (1879) (J. C.) on a colonial statute in the same terms, 5 App. Ca. 342, 49 L. J. P. C. 49. Cp. *Barclay* v. *Pearson* [1893] 2 Ch. 154. This is not affected by the Gaming Act, 1892: *O'Sullivan* v. *Thomas* [1895] 1 Q. B. 698, 64 L. J. Q. B. 398; *Shoolbred* v. *Roberts* [1899] 2 Q. B. 560, 68 L. J. Q. B. 998; confirmed by C. A. in *Burge* v. *Ashley and Smith* [1900] 1 Q. B. 744, 69 L. J. Q. B. 538.

[63] Wassermann *v.* Sloss, 117 Cal. 425; Hardy *v.* Jones, 63 Kan. 8; Sampson *v.* Shaw, 101 Mass. 145; Bank *v.* Wallace, 61 N. H. 24; Lester *v.* Buel, 49 Ohio St. 240, 255; Peters *v.* Grim, 149 Pa. 163; Smith *v.* Blachley, 188 Pa. 550; Kiewert *v.* Rindskopf, 46 Wis. 481; Wells *v.* McGeoch, 71 Wis. 196. Cp. Morgan *v.* Groff, 5 Den. 364.

[64] Lewis *v.* Bruton, 74 Ala. 317; Thornhill *v.* O'Rear, 108 Ala. 299; Wheeler *v.* Spencer, 15 Conn. 28; Hale *v.* Sherwood, 40 Conn. 332; Colson *v.* Meyers, 80 Ga. 499; Petillon *v.* Hipple, 90 Ill. 420; Frybarger *v.* Simpson, 11 Ind. 59; Burroughs *v.* Hunt, 13 Ind. 178; Adkins *v.* Flemming, 29 Ia. 122; Pollock *v.* Agner, 54 Kan. 618; Hutchings *v.* Stilwell, 18 B. Mon. 776; Stacey *v.* Foss, 19 Me. 335; McDonough *v.* Webster, 68 Me. 530; Gilmore *v.* Woodcock, 69 Me. 188, 70 Me. 494; Fisher *v.* Hildreth, 117 Mass. 558; Morgan *v.* Beaumont, 121 Mass. 7; Whitwell *v.* Carter, 4 Mich. 329; Wilkinson *v.* Tousley, 16 Minn. 263; Pabst Brewing Co. *v.* Liston, 80 Minn. 473; Weaver *v.* Harlan, 48 Mo. App. 319; White *v.* Gilleland, 93 Mo. App. 310; Deaver *v.* Bennett, 29 Neb. 812; Perkins *v.* Eaton, 3 N. H. 152; Hoit *v.* Hodge, 6 N. H. 104; Hensler *v.* Jennings, 62 N. J. L. 209; Stoddard *v.* McAuliffe, 81 Hun, 524; affirmed without opinion, 151 N. Y. 671; Wood *v.* Wood, 3 Murph. 172; Forrest *v.* Hart, 3 Murph. 458; Dunn *v.* Drummond, 4 Okla. 461; Willis *v.* Hoover, 9 Oreg. 418; Conklin *v.* Conway, 18 Pa. 329; Dauler *v.* Hartley, 178 Pa. 23; McGrath *v.* Kennedy, 15 R. I. 209; Bledsoe *v.* Thompson, 6 Rich. L. 44; Guthman *v.* Parker, 3 Head, 234; Lillard *v.* Mitchell, 37 S. W. Rep. 702 (Tenn.); Lewy *v.* Crawford, 5 Tex. Civ. App. 293; Tarleton *v.* Baker, 18 Vt. 9; West *v.* Holmes, 26 Vt. 530. See also Shoolbred *v.* Roberts, [1899] 2 Q. B. 560, [1900] 2 Q. B. 497; Trenery *v.* Goudie, 106 Ia. 693; Jones *v.* Cavanaugh, 149 Mass. 124. But in Sutphin *v.* Crozer, 32 N. J. L. 360, it was held that no action could be

it does not apply to money or other valuables deposited by way of security or "cover" for the performance of a wagering agreement (*g*).

Money recoverable back, where agreement not executed. Where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back. But in the decision which establishes this exception it is intimated that it probably would not be allowed if the agreement were actually criminal or immoral (*h*). In general, "if money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose"—or rather, before any material part of it—(*i*) "is carried out;[65] but **384]** if he waits *till [some material part of] the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action" (*k*). And the action cannot

(*g*) *Universal Stock Exchange, Ld.* v. *Strachan* (No. 1) [1896] A. C. 166, 65 L. J. Q. B. 428.

(*h*) *Tappenden* v. *Randall* (1801) 2 B. & P. 467, 5 R. R. 662.

(*i*) *Kearley* v. *Thomson* (1890) 24 Q. B. Div. 742, 59 L. J. Q. B. 288; cp. *Herman* v. *Jeuckner* (1885) 15 Q. B. Div. 561, 54 L. J. Q. B. 340.

(*k*) Per Mellish L.J. *Taylor* v. *Bowers* (1876) 1 Q. B. Div. 291, at p. 300.

maintained by either party against the stakeholder to recover money illegally staked.

In a few States demand must be made upon the stakeholder before the wager has been decided. Johnston *v.* Russell, 37 Cal. 670; Davis *v.* Holbrook, 1 La. Ann. 176; Hickerson *v.* Benson, 8 Mo. 8; Connor *v.* Black, 132 Mo. 150, 154. In Missouri this doctrine has been enacted by statute. See Weaver *v.* Harlan, 48 Mo. App. 319; White *v.* Gilleland, 93 Mo. App. 310; Dooley *v.* Jackson, 104 Mo. App. 21.

If a stakeholder pays the winner, before receiving notice of repudiation of the wager, he is not liable. Colson *v.* Meyers, 80 Ga. 499; Frybarger *v.* Simpson, 11 Ind. 59; Adkins *v.* Flemming, 29 Ia. 122; Goldberg *v.* Feiga, 170 Mass. 146; Riddle *v.* Perry, 19 Neb. 505; Bates *v.* Lancaster, 10 Humph. 134. Unless made so by statute, see Hensler *v.* Jennings, 62 N. J. L. 209; Ruckman *v.* Pitcher, 1 N. Y. 392; 20 N. Y. 9; Columbia Bank *v.* Holdeman, 7 W. & S. 233; Harnden *v.* Melby, 90 Wis. 5.

Repudiation must be absolute. A notification not to pay the winner until further notice was held insufficient. Trenery *v.* Goudie, 106 Ia. 693. See also Maher *v.* Van Horn, 15 Col. App. 14. But see Pabst Brewing Co. *v.* Liston, 80 Minn. 473.

If notwithstanding notice not to do so, the stakeholder pays the money to the winner, the loser may recover his deposit from the winner. McKee *v.* Manice, 11 Cush. 357; Love *v.* Harvey, 114 Mass. 80. But if after the wager is decided against one of the parties, he, contending that he is the winner, demands the whole deposit and forbids its payment to the other party, he cannot, after payment of the whole deposit to the other party, recover from the stakeholder for the amount deposited by himself. Ockerson *v.* Crittenden, 62 Ia. 297; Patterson *v.* Clark, 126 Mass. 531. But see Hale *v.* Sherwood, 40 Conn. 332; Perkins *v.* Hyde, 6 Yerg. 288.

[65] Spring Co. *v.* Knowlton, 103 U. S. 49 (S. C. *contra*, 57 N. Y. 518); Block *v.* Darling, 140 U. S. 234; Wassermann *v.* Sloss, 117 Cal. 425; De Leonis *v.* Walsh, 140 Cal. 175; White *v.* Bank, 22 Pick. 181; Skinner *v.* Henderson, 10 Mo. 205; Brown *v.* Timmany, 20 Ohio, 81.

be maintained by a party who has not given previous notice that he repudiates the agreement and claims his money back (*l*). In *Taylor* v. *Bowers* (*l*[1]) A. had delivered goods to B. under a fictitious assignment for the purpose of defrauding A.'s creditors. B. executed a bill of sale of the goods to C., who was privy to the scheme, without A.'s assent. It was held that A. might repudiate the whole transaction and demand the return of the goods from C. In *Symes* v. *Hughes* (*m*), a case somewhat of the same kind, the plaintiff had assigned certain leasehold property to a trustee with the intention of defeating his creditors; afterwards under an arrangement with his creditors he sued for the recovery of the property, having undertaken to pay them a composition in case of success. The Court held that, as the illegal purpose had not been executed, he was entitled to a reconveyance. It will be observed however that the plaintiff was in effect suing as a trustee for his creditors, so that the real question was whether the fraud upon the creditors should be continued against the better mind of the debtor himself. The cases above mentioned as to recovering money from agents or stakeholders are also put partly on this ground, which however does not seem necessary to them (*n*).

Parties not in pari delicto. In certain cases the parties are said not to be *in pari delicto,* namely where the unlawful agreement and the *payment take place under circumstances practically [385 amounting to coercion.[66]

(*l*[1]) (1876) 1 Q. B. Div. 291.

(*l*) *Palyart* v. *Leckie* (1817) 6 M. & S. 290, 18 R. R. 381.

(*m*) (1870) L. R. 9 Eq. 475, 39 L. J. Ch. 304.

(*n*) *Hastelow* v. *Jackson* (1828) 8 B. & C. 221, 32 R. R. 369. *Mearing* v. *Hellings* (1845) 14 M. & W. 711, 15 L. J. Ex. 168, where that case was doubted, decides only this: A man cannot sue a stakeholder for the whole of the sweepstakes he has won in a lottery, and then reply to the objection of illegality that if the whole thing is illegal he must at all events recover his own stake. Allegans contraria non est audiendus.

[66] Or where the law, the violation of which constitutes the illegality in the transaction, was intended for the coercion of one party only, or the protection of the other. Thomas *v.* Richmond, 12 Wall. 349; Parkersburg *v.* Brown, 106 U. S. 487, 503; Logan County Bank *v.* Townsend, 139 U. S. 67; Scotten *v.* State, 51 Ind. 52; Deming *v.* State, 23 Ind. 416; Smart *v.* White, 73 Me. 332; White *v.* Bank, 22 Pick. 181; Morville *v.* Amer. Tract Soc., 123 Mass. 129, 137, 138; Manchester R. Co. *v.* Concord R. Co., 66 N. H. 100, 131; Schermerhorn *v.* Talman, 14 N. Y. 93, 123; Tracy *v.* Talmage, 14 N. Y. 162, 181, 199; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Bateman *v.* Robinson, 12 Neb. 508; Duval *v.* Wellman, 124 N. Y. 156; Webb *v.* Fulchire, 3 Ired. L. 485; Reinhard *v.* City, 49 Ohio St. 257; Insurance Co. *v.* Hull, 51 Ohio St. 270; Smith *v.* Blachley, 188 Pa. 550.

"The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto* form an independent class entirely distinct from those cases which rest upon a disaffirmance of the contract before it

Purchase of creditor's assent to composition. The chief instances of this kind in courts of law have been payments made by a debtor by way of fraudulent preference to purchase a particular creditor's assent to his discharge in bankruptcy or to a composition. The leading modern case is *Atkinson* v. *Denby* (*o*).[67] There the defendant, one of plaintiff's creditors, refused to accept the composition unless he had something more, and the plaintiff paid him 50*l.* before he executed the composition deed. It was held that this money could be recovered back. "It is true," said the Court of Exchequer Chamber, "that both are *in delicto,* because the act is a fraud upon the other creditors, but it is not *par delictum,* because the one has the power to dictate, the other no alternative but to submit." On the same ground money paid for compounding a penal action contrary to the statute of Elizabeth may be recovered back (*p*). But where a bill is given by way of fraudulent preference to purchase a creditor's assent to a composition, and after the composition the debtor chooses to pay the amount of the bill, this is a voluntary payment which cannot be recovered (*q*).

Like doctrine of equity. In equity the application of this doctrine has been the same in substance, though more varied in its circumstances. The rule followed by courts of equity was thus described by Knight Bruce, L.J.: "Where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against

(*o*) (1860) 6 H. & N. 778, 30 L. J. Ex. 361, in Ex. Ch. 7 H. & N. 934, 31 L. J. Ex. 362: the chief earlier ones are *Smith* v. *Bromley* (1760) 2 Doug. 695; *Smith* v. *Cuff* (1817) 6 M. & S. 160, 18 R. R. 340.

(*p*) *Williams* v. *Hedley* (1807) 8 East, 378, 9 R. R. 473.

(*q*) *Wilson* v. *Ray* (1839) 10 A. & E. 82, 50 R. R. 341.

is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se* the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general principle* of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance. 1. Where he is not *in pari delicto;* or, 2. In some cases where he elects to disaffirm the contract while it remains *executory*. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second it is equally unimportant that the parties are *in pari delicto*." Per Selden, J., in Tracy *v.* Talmage, 14 N. Y. 162, 181.

67 See also Bean *v.* Brookmire, 2 Dillon, 108; Bean *v.* Amsinck, 10 Blatchf. 361; Brown *v.* Everett, &c. Co., 111 Ga. 404; Crossley *v.* Moore, 40 N. J. L. 27. But a payment made by a third party not nearly related to the debtor cannot be recovered back. Solinger *v.* Earle, 82 N. Y. 393.

the transaction, relief is given to him, as we know from various *authorities, of which *Osborne* v. *Williams* [see below] is [386 one" (*r*).[68]

Special grounds of relief. On this principle relief was given and an account decreed in *Osborne* v. *Williams* (*s*), where the unlawful sale of the profits of an office was made by a son to his father after the son had obtained the office in succession to his father and upon his recommendation, so that he was wholly under his father's control in the matter. In *Reynell* v. *Sprye* (*t*) an agreement bad for champerty was set aside at the suit of the party who had been induced to enter into it by the other's false representations that it was a usual and proper course among men of business to advance costs and manage litigation on the terms of taking all the risk and sharing the property recovered. In a later case a mortgage to secure a loan of money which in fact was lent upon an immoral consideration was set aside at the suit of the borrower on the ground that the interest of others besides parties to the corrupt bargain was involved (*u*). A wider exception is made, as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties. Apart from this particular class of cases, it is submitted that the rule and its qualifications may be stated to this effect:

7. **Statement of the rule as qualified.** Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?);

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it *would be voidable [387 at the option of the party seeking relief (*x*);

(*r*) *Reynell* v. *Sprye* (1852) 1 D. M. & G. 660, at p. 679.

(*s*) (1811) 18 Ves. 379, 11 R. R. 218.

(*t*) 1 D. M. & G. 660, 679.

(*u*) *W.* v. *B.* (1863) 22 Beav. 574.

(*x*) This form of expression is not positively warranted by the authorities, but is submitted as fairly representing the result.

[68] See also De Chambrun *v.* Schermerhorn, 59 Fed. Rep. 504, 508; Lighthall *v.* Moore, 2 Col. App. 554; Baehr *v.* Wolff, 59 Ill. 470; Herrick *v.* Lynch, 150 Ill. 283; Norton *v.* Norton, 74 Ia. 161; Deatley's Heirs *v.* Murphy, 3 A. K. Marsh. 472; Harper *v.* Harper, 85 Ky. 160; Belding *v.* Smythe, 138 Mass. 530; Barnes *v.* Brown, 32 Mich. 146; Crawford *v.* Osmun, 70 Mich. 561; Peek *v.* Peek, 101 Mich. 394; Poston *v.* Balch. 69 Mo. 115; O'Conner *v.* Ward, 60 Miss. 1025; Hulhorst *v.* Scharner, 15 Neb. 57; Ford *v.* Harrington, 16 N. Y. 285; Boyd *v.* De la Montagnie, 73 N. Y. 498; Place *v.* Hayward, 117 N. Y. 487. 495; Duval *v.* Wellman, 124 N. Y. 156; Pinkston *v.* Brown, 3 Jones Eq. 494; James *v.* Roberts, 18 Ohio, 548. Cp. Roman *v.* Mali, 42 Md. 513.

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

8. **Conflict of laws.** Where a difference of local laws is in question, the lawfulness of a contract is to be determined by the law governing the substance of the contract (*y*).

Exception 1.—An agreement entered into by a citizen in violation of a prohibitory law of his own state cannot in any case be enforced in any court of that state.

Exception 2.—An agreement contrary to common principles of justice or morality, or to the interests of the state, cannot in any way be enforced.

What we here have to do with is in truth a fragment of a much larger subject, namely, the consideration of the local law governing obligations in general (*z*).

The main proposition is well established, and it would be idle to **388]** attempt in this place any abridgment or restate*ment of what is said upon it by writers on Private International Law. The first exception is a simple one. The municipal laws of a particular state, especially laws of a prohibitory kind, are as a rule directed only to things done within its jurisdiction. But a particular law may positively forbid the subjects of the state to undertake some particular class of transactions in any part of the world: and where such a law exists, the courts of that state must give effect to it. A foreigner cannot sue in an English court on a contract made with a British

(*y*) According to the modern authorities (see especially *Hamlyn & Co.* v. *Talisker Distillery* [1894] A. C. 202) the question is really by what law the parties intended the contract to be governed: Dicey, Conflict of Laws, 540. The auxiliary rules for ascertaining that intention, and so fixing the "proper law of the contract," which, however, are presumptions, and not fixed rules of law, are that "the proper law of a contract is indeed *primâ facie* the law of the country where it is made (*lex loci contractus*); yet when a contract is made in one country, but is wholly or partially to be performed in another, then great weight will be given to the law of the place of performance (*lex loci solutionis*), as being probably the proper law of the contract, in regard, at any rate, to acts to be done there": Dicey, *op. cit.* 572. [See also 9 Harv. L. Rev. 371; 3 Beale, Cases on the Conflict of Laws, 539 *et seq.*]

(*z*) For the treatment of it in this connexion, see Savigny, Syst. 8. 269—278 (§ 374 C.); Story, Conflict of Laws, §§ 243 sqq., 258 sqq.; Dicey, *op. cit.* chaps. 24, 25. Mr. Westlake, Priv. Intern. Law, 3rd ed. 259, 260. states the rules thus: Where a contract contemplated the violation of English law, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. Where a contract conflicts with what are deemed in England to be essential public or moral interests. it cannot be enforced here, notwithstanding that it may have been valid by its proper law.

subject, and itself lawful at the place where it was made, if it is such that British subjects are forbidden by Act of Parliament to make it anywhere (*a*). It may be doubted whether such a contract would be recognized even by the courts of the state where it was made, unless the prohibition were of so hostile or restrictive a character as between the two states as not to fall within the ordinary principles of comity (*e.g.* if the rules of a people skilled in a particular industry should forbid them to exercise or teach that industry abroad). The authorities already cited (pp. *289, *290, above) as to marriages within the prohibited degrees contracted abroad by British subjects may also be usefully consulted as illustrating this topic.

The second exception is by no means free from difficulties touching its real meaning and extent (*b*). There is no means free from difficulties touching its real meaning and extent (*b*). There is no doubt that an agreement will not necessarily, though it will generally, be enforced if lawful according to its proper local law. The reasons for which the court may nevertheless refuse to enforce it have been variously expressed by judges and text-writers, and sometimes in very wide language.[69]

(*a*) *Santos* v. *Illidge* (1860) in Ex. Ch., 8 C. B. N. S. at p. 874, 29 L. J. C. P. at p. 350, per Blackburn J.

(*b*) "Whether an action can be supported in England on a contract which is void by the law of England, but valid by the law of the country where the matter is transacted, is a great question:" per Wilmot J. *Robinson* v. *Bland* (1760) 2 Burr. 1083.

[69] In Watson *v.* Murray, 23 N. J. Eq. 257, a bill by a partner in a lottery firm against his copartners for an account was dismissed. Lotteries in New Jersey are declared common and public nuisances; the sale of a ticket in a lottery, whether erected or opened in New Jersey or any other State, is a misdemeanor. The court said: "Putting the case in its best possible shape, and assuming that all the contracts and transactions involved in it occurred in States where they were toleratd by law, my opinion is that this court will not undertake to enforce or administer them." But see, on the other hand, McIntyre *v.* Parks, 3 Met. 207; Commonwealth *v.* Bassford, 6 Hill, 526; Thatcher *v.* Morris, 11 N. Y. 437; Ormes *v.* Dauchy, 82 N. Y. 443.

In Oscanyan *v.* Arms Co., 103 U. S. 261, 277, the court denied any validity to a promise made in this country to compensate one officer of the Turkish government for improperly influencing the official action of another, even assuming that by the law of Turkey such a contract would be lawful.

"A contract, valid elsewhere, will not be enforced if it is condemned by positive law, or is inconsistent with the public policy of the country, the aid of whose tribunals is invoked for the purpose of giving it effect." Union L. & E. Co. *v.* Railway Co., 37 N. J. L. 23, 25.

A contract "will not be enforced if it involves anything immoral, contrary to general policy, or violative of the conscience of the State called on to give it effect." Eubanks *v.* Banks, 34 Ga. 407.

A contract, valid by the law governing it, by its terms excusing a carrier from the consequences of its negligence was held enforceable in a State where such provisions are not allowed to be made in Fonseca *v.* Cunard S. S. Co.,

389] * **Transactions contrary to common principles of civilized nations not recognized.** It may be taken for granted that the courts of a civilized state cannot give effect to rights alleged to be valid by some local law, but arising from a transaction plainly repugnant to the *ius gentium* in its proper sense—the principles of law and morality common to civilized nations. In other words a local law cannot be recognized, though otherwise it would be the proper law to look to, if it is in derogation of all civilized laws (*c*). This indeed seems a fundamental assumption in the administration of justice, in whatever forum and by whatever procedure. Likewise it is clear that no court can be bound to enforce rights arising under a system of law so different from its own, and so unlike anything it is accustomed to, that not only its administrative means, but the legal conceptions which are the foundation of its procedure, and its legal habit of mind (*d*), so to speak, are

(*c*) It has been laid down that contracts to bribe or corruptly influence officers of a foreign government—even if not prohibited by the law of that government—will not be enforced in the courts of the United States: *Oscanyan* v. *Arms Co.* 103 U. S. 261, 277; and this not in the interest of the foreign government, but for the sake of morality and the dignity of law at home.

(*d*) In German one might speak without any strangeness of the *Rechtsbewusstsein* of the Court.

153 Mass. 553; O'Regan *v.* Cunard S. S. Co., 160 Mass. 356; Forepaugh *v.* Delaware R. Co., 128 Pa. 217; Fairchild *v.* Philadelphia R. Co., 148 Pa. 527 (cp. Hughes *v.* Pennsylvania R. Co., 202 Pa. 222). But see *contra*, The Guildhall, 58 Fed. Rep. 79; The Glenmavis, 69 Fed. Rep. 472; Chicago, &c. R. Co. *v.* Gardiner, 51 Neb. 70. See also The Kensington, 183 U. S. 263.

A gambling contract, though valid where made, was held not enforceable in another State where such contracts were illegal in Pope *v.* Hanke, 155 Ill. 617; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394; Gooch *v.* Faucett, 122 N. C. 270; Winward *v.* Lincoln, 23 R. I. 476; Gist *v.* Telegraph Co., 45 S. C. 344.

An assignment in violation of the law or policy of the jurisdiction where the property is situated, it is everywhere agreed, will not be enforced there. Security Trust Co. *v.* Dodd, 173 U. S. 624, 628; Barnett *v.* Kinney, 2 Idaho, 706 (see s. c. 147 U. S. 476); Townsend *v.* Coxe, 151 Ill. 62; Barth *v.* Iroquois Furnace Co., 63 Ill. App. 323; Whithed *v.* J. Walter Thompson Co., 86 Ill. App. 76; Moore *v.* Church, 70 Ia. 208; Franzen *v.* Hutchinson, 94 Ia. 95; *Ex parte* Dickinson, 29 S. C. 453; Ayres *v.* Desportes, 56 S. C. 544. Compare, however, the following cases where preferential assignments were upheld, though preferences were not allowed by the *lex fori:* Barnett *v.* Kinney, 147 U. S. 476; Atherton *v.* Low, 20 Fed. Rep. 894; Train *v.* Kendall, 137 Mass. 366; Frank *v.* Bobbitt, 155 Mass. 112; Moore *v.* Bonnell, 31 N. J. L. 90; Fuller *v.* Steiglitz, 27 Ohio St. 355.

"No people are bound or ought to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law." 2 Kent, 458. And see also Rousillon *v.* Rousillon, 14 Ch. D. 351, 369; Clark *v.* Tanner, 100 Ky. 275; Roger *v.* Raines, 100 Ky. 295; Greenwood *v.* Curtis, 6 Mass. 358, 378; Mittenthal *v.* Mascagni, 183 Mass. 19, 22; Ivey *v.* Lalland, 42 Miss. 444; Lemonius *v.* Mayer, 71 Miss. 514; Smith *v.* Godfrey, 28 N. H. 379; Flagg *v.* Baldwin, 38 N. J. Eq. 219; Commonwealth *v.* Bassford, 6 Hill, 526; Bank of China *v.* Morse, 168 N. Y. 458; Kanaga *v.* Taylor, 7 Ohio St. 134, 142; Bank *v.* Davidson, 18 Oreg. 57; Wight *v.* Rindskopf, 43 Wis. 344; Rose *v.* Kimberly Co., 89 Wis. 545.

wholly unfitted to deal with them.[70] For this reason the English Divorce Court cannot entertain a suit founded on a Mormon marriage. Apart from the question whether such marriages would be regarded by our courts as immoral *iure gentium* (*e*), the matrimonial law of England is wholly inapplicable to polygamy, and the attempt to apply it would lead to manifest absurdities (*f*).[71] Practically these difficulties can hardly arise except as to rights derived from family relations. One can hardly imagine them in the proper region of contracts.

Opposition to municipal principles of law not enough. Again, judicial observations are to be found which go to the further extent of saying that no court will enforce *anything contrary to the particular [390 views of justice, morality or policy whereon its own municipal jurisprudence is founded. And this doctrine is supported by the general acceptance of text-writers, which in this department of law must needs count for more than in any other, owing to its comparative poverty in decisive authorities.[72]

Contract for sale of slaves enforced in Santos v. Illidge. But a test question is to be found in the treatment of rights arising out of slavery

(*e*) That is, among Western nations. The recognition of Hindu and Mahometan law in British India stands on wholly different ground.

(*f*) *Hyde* v. *Hyde & Woodmansee* (1866) L. R. 1 P. & D. 130, 35 L. J. Mat. 57.

[70] In Hughes *v.* Klingender, 14 La. Ann. 845, it was held that a contract executed in England by which a ship was transferred to a trustee to secure the rights of a third person, the vendor retaining possession of the ship, could not be enforced in Louisiana to defeat the rights acquired by an attachment under the laws of that State, having no analogy to any mode known to its law of affecting personal property for the security of debts. "The comity of nations extends only to enforce obligations, contracts, and rights under those provisions of the law of other countries which are analogous or similar to those of the State where the litigation arises."

[71] As to polygamous or incestuous marriages, see United States *v.* Rodgers, 109 Fed. Rep. 886 (see note 15 Harv. L. Rev. 315); Stevenson *v.* Gray, 17 B. Mon. 193, 208; Sutton *v.* Warren, 10 Met. 451; Commonwealth *v.* Lane, 113 Mass. 458, 463; Hutchins *v.* Kimmell, 31 Mich. 126, 134: True *v.* Ranney, 21 N. H. 52, 55; State *v.* Ross, 76 N. C. 242, 245–6; State *v.* Brown, 47 Ohio St. 102, 109.

[72] *Supra*, note 69, and *infra*, *passim*. In Hill *v.* Spear, 50 N. H. 253, which turned upon the right to recover the price of liquor sold in New York where the sale of liquors is lawful, but with knowledge on the part of the seller that they were bought for the purpose of an unlawful resale in New Hampshire, the court say, at p. 274: "This court will and ought to be reluctant to enforce contract manifestly against public policy; but when the public policy of the country is not uniform, but different in neighboring localities, and variable in all, it would seem to be assuming rather too much to hold and insist that our notions of public policy are and must be infallible to the exclusion of the opinions and views of other enlightened communities, and the subversion of commercial comity." And see Swann *v.* Swann, 21 Fed. Rep. 299; Brown *v.* Browning, 15 R. I. 422.

by the courts of a free country: and for England at least the decision of the Exchequer Chamber in *Santos* v. *Illidge* (*g*) has given such an answer to it as makes the prevailing opinion of the books untenable. Slavery is as repugnant to the principles of English law as anything can well be which has been so far admitted by any other civilized system that any serious question of the conflict of laws could arise upon it. There is no doubt that neither the *status* of slavery nor any personal right of the master or duty of the slave incident thereto can exist in England (*h*), or within the protection of English law (*i*). But it long remained uncertain how an English court would deal with a contract concerning slaves which was lawful in the country where it was made and to be performed. Passing over earlier and indecisive authorities (*k*), we find Lord Mansfield assuming that a contract for the sale of a slave may be good here (*l*). On the other hand, Best J. thought no action "founded upon a right arising out of slavery" would be maintainable in the municipal courts of this country (*m*).[73] In *Santos* v. *Illidge* (*g*) a Brazilian sued an English firm trading in Brazil for the non-delivery of slaves under a contract for the
391] *sale of them in that country, which was valid by Brazilian law. The only question discussed was whether the sale was or was not under the circumstances made illegal by the operation of the statutes against slave trading: and in the result the majority of the Exchequer Chamber held that it was not. It was not even contended that at common law the Court must regard a contract for the sale of slaves as so repugnant to English principles of justice that, wherever made, it could not be enforced in England. Nor can it be suggested that the point was overlooked, for it appears to have been marked for argument. Perhaps it is a matter for regret that it was not insisted upon, and an express decision obtained upon it: but as it is, it now seems impossible to say that purely municipal views of right and wrong

(*g*) (1860) 8 C. B. N. S. 861, 29 L. J. C. P. 348, revg. s. c. in court below, 6 C. B. N. S. 841, 28 L. J. C. P. 317.

(*h*) *Sommersett's case* (1771–2) 20 St. T. 1.

(*i*) *Viz.* on board an English ship of war on the high seas or in hostile occupation of territorial waters, *Forbes* v. *Cochrane* (1824) 2 B. & C. 448, 26 R. R. 402.

(*k*) They are collected in Hargrave's argument in *Sommersett's case.*

(*l*) 20 St. Tr. 79.

(*m*) *Forbes* v. *Cochrane* (1824) 2 B. & C. at p. 469, 26 R. R. 418. To same effect Story, § 259, in spite of American authority being adverse.

73 See dissenting opinion of Sedgwick, J., in Greenwood *v.* Curtis, 6 Mass. 358. That an action will lie in a State where slavery never existed to recover the price of a slave in a sale made in a State where such sale was lawful, see Osborn *v.* Nicholson, 13 Wall. 654, 656, per Swayne, J.; Roundtree *v.* Baker, 52 Ill. 241; Commonwealth *v.* Aves. 18 Pick. 193, 215, per Shaw, C. J.

can prevail against the recognition of a foreign law. Moreover, apart from this decision, the cases in which the dicta relied upon for the wider doctrine have occurred have in fact been almost always determined on considerations of local law, and in particular of the law of the place where the contract was to be performed.

Earlier cases considered with reference to the general doctrine. Thus in *Robinson* v. *Bland* (*n*) the plaintiff sued (1) upon a bill of exchange drawn *upon England* to secure money won at play in France; (2) for money won at play in France; (3) for money lent for play at the same time and place. As to the bill, it was held to be an English bill; for the contract was to be performed by payment in England, and therefore to be governed by English law. For the money won, it could not have been recovered in a French court of justice (*o*), and so could not in any case be sued for here; but as to the money lent, the loan was lawful in France and therefore recoverable here.[74] Wilmot J. said that an action could be maintained in some countries *by a courtesan for the price of her prostitution, but cer- [392 tainly would not be allowed in England, though the cause of action arose in one of those countries.[75] Probably no such local law now exists. But if it did, and if it were attempted to enforce it in our courts, we could appeal, not to our own municipal notions of morality, but to the Roman law as expressing the common and continuous understanding of civilized nations. Such a bargain is immoral *iure gentium*.

In *Quarrier* v. *Colston* (*q*)[76] it was held that money lent by one English subject to another for gaming in a foreign country where such gaming was not unlawful might be recovered in England. This, as well as the foregoing case, is not inconsistent with the rule that the law of the place of performance is to be followed. It must be taken, no doubt, that the parties contemplated payment in England. Then, what says the law of England? Money lent for an unlawful use cannot be recovered. Then, was this money lent for an unlawful use? That must be determined by the law existing at the time and

(*n*) (1760) 2 Burr. 1077.

(*o*) Nor, under the circumstances, in the marshal's court of honour which then existed; but it seems the Court would in any case have declined to take notice of an extraordinary and extra-legal jurisdiction of that sort.

(*q*) (1842) 1 Ph. 147.

[74] Scott *v.* Duffy, 14 Pa. 18.

[75] *Acc.* per Chase, C. J., in De Sobry *v.* De Laistre, 2 H. & J. 191, 288; per Parsons, C. J., in Greenwood *v.* Curtis, 6 Mass. 358, 379.

[76] See also Sondheim *v.* Gilbert, 117 Ind. 71.

place at which the money was to be used in play. That law not being shown to prohibit such a use of it, there was no unlawful purpose in the loan, and there was a good cause of action, not merely by the local law (which in fact was not before the Court) (*r*), but by the law of England. These cases do show, however, that the English law against gaming is not considered to be founded on such high and general principles of morality that it is to override all foreign laws, or that an English court is to presume gaming to be unlawful by a foreign law (*s*).[77]

393] *In *Hope* v. *Hope* (*t*) an agreement made between a husband and wife, British subjects domiciled in France, provided for two things which made the agreement void in an English court: the collusive conduct of a divorce suit in England, and the abandonment by the husband of the custody of his children. It is worth noting that at the time of the suit the husband was resident in England, and it does not seem clear that he had not recovered an English domicil. Knight Bruce L.J. put his judgment partly on the ground that an important part at least of the provisions of the document was to be carried into effect in England. Turner L.J. did say in general terms that a contract must be consistent with the laws and policy of the country where it is sought to be enforced, and he appears to have thought the provision as to the custody of the children was one that an English court must absolutely refuse to enforce, whether to be performed in England or not, and whether by a domiciled British subject or not. But this is neither required by the decision nor reconcilable with *Santos* v. *Illidge*.

In *Grell* v. *Levy* (*u*) an agreement was made in France between an English attorney and a French subject that the attorney should re-

(*r*) The local law might conceivably, without making gaming unlawful, reduce debts for money lent at play to the rank of natural obligations or debts of honour not enforceable by legal process: if the view in the text be correct, the existence of such a law would make no difference in the English court.

(*s*) *Contra* Savigny, who thinks laws relating to usury and gaming must be reckoned strictly compulsory (von streng positiver, zwingender Natur)—*i.e.* must be applied without regard to local law by every court within their allegiance, but are not to be regarded by any court outside it. Syst. 8. 276. The old usury laws were without doubt supposed to express the dictates of universal Christian morality.

(*t*) (1857) 8 D. M. & G. 731; per Knight Bruce L.J. at p. 740; per Turner L.J. at p. 743.

(*u*) (1864) 16 C. B. N. S. 73.

77 Gambling contracts, though valid where made, were refused enforcement on account of the *lex fori* in Pope *v.* Hanke, 155 Ill. 617; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394; Gooch *v.* Faucett, 122 N. C. 270; Winward *v.* Lincoln, 23 R. I. 476; Gist *v.* Telegraph Co., 45 S. C. 344.

cover a debt for the client in England and keep half of it. Our rules against champerty are not known to the French law: but here the agreement was to be performed in England by an officer of an English court (*x*).[78] Perhaps, indeed, the English law governing the relations and mutual rights of solicitor and client may be regarded as a law of English procedure; and in that character, of course, private arrangements cannot acquire any greater power to vary it by being made abroad (*y*).

***As to agreements against public interest of state.** As for agree- [394 ments contrary to the public interests of the state in whose courts they are sued upon, it is obvious that the courts must refuse to enforce them without considering any foreign law. The like rule applies to the class of agreements in aid of hostilities against a friendly state of which we have already spoken. In practice, however, an agreement of this kind is more likely than not to be unlawful everywhere. Thus an agreement made in New York to raise a loan for insurgents in China would not be lawful in England; but it would also not be lawful in New York, and for the same reason. It might possibly happen on the other hand that the United States should recognize such insurgents while they were not recognized by England; and in that case the courts of New York would regard the contract as lawful, but ours would not.

It should be borne in mind that the foregoing discussion has nothing to do with the *formal* validity of contracts, which is governed by other rules (expressed in a general way by the maxim *locus regit actum*); and also that all rules as to the conflict of laws depend on practical assumptions as to the conduct to be expected at the hands of civilized legislatures and tribunals. It is in theory perfectly competent to the sovereign power in any particular state to impose any restrictions, however capricious and absurd, on the action of its own municipal courts; and even to municipal courts, in the absence of any paramount directions, to pay as much or as little regard as they please to any foreign opinion or authority.

(*x*) Per Erle C.J. at p. 79. (*y*) See judgment of Williams J.

[78] See Berrien *v.* McLane, 1 Hoff. Ch. 421, 427; Giddings *v.* Eastman, 1 Clarke, 19. A contract, assumed to be unlawful for champerty by the law of Connecticut, made in that State, to be performed in New York, where it was lawful, was held valid in the former State in Richardson *v.* Rowland, 40 Conn. 565. But see Blackwell *v.* Webster, 29 Fed. Rep. 614.

9. Where performance becomes unlawful, contract dissolved. Where the performance of a contract lawful in its inception is made unlawful by any subsequent event, the contract is thereby dissolved (*z*).[79]

395] **Explanation.*—Where the performance is subsequently forbidden by a *foreign* law, it is deemed to have become not unlawful but impossible (*a*).

This rule does not call for any discussion. It is admitted as certain in *Atkinson* v. *Ritchie* (*b*), and is sufficiently illustrated by the modern case of *Esposito* v. *Bowden* (*c*), of which some account has already been given. It applies to negative as well as to affirmative promises. "It would be absurd to suppose that an action should lie against parties for doing that which the legislature has said they shall be obliged to do" (*d*). To the qualification we shall have to return in the following chapter on Impossibility.

10. Otherwise law at date of agreement governs. Otherwise the validity of a contract is generally determined by the law as it existed at the date of the contract.

This is a wider rule than those we have already stated, as it applies to the form as well as to the substance of the contract, and not only to the question of legality but to the incidents of the contract generally (*e*). It is needless to seek authority to show that an originally lawful contract cannot become in itself unlawful by a subsequent change in the law (*f*).[80]

Quære when agreement made in ignorance of its illegality, and performance afterwards becomes lawful. It does not seem certain, however, that the converse proposition would always hold good. Perhaps the par-

(*z*) *Atkinson* v. *Ritchie* (1809) 10 East, 530, 10 R. R. 372; *Esposito* v. *Bowden* (1857) 4 E. & B. 963, 24 L. J. Q. B. 210; in Ex. Ch. 7 E. & B. 763, 27 L. J. Q. B. 17, p. *319, *supra*.

(*a*) *Barker* v. *Hodgson* (1814) 3 M. & S. 267, 15 R. R. 485; *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q. B. Div. 589, 53 L. J. Q. B. 156.

(*b*) See note (*z*), *ante*.

(*c*) *Ibid*.

(*d*) *Wynn* v. *Shropshire Union Rys. & Canal Co.* (1850) 5 Ex. 420, 440.

(*e*) Sav. Syst. § 392 (8. 435).

(*f*) See *Boyce* v. *Tabb* (1873) 18 Wallace (Sup. Ct. U. S.) 546, *supra*, p. *312.

79 Gates *v.* Goodloe, 101 U. S. 612, 619–621; Gray *v.* Sims, 3 Wash. C. C. 276, 280; United States *v.* Dietrich, 126 Fed. Rep. 671; Chicago *v.* Railroad Co., 105 Ill. 73; Jamieson *v.* Indiana Gas Co., 128 Ind. 555; Brown *v.* Delano, 12 Mass. 370; Cordes *v.* Miller, 39 Mich. 581 (with this case last cited cp. David *v.* Ryan, 47 Ia. 642); Bradford *v.* Jenkins, 41 Miss. 328; Bullard *v.* Northern Pac. Ry. Co., 10 Mont. 168; Hillyard *v.* Mutual Benefit Ins. Co., 35 N. J. L. 415, 418, 422; Brick Presb. Church *v.* New York, 5 Cow. 538; Baltimore, &c. R. Co. *v.* O'Donnell, 49 Ohio St. 489.

80 Anheuser-Busch Co. *v.* Bond, 66 Fed. Rep. 653 (C. C. A.); Stephens *v.* Southern Pac. Ry. Co., 109 Cal. 86.

ties might be entitled to the benefit of a subsequent change in the law if their actual intention in making the contract was not unlawful.[81]

The question may be put as follows on an imaginary case, which the facts of *Waugh* v. *Morris* (*g*) show to be quite within the bounds of possibility. A. and B. make *an agreement which by reason [396 of a state of things not known to them at the time is not lawful. That state of things ceases to exist before it comes to the knowledge of the parties, and before the agreement is performed, but A. refuses to perform the agreement on the ground that it was unlawful when made. Is this agreement a contract on which B. can sue A.? Justice and reason seem to call for an affirmative answer, and the analogy of *Waugh* v. *Morris* (*h*), where the court looked to the actual knowledge and intention of the parties at the time of the contract, is also in its favour.

Contract conditional on performance becoming lawful. Apart from this a contract which provides for something known to the parties to be not lawful at the time being done in the event, and only in the event, of its being made lawful, is free from objection and valid as a conditional contract (*i*): unless, indeed, the thing were of such a kind that its becoming lawful could not be properly or seriously contemplated (*k*).[82]

(*g*) (1873) L. R. 8 Q. B. 202, 42 L. J. Q. B. 57; *supra*, p. *378.

(*h*) Last note.

(*i*) *Taylor* v. *Chichester & Midhurst Ry. Co.* (1867) L. R. 4 H. L. 628, 640, 645, 39 L. J. Ex. 217; cp. *Mayor of Norwich* v. *Norfolk Ry. Co.* (1855) 4 E. & B. 397, 24 L. J. Q. B. 105, *supra*, p. *276.

(*k*) Cp. D. 18. 1. de cont. empt. 34 § 2 (Paulus). Liberum hominem scientes emere non possumus; sed

[81] In Graham *v.* Chicago, &c. Ry. Co., 53 Wis. 473, 484, the court said: "The lawfulness of an act done depends upon the laws in force at the time it is done; and, if unlawful when done, it does not become lawful by a subsequent change of the law which renders such act lawful thereafter. Bailey *v.* Mogg, 4 Denio, 60; Roby *v.* West, 4 N. H. 285; Jaques *v.* Withy, 1 H. Bl. 65; Fletcher *v.* Peck, 6 Cranch, 87; Conley *v.* Palmer, 2 N. Y. 182.

"This court has enforced this rule to its full extent in cases of contracts void at the time they were made, under the Usury Law and the law prohibiting a party from recovering for liquor bills. Gorsuth *v.* Butterfield, 2 Wis. 237; Root *v.* Pinney, 11 Wis. 84; Wood *v.* Lake, 13 Wis. 84; Lee *v.* Peckham, 17 Wis. 383; Morton *v.* Rutherford, 18 Wis. 298; Meiswinkle *v.* Jung, 30 Wis. 361; Austin *v.* Burgess, 36 Wis. 186."

The same doctrine was applied in Fulton *v.* Day, 63 Wis. 112, to the case of a note given after the repeal of the United States Bankruptcy Law of 1867 in renewal of a note made void by that statute.

Cp. Hartford Fire Ins. Co. *v.* Chicago, &c. Ry. Co., 62 Fed. Rep. 904.

For other applications of the principle see Woods *v.* Armstrong, 54 Ala. 150; Mitchell *v.* Doggett, 1 Fla. 356; Robinson *v.* Barrows, 48 Me. 186; Webber *v.* Howe, 36 Mich. 150; Handy *v.* St. Paul Globe Co., 41 Minn. 188; Anding *v.* Levy, 57 Miss. 51, 58; Nichols *v.* Poulson, 6 Ohio St. 305; Gilliland *v.* Phillips, 1 S. C. 152.

[82] In Noice *v.* Brown, 38 N. J. L. 228; 39 N. J. L. 133, the defendant, being

General results as to knowledge of parties. It may be useful to collect here in a separate form the results of the foregoing discussion, so far as they show in what circumstances and to what extent the knowledge of the parties is material on the question of illegality.

α. If the immediate object of agreement be unlawful, the knowledge of either or both parties is immaterial (*l*): except, perhaps, **397]** where the agreement is made in good faith and in *ignorance of a state of things making it unlawful: and in this case it is submitted for the reasons above given that the agreement becomes valid if that state of things ceases to exist in time for the agreement to be lawfully performed according to the original intention.

β. A. makes an agreement with B. the execution of which would involve an unlawful act on B.'s part (*e. g.* a breach of B.'s contract with C.).

If A. does not know this, there is a good contract, and A. can sue B. for a breach of it, though B. cannot be compelled to perform it or may be restrained (*m*) from performing it. We may say if we like that B. is deemed to warrant that he can lawfully perform his contract.

The contract is voidable at A.'s option *on the ground of fraud,* if B. has falsely stated or actively concealed the facts, but not otherwise (*n*).

nec talis emptio aut stipulatio admittenda est; *cum servus erit,* quamvis dixerimus, futuras res emi posse; nec enim fas est eiusmodi casus exspectare.

(*l*) A strong illustration of this will be found in *Wilkinson* v. *Loudonsack* (1814) 3 M. & S. 117, 15 R. R. 438. In *South African Breweries* v. *King* [1899] 2 Ch. 173, 68 L. J. Ch. 530, in C. A. [1900] 1 Ch. 273, 69 L. J. Ch. 171, the parties were advised that a clause of their agreement was, or might be held, invalid by the local law, but executed the agreement containing that clause for what it might be worth. Nothing decided in the case turned upon this rather curious state of facts.

(*m*) *Jones* v. *North* (1875) L. R. 19 Eq. 426, 44 L. J. Ch. 388.

(*n*) *Beachey* v. *Brown* (1860) E. B. & E. 796, 29 L. J. Q. B. 105; but one can never be quite safe in drawing any general conclusion from a decision on the contract to marry. And cp. D. 18. 1. de cont. empt. 34 § 3.

a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained. The contract was held void, and Beasley, C. J., said:

"I cannot see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the

If A. does know the facts, the agreement is void.

γ. A. makes an agreement with B. who intends by means of the agreement or of something to be obtained or done under it to effect an unlawful or immoral purpose.

If A. does not know of this purpose, there is a contract voidable at his option when he discovers it.

If he does know of it, the agreement is void.[83]

act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy." See also Paddock *v.* Robinson, 63 Ill. 99; Leupert *v.* Shields, 60 Pac. Rep. 193 (Col. App.). Compare Brown *v.* Odill, 104 Tenn. 250.

[83] See also *supra*, pp. 494, 495.

398] *CHAPTER VIII.

Impossible Agreements.

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Performance of agreement may be impossible in itself. An agreement may be impossible of performance at the time when it is made, and this in various ways.

It may be impossible in itself; that is, the agreement itself may involve a contradiction, as if it contains promises inconsistent with one another or with the date of the agreement. Or the thing contracted for may be contrary to the course of nature, "*quod natura fieri non concedit*" (*a*).

As if a man should undertake to make a river run up-hill; to make two spheres of the same substance, but one twice the size of the other, of which the greater should fall twice as fast as the smaller when

(*a*) D. 45. 1. de v. o. 35 pr.

they were both dropped from a height; or to construct a perpetual motion (*b*).

It may be impossible by law. It may be impossible by law, as being inconsistent with some legal principle or institution.

As in the cases already considered in Chap. V. of attempts to enable a stranger to a contract to sue upon it by agreement of the parties; or as if a man should give a bond to secure a simple contract with a collateral agreement that the simple contract debt should not be merged (*c*), or should covenant to create a new manor. *Again it is the general rule of law that a man may contract for [399 the sale of a specific thing which is not his own at the time. But if the thing be already the buyer's own, or cannot be the subject of private ownership at all (as the site of a public building, the Crown jewels, a ship in the Royal Navy) (*d*), the agreement is impossible in law.

Or in fact. It may be impossible in fact by reason of the existence of a particular state of things which makes the performance of the particular contract impossible. As where the contract is to go to a certain island and there load a full cargo of guano, but there is not enough guano there to make a cargo (*e*): or a lessee covenants to dig not less than 1,000 tons of a certain kind of clay on the land demised in every year of the term, but there is no such clay on the land (*f*).

Or may become impossible in law or in fact — According to modern authorities the rules are rules of construction. Moreover the performance of a contract which was possible in its inception may become impossible in either the second or third of these ways. The strong and concurrent tendency of the modern authorities is to avoid laying down absolute rules in any case, and to give effect as far as possible to the real intention of the parties—in other words, to treat the subject as one to be governed by rules of construction rather than by rules of law. As evidence of intention in such matters is very seldom forthcoming, the Court has to fall back on its own view of what reasonable men

(*b*) Of these particular impossibilities the second was supposed to be an elementary fact before Galileo made the experiment; the last continues to be now and then attempted by persons who know mechanical handicraft without mechanical principles: we choose the examples as all the more instructive on that account.

(*c*) See *Owen* v. *Homan* (1851) 3 Mac. & G. 378, 407–411.

(*d*) In Roman law "quorum commercium non sit, ut publica quae non in pecunia populi sed in publico usu habeantur, ut est Campus Martius." D. 18. 1. de cont. empt. 6 pr.

(*e*) *Hills* v. *Sughrue* (1846) 15 M. & W. 253.

(*f*) *Clifford* v. *Watts* (1870) L. R. 5 C. P. 577, 40 L. J. C. P. 36.

would intend if they had thought of the contingency. Still actual intention will prevail if and so far as it can be ascertained. Before proceeding to details we may give an outline of the results.

1. **General statement.** An agreement is void if the performance of it is either impossible in itself or impossible by law.

400] *When the performance of an agreement becomes impossible by law, the agreement becomes void.

2. An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditional on its performance being or continuing possible in fact.

Such an intention is presumed where the performance depends on the existence of a specific thing, or on the life or health of a party who undertakes personal services by the contract.

3. If the performance of any promise becomes impossible in fact by the default of the promisee, the promisor is discharged, and the promisee is liable to him under the contract for any loss thereby resulting to him.

If it becomes impossible by the default of the promisor, the promisor is liable under the contract for the non-performance.

1. **Agreement impossible in itself is void for lack of animus contrahendi.** On the first and simplest rule—that an agreement impossible in itself is void—there is little or no direct authority, for the plain reason that such agreements do not occur in practice; but it is always assumed to be so. Strictly this is not an absolute rule of law, but rests on the ground that the impossible nature of the promise shows that there was no real intention of contracting and therefore no real agreement. Brett J. said in *Clifford* v. *Watts* (*g*): "I think it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties cannot be

401] supposed to have so contracted." The *same view is also distinctly given in the Digest (*h*). It seems to follow then that the

(*g*) (1870) L. R. 5 C. P. p. 558.

(*h*) D. 44 7. de obl. et act. 31. Non solum stipulationes . . sed etiam ceteri quoque contractus . . impossibili condicione interposita aeque nullius momenti sunt, quia in ea re, quae ex duorum pluriumve consensu agitur, omnium voluntas spectetur; quorum procul dubio in huiusmodi actu talis cogitatio est, ut nihil agi existiment apposita ea condicione quam sciant esse impossibilem.

question is not whether a thing is absolutely impossible (a question not always without difficulty), but whether it is such that reasonable men in the position of the parties must treat it as impossible (*i*).

A thing is not impossible because not known to be possible. On the other hand a thing is not to be deemed impossible merely because it has never yet been done, or is not known to be possible. "Cases may be conceived," says Willes J. in the case last cited, "in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible." Indeed many things have become possible which were long supposed to be impossible; and this not only in the well-known instances of mechanical invention and the applications of scientific discovery to the arts of life, but in the regions of pure science and mathematics. Formerly it seemed impossible that we should ever have direct evidence of the physical constitution of the sun and fixed stars: we now have much. In the earlier edition *of this book the case of an agreement [402 to make a practicable flying machine was propounded with some diffidence. At this day no one would doubt that, whether prudent or not, such an agreement might be binding.

In testing the seriousness and validity of an agreement by the presumed intention of the parties, we must remember that they are also presumed to have the ordinary knowledge of reasonable men. Thus the Indian Contract Act (s. 56, illust. *a*), says that an agreement to discover treasure by magic is void, notwithstanding that in some regions at least of British India the parties might really believe in the efficacy of magic for the purpose. If a promisee believes in the possibility of the performance nominally promised, and the promisor does not, the case will generally be reduced to one of fraud.

(*i*) In *Thornborow* v. *Whitacre* (1706) 2 Ld. Raym. 1164, a promise to deliver two grains of rye on a certain Monday, and four, eight, sixteen, &c., on alternate Mondays following for a year, was said by Holt to be "only impossible with respect to the defendant's ability," though it was urged for the defendant that "all the rye in the world was not so much." No judgment was given, the case being settled. The point that the parties could not have been in earnest was not made.

"Practical impossibility," i. e. extreme cost or difficulty, not material. If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome. For some purposes practical impossibility may be treated as equivalent to absolute impossibility: a ship is said to be totally lost when it is in this sense practically impossible, though not physically impossible, to repair her (*k*). But this does not apply to the matter now in hand (*l*).[1]

Logical impossibility — Repugnancy between different parts of instrument. The other conceivable cases of absolute impossibility may be very briefly dismissed. Inconsistent or, in the usual technical phrase, repugnant promises contained in the same instrument cannot of course be enforced: this however is rather a case of failure of that certainty which, as we saw in the first chapter, is one of the primary conditions for the formation of a contract. There may also be a repugnancy
403] as to date, as if a man promises to do a thing *on a day already past. Practically, however, such a repugnancy can hardly be more than apparent. Either it is a mere clerical or verbal error, in which case the Court may correct it by the context (*m*),[2] or it arises from the terms of the agreement being fixed before and with reference to a certain time but not reduced into writing and executed as a written contract till afterwards. In such a case it must be determined on the circumstances and construction of the contract whether the stipulation as to time is to be treated as having ceased to be part of the contract (in other words, as having been left in the statement of the contract by a common mistake), or as still capable of giving

(*k*) *Moss* v. *Smith* (1850) 9 C. B. 94, 103, 19 L. J. C. P. 225.

(*l*) See per Mellor J., L. R. 6 Q. B. 123, per Hannen J. *ib.* 127. These dicta seem to go even beyond what is said in the text, but are probably limited in their true effect to what is here called impossibility in fact.

(*m*) See *Fitch* v. *Jones* (1855) 5 E. & B. 238, 24 L. J. Q. B. 293, where a note payable two months after date, and made in January, 1855, was dated by mistake 1854, but across it was written "due the 4th March, 1855." The Court held that this sufficiently corrected the mistake, and might be taken as a direction to read 5 for 4.

[1] A contract to sell salmon packed in Alaska, the fish to be "exactly like Puget Sound fancy Sockeye" is not void as stipulating for the impossible, though, so far as known fish of that sort are not found in Alaska at the present time; for the country is known to be still unexplored, and if such fish are not there, they may be caught elsewhere and packed in Alaska. Reid *v.* Alaska Packing Co., 43 Oreg. 429. See also Bennett *v.* Morse, 6 Col. App. 122; Beebe *v.* Johnson, 19 Wend. 500; Anderson *v.* Adams, 43 Oreg. 621; Stratford Gas Co. *v.* Stratford, 26 Ont. App. 109.

[2] Or rectify the contract so that it shall express the intention of the parties. Cameron *v.* White, 74 Wis. 425.

an independent right of action. At all events it cannot be treated as a condition precedent so as to prevent the rest of the contract from being enforced (*n*).[3]

Promisor not excused by relative impossibility, i. e. not having the means of performance. Leaving, however, this rather barren discussion, we come to a qualification, or rather explanation of more practical importance, which follows *a fortiori* from the principle laid down by Willes J. Difficulty, inconvenience, or impracticability arising out of circumstances merely relative to the promisor will not excuse him. "Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first or objective kind of impossibility that is recognized as such by law. The second, or subjective kind, cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On this last point the most obvious example is that of the debtor who owes a sum certain, but has neither money nor credit. There is plenty of money in the world, and it is a matter *wholly personal to the [404 debtor if he cannot get the money he has bound himself to pay" (*o*).[4]

One may warrant acts of third persons, or natural event in itself possible. Therefore a man is not excused who chooses to make himself answerable for the acts or conduct of third persons, though beyond his control; or even, it seems, for a contingent event in itself possible and ordinary but beyond the control of man. It has been said that a covenant that it shall rain to-morrow might be good (*p*), and that "if a man is bound to another in 20*l.* on condition *quod pluvia debet pluere cras,* there *si pluvia non pluit cras* the obligor shall forfeit the bond, though there was no default on his part, for he knew not that it would not rain. In like manner if a man is bound to me on con-

(*n*) *Hall* v. *Cazenove* (1804) 4 East, 477, 7 R. R. 611, where the Court agreed to this extent, but differed on the other question.

(*o*) Savigny, Obl. 1. 384.

(*p*) By Maule J. *Canham* v. *Barry* (1855) 15 C. B. at p. 619, 24 L. J. C. P. at p. 106. Per Cur. *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. at p. 185. But *qu.* would not such a contract be a mere wager in almost any conceivable circumstances?

[3] See Stratford Gas Co. *v.* Stratford, 26 Ont. App. 109.

[4] So the destruction or injury of a vendor's factory does not excuse performance of a contract to deliver goods at a stated time, if the contract did not require the goods to be manufactured in that factory. Jones *v.* United States, 96 U. S. 24; Summers *v.* Hibbard, 153 Ill. 102; Booth *v.* Spuyten Duyvil Mill Co., 60 N. Y. 487. Nor is an agreement to ship goods within a reasonable time excused by the inability of the promisor to get shipping facilities owing to discrimination against him. Eppens *v.* Littlejohn, 164 N. Y. 187. See also Railroad Co. *v.* Reichert, 58 Md. 261, 274.

dition that the Pope shall be here at Westminster to-morrow, then if the Pope comes not there is no default on the defendant's part, and yet he has forfeited the obligation" (*q*). "Generally if a condition is to be performed by a stranger and he refuses, the bond is forfeit, for the obligor took upon himself that the stranger should do it" (*r*). "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. does not go thither that day; in this case it seems the condition is broken, and that he must procure I. S. to go thither and ride with him at his peril" (*s*). Where the condition of a bond was to give such a release as by the Court should be thought meet, it was held to be the obligor's duty to procure the judge to devise and direct it (*t*). If a lessee agrees absolutely to assign his lease, the lease containing a covenant not to assign without licence, the contract is binding and he must procure the lessor's consent (*u*). **405]** But *on the sale of shares in a company, on the Stock Exchange at all events, the vendor is not bound to procure the directors' assent, though it may be required to complete the transfer (*x*), and it seems at least doubtful whether he is bound in any case (*y*).

Agreement impossible in law is void. Where an agreement is impossible by law there is no doubt that it is void:[5] for example, a promise by a servant to discharge a debt due to his master is void, and therefore no consideration for a reciprocal promise (*z*); though, by the rule last stated, a promise to procure his master to discharge it would (in the absence of any fraudulent intention against the master) be good and binding. And when the performance of a contract becomes wholly or in part impossible by law, the contract is to that extent discharged.[6]

(*q*) Per Brian C.J. Mich. 22 Ed. IV. 26. The whole discussion there is curious, and well worth perusal in the book at large. Note Brian's change of opinion as to the plea in the case at bar, *ad fin.*

(*r*) Ro. Ab. 1. 452, L. pl. 6.

(*s*) Shepp. Touchst. 392.

(*t*) *Lamb's case*, 5 Co. Rep. 23 *b*.

(*u*) *Lloyd* v. *Crispe* (1813) 5 Taunt. 249. 14 R. R. 744; cp. *Canham* v. *Barry* (1855) 15 C. B. 597, 24 L. J. C. P. 100. [Cp. Beebe *v.* Johnson, 19 Wend. 500.]

(*x*) *Stray* v. *Russell* (1859) Q. B. & Ex. Ch. 1 E. & E. 888, 916, 28 L. J. Q. B. 279, 29 L. J. Q. B. 115.

(*y*) Lindley on Companies, 491.

(*z*) *Harvey* v. *Gibbons* (1674) 2 Lev. 161. It is called an *illegal* consideration, but such verbal confusions are constant in the early reports.

[5] Stevens *v.* Coon, 1 Pinney (Wis.), 356.

[6] Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 5 E. & B. 729; Commissioners *v.* Young, 59 Fed. Rep. 96, 108; Knox *v.* Childersburg Land Co., 86 Ala. 180; Dunham *v.* New Britain, 55 Conn. 378; Scovill *v.* McMahon, 62 Conn. 378; Kuhn *v.* Freeman, 15 Kan. 423; Gammon *v.* Blaisdell, 45 Kan. 221; Theobald *v.* Burleigh, 66 N. H. 574; Brick Church *v.* New York, 5 Cow. 538; Kaiser

When performance becomes impossible by law, promisor is excused — Baily v. De Crespigny. A good instance of this is *Baily* v. *De Crespigny* (*a*). There a lessor covenanted with the lessee that neither he nor his heirs nor his assigns would allow any building (with certain small exceptions) on a piece of land of the lessor's fronting the demised premises. Afterwards a railway company purchased this piece of land under the compulsory powers of an Act of Parliament, and built a station upon it. The lessee sued the lessor upon his covenant; but the Court held that he was discharged by the subsequent Act of Parliament, which put it out of his power to perform it. And this was agreeable to the true intention, for the railway company coming in under compulsory powers, "whom he [the covenantor] could not bind by any stipulation, as he could an assignee chosen by himself," was "a new kind of assign, such as was not in the contemplation of the parties when the contract was *entered into." Nor was it [406 material that the company was only empowered by Parliament, not required, to build a station at that particular place (*b*).[7] As the American phrase concisely puts it, a covenant of warranty does not extend to the State in the exercise of its eminent domain (*c*). If a subsequent Act of Parliament making the performance of a contract impossible were a private Act obtained by the contracting party himself, he might perhaps remain bound by his contract as if he had made

(*a*) (1869) L. R. 4 Q. B. 180, 38 L. J. Q. B. 98.
(*b*) (1869) L. R. 4 Q. B. 186.
(*c*) See *Osborn* v. *Nicholson* (1871) 13 Wall. at p. 657.

v. Richardson, 5 Daly, 301; Jones *v.* Judd, 4 N. Y. 412; Burkhardt *v.* Georgia School Township, 9 S. Dak. 315. Compare Klauber *v.* Street Ry. Co., 95 Cal. 353; Newport News Co. *v.* McDonald Brick Co.'s Assignee, 59 S. W. Rep. 332 (Ky.); Baker *v.* Johnson, 42 N. Y. 126.

A provision in a contract of insurance that no action shall be maintainable on it unless begun within twelve months next after the occurrence of the loss does not, in case of war between the countries of the contracting parties, operate like a Statute of Limitations, by letting the term open and expand itself, so as to receive within it the term of legal disability created by the war, and then close together at each end of that period, so as to complete itself, as though the war had never occurred, but having become impossible of performance by law, is wholly discharged. Semmes *v.* Insurance Co., 13 Wall. 158.

"Where, by the terms of a contract for work and labor, the full price is not to be paid until the work is completed, and a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full prices agreed upon." Jones *v.* Judd, 4 N. Y. 411.

To discharge the contract the law must make performance impossible, not merely more expensive or burdensome. Baker *v.* Johnson, 42 N. Y. 126.

Where the law prevents performance of a contract for a limited time only the obligation of the contract is suspended but not discharged. Sherman County *v.* Howard, 98 N. W. Rep. 666 (Neb.).

[7] Kuhn *v.* Freeman, 15 Kan. 423; Gammon *v.* Blaisdell, 45 Kan. 221; Hitchcock *v.* Bacon, 118 Pa. 272.

the performance impossible by his own act[8] (of which afterwards): but where the Act is a public one, its effect in discharging the contract cannot be altered by showing that it was passed at the instance of the party originally bound (*d*).[9]

Buying one's own property. The case of a man agreeing to buy that which is already his own is a peculiar one. Here the performance is impossible in law; and the agreement may be regarded as void not only for impossibility but for want of consideration. But this class of cases is by its nature strictly limited. No man will knowingly pay for what belongs to him already. If on the other hand the parties are in doubt or at variance as to what their rights are, any settlement which they come to in good faith, whatever its form, has the character of a compromise. There remain only the cases in which the parties act under a common mistake as to their respective rights. The presence of the mistaken assumption is the central point on which the whole transaction turns, and is decisive in fixing its true nature. Hence it is the most conspicuous element in practice, and these cases are treated as belonging not to the head of Impossibility but to that of Mistake. Under that head we recur to them in the next chapter. It is hardly needful to add that a contract for the
407] sale of some*thing which the seller has not at the time is perfectly good if the thing is capable of private ownership. The effect of the contract is that he binds himself to acquire a lawful title to it by the time appointed for completing the contract.

Exposition of same principles in Roman law. The general principles above considered are well brought together in the Digest, in a passage from a work of Venuleius (*e*) on Stipulations. "Illud inspiciendum est, an qui centum dari promisit confestim teneatur, an vero cesset obligatio donec pecuniam conficere (*f*) possit. Quid ergo si

(*d*) *Brown* v. *Mayor of London* (1861) 9 C. B. N. S. 726, 30 L. J. C. P. 225, in Ex. Ch. 13 C. B. N. S. 828, 31 L. J. C. P. 280.

(*e*) See Roby's Introduction, p. clxxxiii.

(*f*) Mommsen's correction for *conferre*, which would mean "pay" or "contribute," not "procure."

8 So decided in *Re* Companies' Acts, 117 L. T. 60.

9 "The corporation of the city of New York conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment; and afterwards, pursuant to a power granted by the Legislature, passed a by-law prohibiting the use of these lands as a cemetery. Held, that this was not a breach of the covenant which entitled to damages, but it was a repeal of the covenant." Brick Presb. Church *v.* New York, 5 Cow. 538. See also Board of Commissioners *v.* Young, 59 Fed. Rep. 96, 108; Dunham *v.* New Britain, 55 Conn. 378; Scovill *v.* McMahon, 62 Conn. 378.

Interferenee by writ sued out by a private litigant does not create impossibility caused by operation of law. Klauber *v.* Street Ry. Co., 95 Cal. 353.

neque domi habet neque inveniat creditorem? Sed haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi (*g*). . . . Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris pertinet [*i.e.* inconvenience short of impossibility is no answer]. . . . Si ab eo stipulatus sim, qui efficere non possit, cum alii possibile sit, iure factam obligationem Sabinus scribit." He goes on to say that a legal impossibility, *e.g.* the sale of a public building, is equivalent to a natural impossibility. . . . 'Nec ad rem pertinet quod ius mutari potest et id quod nunc impossibile est postea possibile fieri; non enim secundum futuri temporis ius sed secundum praesentis aestimari debet stipulatio" (*h*): (as if it should be contended that a covenant to create a new manor is not a covenant for a legal impossibility, because peradventure the statute of *Quia emptores* may be repealed.) All this is in exact accordance with English law.

2. Performance impossible in fact: no excuse where contract is absolute. We now come to the cases where the performance of an agreement is not impossible in its own nature, but *impossible in fact by [408 reason of the particular circumstances. It is a rule admitted by all the authorities, and supported by positive decisions, that impossibility of this kind is in itself no excuse for the failure to perform an unconditional (*i*) contract, whether it exists at the date of the contract, or arises from events which happen afterwards (*k*). Thus an absolute contract to load a full cargo of guano at a certain island was not discharged by there not being enough guano there to make a cargo (*l*): and where a charter-party required a ship to be loaded with usual despatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course (*m*).

(*g*) For the explanation of a not very clear illustration which follows here, and is omitted in our text, see Sav. Obl. 1. 385.

(*h*) D. 45. 1. de v. o. 137. §§ 4–6.

(*i*) It may be shown, and not necessarily by the presence of express saving words, that the fact or event was outside the risks undertaken by the promisor: in other words that the contract was not unconditional.

(*k*) *Atkinson* v. *Ritchie* (1809) 10 East, 530. 10 R. R. 372.

(*l*) *Hills* v. *Sughrue* (1846) 15 M. & W. 253. This case turned in part on the unusual incident of the charter-party providing that the cargo was to be found by the owner. "He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price:" Parke B. at p. 261. And see Anson, 330, 331.

(*m*) *Kearon* v. *Pearson* (1861) 7 H. & N. 386, 31 L. J. Ex. 1. So where a given number of days is allowed to the charterer for unloading, he is held to take the risk of any ordinary vicissitudes which may cause delay: *Thiis* v. *Byers* (1876) 1 Q. B. D. 244, 45 L. J. Q. B. 511.

Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse.[10]

A fortiori where only inconvenient or impracticable. Where insured premises were damaged by fire and the insurance company, having an

[10] The Harriman, 9 Wall. 161; Jones *v.* United States, 96 U. S. 24, 29; Railway Co. *v.* Hoyt, 149 U. S. 1, 14; Railway Co. *v.* Hooper, 160 U. S. 514; United States *v.* Gleason, 175 U. S. 588, 602; Lumberman's Co. *v.* Gilchrist, 55 Fed. Rep. 677; Robson *v.* Mississippi Logging Co., 61 Fed. Rep. 889, 69 Fed. Rep. 773; Merriwether *v.* Lowndes Co., 89 Ala. 362; Klauber *v.* Street Ry. Co., 95 Cal. 353; Bacon *v.* Cobb, 45 Ill. 47; Summers *v.* Hibbard, 153 Ill. 102; Wernli *v.* Collins, 87 Ia. 548; Jackson *v.* Creswell, 94 Ia. 713; Bates Machine Co. *v.* Norton Iron Works, 68 S. W. Rep. 423 (Ky.); Adams *v.* Nichols, 19 Pick. 275; Bank *v.* Burt, 5 Allen, 113; Nical *v.* Fitch, 115 Mich. 15; Anderson *v.* May, 50 Minn. 280; Harrison *v.* Railway Co., 74 Mo. 364; Knapman Whiting Co. *v.* Middlesex Water Co., 64 N. J. L. 240; Harmony *v.* Bingham, 12 N. Y. 99; Booth *v.* Spuyten Duyvil Co., 60 N. Y. 487; Ward *v.* Hudson River Bg. Co., 125 N. Y. 230; Hanthorn *v.* Quinn, 42 Oreg. 1; Hand *v.* Baynes, 4 Whart. 204; Du Bois *v.* Water Works Co., 176 Pa. 430; Eddy *v.* Clement, 38 Vt. 486.

Where one contracts to build a house on the land of another, and performance becomes impracticable, either by reason of a latent defect in the soil, or, the contract being to finish and deliver the house by a day named, by reason of the accidental destruction of the building shortly before that day, he is not excused from performance; and performance not being excused he cannot retain installments paid on account. Tompkins *v.* Dudley, 25 N. Y. 272; Dermott *v.* Jones, 2 Wall. 1; Autcliff *v.* McAnally, 88 Ala. 507; Green *v.* Wells, 2 Cal. 584; Clark *v.* Collier, 100 Cal. 256; School District *v.* Dauchy, 25 Conn. 530; Parker *v.* Scott, 82 Ia. 266; Stees *v.* Leonard, 20 Minn. 494; Haynes *v.* Second Baptist Church, 88 Mo. 285; Leavitt *v.* Dover, 67 N. H. 94; Trustees *v.* Bennett, 3 Dutch. 513; Lawing *v.* Rintles, 97 N. C. 380; Galyon *v.* Ketchen, 85 Tenn. 55; Burke *v.* Purifoy, 21 Tex. Civ. App. 202. See also Brown *v.* Royal Ins. Co., 1 E. & E. 853; Simpson *v.* United States, 172 U. S. 372; Schliess *v.* Grand Rapids, 131 Mich. 52; Hanthorn *v.* Quinn, 42 Oreg. 1; Filbert *v.* Philadelphia, 181 Pa. 530; Harlow *v.* Homestead, 194 Pa. 57.

As to whether accidental calamity excuses delay in completing a building, see Phœnix Bridge Co. *v.* United States, 38 Ct. Cl. 492; Cannon *v.* Hunt, 113 Ga. 501; Cochran *v.* People's Ry. Co., 131 Mo. 607; Ward *v.* Hudson River Building Co., 1 Silvernail (N. Y.), 341; Reichenbach *v.* Sage, 13 Wash. 364; Bentley *v.* State, 73 Wis. 416.

In Dermott *v.* Jones, 2 Wall. 1, Jones had covenanted for the erection and complete finishing for use and occupation, by a day fixed, of a house upon the land of Miss Dermott. Owing to a latent defect in the soil, causing the foundation to sink, he failed to make part of the building fit for use and occupation. Miss Dermott was compelled to take that part down, renew the foundation with artificial floats, and rebuild. The court held that while the builder was not excused from performance, he might recover in *indebitatus assumpsit*, the owner having accepted the work, but that the latter was entitled to recoup for the damages sustained by the plaintiff's deviations from the contract, both as to the manner and time of performance.

In Butterfield *v.* Byron, 153 Mass. 517, it appeared that the plaintiff was to do the grading, excavating, stone work, brick work, painting, and plumbing for a frame hotel and the defendant was to do the remainder of the work of building. When almost completed the building was struck by lightning. The court held that the defendant was entitled to recover for the value of the work which he had done and the plaintiff to recover back any payments he had made. Neither party could recover damages for the non-completion of the hotel. Cp. Chapman *v.* Beltz Co., 48 W. Va. 1; Vogt *v.* Hecker, 118 Wis. 306. See also Krause *v.* Crothersville, 162 Ind. 278, 65 L. R. A. 111; Weis *v.* Devlin, 67 Tex. 507; Cook *v.* McCabe, 53 Wis. 250.

option to pay in money or reinstate the building, elected to reinstate, but before they had done so the whole was pulled down by the authority of the Commissioners of Sewers as being in a dangerous condition; it was held that the company were bound by their election, and the performance of the contract as they had elected to perform it was not excused (*n*).[11] So again if a man contracts to do *work according to orders or specifications given or to be given [409 by the other contracting party, he is bound by his contract, although it may turn out not to be practicable to do the work in the time or manner prescribed. In *Jones* v. *St. John's College* (*Oxford*) (*o*) the plaintiffs contracted to erect certain farm buildings according to plans and specifications furnished to them, together with any alterations or additions within specific limits which the defendants might prescribe, and subject to penalties if the work were not finished within a certain time. And they expressly agreed that alterations and additions were to be completed on the same conditions and in the same time as the works under the original contract, unless an extension of time were specially allowed. It was held that the plaintiffs, having contracted in such terms, could not avoid the penalties for non-completion by showing that the delay arose from alterations being ordered by the defendants which were so mixed up with the original work that it became impossible to complete the whole within the specified time (*p*). In *Thorn* v. *Mayor of London* (*q*) a contractor undertook to execute works according to specifications prepared by the engineer of the corporation. It turned out that an important part of the works could not be executed in the manner therein described, and after fruitless attempts in which the plaintiff incurred much expense, that part had to be executed in a different way. It was held that no warranty could be implied on the part of the corporation that the plans were such as to make the work in fact reasonably practicable, and that the plaintiff could

(*n*) *Brown* v. *Royal Insurance Co.* (1859) 1 E. & E. 853, 28 L. J. Q. B. 275, *diss.* Erle J. who thought such a reinstatement as was contemplated by the contract (not being an entire rebuilding) had become impossible by the act of the law.

(*o*) (1870) L. R. 6 Q. B. 115, 124, 40 L. J. Q. B. 80.

(*p*) This case was argued on demurrer, so that the agreement was admitted as pleaded. Such an agreement will not be implied or inferred from ambiguous terms: *Dodd* v. *Churton* [1897] 1 Q. B. 563, 66 L. J. Q. B. 477, C. A.

(*q*) (1876) L. R. 9 Ex. 163, in Ex. Ch. 10 Ex. 112, affd. in H. L. 1 App. Ca. 120, 45 L. J. Ex. 487.

[11] See David *v.* Ryan, 47 Ia. 642; Brady *v.* Insurance Co., 11 Mich. 451; Cordes *v.* Miller, 39 Mich. 581; Fire Assoc. *v.* Rosenthal, 108 Pa. 474.

not recover as on such a warranty the value of the work that had been thrown away.[12] The judgments in the House of Lords leave
410] it an open *question whether, assuming the extra work thus caused not to have been extra work of the kind contemplated by the contract itself and to be paid for under it, the plaintiff might not have recovered for it as on a *quantum meruit*. In short, it is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible (*r*).

Prohibition by foreign law is impossibility in fact. Where the performance of a contract becomes impracticable by reason of its being forbidden by a *foreign* law, it is deemed to have become impossible not in law but in fact.[13] In *Barker* v. *Hodgson* (*s*) intercourse with the port to which a ship was chartered was prohibited on account of an epidemic prevailing there, so that the freighter was prevented from furnishing a cargo; but it was held that this did not dissolve his obligation. So if the goods are confiscated at a foreign port that is no answer to an action against the shipowner for not delivering them (*t*). But where the effect of a foreign law is to prevent both parties from performing their respective parts of the contract, both are excused (*u*).

Obligation of tenant to pay rent though demised premises accidentally destroyed. Certain cases, of which *Paradine* v. *Jane* (*x*) is the leading
411] one, are often referred to upon this head. The *effect of them is

(*r*) *Taylor* v. *Caldwell* (1863) 3 B. & S. 826, 833, 32 L. J. Q. B. 164, 166. This rule does not extend, however, beyond express contracts. An undertaking to be answerable for delay caused by *vis maior*, or other causes beyond the contractor's control and apart from any default on his part, cannot be made part of an implied contract: *Ford* v. *Cotesworth* (1870) (Ex. Ch.) L. R. 5 Q. B. 544, 39 L. J. Q. B. 188; *Hick* v. *Raymond* [1893] A. C. 22, 62 L. J. Q. B. 98. [Hand *v.* Baynes, 4 Whart. 204, 213.]

(*s*) (1814) 3 M. & S. 267, 15 R. R. 485, cp. *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q. B. Div. 589, 53 L. J. Q. B. 156, where the exportation of the cargo contracted for was forbidden by local law.

(*t*) *Spence* v. *Chodwick* (1847) 10 Q. B. 517, 16 L. J. Q. B. 313.

(*u*) *Cunningham* v. *Dunn* (1878) 3 C. P. Div. 443.

(*x*) (1648) Aleyn 26.

[12] Cp. Schliess *v.* Grand Rapids, 131 Mich. 52; McKnight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72; Dwyer *v.* Mayor, 77 N. Y. App. Div. 224; Filbert *v.* Philadelphia, 181 Pa. 530; Harlow *v.* Homestead, 194 Pa. 57; Bentley *v.* State, 73 Wis. 416.

[13] Ashmore *v.* Cox, [1899] 1 Q. B. 436; Tweedie Trading Co. *v.* James P. Macdonald Co., 114 Fed. Rep. 985; Beebe *v.* Johnson, 19 Wend. 500.

that the accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not determine or suspend the obligation to pay rent (*y*).[14] In these cases, however, the performance of the contract does not really become impossible. There is obviously nothing impossible in the relation of landlord and tenant continuing with its regular incidents. We must be careful not to lose sight of the two distinct characters of a lease as a contract (or assemblage of contracts) and as a conveyance. There is a common misfortune depriving both parties to some extent of the benefit of their respective interests in the property; not of the benefit of the contract, for so far as it is a matter of contract, neither party is in a legal sense disabled from performing any material part of it. The expense of getting housed elsewhere, or the loss of profits from a business carried on upon the premises, may render it difficult or even impracticable for the tenant to go on paying rent. But it does not render the payment of his rent im-

(*y*) *Leeds* v. *Cheetham* (1827) 1 Sim. 146, 27 R. R. 181; *Lofft* v. *Dennis* (1859) 1 E. & E. 474, 28 L. J. Q. B. 168.

[14] Osborn *v.* Nicholson, 13 Wall. 654, 660; Viterbo *v.* Friedlander, 120 U. S. 707; Warren *v.* Wagner, 75 Ala. 188; Cook *v.* Anderson, 85 Ala. 99; Cowell *v.* Lumley, 39 Cal. 151; Robinson *v.* L'Engle, 13 Fla. 482; Coy *v.* Downie, 14 Fla. 544; White *v.* Molyneux, 2 Ga. 124; Leonard *v.* Boynton, 11 Ga. 109; Pope *v.* Garrard, 39 Ga. 471; Fleming *v.* King, 100 Ga. 449; Peck *v.* Ledwidge, 25 Ill. 109; Stubbings *v.* Evanston, 136 Ill. 37; Smith *v.* McLean, 22 Ill. App. 451, 454; Womack *v.* McQuarry, 28 Ind. 103; Skillen *v.* Waterworks Co., 49 Ind. 193, 198; Harris *v.* Heackman, 62 Ia. 411; Redding *v.* Hall, 1 Bibb, 536; Helburn *v.* Mofford, 7 Bush, 169; Lamott *v.* Sterett, 1 Harr. & J. 42; Fowler *v.* Bott, 6 Mass. 63; Kramer *v.* Cook, 7 Gray, 550, 553; Lanpher *v.* Glenn, 37 Minn. 4; Gibson *v.* Perry, 29 Mo. 245; Hallett *v.* Wylie, 3 Johns. 44; Gates *v.* Green, 4 Paige Ch. 355; Patterson *v.* Ackerson, 1 Edw. Ch. 96; Howard *v.* Doolittle, 3 Duer, 464; Graves *v.* Berdan, 26 N. Y. 498, 500; Hilliard *v.* New York, &c. Co., 41 Ohio St. 662; Felix *v.* Griffiths, 56 Ohio St. 39; Harrington *v.* Watson, 11 Oreg. 143; French *v.* Richards, 6 Phila. 547; Diamond *v.* Harris, 33 Tex. 634; Arbenz *v.* Exley, 52 W. Va. 476; Cross *v.* Button, 4 Wis. 468. But otherwise in Nebraska and South Carolina. Wattles *v.* South Omaha Co., 50 Neb. 251; Ripley *v.* Wightman, 4 McC. 447; Coogan *v.* Parker, 2 S. C. 255. And perhaps in Kansas. Whitaker *v.* Hawley, 25 Kan. 674. Also in New York and Kentucky by statute. N. Y. Laws of 1860, chap. 345; Ky. Stats., § 2297. See Suydam *v.* Jackson, 54 N. Y. 450; Butler *v.* Kidder, 87 N. Y. 98; Edwards *v.* McLean, 122 N. Y. 302; Craig *v.* Butler, 83 Hun, 286, 156 N. Y. 672; Werner *v.* Padula, 49 N. Y. App. Div. 135, 167 N. Y. 611; Sun Ins. Office *v.* Varble, 103 Ky. 758.

A lessee who, during the late Civil War, was dispossessed by the military authorities and deprived of the use and control of the demised premises, his lessor having gone within the lines of the enemy, was held to be discharged from liability to the lessor for the rent accruing during the period of such dispossession. Gates *v.* Goodloe, 101 U. S. 612. And see Harrison *v.* Myer, 92 U. S. 111; Coogan *v.* Parker, 2 S. C. 255.

It is held in this country that the lessee of apartments in a building, his lease giving him no interest in the soil upon which the building stands, is released from his covenant to pay rent by the accidental destruction of the

possible in any other sense than it renders the payment of any other debt to any other creditor impossible (*z*). It is a personal and relative "causa difficultatis;" which, as we have seen, is irrevelant in a legal point of view. The lessee's special covenants, if such there be, to paint the walls at stated times or the like, do become impossible of performance by the destruction of their subject-matter, and to that extent, no doubt, are discharged or suspended as being within the rule in *Taylor* v. *Caldwell,* which we shall immediately consider. Only to this limited extent is there any precise resemblance to the wider class of cases where the performance of a contract becomes in fact impossible

A similar question, viz., whether the contract is really unconditional. The true analogy is in the nature of the question which the rule of law has to decide: namely, whether the contract is in substance
412] and effect as *well as in terms unconditional and without any implied exception of inevitable accident. We shall see that this is always the real question. The answer being here determined by *Paradine* v. *Jane* (*a*), it was held in the later cases (*b*) (about which difficulties are sometimes felt, but it is submitted without solid reason) that it is not affected by the landlord having protected himself

(*z*) See per Lord Blackburn, 2 App. Ca. 770.

(*a*) Aleyn 26.

(*b*) *Leeds* v. *Cheetham* (1827) 1 Sim. 146, 27 R. R. 181; *Lofft* v. *Dennis* (1859) 1 E. & E. 474, 28 L. J. Q. B. 168.

edifice. McMillan *v.* Solomon, 42 Ala. 356; Ainsworth *v.* Ritt, 38 Cal. 89; Alexander *v.* Dorsey, 12 Ga. 12; Womack *v.* McQuarry, 28 Ind. 103; Shawmut Bank *v.* Boston, 118 Mass. 125, 128; Graves *v.* Berdan, 29 Barb. 100; 26 N. Y. 498; Hilliard *v.* New York, &c. Co., 41 Ohio St. 662, 666; Harrington *v.* Watson, 11 Oreg. 143, 145; Hahn *v.* Baker Lodge, 21 Oreg. 30, 34; Connecticut Ins. Co. *v.* United States, 21 Ct. Cl. 195, 201. See also Waite *v.* O'Neil, 76 Fed. Rep. 408 (C. C. A.); Buerger *v.* Boyd, 25 Ark. 441; Ainsworth *v.* Mount Moriah Lodge, 172 Mass. 257; Uhler *v.* Cowen, 199 Pa. 316 (with which cp. Foote *v.* Cincinnati, 11 Ohio, 408). Kentucky followed the English law (Helburn *v.* Mofford, 7 Bush, 169), until the rule was changed by statute. Ky. Stat., § 2297; Sun Ins. Office *v.* Varble, 103 Ky. 758.

On the other hand the lessee is not entitled to rebuild a leased room after the building has been destroyed. Hahn *v.* Baker Lodge, 21 Oreg. 30. See also Utah Optical Co. *v.* Keith, 18 Utah, 464.

The special rules for leased apartments are applicable when, and only when, the leased premises are totally destroyed. Humiston *v.* Wheeler, 175 Ill. 514. See also Waite *v.* O'Neil, 76 Fed. Rep. 408 (C. C. A.); Corrigan *v.* City, 144 Ill. 537.

In Whitaker *v.* Hawley, 25 Kan. 674, it was held that where, by a single instrument, real and personal property were leased for a gross rental, the personalty being a substantial part of the leased property, upon a total destruction by accident, the lessee was entitled to an abatement of the rent equal to the proportionate rental value of the personalty. But see Bussman *v.* Ganster, 72 Pa. 285. See further, 9 Harv. L. Rev. 125–130.

by an insurance, which is a purely collateral contract of indemnity.[15] There might indeed be a further collateral agreement between the landlord and tenant that the landlord should apply the insurance moneys to rebuilding the premises. Such an agreement would be good without any new consideration on the tenant's part beyond his acceptance of the lease, and probably without being put into writing (*c*). On the other hand it is often a term of the lease that the tenant shall keep the premises insured and that in case of fire the insurance moneys shall be applied in reinstatement. There, if the landlord has insured separately without the knowledge of the tenant, so that the damage is apportioned between the two policies, and the amount received by the tenant is diminished, the tenant is entitled to the benefit of the other policy also (*d*).

The rule of the civil law is otherwise. The rule or presumption might have been the other way, as it is by the civil law, where it is an incident of the contract to pay rent that it is suspended by inevitable accident destroying or making useless the thing demised. The particular event on which *Paradine* v. *Jane* was decided, eviction by alien enemies (*e*), is expressly dealt *with in this manner. The [413

(*c*) Parol collateral agreements have been held good in *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46; *Angell* v. *Duke* (1875) L. R. 10 Q. B. 174, 44 L. J. Q. B. 78; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A.

(*d*) *Reynard* v. *Arnold* (1875) L. R. 10 Ch. 386.

(*e*) Si incursus hostium fiat, D. 19. 2. locati conducti, 15 § 2; or even reasonable fear of it: Si quis timoris causa emigrasset . . . respondit, si causa fuisset cur periculum timeret, quamvis periculum vere non fuisset, tamen non debere mercedem; sed si causa timoris iusta non fuisset, nihilominus debere, B. *eod. tit.* 27, § 1.

[15] Sheets *v.* Selden, 7 Wall. 416, 424; Skillen *v.* Water Works Co., 49 Ind. 193, 198; Carlson *v.* Presbyterian Board, 67 Minn. 436; Insurance Co. *v.* Hutchinson, 21 N. J. Eq. 107; Kingsbury *v.* Westfall, 61 N. Y. 356; Platt *v.* Railroad Co., 108 N. Y. 358; Magaw *v.* Lambert, 3 Pa. 444; Bussman *v.* Ganster, 72 Pa. 285; Hoy *v.* Holt, 91 Pa. 88, 90. Cp. Williams *v.* Lilley, 67 Conn. 50.

Where the tenant covenants to keep the building in repair, and at the end of the term to deliver it up in as good condition as when he received it, though the landlord protects himself by an insurance, if the building is destroyed by fire, the tenant, having rebuilt in performance of his covenant, has no claim upon the insurance money. Ely *v.* Ely, 80 Ill. 532. But the tenant having repaired, the insurance company can recover from the landlord the insurance which it has paid. Darrell *v.* Tibbitts, 5 Q. B. D. 560; West of England Ins. Co. *v.* Isaacs, [1896] 2 Q. B. 377; [1897] 1 Q. B. 226.

In Whitaker *v.* Hawley, 25 Kan. 674, it was held that a stipulation in the lease that the lessee should insure for the benefit of the lessor "limits and qualifies the promise to pay rent, and that as the former becomes operative the latter ceases to have force."

As to the right to insurance when property is destroyed pending a contract of sale. Ames, Cas. Eq. Jur. 234, n.; 15 Harv. L. Rev. 160.

law of Scotland follows the civil law (*f*),[16] and the Irish Landlord and Tenant Act of 1860 gives the tenant the option of surrendering on a dwelling-house "or other building constituting the substantial matter of the demise" being by fire or other inevitable accident destroyed or made incapable of beneficial occupation (*g*). Either way the rule is subject to any special agreement of the parties; the only question of principle is which, in the absence of such agreement, is the better distribution of the hardship that must to some extent fall upon both. It is hard for a tenant, according to the English rule, to pay an occupation rent for a burnt out plot of ground. It is hard for a landlord, according to the Roman and Scottish rule, to lose the rent as well as (it may be) a material part of the value of the reversion. Either party may be insured; but that, as we have said, is not of itself relevant as between them.

Exceptions in certain cases of susbequent impossibility. So far the general rule. The nature of the exceptions is thus set forth by the judgment of the court in *Baily* v. *De Crespigny*:—

"There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

"But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a com-414] plaint of an alleged breach *of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract" (*h*).

Events not within the contemplation of the contract. This (as well as the following context, which is too long to quote) well shows the modern tendency to reduce all the rules on this subject to rules of construction.[17] By the modern understanding of the law we are

(*f*) Per Lord Campbell, *Lofft* v. *Dennis* (1859) note (*b*) last page; Bell, Principles, § 1208.

(*g*) 23 & 24 Vict. c. 154, s. 40.

(*h*) (1869] L. R. 4 Q. B. at p. 185.

[16] See Viterbo *v.* Friedlander, 120 U. S. 707; Gates *v.* Green, 4 Paige, 355; Coogan *v.* Parker, 2 S. C. 255.

[17] "The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract." Dexter *v.* Norton, 47 N. Y. 62, 64.

"The result must be deemed an unexpressed condition of their agreement." People *v.* Insurance Co., 91 N. Y. 174, 179. See also Moore *v.* Sun Printing

not bound to seek for a general definition of "the act of God" or *vis maior* (*i*), but only to ascertain what kind of events were within the contemplation of the parties, including in the term "event" an existing but unascertained state of facts. This is yet more apparent if one attempts to frame any definition of the term "act of God." It is said to be generally confined to events which cannot be foreseen, or which if they can be foreseen cannot be guarded against (*k*). It does not include every inevitable accident; contrary winds, for example, are not within the meaning of the term in a charter-party. Nor is the reason far to seek; the risk of contrary winds, though inevitable, is one of the ordinary risks which the parties must be understood to have before them and to take upon them in making such a contract: therefore it is said that the event must be not merely accidental, but overwhelming (*l*). But on the other hand the term is not confined to unusual events: death, for example, is an "act of God" as regards contracts of personal service, because in the particular case it is not calculable. Yet the fact that this very event is not only certain to happen, but on a sufficiently large average is calculable, and therefore in one sense can be guarded against, is the foundation of the whole system of life *annuities [415 and life insurance (*m*). Again, death is inevitable sooner or later, but may be largely prevented as to particular causes and occasions. The effects of tempest or of earthquake may be really inevitable by any precaution whatever. But fire is not inevitable in that sense. Precautions may be taken both against its breaking out and for extinguishing it when it does break out. We cannot arrive, then, at any more distinct conception than this: An event which, *as between the parties* and *for the purpose of the matter in hand,* cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract (*n*).[18]

We may now proceed to the specific classes of exceptional cases.

(*i*) Both these terms are classical: "Vis maior, quam Graeci θεοῦ βιαν appellant." Gaius in D. 19. 2. locati 25 § 6. *Vis maior* is sometimes the only appropriate term, as where the idea is applied to acts of a human sovereign power, see *Mittelholzer* v. *Fullarton* (1844) 6 Q. B. 989, 1018.

(*k*) Cave J. in *R.* v. *Commissioners of Sewers for Essex* (1885) 14 Q. B. D. 561, 574.

(*l*) Per Martin B. *Oakley* v. *Portsmouth & Ryde Steam Packet Co.* (1856) 11 Ex. 618. 22 L. J. Ex. 99.

(*m*) As the medieval adage puts it, "Nihil morte certius, nihil incertius hora mortis."

(*n*) As to what is such an "act

Assoc., 101 Fed. Rep. 591, 593; Lorillard *v.* Clyde, 142 N. Y. 456, 462; Dolan *v.* Rodgers, 149 N. Y. 489; Buffalo, &c. Co. *v.* Bellevue, &c. Co., 165 N. Y. 247; Lovering *v.* Buck Mountain Co., 54 Pa. 291; 1 Columbia L. Rev. 529.

[18] See Friend *v.* Woods, 6 Gratt. 189, 195.

a. **Where the performance depends on the existence of a specific thing.** Where the performance of the contract depends on the existence of a specific thing. The law was settled on this head by *Taylor* v. *Caldwell* (*o*), where the defendants agreed to let the plaintiffs have the use (*o*) of the Surrey Gardens and Music-hall on certain days for the purpose of giving entertainments. Before the first of those days the music-hall was destroyed by fire so that the entertainments could not be given, and without the fault of either party. The Court held that the defendants were excused, and laid down the following principle: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that **416]** when entering into the contract they must *have contemplated such continued existence as the foundation of what was to be done; there in the absence of any express or implied (*p*) warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." [19] And the following authorities and analogies were relied upon:—

The civil law, which implies such an exception in all cases of obligation *de certo corpore* (*q*).

of God" as will make an exception to a duty imposed not specially by contract but by the general law, see *Nichols* v. *Marsland* (1876) 2 Ex. Div. 1, 46 L. J. Ex. 174; *Nugent* v. *Smith* (1876) 1 C. P. Div. 423, 444, 45 L. J. C. P. 697; *Commissioners of Sewers* v. *Reg.* (1886) 11 App. Ca. 449.

(*o*) (1863) 3 B. & S. 826, 32 L. J. Q. B. 164. There were words sufficient for an actual demise, but the Court held that the manifest general intention prevailed over them.

(*p*) That is, understood in fact between the parties: the whole scope of the passage being that it is not to be implied by law.

(*q*) D. 45. 1. de v. o. 23, 33. Cp. also D. 46. 3. de solut. 107. Verborum obligatio aut naturaliter resolvitur aut civiliter; naturaliter, veluti solutione, aut cum res in stipulationem deducta sine culpa promissoris in rebus humanis esse desiit. Pothier, Obl. § 149, *ib.* Part 3, ch. 6, § 649, sqq., and *Contrat de Vente*, § 308, sqq. translated in Blackburn on Sale, 173 (249 in 2d ed. by Graham).

[19] See The Tornado, 108 U. S. 342; Arthur *v.* Blackman, 63 Fed. Rep. 536; Fresno Milling Co. *v.* Fresno C. & I. Co., 126 Cal. 64; School District *v.* Dauchy, 25 Conn. 530; Walker *v.* Tucker, 70 Ill. 527; Price *v.* Pepper, 13 Bush, 42; Pinkham *v.* Libbey, 93 Me. 575; Wells *v.* Calnan, 107 Mass. 514; Thomas *v.* Knowles, 128 Mass. 22; Gilbert, &c. Co. *v.* Butler, 146 Mass. 82; Goldman *v.* Rosenberg, 116 N. Y. 78; Stewart *v.* Stone, 127 N. Y. 500; Young *v.* Leary, 135 N. Y. 569; Dolan *v.* Rodgers, 149 N. Y. 489; Lovering *v.* Coal Co., 54 Pa. 291; Huguenin *v.* Courtenay, 21 S. C. 403; McMillan *v.* Fox, 90 Wis. 173. Cp. Board of Education *v.* Townsend, 63 Ohio St. 514.

The cases of rights or duties created by a contract of a strictly personal nature which, though the contract is not expressly qualified, are by English law not transmissible to executors.

The admitted rule of English law that where the property in specific chattels to be delivered at a future day has passed by bargain and sale, and the chattels perish meanwhile without the vendor's default, he is excused from performing his contract to deliver; and the similar rule as to loans of chattels and bailments. In all these cases, though the promise is in words positive, the exception is allowed "because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Appleby v. Myers. The same principle was followed in *Appleby* v. *Myers* (*r*). There the plaintiffs agreed with the defendant to erect an *engine and other machinery on his premises, at certain **[417** prices for the separate parts of the work, no time being fixed for payment. While the works were proceeding, and before any part was complete, the premises, together with the uncompleted works and materials upon them, were accidentally destroyed by fire. In the Common Pleas it was held that the plaintiffs might recover the value of the work already done as on a term to that effect to be implied in the nature of the contract. In the Exchequer Chamber the judgment of the Common Pleas was reversed. It was admitted that the work under the contract could not be done unless the defendant's premises continued in a fit state to receive it. It was also admitted that if the defendant had by his own default rendered the premises unfit to receive the work, the plaintiffs might have recovered the value of the work already done.[20] But it was held that the Court below were wrong in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither."[21] Another

(*r*) (1867) L. R. 2 C. P. 651, in Ex. Ch. revg. s. c. 1 C. P. 615, 36 L. J. C. P. 331, applied in a towage case where it was held that the tug earned nothing when the vessel was accidentally stranded before the end of the journey: *The Madras* [1898] P. 90.

20 See Gilbert Mfg. Co. *v.* Butler, 146 Mass. 82; Sennott *v.* Mallin, 82 Pa. 333.

21 In this country recovery for the work done is generally allowed. Schwartz *v.* Saunders, 46 Ill. 18; Rawson *v.* Clark, 70 Ill. 656; Clark *v.* Busse, 82 Ill. 515; Lord *v.* Wheeler, 1 Gray, 282; Cleary *v.* Sohier, 120 Mass. 210; Butter-

argument for the plaintiffs was that the property in the work done had passed to the defendant and was therefore at his risk (*s*). To this the Court answered that it was at least doubtful whether it had; and even if it had, the contract was still that nothing should be payable unless and until the whole work was completed.

Contract for shipment in named ship. Similarly, a contract for the de-
418] livery of cargo to be *shipped at Alexandria in a named ship during a certain month was held to be discharged by an accident to the ship which stranded her in the Baltic before the time for performance; in other words the contract was conditional on that ship continuing to exist as a cargo-carrying ship available for the performance of the contract (*t*).

Saving as to instalments of payment already earned. Where there is an entire contract for doing work upon specific property, as fitting a steamship with new machinery, for a certain price, but the price is payable by instalments, and the ship is lost before the machinery has been delivered, but after one or more of the instalments has been paid, the further performance of the contract is excused, but the money already paid, though on account not of a part, but of the entire contract, cannot be recovered back (*u*).

(*s*) In the case cited in argument from Dalloz, Jurisp. Gén. 1861, pt. 1. 105, *Chemin de fer du Dauphiné* v. *Clet* (1861) where railway works in course of construction had been spoilt by floods, the Court of Cassation relied on the distinction that they were not such as remained in the contractor's disposition till the whole was finished, but "de constructions dont les matériaux et la main d'œuvre étaient fournis par l'entrepreneur et qui s'incorporaient au sol du propriétaire." as excluding the application of articles 1788–1790 of the Code Civil, which lay down a rule similar to that of the principal case.

(*t*) *Nickoll & Knight* v. *Ashton, Edridge & Co.* [1901] 2 K. B. 126, 70 L. J. K. B. 600, C. A.

(*u*) *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875) L. R. 10 C. P. 271, 44 L. J. C. P. 130. It would seem the same on principle where the whole price is paid in advance. See Vangerow, Pand. 3. 234 sqq.; and the cases on contracts, personal service, and apprenticeship cited farther on. The destruction of a place of business does not discharge a continuing contract to carry on the business if it is capable of being resumed elsewhere: *Turner* v. *Goldsmith* [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, C. A.

field *v.* Byron, 153 Mass. 517; Angus *v.* Scully, 176 Mass. 357; Haynes *v.* Second Baptist Church, 88 Mo. 285 (cp. Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 262); Niblo *v.* Binsse, 1 Keyes, 476; Whelan *v.* Ansonia Clock Co., 97 N. Y. 293; Dolan *v.* Rodgers, 149 N. Y. 489, 494; Hayes *v.* Gross, 9 N. Y. App. Div. 12; affd., without opinion, 162 N. Y. 610; Hollis *v.* Chapman, 36 Tex. 1; Weis *v.* Devlin, 67 Tex. 507; Clark *v.* Franklin, 7 Leigh, 1. See also Bentley *v.* State, 73 Wis. 416 (cp. Vogt *v.* Hecker, 118 Wis. 306).

But see *contra*, Brumby *v.* Smith, 3 Ala. 123; Clark *v.* Collier, 100 Cal. 256; Siegel *v.* Eaton & Prince Co., 165 Ill. 550; Huyett Mfg. Co. *v.* Chicago Edison Co., 167 Ill. 233; Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 272; Murphy *v.* Forget, Rep. Jud. Quebec, 19 C. S. 135.

Contract for future specific product. The same doctrine has been applied where the subject-matter of the contract is a future specific product or some part of it. In March A. agreed to sell and B. to purchase 200 tons of potatoes grown on certain land belonging to A. In August the crop failed by the potato blight, and A. was unable to deliver more than 80 tons: the Court held that he was excused as to the rest. "The contract was for 200 tons of a particular crop in particular fields" . . . "not 200 tons of potatoes simply, but 200 tons off particular land" . . . "and therefore there was an implied term in the contract that each party should be free if the crop perished" (*x*).[22]

Abolition of slave status. The same principle is involved in the decision of the *Supreme Court of the United States that a war- [419 ranty of title and quiet enjoyment given on the sale of a slave before the war was discharged by the Thirteenth Amendment to the Constitution (*y*).

Impossibility at date of contract from state of things not contemplated by parties. These are all cases of the performance becoming impossible by events which happen after the contract is made. But sometimes the same kind of impossibility results from the present existence of a state of things not contemplated by the parties, and the performance is excused to the same extent and for the same reasons as if that state of things had supervened. Where this impossibility consists in the absolute non-existence of the specific property or interest in property which is the subject-matter of the agreement, it is evident that the agreement would not have been made unless the parties had contemplated the subject-matter as existing. Otherwise it would be reduced to a case of absolute impossibility; for when a thing is once known to be in the events which have happened impossible,

(*x*) *Howell* v. *Coupland* (1876) L. R. 9 Q. B. 462, 466, 46 L. J. Q. B. 147, affd. in C. A. 1 Q. B. Div. 258, see per Cleasby B. at p. 263.

(*y*) *Osborn* v. *Nicholson* (1871) 13 Wallace, 654.

22 To the same effect are: Browne *v.* United States, 30 Ct. Cl. 124; Ontario Fruit Assoc. *v.* Cutting Packing Co., 134 Cal. 21; Losecco *v.* Gregory, 108 La. 648. See also Rice *v.* Weber, 48 Ill. App. 573. But where the crop is not required by the contract to be grown on particular land, the contractor is not excused. Anderson *v.* May, 50 Minn. 280; Newell *v.* New Holstein Canning Co., 119 Wis. 635. In Summers *v.* Hibbard, 153 Ill. 102, the defendant was held not excused from liability on a contract to sell goods manufactured at a particular mill by the fact that machinery in the mill broke down, making performance impossible. But where the mill itself was destroyed the contractor was held excused. Stewart *v.* Stone, 127 N. Y. 500. Cp. Jones *v.* United States, 96 U. S. 24; Booth *v.* Spuyten Duyvil Co., 60 N. Y. 487. Also *supra*, p. 528, n. 10.

it is the same as if it had been in its own nature impossible. Here, then, the agreement of the parties is induced by a mistaken assumption on which they both proceed, as in the analogous cases noticed above under the head of impossibility in law. Here, as there, it is a question whether impossibility or mistake, or both, shall be assigned as the ground on which the agreement is void. And here likewise, according to our authorities, mistake seems to be the ground assigned by preference. It is not so much the impossibility of performance that is regarded as the original non-existence of the state of things assumed by the contracting parties as the basis of their contract. The main thing is to ascertain, not whether the agreement can be performed, but what was in the true intention and contemplation of the parties (*z*). If it appears that they conceived and
420] dealt *with something non-existent as existing, the agreement breaks down for want of any real contents. Hence these cases are treated for the most part as belonging to the head of Mistake.

It may be that the peculiar historical conditions of English law count for something in this. Accident, Fraud, and Mistake were the accustomed descriptions of heads of equity under which the Court of Chancery gave relief. The fiction of this relief being something extraordinary, and as it were supra-legal, was kept up in form long after it had ceased to be either true or useful; and the terms Fraud and Mistake were extended far beyond any reasonable meaning in order to support the jurisdiction of the Court in a great variety of cases where the procedure and machinery of the common law Courts were inadequate to do justice. In the cases now before us, however, there is real difficulty in drawing the line: and one or two examples of the class will be given in this place.

Sale of cargo previously lost. In the leading case of *Couturier* v. *Hastie* (*a*), decided by the House of Lords in 1856, a bought note had been signed for a cargo of Indian corn described as "of fair average quality when shipped from Salonica." Several days before the sale, but unknown to the parties, the cargo, then on the voyage, was found to be so much damaged from heating that the vessel put

(*z*) See especially *Couturier* v. *Hastie* (1856) 5 H. L. C. 673, 25 L. J. Ex. 253. Savigny (Syst. 3. 303) is decidedly against error being considered the ground of nullity in these cases: but chiefly because, as he holds, the knowledge or other state of mind of the parties makes no difference. It is at least doubtful, as we shall have opportunities of seeing, whether this position be true in English law.

(*a*) (1856) 5 H. L. C. 673.

into Tunis, where the cargo was sold. The only question seriously disputed was what the parties really meant to deal with, a cargo supposed to exist as such, or a mere expectation of the arrival of a cargo, subject to whatever might have happened since it was shipped. Lord Cranworth in the House of Lords, in accordance with the opinion of nearly all the judges, held *that "what the parties contem- [421 plated, those who sold and those who bought, was that there was an existing something to be sold and bought." No such thing existing, there was no contract which could be enforced.

Covenants to work mines, or to raise minimum amount. When a lessee under a mining lease covenants in unqualified terms to pay a fixed minimum rent, he is bound to pay it (*b*),[23] though the mine may turn out to be not worth working or even unworkable. But it is otherwise with a covenant to work the mine[24] or to raise a minimum amount.[25] Where a coal mine was found to be so interrupted by faults as to be not worth working, it was said that the lessor might be restrained from suing on the covenant to work it on the terms of the lessee paying royalty on the estimated quantity of coal which remained unworked (*c*).

Clifford v. Watts. A similar question was fully dealt with in *Clifford* v. *Watts* (*d*). The demise was of all the mines, veins, etc., of clay on certain land. There was no covenant by the lessee to pay any minimum rent, but there was a covenant to dig in every year of the term

(*b*) *Marquis of Bute* v. *Thompson* (1844) 13 M. & W. 487, 17 L. J. Ex. 95. So in equity, *Ridgway* v. *Sneyd* (1854) Kay, 627.

(*c*) *Ridgway* v. *Sneyd*, last note.

(*d*) (1870) L. R. 5 C. P. 577, 40 L. J. C. P. 36.

[23] Lehigh Zinc Co. *v.* Bamford, 150 U. S. 665; McDowell *v.* Hendrix, 67 Ind. 513; Valley City Milling Co. *v.* Prange, 123 Mich. 211; Wharton *v.* Stoutenburgh, 46 N. J. L. 151; Timlin *v.* Brown, 158 Pa. 606. Cp. Monnett *v.* Potts, 10 Ind. App. 191; Blake *v.* Lobb's Estate, 110 Mich. 608; Brick Co. *v.* Pond, 38 Ohio St. 65.

In the case last cited A., by an agreement in writing, "leased" to B., "all the clay that is good No. 1 fire clay, on his land" described, for a term of three years subject to the conditions that B. "shall mine, or cause to be mined, or pay for, not less than 2,000 tons of clay every year, and shall pay therefor twenty-five cents per ton for every ton of clay monthly, as it is taken away," it was held that if clay of the quality mentioned, and in quantity sufficient to justify its mining, could not, by the use of due diligence, be found on the land, then there was no obligation to pay the amount agreed on, in case of failure to mine. See also Muhlenberg *v.* Henning, 116 Pa. 138; Boyer *v.* Fulmer, 176 Pa. 282.

[24] Cook *v.* Andrews, 36 Ohio St. 174. See also Buchanan *v.* Layne, 95 Mo. App. 148.

[25] Ridgely *v.* Conswago Iron Co., 53 Fed. Rep. 988; Gribben *v.* Atkinson, 64 Mich. 651; Muhlenberg *v.* Henning, 116 Pa. 138; Boyer *v.* Fulmer, 176 Pa. 282. See also Bannan *v.* Graeff, 186 Pa. 648.

not less than 1000 tons nor more than 2000 tons of pipe or potter's clay. An action was brought by the lessor for breach of this covenant. Plea (*e*), to the effect that there was not at the time of the demise or since so much as 1000 tons of such clay under the lands, that the performance of the covenant had always been impossible, and that at the date of the demise the defendant did not know and had no reasonable means of knowing the impossibility. The Court held that upon the natural construction of the deed the contract was that the lessee should work out whatever clay there might be under the land, and the covenant sued on was only a subsidiary provision fixing the rate at which it should be worked. The tenant could not be presumed to
422] warrant that clay should *be found: and "the result of a decision in favour of the plaintiff would be to give him a fixed minimum rent when he had not covenanted for it" (*f*).

Analogous effect of express exceptions in commercial contracts. In certain kinds of contracts, notably charter-parties, it is usual to provide by express exceptions for the kind of events we have been considering. It is not within our province to enter upon the questions of construction which arise in this manner, and which form important special topics of commercial law. However, when the exception of a certain class of risks is once established, either as being implied by law from the nature of the transaction, or by the special agreement of the parties, the treatment is much the same in principle: and a few recent decisions may be mentioned as throwing light on the general law. Where the principal part of the contract becomes impossible of performance by an excepted risk, the parties are also discharged from performing any other part which remains possible, but is useless without that which has become impossible (*g*).[26] It is a general prin-

(*e*) It was pleaded as an equitable plea under the C. L. P. Act, but the Court treated the defence as a legal one.

(*f*) Per Montague Smith J. at p. 587. Cp. and dist. *Jervis* v. *Tomkinson* (1856) 1 H. & N. 195, 26 L. J. Ex. 41, where the covenant was not only to get 2,000 tons of rock salt per annum, but to pay 6d. a ton for every ton short, and the lessees knew of the state of the mine when they executed the lease. As to the relation of *Clifford* v. *Watts* to *Hills* v. *Sughrue* (pp. *399, *400, *408, above), it is perhaps enough to say that the Court of Common Pleas as constituted in 1870 would scarcely have arrived, on the facts of *Hills* v. *Sughrue*, at the same result as the Court of Exchequer in 1847: but there is no actual conflict, as the question in every case is of the true intention of the contract taken as a whole, and the contracts in these cases are of quite different kinds.

(*g*) *Geipel* v. *Smith* (1872) L. R. 7 Q. B. 404, 411, 41 L. J. Q. B. 153.

26 Where the defendants contracted with the proprietors of a theatre to furnish the "Wachtel Opera Troupe" to give a certain number of performances, Wachtel being the leader and chief attraction of the company, and his connec-

ciple that a contract is not to be treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed (*h*):[27] but on the other hand special exceptions are not to be laid hold of to keep it in force contrary to the real intention. Thus where the contract is to be performed "with all possible despatch," saving certain impediments, the party for whose benefit the saving is introduced cannot force the other to accept *performance after a delay unreasonable in itself, though due to [423 an excepted cause, if the manifest general intention of the parties is that the contract shall be performed within a reasonable time, if at all. The saving clause will protect him from liability to an action for the delay, but that is all: the other party cannot treat the contract as broken for the purpose of recovering damages, but he is not prevented from treating it as dissolved (*i*).

Where performance depends on life or health of a person. Where the contract is for personal services of which the performance depends on the life or health of the party promising them. "All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death" (*k*).[28] Conversely, if the master dies during the service, the servant is thereby discharged, and cannot treat the contract as in force against the master's personal representatives (*l*).[29] The passage

(*h*) *The Teutonia* (1872) L. R. 4 P. C. 171, 182, 41 L. J. Ad. 57. Cp. *Jones* v. *Holm* (1867) L. R. 2 Ex. 335.

(*i*) *Jackson* v. *Union Marine Insurance Co.* (1874) in Ex. Ch. L. R. 10 C. P. 125, 144 *sqq.*, 44 L. J. C. P. 27.

(*k*) Pollock C.B. in *Hall* v. *Wright* (1858) E. B. & E. at p. 793, 29 L. J. Q. B. at p. 51.

(*l*) *Farrow* v. *Wilson* (1869) L. R. 4 C. P. 744, 38 L. J. C. P. 326.

iton with it the inducement to plaintiffs to enter into the contract, it was held "that the presence of Wachtel was the principal thing contracted for, and was of the essence of the contract; that plaintiffs would not have been bound to accept the services of the troupe without him," and that the illness of Wachtel having incapacitated him to perform constituted a valid excuse for defendant's failure to furnish the troupe. Spalding *v.* Rosa, 71 N. Y. 40.

[27] White *v.* Mann, 26 Me. 361; Williams *v.* Vanderbilt, 28 N. Y. 217.

[28] Marvel *v.* Phillips, 162 Mass. 399; Siler *v.* Gray, 86 N. C. 566; Dickinson *v.* Calahan, 19 Pa. 227. Nor can the executor insist that the other party shall accept performance by himself in place of the decedent. Schultz *v.* Johnson's Adm'r, 5 B. Mon. 497; Blakely *v.* Sousa, 197 Pa. 305. See also Baxter *v.* Billings, 83 Fed. Rep. 790.

[29] Harris *v.* Johnson, 98 Ga. 434; Weedon *v.* Waterhouse, 10 Hawaii, 696; Lacy *v.* Getman, 119 N. Y. 109; Yerrington *v.* Greene, 7 R. I. 589. Cp. Volk *v.* Stowell, 98 Wis. 385.

The death of one member of a partnership is generally held to dissolve a

now cited goes on to suggest the extension of this principle to the case of the party becoming, without his own default, incapable of fulfilling the contract in his lifetime: "A contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." This view, which obviously commends itself in point of reason and convenience, is strongly confirmed by *Taylor* v. *Caldwell* (*supra*, p. *415), where indeed it was recog-
424] nized *as correct, and it has since been established by direct decisions.

Boast v. Firth. In *Boast* v. *Firth* (*m*) a master sued the father of his apprentice on his covenant in the apprenticeship deed that the apprentice should serve him, the plaintiff, during all the term. The defence was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The Court held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance" (*n*), and that the defence was a good one.

Robinson v. Davison. In *Robinson* v. *Davison* (*o*) the defendant's wife, an eminent pianoforte player, was engaged to play at a concert. When the time came she was disabled by illness. The giver of the entertainment sued for the loss he had incurred by putting off the concert, and had a verdict for a small sum under a direction to the

(*m*) (1868) L. R. 4 C. P. 1, 38 L. J. C. P. 1.

(*n*) Per Montague Smith J. at p. 7.

(*o*) (1871) L. R. 6 Ex. 269, 40 L. J. Ex. 172.

contract of employment made with the firm. Tasker *v.* Shepherd, 6 H. & N. 575; Cowasjee Manabhoy *v.* Lallbhoy Vullubhoy, 3 Ind. App. 200; Brace *v.* Calder, [1895] 2 Q. B. 253; Hoey *v.* McEwan, 5 Sess. Cas. (3d Ser.), 814; Griggs *v.* Swift, 82 Ga. 392; Greenburg *v.* Early, 30 Abb. N. C. 300, 303. But see Phillips *v.* Alhambra Palace Co., [1901] 1 Q. B. 59; Hughes *v.* Gross, 166 Mass. 61; Nickerson *v.* Russell, 172 Mass. 584; Fereira *v.* Sayers, 5 W. & S. 210.

The Louisiana Civil Code, art. 2007, provides that "all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be performed by any other as by the obligor, unless there is some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee." See Tete *v.* Lanaux, 45 La. Ann. 1343.

effect that the performer's illness was an excuse, but that she was bound to give the plaintiff notice of it within a reasonable time. The sum recovered represented the excess of the plaintiff's expenses about giving notice of the postponement to the public and to persons who had taken tickets beyond what he would have had to pay if notice had been sent him by telegraph instead of by letter. The Court of Exchequer upheld the direction on the main point. The reason was thus shortly put by Bramwell B. "This is a contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased: and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance" (*p*).[30]

The contract becomes void, not only voidable at option of party disabled. The same judge also observed, in effect, that *the contract be- [425 comes not voidable at the option of the party disabled from performance, but wholly void. Here the player could not have insisted "on performing her engagement, however ineffectually that might have been," when she was really unfit to perform it. The other party's right to rescind has since been established by a direct decision (*q*).[31]

Notice should be given to the other party. No positive opinion was expressed on the other point as to the duty of giving notice. But it may be taken as correct that it is the duty of the party disabled to give the earliest notice that is reasonably practicable. Probably notice reasonable in itself could not be required, for the disabling accident may be sudden and at the last moment, and the duty must be limited to cases where notice can be of some use (*r*).[32] It further appears from the case that the effect of an omission of this duty is that the contract remains in force for the purpose only of recovering such damage as is directly referable to the omission. The decision also

(*p*) (1871) L. R. 6 Ex. at p. 277.

(*q*) *Poussard* v. *Spiers & Pond* (1876) 1 Q. B. D. 410, 45 L. J. Q. B. 621.

(*r*) Cp. the doctrine as to giving notice of abandonment to underwriters, *Rankin* v. *Potter* (1872–3) L. R. 6 H. L. 83, 121, 157, 42 L. J. C. P. 169.

30 Dickey *v.* Linscott, 20 Me. 453; Spalding *v.* Rosa, 71 N. Y. 40; Fenton *v.* Clark, 11 Vt. 557, 563; Green *v.* Gilbert, 21 Wis. 395.

But if his probable physical incapacity could be foreseen by a contractor such incapacity is no excuse. Jennings *v.* Lyons, 39 Wis. 553.

31 Leopold *v.* Salkey, 89 Ill. 412; Johnson *v.* Walker, 155 Mass. 253; Powell *v.* Newell, 59 Minn. 406; Raley *v.* Victor Co., 86 Minn. 438.

32 Where a contract of service is terminable on giving a certain number of days notice, if the servant becomes incapacitated to perform by *vi majore*, the necessity of notice is dispensed with. Fuller *v.* Brown, 11 Met. 440; Hughes *v.* Wamsutta Mills, 11 Allen, 201.

shows, if express authority be required for it, that it matters not whether the disability be permanent or temporary, but only whether it is such as to prevent the fulfilment of the particular contract. In the event of the disabled party having suffered from the breach of contract or negligence of a third person, and being entitled to a remedy against that person, a question of subrogation might possibly arise, but this does not appear to have been judicially considered.

Hall v. Wright: anomalous decision on the contract to marry. In the earlier and very peculiar case of *Hall* v. *Wright* (*s*) the question, after some critical discussion of the pleadings, which it is needless to follow, came to this: "Is it a term in an ordinary agreement to marry, that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the **426]** time *appointed, he shall be excused marrying then?" (*t*) or in other words: "Is the continuance of health, that is, of such a state of health as makes it not improper to marry," an implied condition of the contract? (*u*). The Court of Exchequer Chamber decided by four to three that it is not, the Court of Queen's Bench having been equally divided. The majority of the judges relied upon two reasons: that if the man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but at most highly imprudent; and that at any rate the contract could be so far performed as to give the woman the status and social position of a wife. It was not disputed that the contract was voidable at her option. "The man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract" (*x*). As to the first of these reasons, the question is not whether there is or not an absolute impossibility, but what is the true meaning of the contract; and in this case the contract is of such a kind that one might expect the conditions and exceptions implied in strictly personal contracts to be extended rather than excluded (*y*).

(*s*) (1858) E. B. & E. 746, 29 L. J. Q. B. 43.

(*t*) Per Bramwell B. 29 L. J. Q. B. 45.

(*u*) Per Pollock C.B. *ib.* 52.

(*x*) The case is thus explained and distinguished by Montague Smith J. in *Boast* v. *Firth* (1868) L. R. 4 C. P. 8.

(*y*) It has long been settled that the contract to marry is so far personal that executors, in the absence of special damage to the personal estate, cannot sue upon it: *Chamberlain* v. *Williamson* (1814) 2 M. & S. 408, 15 R. R. 295. [Hovey *v.* Page, 55 Me. 142; Flint *v.* Gilpin, 29 W. Va. 740.] And it is now decided

As to the second reason, it cannot be maintained, except against the common understanding of mankind and the general treatment of marriage by English law, that the acquisition of legal or social position by marriage is a principal or *independent object of the [427 contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipel* v. *Smith* (*z*), that when the main part of a contract has become impossible of performance by an excepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal; but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which for the obvious reasons indicated in some of the judgments is not at all likely to recur (*a*).[33]

Limitation of the rule to contracts for actual personal services. The rule now before us applies only to contracts for actual personal services. A contract of which the performance depends less directly on the promisor's health is not presumed to be conditional. If a man covenants to insure his life within a certain time, he is not discharged by his health becoming so bad before the end of that time as to make his life uninsurable (*b*). It has never been supposed that the current contracts of a manufacturing firm are affected in law by the managing partner being too ill to attend to business, though there are many kinds of business in which the proper execution of an order may depend on the supervision of a particular person. And in general

that they cannot, except perhaps for special temporal damage, be sued: *Finlay* v. *Chirney* (1888) 20 Q. B. Div. 494, 57 L. J. Q. B. 247. [Webber *v.* St. Paul Ry. Co. 97 Fed. Rep. 140, 145; Stebbins *v.* Palmer, 1 Pick. 71; Smith *v.* Sherman, 4 Cush. 408; Chase *v.* Fitz, 132 Mass. 359; Wade *v.* Kalbfleisch, 58 N. Y. 282; Lattimore *v.* Simmons, 13 S. & R. 183; Weeks *v.* Mays, 87 Tenn. 442; Grubb's Admr. *v.* Sult, 32 Gratt. 203.]

(*z*) (1872) L. R. 7 Q. B. 404, 41 L. J. Q. B. 153.

(*a*) See Wharton on Contracts, § 324, and *Allen* v. *Baker* (1882) 86 N. C. 91, there cited, where the Supreme Court of North Carolina expressly declined to follow *Hall* v. *Wright*.

(*b*) *Arthur* v. *Wynne* (1880) 14 Ch. D. 603, 49 L. J. Ch. 557.

33 In an action by a woman for breach of promise to marry, it is a defense either that the woman has physical defects making marriage improper which, if existing, were unknown to the defendant at the time the engagement was made (Goddard *v.* Westcott, 82 Mich. 180; Gring *v.* Lerch, 112 Pa. 244), or that the defendant himself has such defects. Vierling *v.* Bender, 113 Ia. 337, 340; Shackleford *v.* Hamilton, 93 Ky. 80; Gardner *v.* Arnett, (Ky.) 50 S. W. Rep. 840; Trammell *v.* Vaughan, 158 Mo. 214; Allen *v.* Baker, 86 N. C. 91; Sanders *v.* Coleman, 97 Va. 690.

If the incapacity is but temporary the defendant is entitled to postpone, but not to repudiate totally, the marriage. Trammell *v.* Vaughan, 158 Mo. 214.

terms it may be said that no contract which may be performed by an agent can be discharged by a cause of this kind, unless the parties have expressly so agreed.[34]

Rights already acquired under the contract remain. As we saw in the case of contracts falling directly within the rule in *Taylor* v. *Caldwell*, so in the case of contracts for personal services the dissolution of the contract by subsequent impossibility does not affect any specific right
428] already acquired under it. Where there is *an entire contract of this kind for work to be paid for by instalments at certain times, any instalments which have become due in the contractor's lifetime remain due to his estate after the contract is put an end to by his death (*c*).[35] In like manner where a premium has been paid for apprenticeship, and the master duly instructs the apprentice for a part of the term and then dies, his executors are not bound to return the premium or any part of it as on a failure of consideration (*d*).

(*c*) *Stubbs* v. *Holywell Ry. Co.* (1867) L. R. 2 Ex. 311, 36 L. J. Ex. 166.

(*d*) *Whincup* v. *Hughes* (1871) L. R. 6 C. P. 78, 40 L. J. C. P. 104, dissenting from the view of the common law on which the decision in *Hirst* v. *Tolson* (1850) 2 Mac. & G. 134, 19 L. J. Ch. 441, purported to be founded. *Hirst* v. *Tolson* does not, of course, establish any rule of equity.

[34] The enforced dissolution of a corporation has been treated as analogous to the death of a natural person and, therefore, as affording a defense to the obligation of a contract for personal services. Malcolmson *v.* Wappoo Mills, 88 Fed. Rep. 680; People *v.* Globe Ins. Co., 91 N. Y. 174; Lenoir *v.* Linville Improvement Co., 126 N. C. 922. But if, as is generally the case, such dissolution is due to the impaired financial condition of the corporation or to improper management of the corporate affairs, it would seem that the dissolution should be no excuse, and such is the law in New Jersey. Spader *v.* Mural Decoration Co., 47 N. J. Eq. 18; Bolles *v.* Crescent Drug & Chemical Co., 53 N. J. Eq. 614; Rosenbaum *v.* United States Credit Co., 61 N. J. L. 543.

If a corporation voluntarily winds up business it is liable for failing to fulfill its contracts. *Re* London, &c. Co., L. R. 7 Eq. 550; Yelland's Case, L. R. 4 Eq. 350; *Re* Dale, 43 Ch. D. 255; Lovell *v.* St. Louis Ins. Co., 111 U. S. 264; Kalkhoff *v.* Nelson, 60 Minn. 284; Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157; Seipel *v.* Insurance Co., 84 Pa. 47; Potts *v.* Rose Valley Mills, 167 Pa. 310. See also *Ex parte* Maclure, L. R. 5 Ch. 737; Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139.

[35] In this country it is generally held that where one engaged under an entire contract for personal services, after part performance, is by sickness disabled from fully performing, or dies, an action lies in his favor, or his administrator's as the case may be, to recover on account of the work actually performed, but as to the measure of the recovery the cases are not harmonious. Coe *v.* Smith, 4 Ind. 79; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Wolfe *v.* Howes, 20 N. Y. 197; Clark *v.* Gilbert, 26 N. Y. 279; Parker *v.* Macomber, 17 R. I. 674; Fenton *v.* Clark, 11 Vt. 557; Hubbard *v.* Belden, 27 Vt. 645; Patrick *v.* Putnam, 27 Vt. 759. See also Ryan *v.* Dayton, 25 Conn. 188; Green *v.* Gilbert, 21 Wis. 395, and 48 Cent. L. J. 250. As to sickness, which it was held plaintiff should have foreseen, and which, therefore, did not excuse non-performance see Jennings *v.* Lyons, 39 Wis. 553.

Justifiable fear of sickness was held to have similar effect in entitling a workman to recover for services performed, though he had only partially ful-

Substituted contract becoming impossible of performance. Where an existing contract is varied or superseded by a subsequent agreement, and the performance of that agreement becomes impossible (*e.g.*, by the death of a person according to whose estimate a sum is to be assessed) so that the parties are no longer bound by it, they will be remitted to the original contract if their intention can thereby be substantially carried out. At all events a party for whose benefit the contract was varied, and who but for his own delay might have performed it as varied before it became impossible, cannot afterwards resist the enforcement of the contract in its original form (*e*).

3. Impossibility by default of either party. We now come to the case of a contract becoming impossible of performance by the default of either party.

Default of promisor is breach of contract. Where the promisor disables himself by his own default from performing his promise, not only is he not excused (for which indeed authority would be superfluous) but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it (*f*).[36]

*** Default of promisee discharges promisor, and may be treated as breach.** On the other hand, where the promisor is prevented from performing his contract or any part of it by the default or refusal of the promisee, the performance is to that extent excused;[37] and moreover [429

(*e*) *Firth* v. *Midland Ry. Co.* (1875) L. R. 20 Eq. 100, 44 L. J. Ch. 313.

(*f*) 1 Ro. Ab. 448, B., citing 21 E. IV. 54, pl. 26: "If you are bound to enfeoff me of the manor of D. before such a feast, and you make a feoffment of that manor to another before the feast, you have forfeited the bond notwithstanding that you have the land back before the feast, having once disabled yourself from making the said feoffment," per Choke J.

filled his contract. Lakeman *v.* Pollard, 43 Me. 463. So fear of violence from strikers. Walsh *v.* Fisher, 102 Wis. 172.

[36] See this question treated more at length, chap. VI.

[37] United States *v.* Peck, 102 U. S. 64; Clearwater *v.* Meredith, 1 Wall. 25, 39; King, &c. Co. *v.* St. Louis, 43 Fed. Rep. 768; Hood *v.* Hampton, &c. Co., 106 Fed. Rep. 408, 413; Railway Co. *v.* Danforth, 112 Ala. 80; McKee *v.* Miller, 4 Blackf. 222; Schulte *v.* Hennessy, 40 Ia. 352; Marshall *v.* Craig, 1 Bibb, 379. 386; Parker Vein Coal Co. *v.* O'Hern, 8 Md. 197: Fredenburg *v.* Turner, 37 Mich. 402; Hammer *v.* Breidenbach, 31 Mo. 49; Wilt *v.* Ogden, 13 Johns. 56; Stewart *v.* Keteltas, 36 N. Y. 388; Gallagher *v.* Nichols, 60 N. Y. 438; Dannat *v.* Fuller, 120 N. Y. 554; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435; Ashcraft *v.* Allen, 4 Ired. L. 96; Sutton *v.* Tyrrell, 12 Vt. 79.

One who prevents the performance of a condition, or makes it impossible by his own act, cannot take advantage of the non-performance. Ruble *v.*

default or refusal is a cause of action on which the promisor may recover any loss he has incurred thereby (*g*),[38] or he may rescind the contract and recover back any money he has already paid under it (*h*).[39] Default may consist either in active interruption or interference on the part of the promisee (*i*), or in the mere omission of something without which the promisor cannot perform his part of the contract (*k*).[40]

(*g*) As in the familiar case of an action for non-acceptance of goods, for not furnishing a cargo, &c.; so with a special contract, *e.g.*, *Roberts* v. *Bury Commissioners* (1869) L. R. 4 C. P. 755, in Ex. Ch. 5 C. P. 310, 39 L. J. C. P. 129.

(*h*) *Giles* v. *Edwards* (1797) 7 T. R. 181, 4 R. R. 414.

(*i*) 1 Ro. Ab. 453, N.

(*k*) Where a condition can be performed only in the obligee's presence, his absence is an excuse, 1 Ro. Ab. 457, U. A covenant to make within a year such assurance as the covenantee's counsel shall devise is discharged if the covenantee does not tender an assurance within the year, *ib.* 446, pl. 12.

Massey, 2 Ind. 636; Leonard *v.* Smith, 80 Ia. 194; Jones *v.* Walker, 13 B. Mon. 163; Holt *v.* Silver, 169 Mass. 435; Navigation Co. *v.* Wilcox, 7 Jones L. 481; Bright *v.* Taylor, 4 Sneed, 159; Camp *v.* Barker, 21 Vt. 469; Jones *v.* Railroad Co., 14 W. Va. 514.

[38] United States *v.* Peck, 102 U. S. 64; Lovell *v.* Insurance Co., 111 U. S. 264; Anvil Mining Co. *v.* Humble, 153 U. S. 540, 552; Kingman *v.* Western Mfg. Co., 92 Fed. Rep. 486; O'Connell *v.* Hotel Co., 90 Cal. 515; Hawley *v.* Smith, 45 Ind. 183, 202; Black *v.* Woodrow, 39 Md. 194; North *v.* Mallory, 94 Md. 305; Thompson *v.* Gaffey, 52 Neb. 317; Smith *v.* Railroad Co., 36 N. H. 458, 493; Nichols *v.* Scranton Steel Co., 137 N. Y. 471; Kugler *v.* Wiseman, 20 Ohio St. 361; Curtis *v.* Smith, 48 Vt. 116.

[39] United States *v.* Behan, 110 U. S. 338; Seipel *v.* Insurance Co., 84 Pa. 47. He may rescind the contract and recover the value of what he has done for defendant's benefit in performance of it. Chicago *v.* Tilley, 103 U. S. 146; Wells *v.* National Life Assoc., 99 Fed. Rep. 222; Joyce *v.* White, 95 Cal. 236; Adams *v.* Burbank, 103 Cal. 646; Connelly *v.* Devoe, 37 Conn. 570; Lake Shore Ry. Co. *v.* Richards, 152 Ill. 59; Western Union Co. *v.* Semmes, 73 Md. 9; North *v.* Mallory, 94 Md. 305; Moulton *v.* Trask, 9 Met. 577; Canada *v.* Canada, 6 Cush. 15; Thompson *v.* Gaffey, 52 Neb. 317; Wright *v.* Reusens, 133 N. Y. 298; Greene *v.* Haley, 5 R. I. 260; Blood *v.* Enos, 12 Vt. 625; Derby *v.* Johnson, 21 Vt. 17. Where a person on a contract of sale covenants to pay a sum whose amount is to be contingent on certain events, and is to be ascertained by arbitrators to be selected by the parties respectively to the contract, such person, if he prevent any arbitration, may be sued on a *quantum valebat*. Hunnaston *v.* Telegraph Co., 20 Wall. 20. See further, chap. VI.

[40] Williams *v.* Bank, 2 Pet. 96, 102; Eastern Granite Co. *v.* Heim, 89 Ia. 698; Majors *v.* Hickman, 2 Bibb, 217; Gilbert Mfg. Co. *v.* Butler, 146 Mass. 82, 84; Howard *v.* American Mfg. Co., 162 N. Y. 347. Where the defendant agreed to allow the plaintiff to dig sand on the former's land at places to be designated by the defendant: Held, that a refusal to designate a place was a breach of the contract. Warner *v.* Wilson, 4 Cal. 310; Hurd *v.* Gill, 45 N. Y 341. Where the giving of directions by defendant as to how certain rails which plaintiff was to deliver to him should be drilled, was to be performed by him before plaintiff could proceed with a proper execution of the contract, the refusal of defendant to give such directions was held to be of itself a breach of the contract. Pittsburgh B. S. Rail Co. *v.* Hinckley, 17 Fed. Rep. 584; affirmed, 121 U. S. 264. And see Aller *v.* Pennell, 51 Ia. 537; Butler *v.* Butler, 77 N. Y. 472.

Roberts v. Bury Commissioners, &c. The principle, in itself well settled, is illustrated by several modern cases. Where the failure of a building contractor to complete the works by the day specified is caused by the failure of the other parties and their architect to supply plans and set out the lands necessary to enable him to commence the works, "the rule of law applies which exonerates one of the two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party" (*l*), and the other party cannot take advantage of a provision in the contract making it determinable at their option in the event of the contractor failing in the due performance of any part of his undertaking (*l*).[41] So where it is a term of the contract that the contractor shall pay penalties for any delay in the *fulfilment of it, no penalty becomes due in respect [430 of any delay caused by the refusal or interference of the other party (*m*).[42] Where a machine is ordered for doing certain work on the buyer's land, on the terms that it is to be accepted only if it answers a certain test; there, if the buyer fails to provide a fit place and occasion for trying the machine, and so deals with it as to prevent a fair test from being applied according to the contract, he is bound to accept and pay for the machine (*n*).

Cases of apprenticeship. In *Raymond* v. *Minton* (*o*) it was pleaded to an action of covenant against a master for not teaching his apprentice that at the time of the alleged breach the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him. This was held a good plea, for "it is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught."[43] An earlier and converse case is *Ellen* v.

(*l*) *Roberts* v. *Bury Commissioners* (1869) L. R. 5 C. P. 310, 329.

(*m*) *Holme* v. *Guppy* (1838) 3 M. & W. 387, 49 R. R. 647; *Russell* v. *Da Bandeira* (1862) 13 C. B. N. S. 149, 32 L. J. C. P. 68.

(*n*) *Mackay* v. *Dick* (1881) in H. L. (Sc.) 6 App. Ca. 251.

(*o*) (1866) L. R. 1 Ex. 244, 35 L. J. Ex. 153. So if a pawnbroker's apprentice is a habitual thief: *Learoyd* v. *Brook* [1891] 1 Q. B. 431, 60 L. J. Q. B. 373.

41 See Van Buren *v.* Digges, 11 How. 461; McAndrews *v.* Tippett, 39 N. J. L. 105; Weeks *v.* Little, 89 N. Y. 566; Mansfield *v.* New York Central R. Co., 102 N. Y. 205, 114 N. Y. 331.

42 Dodd *v.* Churton, [1897] 1 Q. B. 562; Weeks *v.* Little, 89 N. Y. 566.

43 Where A. promised B. to pay him two hundred dollars annually for C.'s support and maintenance, and B. promised to support and maintain C., but C. refused to be supported by B., it was held that no action would lie in favor of B. against A. for failure to pay. Cornell *v.* Cornell, 96 N. Y. 108. See also

Topp (*p*), referred to by the reporters. There a master undertook to teach an apprentice several trades; it was held that on his giving up one of them, and thus making the complete performance of his own part of the contract impossible, the apprentice was no longer bound to serve him in any. "If the master is not ready to teach in the very trade which he has stipulated [promised] to teach, the apprentice is not bound to serve." A case of the same sort is put by Choke J. in the Year Book, 22 Ed. IV., 26, in a case from which one passage has already been given.

"If I am bound to Catesby [then another judge of the Common Pleas] that my son shall serve him for seven years, and I come with my son to Catesby, and offer my son to him, and he will not take him, there because there 431] is no default on my part I shall not forfeit the bond. In like *manner if he took my son and afterwards within the term sent him away, it is unreasonable that this should be a forfeiture."

Alternative contract — Where one thing impossible, the possible one must be performed. Where a contract is in the alternative to do one of two things at the promisor's option, and one of them is impossible, the promisor is bound to perform that which is possible (*q*).[44] We find the rule clearly stated in the Digest (*r*). Where one of two things contracted for in the alternative subsequently becomes impossible, it is a question of construction for which no positive rule can be laid down, whether according to the true intention of the parties the promisor must perform the alternative which remains possible, or is altogether discharged (*s*). It was held, indeed, in *Laughter's case* (*t*), that where the condition of a bond is for either of two things to be

(*p*) (1851) 6 Ex. 424, 442, 20 L. J. Ex. 241.

(*q*) *Da Costa* v. *Davis* (1778) 1 B. & P. 242, 4 R. R. 795.

(*r*) Si ita stipulatus fuero: *te sisti; nisi steteris, hippocentaurum dari?* proinde erit atque te sisti solummodo stipulatus essem. D. 45. 1. de v. o. 97 pr.

(*s*) *Barkworth* v. *Young* (1856) 4 Drew. 1. 25, 26 L. J. Ch. 153.

(*t*) 5 Co. Rep. 21 *b*.

Jones *v.* Comer, 25 Ky. L. Rep. 773, 1104. Cp. Clancy *v.* Flusky, 187 Ill. 605; also compare decisions in which a school teacher was held to be entitled to recover the stipulated pay though the school was necessarily closed on account of contagious disease. Gear *v.* Gray, 10 Ind. App. 428; Dewey *v.* Union School Dist., 43 Mich. 480. The decisions of Stewart *v.* Loring, 5 Allen, 306; School District *v.* Howard, 98 N. W. Rep. 666 (Neb.), seem opposed in principle and are sounder decisions. But if a teacher is required to remain in readiness to teach whenever the school shall be reopened clearly the salary must be paid. Libby *v.* Douglas, 175 Mass. 128. So, if the schoolhouse is burned, for other accommodations may be found. Charlestown *v.* Hay, 74 Ind. 127: Smith *v.* Pleasant Plains School District, 69 Mich. 589; Cashen *v.* Berlin School Dist., 50 Vt. 30.

[44] Drake *v.* White, 117 Mass. 10; State *v.* Worthington, 7 Ohio, pt. 1, 171; Board of Education *v.* Townsend, 63 Ohio St. 514.

done by the obligor, and one of them becomes impossible by the act of God, he is not bound to perform the other.[45] But this is to be accounted for by the peculiar treatment of bonds, of which we shall speak presently, the right of election being part of the benefit of the condition, of which the obligor is not to be deprived. And even as to bonds the general proposition has been denied (*s*). In the absence of anything to show the intention in the particular case, the presumption should surely be the other way, namely, that the promisor should lose his election rather than the promisee lose the whole benefit of the contract.[46] Where either the promisor or the promisee, having the right under a contract to choose which of two things shall be done, chooses one which becomes impossible after the choice is determined, there (on authority as well as principle) it is the same as if there had been from the first a single unconditional contract to do that thing (*u*). In *Roman law the presumption seems distinctly in favour of [432 the promisor remaining bound to do what is possible (*x*); otherwise it agrees with ours (*y*).

Effects of default. The exception as to *mora* in the extract given in the note shows the application here of the general rule as to impossibility caused by acts of the parties. The case put is that the creditor has made his election (to have Stichus, suppose) but has neglected or refused to accept Stichus: now if Stichus dies he cannot demand Pamphilus. It is the same as if there had been a single promise, and the performance made impossible by the promisee's default. The same rule is given in another passage (*z*).

(*s*) *Barkworth* v. *Young* (1856) 4 Drew. 1, 25, 26 L. J. Ch. 153.

(*u*) *Brown* v. *Royal Insurance Co.* (1859) p. *408, above.

(*x*) Save that in the case of an alternative obligation to deliver specific objects at the promisor's election he still has an election *in solutione*, as it is said, *i.e.* he may at his option pay the value of that which has perished. See Vangerow, Pand. § 569, note 2 (3. 22 *sqq.*), where the subject is fully worked out.

(*y*) Papinian says: *Stichum aut Pamphilum, utrum ego velim, dare spondes?* altero mortuo, qui vivit solus petetur, nisi si mora facta sit in eo mortuo, quem petitor elegit; tunc enim perinde solus ille qui decessit praebetur ac si solus in obligationem deductus fuisset. Quod si promissoris fuerit electio, defuncto altero (*i.e.* before election made), qui superest aeque peti potest. D. 46. 3. de solut. et. lib. 95 pr. He proceeds to this curious question: What if one dies by the debtor's default before election made, and afterwards the other dies without his default? No action can be maintained on the stipulation, but there is a remedy by *doli actio*.

(*z*) Stipulatus sum Damam aut Erotem servum dari, cum Damam dares, ego quominus acciperem in

45 State *v.* Worthington, 7 Ohio, pt. 1, 171, 172.

46 Jacquinet *v.* Boutron, 19 La. Ann. 30; Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 443.

Conditional contracts. There is yet something to be said of the treatment of conditional contracts where the condition is or becomes impossible. A condition may be defined for the present purpose as an agreement or term of an agreement whereby the existence of a contract is made to depend on a future contingent event assigned by the will of the parties (*a*).

433] The condition may be either that an event shall or that *it shall not happen, and is called positive or negative accordingly. Now the event which is the subject-matter of the condition, instead of being really contingent, may be necessary or impossible, in itself or in law. But the negation of a necessary event is impossible and the negation of an impossible event is necessary. It therefore depends further on the positive or negative character of the contingency whether the condition itself is necessary or impossible.

In what ways condition may be necessary or impossible. Thus we may have conditional promises with conditions of these kinds:

Necessary:

(α) By affirmation of a necessity. As a promise to pay 100*l.*, "if the sun shall rise to-morrow."

(β) By negation of an impossibility: "If J. S. does not climb to the moon," or "if my executor does not sue for my debt to him."

Impossible:

(γ) By affirmation of an impossibility: "If J. S. shall climb to the moon," or "if J. S. shall create a new manor."

(δ) By negation of a necessity: "If the sun shall not rise to-morrow," or "if my personal estate shall not be liable to pay my debts" (*b*).

It is obvious that as a matter of logical construction the forms (α) and (β) are equivalent to unconditional promises, (γ) and (δ) to impossible or nugatory promises. And so we find it dealt with by the Roman law (*c*). It is equally obvious that (still as a matter

mora fui; mortuus est Dama; an putes me ex stipulatu actionem habere? Respondit, secundum Massurii Sabini opinionem puto te ex stipulatu agere non posse; nam is recte existimabat, si per debitorem mora non esset, quominus id quod debebat solveret, continuo eum debito liberari. D. 45. 1. de v. o. 105.

(*a*) Savigny, Syst. § 116 (3. 121); Pothier, Obl. § 199.

(*b*) Slightly modified from Savigny, Syst. § 121 (3. 156, 158).

(*c*) "Si impossibilis condicio obligationibus adiciatur, nihil valet stipulatio. Impossibilis autem condicio habetur, cui natura impedimento est quo minus existat, veluti si quis ita dixerit: Si digit caelum attigero, dare spondes? At si ita stipuletur: Si digito caelum non attigero, dare spondes? pure facta obligatio intellegitur ideoque statim petere potest." I. 3. 19. de inut. stipul. § 11.

of logical construction) there is nothing to prevent the condition from having its regular effect if the event is or becomes impossible in fact. For example, "if A. shall dig 1000 tons of clay on B.'s land *in every year for the next seven years:" here there may [434 not be so much clay to be dug or A. may die in the first year. But a promise so conditioned is perfectly consistent and intelligible without importing any further qualification into it; and it is obviously more difficult to infer that some further qualification was intended than in the case of a direct and unconditional contract by A. himself to dig so much clay.

Direct covenants or promises dependent on express conditions must be construed with reference to these general principles: beyond this no rule can be given except that effect is to be given so far as possible to the real meaning of the parties (*d*).

Treatment of conditions in English law. Practically the discussion in our books of conditions and their effect on the legal transactions into which they enter is limited to the following sorts of questions:

1. What contracts are really conditional, or in technical language, what amounts to a condition precedent (*d*):

2. The effect of conditions and conditional limitations in conveyances at common law and under the Statute of Uses (which topics are obviously beyond our present scope):

3. The effect of conditions in bonds. This form of contract is now used only for certain special purposes, but was formerly of general application, insomuch that almost all the older learning on the construction and performance of contracts is to be found under the head of conditions. Here there are some peculiarities which call for our attention in this place.

Bonds — Difference between the technical form and the real meaning of the instrument. So far as the form goes, a bond is a contract dependent on a negative condition. In the first instance the obligor professes to be bound to the obligee in a sum of a certain amount. Then follows the condition, showing that if a certain event happens (generally something to be done by the obligor) the bond shall be void, but otherwise it shall *remain in force. "The condition is subsequent to [435 the legal obligation; if the condition be not fulfilled the obligation remains" (*e*). This is in terms a promise, stated in a singularly in-

(*d*) *Supra*, Ch. VI., p. 260.

(*e*) Sir W. W. Follett, *arg. Bes-wick* v. *Swindells* (1835) 3 A. & E. 873, 53 R. R. 200.

volved way, to pay a sum of money if the event mentioned in the condition does not happen. But this, as everybody knows, is not the true nature of the contract. The object is to secure the performance of the condition, and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum. This view is fully recognized by the modern statutes regulating actions on bonds, by which the penalty is treated as a mere security for the performance of the contract or the payment of damages in default (*f*). On principle, therefore, a bond with an impossible condition, or a condition which becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible. In the former case the bond should be void, in the latter the rule in *Taylor* v. *Caldwell* (*g*) would determine whether it were avoided or not. We have seen that where the condition is *illegal* our Courts have found no difficulty in considering the bond as what in truth it is: an agreement to do the illegal act. But in the case of impossibility the law has stuck at the merely formal view of a bond as a contract to pay the penal sum, subject to be avoided by the performance of the condition; accordingly if the condition is impossible either in itself or in law the obligation remains absolute.

"If a man be bound in an obligation, &c., with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible and the **436]** obligation standeth *good." So, again, if the condition is against a maxim or rule in law, as "if a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good" (*h*).

In the same way, "when the condition of an obligation is so insensible and incertain that the meaning cannot be known, there the condition only is void and the obligation good" (*i*).[47]

Subsequent impossibility is a discharge. On the point of subsequent impossibility, however, the strictly formal view is abandoned, and an

(*f*) As to these, see *Preston* v. *Dania* (1872) L. R. 8 Ex. 19, 42 L. J. Ex. 33.

(*g*) (1863) 3 B. & S. 826, *supra*, p. *415.

(*h*) Co. Lit. 206 *b* (some of the &c.'s in Coke's text are omitted). To the same effect Shepp. Touchst. 372. As to going to Rome the more usual phrase in the old books is three days; which is now inapplicable, the course of post from London to Rome being less than forty-eight hours.

(*i*) Shepp. Touchst. 373.

47 See further, p. 356.

opposite result arrived at, but still in an artificial way. The condition, it is said, is for the benefit of the obligor, and the performance thereof shall save the bond; therefore he shall not lose the benefit of it by the act of God (*k*), and where the condition is possible at the date of the instrument, "and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved" (*l*);[48] or as another book has it, "the obligation and the condition both are become void" (*m*). "Generally if a condition that was possible when made is become impossible by the act of God, the obligation is discharged" (*n*). As to the acts of the law and of the obligee this agrees with the doctrine of contracts in general: as to inevitable accident it establishes a different rule. The decision in *Laughter's case* (*supra,* **p.** *431), was an application of the same view, and it therefore appears that there should never have been any question of extending it to direct covenants or contracts.

The peculiar law thus laid down is distinctly recognized *by [**437** modern authorities (*o*). However, if a bond appears on the face of it to be given to secure the performance of an agreement which it recites, the condition will take effect according to the true intention

(*k*) This reasoning appears both in *Laughter's case*, 5 Co. Rep. 21 *b*, and *Lamb's case, ib.* 23 *b*.

(*l*) Co. Lit. 206 *a*.

(*m*) Sbepp. Touehst. 372.

(*n*) Ro. Ab. I. 449, G, pl. 1; repeated on p. 451, I, pl. 1.

(*o*) 1 Wms. Saund. 238; per Williams J. *Brown* v. *Mayor of London* (1861) 9 C. B. N. S. 726, 747, 30 L. J. C. P. 225, 230.

[48] Taylor *v.* Taintor, 16 Wall. 366, 369; Belding *v.* State, 25 Ark. 315; Marshall *v.* Craig, 1 Bibb, 386, 390; Hopkins *v.* Commonwealth, Ct. App. Ky. 18 C. L. J. 77; Badlam *v.* Tucker, 1 Pick. 284; Brown *v.* Dillehanty, 4 S. & M. 713; Blake *v.* Niles, 13 N. H. 459; Whitney *v.* Spencer, 4 Cow. 39; People *v.* Bartlett, 3 Hill, 570; People *v.* Manning, 8 Cow. 297; People *v.* Tubbs, 37 N. Y. 586; Scully *v.* Kirkpatrick, 79 Pa. 324, 331. When a person arrested in one State on a criminal charge and released under his own and his bail's recognizance that he will appear on a day fixed, and abide the order and judgment of the court, on process from which he has been arrested, goes into another State, and while there is, on the requisition of the Governor of a third state, for a crime committed in it, delivered up, and is convicted and imprisoned in such third State, the condition of the recognizance has not become impossible by act of law so as to discharge the bail; "the law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities." Taylor *v.* Taintor, 16 Wall. 366; S. C., 36 Conn. 242. And see United States *v.* Van Fossen, 1 Dill. 406; Cain *v.* State, 55 Ala. 170; Withrow *v.* Commonwealth, 1 Bush, 17; State *v.* Horn, 70 Mo. 466; Devine *v.* State, 5 Sneed, 623. Arrest and detention of the principal by Federal authority precluding his appearance will discharge the bail. Belding *v.* State, 25 Ark. 315; Commonwealth *v.* Terry, 2 Duv. 383; Commonwealth *v.* Webster, 1 Bush, 616; Commonwealth *v.* Overby, 80 Ky. 208. Cp. *In re* James C. C. U. S. W. D. Mo., 18 Fed. Rep. 853; Shook *v.* People, 39 Ill. 443. Subse-

of the agreement rather than the technical construction resulting from the form of the instrument (*p*).

Alternative conditions, and default of parties; same law as for ordinary contracts. Alternative conditions, at any rate as to immediate impossibility, and conditions made impossible by the default of the parties, or otherwise than by the "act of God," are treated in the same way as direct promises.[49]

"When a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond" (*q*).[50]

"When the condition of an obligation is to do two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of making of the obligation one of the things is and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor or a stranger, the obligor must see that he do the other thing at his peril." "If the condition be that A. shall marry B. by a day, and before the day the obligor himself doth marry her: in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged" (*r*).

"If a man is bound to me in 20*l.* on condition that he pay me 10*l.*, in that case if he tender me the money and I refuse he is altogether excused from the obligation, because the default is on my part who am the obligee" (*s*).

Indian Contract Act. The Indian Contract Act, s. 56, is so worded as to extend the rule in *Taylor* v. *Caldwell* to every kind of contract.

(*p*) *Beswick* v. *Swindells* (1835) Ex. Ch. 3 A. & E. 868, 53 R. R. 196.

(*q*) Per Cur. *Beswick* v. *Swindells*, 3 A. & E. at p. 883, 53 R. R. 207.

(*r*) Shepp. Touchst. 382, 392.

(*s*) Brian C.J. 22 Ed. IV. 26.

quent arrest and detention under the law of the same State, or delivery of the principal by the Governor of the same State on requisition of the Governor of another state is such an act of the law as discharges the bail from liability. Smith *v.* Kitchens, 51 Ga. 158; Medlin *v.* Commonwealth, 11 Bush, 605; Way *v.* Wright, 5 Met. 380; Fuller *v.* Davis, 1 Gray, 612; State *v.* Allen, 2 Humph. 258; State *v.* Adams, 3 Head, 259; Peacock *v.* State, 44 Tex. 11; Caldwell's Case, 14 Gratt. 698; People *v.* Bartlett, 3 Hill, 570. Cp. Ingram *v.* State, 27 Ala. 17; Mix *v.* People, 26 Ill. 32; Wheeler *v.* State, 38 Tex. 173. See further as to excuses for non-performance of a bail bond, 99 Am. Dec. 216, n.

49 "The rule of law is that where the condition of a bond is to do one of two things, if one cannot be performed, unless it has become impossible by the act of the obligee, the obligor is bound to perform the other." Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 443.

50 When a bond is executed with a condition that it shall become absolute in case certain services are performed by the obligee within a specified time, the refusal of the obligor to accept performance will have the effect of actual performance, so far as to give the obligee a right of action upon the bond. Boardman *v.* Keeler, 21 Vt. 77; Tasker *v.* Bartlett, 5 Cush. 359.

This is a wide and (it must be assumed) a deliberate departure from the common law.[51]

[51] There are a few cases in the United States which seem to involve a similar extension of the law by applying the rule of Taylor *v.* Caldwell to the contemplated means of performance, whatever their nature.

"There are many cases holding that the continued existence of the means of performance, or of the subject-matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception, and, as said in Dexter *v.* Norton, 47 N. Y. 62, it operates 'to carry out the intention of the parties under most circumstances, and is more just than the contrary rule.'" Dolan *v.* Rodgers 149 N. Y. 489, 493. See also Clarksville Land Co. *v.* Harriman, 44 Atl. Rep. 527 (N. H.); Herter *v.* Mullen, 159 N. Y. 28. Cp. Ashmore *v.* Cox, [1899] 1 Q. B. 436; Robson *v.* Mississippi Logging Co., 61 Fed. Rep. 893; Keystone Lumber, &c. Co. *v.* Dole, 43 Mich. 370; Shear *v.* Wright, 60 Mich. 159; Eppens *v.* Littlejohn, 164 N. Y. 187; Ellis *v.* Midland Ry. Co., 7 Ont. App. 464.

438] *CHAPTER IX.

MISTAKE.

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PART I. OF MISTAKE IN GENERAL.

Conditions affecting reality or freedom of consent. Hitherto we have been dealing with perfectly general conditions for the formation or subsistence of a valid contract, and as a consequence of this the rules of law we have had occasion to explain are for the most part collateral or even paramount to the actual intention or belief of the parties. Apparent exceptions occur, but mostly in cases where the rules are found to be reducible to rules of construction. We have had before us, on the whole, the purely objective conditions of contract; the questions which must be answered before the law can so much as think of giving effect to the consent of the parties. We now come to a set of conditions which by comparison with the foregoing ones may be called subjective. The consent of the parties is now the central point of the inquiry, and our task is to examine how the legal validity of an agreement is affected when the consent or apparent consent is determined by certain causes.

The existence of consent is ascertained in the first instance by the rules and principles set forth in the first chapter. When the requirements there stated are satisfied by a proposal duly accepted, there is on the face of things a good agreement, and the mutual communications of the parties are taken as the expression of a valid consent. But we still require other conditions in order to make the

consent binding on him who gives it, although their absence is in
439] general not to be assumed, and the party seeking to *enforce a contract is not expected to give affirmative proof that they have been satisfied. Not only must there be consent, but the consent must be true, full, and free.

The reality and completeness of consent may be affected (*a*) by ignorance, that is, by wrong belief or mere absence of information or belief as to some fact material to the agreement. Freedom of consent may be affected by fear or by the consenting party being, though not in bodily or immediate fear, yet so much under the other's power, or in dependence on him, as not to be in a position to exercise his own deliberate choice. Now the results are different according as these states of mind are or are not due to the conduct of the other party (or, in certain cases, to a relation between the parties independent of the particular occasion). When they are so, the legal aspect of the case is altogether changed, and we look to that other party's conduct or position rather than to the state of mind induced by it. We speak not of Mistake induced by Fraud, but of Fraud simply, as a ground for avoiding contracts, though there can be no Fraud where there is no Mistake.

Classification and legal consequences of Mistake, Fraud, &c. We have then the following combinations:

A.	*Ignorance.*	
A.	Not caused by act (*b*) of other party, is referred in law to the head of	*Mistake.*
	Caused by act (*b*) of other party	
B.	without wrongful intention.	*Misrepresentation.*
C.	with wrongful intention.	*Fraud.*
B.	*Fear, or dependence excluding freedom of action.*	
	Not caused by acts of other party or relation between the parties.	(Immaterial.)
D.	Caused by such acts.	*Duress or Coercion.*
E.	By such relation.	*Undue influence.*

440] *The legal consequences of these states of things are exceedingly various.

(*a*) It is quite wrong, as Savigny has shown, to say that a consent determined by mistake, fraud, or coercion is *no* consent. Syst. §§ 114, 115 (3. 98 *sqq.*). If it were so the agreement would be absolutely void in all cases: a *reductio ad absurdum* which is no less complete for English than for Roman law. See per Lord Cranworth, *Boyse* v. *Rossborough* (1856–7) 6 H. L. C. at p. 44, and per Lord Chelmsford, *Oakes* v. *Turquand* (1867) L. R. 2 H. L. at p. 349.

(*b*) It will be seen hereafter that omissions are equivalent to acts for this purpose in certain exceptional cases.

A. Mistake does not *of itself* affect the validity of contracts at all (*c*). But mistake may be such as to prevent any real agreement from being formed; in which case the agreement is void: or mistake may occur in the expression of a real agreement; in which case, subject to rules of evidence, the mistake can be rectified.[1] There are also rules in the construction of certain species of contracts which are founded on the assumption that the expressions used do not correspond to the real intention (*d*).

B. Contracts induced by misrepresentation are not void. In many cases, and under conditions depending on the nature of the contract, they are voidable at the option of the party misled.

C. Contracts induced by fraud are not void, but voidable at the option of the party deceived.

D, E. Contracts entered into under coercion or undue influence are not void, but voidable at the option of the party on whom coercion or undue influence is exercised.

It is now seldom, if ever, necessary or useful to consider the former differences between the doctrines of the common law and those of equity.

These topics have now to be considered in order. And first of Mistake.

The whole topic was formerly surrounded with a great deal of confusion in our books, though on the whole of a verbal kind, and more embarrassing to students than to practitioners. Exactly the same kind of confusion prevailed in the civil law (whence indeed some of it passed on to our own) until Savigny cleared it up in the masterly essay which forms the Appendix to the third volume of his System. The principles there established by him have been fully adopted by later writers (*e*), and appear to be in the main applicable to the law of England.

*The difficulties which have arisen as well with us as in the civil law [441 may be accounted for under the following heads:

(1.) Confusion of proximate with remote causes of legal consequences: in other words, of cases where mistake has legal results of its own with cases where it determines the presence of some other condition from which legal results follow, or the absence of some other condition from which legal results would follow, or even where it is absolutely irrelevant.

(2.) The assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of

(*c*) Just as fear, merely as a state of mind in the party, is in itself immaterial. As Fear is to Coercion, so is Mistake to Fraud. Sav. Syst. 3. 116.

(*d*) P. *257, above.

(*e*) Some of his conjectural dealings with specific anomalies in the Roman texts are at least daring, but this does not concern English students. Vangerow gives the general doctrine (Pand. § 83, 1. 116 *sqq.*) and its special application to contract (*ib.* § 604, 3. 275) in a compact and useful form. For the old difficulties, cp. Grotius De Iure B. et P. 1. ii. c. 11, 6. "De pacto errantis perplexa satis tractatio est."

[1] This is quoted with approval in Curtis *v.* Albee, 167 N. Y. 360, 365.

cases. Such are the maxim *Non videntur qui errant consentire* and other similar expressions, and to some extent the distinction between ignorance of fact and of law (*f*).

(3.) Omission to assign an exact meaning to the term "ignorance of law" in those cases where the distinction between ignorance of law and ignorance of fact is material (the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury (*g*), being that "ignorance of law" means only ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument).

It is needless to point out in detail how these influences have operated on our books and even on judicial expressions of the law. We rather proceed to deal with the matter affirmatively on that which appears to us its true footing.

A. *Mistake in general.*

General rule: Mistake as such inoperative. The general rule of private law is that mistake *as such* has no legal effects at all. This may be more definitely expressed as follows:

When an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act either as regards any right of other persons or any liability of the person doing it, nor does it produce any special consequences of its own;

442] ***Except where knowledge is a condition precedent of legal consequences.** Unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it.

Special exceptions to the rule exist, but even these are founded on special reasons beside, though connected with, the mistake itself.

There are abundant examples to show the truth of this proposition in both its branches.

As to the position of the person acting under mistake. First, mistake is in general inoperative as to the legal position or liability of the party doing an act. We must premise that a large class of cases is altogether outside this question, as appears by the qualification with which the rule has just been stated; those, namely, where a liability attaches not to the doing of an act in itself, but to the doing of it *knowingly*. There, if the act is done without knowledge, the offence or wrong is not committed, and no liability arises. It is not that

(*f*) See Savigny's Appendix, Nos. VII., VIII. Syst. 3. 342, 344.

(*g*) *Cooper* v. *Phibbs* (1867) L. R. 2 H. L. at p. 170: to which the dicta in the later case of *Earl Beauchamp* v. *Winn* (1873) L. R. 6 H. L. 223, really add little or nothing.

ignorance is an excuse for the wrongful act, but that there is no wrongful act at all (*h*).

Wrongful acts: ignorance in general no excuse. It is certain that ignorance is as a rule no excuse as regards either the liabilities of a quasi-criminal kind which arise under penal statutes (*i*) or such as are purely civil. Thus ignorance of the real ownership of property is no defence to an action for its recovery, except for carriers and a few other classes of persons exercising public employments of a like nature, who by the necessity of the case *are specially privi- [443 leged (*k*).[2] Again, railway companies and other employers have in many cases been held liable for acts of their servants done as in the exercise of their regular employment, and without any lawful intention, but in truth unlawful by reason of a mistake on the part of the servant: the act being one which, if the state of circumstances supposed by him did exist, would be within the scope of his lawful authority (*l*).[3] Of course the servant himself is equally liable. Here, indeed, it looks at first sight as if the mistake gave rise to the employer's liability. For the act, if done with knowledge of the facts, and so merely wrongful in intention as well as in effect, would no more charge the employer than if done by a stranger. But it is not that mistake has any special effect, but that knowledge, where it exists, takes the thing done out of the class of authorized acts.

(*h*) The wider question how far and under what conditions ignorance of fact excludes criminal liability is beyond the scope of this work, and too important to be discussed incidentally. See thereon Stephen's Digest of Criminal Law, Art. 34, *Reg.* v. *Prince* (1875) L. R. 2 C. C. R. 154. 44 L. J. M. C. 122; and consult O. W. Holmes, The Common Law, p. 49 *sqq.*

(*i*) That ignorance cannot be pleaded in discharge of statutory penalties, see *Carter* v. *McLaren* (1871) L. R. 2 Sc. & D. 125–6.

(*k*) *Fowler* v. *Hollins* (1872) Ex. Ch., L. R. 7 Q. B. 616, affd. in H. L. *nom. Hollins* v. *Fowler* (1874–5) L. R. 7 H. L. 757.

(*l*) *See Pollock on Torts*, 6th ed. 87—90. The latest reported decision of this class is *Hanson* v. *Waller* [1901] 1 K. B. 390, 70 L. J. K. B. 231.

2 Barker *v.* Furlong, [1891] 2 Ch. 172; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495; Moore *v.* Hill, 38 Fed. Rep. 330; Rogers *v.* Huie, 1 Cal. 429; Swim *v.* Wilson, 90 Cal. 126; Rogers *v.* Skipworth, 23 Ind. 311; Fort *v.* Wells, 14 Ind. App. 531; Coles *v.* Clark, 3 Cush. 399; Robinson *v.* Bird, 158 Mass. 357; Koch *v.* Branch, 44 Mo. 542; Kramer *v.* Faulkner, 9 Mo. App. 34; Bercich *v.* Marye, 9 Nev. 312; Williams *v.* Merle, 11 Wend. 80; Hoffman *v.* Carow, 22 Wend. 285; Pease *v.* Smith, 61 N. Y. 477; Courtis *v.* Cane, 32 Vt. 232. Cp. Abernathy *v.* Wheeler, 92 Ky. 320; Frizzell *v.* Rundle, 88 Tenn. 396.

3 See Hershey *v.* O'Neill, 36 Fed. Rep. 168; Blumenthal *v.* Shaw, 77 Fed. Rep. 954, 956; Little Rock, etc., Co. *v.* Walker, 65 Ark. 144; Higgins *v.* Railway Co., 98 Ga. 751; Laird *v.* Farwell, 60 Kan. 512; Barabasz *v.* Kabat, 86 Md. 23; President *v.* Green, 86 Md. 161; Driscoll *v.* Carlin, 50 N. J. L. 28; Staples *v.* Schmid, 18 R. I. 224; Railway Co. *v.* Conder, 23 Tex. Civ. App. 488.

The servant who commits a wilful and gratuitous wrong, or goes out of his way to do something which if the facts were as he thought might be lawful or even laudable, but which he has no charge to do, is no longer about his master's business.

Exceptions in judicial process, but limited. Real exceptions are the following:—An officer of a court who has quasi-judicial duties to perform, such as those of a trustee in bankruptcy, is not personally answerable for money paid by him under an excusable misapprehension of the law (*m*). Also an officer who in a merely ministerial capacity executes a process apparently regular, and in some cases a person who pays money under compulsion of such process, not knowing the want of jurisdiction, is protected, as it is but reasonable that he should be (*n*).[4] But this special exception is confined within
444] *narrow bounds. Mistake as to extraneous facts, such as the legal character of persons or the ownership of goods, is no excuse. It is "a well-established rule of law that if by process the sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them" (*o*).[5] A sheriff seized under a *fi. fa.* goods supposed to belong to the debtor by marital right. Afterwards the supposed wife discovered that when she went through the ceremony of marriage the man had another wife living: consequently she was still the sole owner of the goods when they were seized. Thereupon she brought trover against the sheriff, and he was held liable, though possibly the plaintiff might have been estopped if she had asserted at the time that she was the wife of the person against whom the writ issued (*p*). The powers of a Superior Court, under express rules or otherwise, to correct slips in its own proceedings, is on a different footing: but it is not exercised indiscriminately (*q*).

Ignorance in certain cases condition of acquiring rights: (purchase for value without notice). There are certain classes of cases in which it may be said that mistake, or at any rate ignorance, is the condition of ac-

(*m*) *Ex parte Ogle* (1873) L. R. 8 Ch. 711, 42 L. J. Bk. 99.

(*n*) See *Mayor of London* v. *Cox* (1866) L. R. 2 H. L. at p. 269, 36 L. J. Ex. 225.

(*o*) Lord Tenterden C.J. *Glasspoole* v. *Young* (1829) 9 B. & C. 696, 700, 33 R. R. 294, 297; cp. *Garland* v. *Carlisle* (1837) 4 Cl. & F. 693.

(*p*) *Glasspoole* v. *Young* (1829) 9 B. & C. 696, 701, 33 R. R. 294, 298.

(*q*) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673, 65 L. J. Ch. 432.

[4] That payment by a garnishee of a judgment against him void for want of jurisdiction is no protection against an action for the same debt by the attachment defendant, see Harmon *v.* Birchard, 8 Blackf. 418; Richardson *v.* Hickman, 22 Ind. 244; Robertson *v.* Roberts, 1 A. K. Marsh. 247; Loring *v.* Folger, 7 Gray, 505; Stimpson *v.* Malden, 109 Mass. 313; Laidlaw *v.* Morrow, 44 Mich. 547; Ford *v.* Hurd, 4 S. & M. 683.

[5] Pike *v.* Colvin, 67 Ill. 227; Burgin *v.* Burgin, 1 Ired. L. 160, 453.

quiring legal or equitable rights. These are the exceptional cases in which an apparent owner having a defective title, or even no title, can give to a purchaser a better right than he has himself, and which fall partly under the rules of law touching market overt and the transfer of negotiable instruments, partly under the rule of equity that the purchase for valuable consideration without notice of any legal estate, right, or advantage is "an absolute, unqualified, unanswerable defence" (*r*) against any claim to restrict the exercise or enjoyment of the legal rights so acquired (*s*). *These rules [445 depend on special reasons. The two former introduce a positive exception to the ordinary principles of legal ownership, for the protection of purchasers and the convenience of trade.[6] It is natural and necessary that such anomalous privileges should be conferred only on purchasers in good faith. Now good faith on the purchaser's part presupposes ignorance of the facts which negative the vendor's apparent title. It may be doubted on principle, indeed, whether this ignorance should not be free from negligence (in other words, accompanied with "good faith" in the sense of the Indian Codes), in order to entitle him. For some time this was so held in the case of negotiable instruments, but is so no longer (*t*). The rule of equity, though in some sort analogous to this, is not precisely so. A. transfers legal ownership to B., a purchaser for value, by an act effectual for that purpose. If in A.'s hands the legal ownership is fettered by an equitable obligation restraining him wholly or partially from the beneficial enjoyment of it, this alone will not impose any restriction upon B. For all equitable rights and duties are, in their origin and proper nature, not *in rem* but *in personam:* they confer *obligationes* not *dominia.* But if B. (by himself or his agent) knows

(*r*) *Pilcher* v. *Rawlins* (1872) L. R. 7 Ch. 259, 269, 41 L. J. Ch. 485, per James L.J.; *Blackwood* v. *London Chartered Bank of Australia* (1874) L. R. 5 P. C. 92, 111, 43 L. J. P. C. 25.

(*s*) This applies not only to purely equitable claims but to all purely equitable remedies incident to legal rights. But it does not apply to those remedies for the enforcement of legal rights which in a few cases have been administered by courts of equity concurrently with courts of law. Per Lord Westbury, *Phillips* v. *Phillips* (1861) 4 D. F. & J. 208, 31 L. J. Ch. 321.

(*t*) See Chap. V., p. *229, above.

6 "We are not aware that this Saxon institution of market overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction." Ventress *v.* Smith, 10 Pet. 161, 176; Fawcett *v.* Osborn, 32 Ill. 411; Browning *v.* Magill, 2 H. & J. 308; Coombs *v.* Gorden, 59 Me. 111; Dame *v.* Baldwin, 8 Mass. 518; Bryant *v.* Whitcher, 52 N. H. 158; Wheelwright *v.* Depeyster, 1 Johns. 471; 2 Kent, 324; Mowrey *v.* Walsh, 8 Cow. 238; Hoffman *v.* Carow, 20 Wend. 21; 22 Wend. 285, 294; Roland *v.* Gundy, 5 Ohio, 202; Easton *v.* Worthington, 5 S. & R. 130; Griffith *v.* Fowler, 18 Vt. 390.

of the equitable liability, or if the circumstances are such that with reasonable diligence he would know it, then he makes himself, actively by knowledge, or passively, by negligent ignorance, a party to A.'s breach of duty. In such case he cannot rely on the legal right derived from A., and disclaim the equitable liability which he knew or ought to have known to attach to it: and the equitable claim is no less enforceable against him than it formerly was against A. To be accurate, therefore, we should say not that an exception against
446] equitable *claims is introduced in favour of innocent purchasers, but that the scope of equitable claims is extended against purchasers who are not innocent; not that ignorance is a condition of acquiring rights, but that knowledge (or means of knowledge treated as equivalent to actual knowledge) is a condition of being laden with duties which, as the language of equity has it, affect the conscience of the party (*u*).[7]

Limits of these exceptional rights. Even here the force and generality of the main rule is shown by the limits set to the exceptions. The purchaser of any legal right for value and without notice is to that extent absolutely protected. But the purchaser of an equitable interest, or of a supposed legal right which turns out to be only equitable, must yield to all prior equitable rights (*x*),[8] however blameless

(*u*) Observe that on the point of negligence the rule of equity differs from the rules of law: though, as the subject-matter of the rules is different, there is no actual conflict.

(*x*) *Phillips* v. *Phillips* (1861) 4 D. F. & J. 208, 31 L. J. Ch. 321. A court of equity would not deprive a purchaser for value without notice of anything he had actually got, *e.g.* possession of title deeds: *Heath* v. *Crealock* (1874) L. R. 10 Ch. 22, 44 L. J. Ch. 157; *Waldy* v. *Gray* (1875) L. R. 20 Eq. 238, 44 L. J. Ch. 394; but now that the Court can administer both legal and equitable remedies in every case this rule has lost its practical importance: *Cooper* v. *Vesey* (1882) 20 Ch. Div. 611, 632, 51 L. J. Ch. 862.

[7] See an article on Purchase for Value, by Professor Ames, in 1 Harv. L. Rev. 1.

[8] "Courts of equity follow the common-law rule in dealing with equitable interests; so that a purchaser who acquires only a right in equity takes it subject to all prior equitable claims, whether he had notice of them or not. It is only, therefore, when an equitable claim to property comes into competition with the legal ownership, that the peculiar doctrines of equity, in regard to purchase for value without notice are called into action; and even then the inquiry is not whether the equitable claimant, but whether the legal owner is a purchaser for value without notice. If he is, he takes the property discharged from the adverse equitable claim; if he is not, he is bound by it. In other words, purchase for value without notice is not a source of title, either legal or equitable, and is not commonly a material element of either; it is material only to one who is legal owner without it, and it is material to him only for the purpose of rendering his title unimpeachable in equity." Langdell's Summary of Eq. Pl., § 140. And see Hinds *v.* Vattier, 7 Pet. 252, 271; Boone *v.* Chiles, 10 Pet. 177, 210; O'Neal *v.* Seixas, 85 Ala. 80; Wailes *v.* Cooper, 24 Miss. 208; Durant *v.* Crowell, 97 N. C. 367; Anketel *v.* Converse,

or even unavoidable his mistake may have been. Again, no amount of negligence will vitiate the title of a *bona fide* holder of a negotiable instrument, but not the most innocent mistake will enable him to make title through a forged indorsement.[9] Where a bill was drawn payable to the order of one H. Davis and indorsed by another H. Davis, it was held that a person who innocently discounted it on the faith of this indorsement had no title (*y*). It might also be said that where tacit assent or acquiescence is in question, there ignorance is in like manner a condition of not losing one's rights. But this is not properly so. For it is not that ignorance avoids the effect of acquiescence, but that there can be no acquiescence without knowledge. It is like the case where *knowledge or intention [447 must be present to constitute an offence. In this sense and for this purpose "nulla voluntas errantis est" (*z*).

Application of the general rule in cases of contract. The same principles hold in cases more directly connected with the subject of this work. A railway company carries an infant above the age of three years without taking any fare, the clerk assuming him to be under that age, and there being no fraud on the part of the person in whose care he travels; the mistake does not exclude the usual duty on the company's part to carry him safely (*a*). A person who does not correctly know the nature of his interest in a fund disposes of it to a purchaser for value who has no greater knowledge and deals with him in good faith; if he afterwards discovers that his interest was in truth greater and more valuable than he supposed it to be, he cannot claim to have the transaction set aside on the ground of this mistake (*b*). This, however, is to be taken with caution, for it applies only to cases where

(*y*) *Mead* v. *Young* (1790) 4 T. R. 28, 2 R. R. 314.

(*z*) D. 39. 3. de aqua pluv. 20.

(*a*) *Austin* v. *G. W. R. Co.* (1869) L. R. 2 Q. B. 442, 36 L. J. Q. B. 201. The mother of the infant plaintiff took only one ticket for herself; it seems that the contract operated in favour of both (Lush J. L. R. 2 Q. B. at p. 447). But the case is really one of those on the border-line of contract and tort, where the breach is not so much of a contractual duty as of a general duty annexed by law to a particular business or undertaking, such as was the ground of the action of *assumpsit* in its original form. See judgment of Blackburn J. and cp. the remarks of Grove J. in *Foulkes* v. *Metropolitan District Ry. Co.* (1880) 4 C. P. D. at p. 279, 49 L. J. C. P. 361. Bigelow L. C. on Law of Torts, 615, and the present writer's "Law of Torts," 515, 518 (6th ed.).

(*b*) *Marshall* v. *Collett* (1835) 1 Y. & C. Ex. 232, 41 R. R. 254.

17 Ohio St. 11, 20; Elstner *v.* Fife, 32 Ohio St. 358; Chew *v.* Barnet, 11 S. & R. 389; Briscoe *v.* Ashby, 24 Gratt. 454, 475 sqq.; Downer *v.* Bank, 39 Vt. 25; Morehead *v.* Horner, 30 W. Va. 548.

9 *Supra*, p. 292, note 85

the real intention is to deal with the party's interest, whatever it may be. The result would be quite different if the intention of both parties were to deal with it only on the implied condition that the state of things is not otherwise than it is supposed to be, as we shall find under the head of Fundamental Error.

So far, then, mistake as such does not improve the position of the party doing a mistaken act. Neither does it as a rule make
448] it any worse. A mistaken demand *which produces no result does not affect a plaintiff's right to make the proper demand afterwards. Where B. holds money as A.'s agent to pay it to C., and appropriates it to his own use, C. may recover from A. notwithstanding a previous mistaken demand on B.'s estate, made on the assumption that B. would be treated as C.'s own agent (*c*). Nor does a mistaken repudiation of ownership prevent the true owner of goods from recovering damages afterwards for injury done to them by the negligence of a bailee, whose duty it was to hold them for the true owner at all events (*d*). This is independent of and quite consistent with the rule that a party who has wholly mistaken his remedy cannot be allowed to proceed by way of amendment *in the same action* in an entirely different form and on questions of a different character (*e*).

As to existing rights of other persons. Next, mistake does not in general alter existing rights. The presence of mistake will not make an act effectual which is otherwise ineffectual. Many cases which at first sight look like cases of relief against mistake belong in truth to this class, the act being such that for reasons independent of the mistake it is inoperative. Thus a trustee's payment over of rents and profits to a wrong person, whether made wilfully and fraudulently, or ignorantly and in good faith, cannot alter the character of the trustee's possession (*f*). Where the carrier of goods after receiving notice from an unpaid vendor to stop them nevertheless delivers them by mistake to the buyer, this does not defeat the vendor's rights: for the right of possession (*g*) revests in the vendor from the date of

(*c*) *Hardy* v. *Metropolitan Land & Finance Co.* (1872) L. R. 7 Ch. 427, 433, 41 L. J. Ch. 257. Cp. Vangerow, Pand. 1. 118.

(*d*) *Mitchell* v. *Lancashire & Yorkshire Ry. Co.* (1875) L. R. 10 Q. B. 256, 261, 44 L. J. Q. B. 107.

(*e*) *Jacobs* v. *Seward* (1872) L. R. 5 H. L. 464, 41 L. J. C. P. 221.

(*f*) *Lister* v. *Pickford* (1865) 34 Beav. 576, 582.

(*g*) The book has *property;* but the word must here, as often, mean only right to possess. It is now generally held that stoppage *in transitu* does not rescind the contract: *Schotsmans* v. *Lancashire & Yorkshire Ry. Co.* (1867) L. R. 2 Ch. 332, 340, 36 L. J Ch. 361. [See also Kemp *v.* Falk, 7 App. Cas. 573; Shephard *v.* Newhall, 54 Fed. Rep. 306; Shaw *v.* Lady Ensley, &c. Coal

the *notice, if given at such a time and under such circum- [449
stances that the delivery can and ought to be prevented (*h*),[10] and the subsequent mistake delivery has not, as an intentional wrongful delivery would not have, any power to alter it (*i*). Again, by the rules of the French Post-office the sender of a letter can reclaim it after it is posted and before the despatch of the mail. C., a banker at Lyons, posted a letter containing bills of exchange on England endorsed to D., an English correspondent. These were in return for a bill on Milan sent by D. to C. Before the despatch of the mail, learning from D.'s agent at Lyons that the bill on Milan would not be accepted and D. desired that no remittance should be made, C. sent to the post-office to stop the letter. It was put aside from the rest of the mail, but by a mistake of C.'s clerk in not completing the proper forms it was despatched in the ordinary course. It was held that there was no effectual delivery of the bills to D., and that the property remained in C. The mistake of the clerk could not take "the effect of making the property in the bills pass contrary to the intention of both indorser and indorsee" (*k*). Had not the revocation been at the indorsee's request, then indeed the argument would probably have been correct that it was a mere uncompleted intention on C.'s part: for as between C. and the post-office everything had not been done to put an end to the authority of the post-office to forward the letter in the regular course of post.

Anderson's case (*l*) may possibly be supported on a *similar [450
ground. It was there held that a transfer of shares sanctioned by the directors and registered in ignorance that calls were due from the transferor might afterwards be cancelled, even by an officer of the company without authority from the directors, on the facts being

Co. 147 Ill. 526; Rucker *v.* Donovan, 13 Kan. 251; Newhall *v.* Vargas, 15 Me. 314; Johnson *v.* Eveleth, 93 Me. 306; Rowley *v.* Bigelow, 12 Pick. 307, 313; Stanton *v.* Eager, 16 Pick. 467, 475; Babcock *v.* Bonnell, 80 N. Y. 244; Jordan *v.* James, 5 Ohio, 88, 98; Diem *v.* Koblitz, 48 Ohio St. 41; Chandler *v.* Fulton, 10 Tex. 2, 23; Allen *v.* Willis, 60 Tex. 155.]

(*h*) *Whitehead* v. *Anderson* (1842) 9 M. & W. 518, 11 L. J. Ex. 157; Blackburn on Cont. of Sale, 269, 2nd ed. by Graham, 384.

(*i*) *Litt* v. *Cowley* (1816) 7 Taunt. 169, 17 R. R. 482.

(*k*) *Ex parte Cote* (1873) L. R. 9 Ch. 27, 32, 43 L. J. Bk. 19.

(*l*) (1869) L. R. 8 Eq. 509. *Sed qu.* Lord Lindley, who was himself counsel in the case, cites it (on Companies, 829) with the material qualification, "if the transferee does not object." The case is remarkable for the dictum (which ought never to have been reported) that "fraud or mistake, either of them, is enough to vitiate *any transaction*."

[10] Bethell *v.* Clark, 19 Q. B. D. 553; Bell *v.* Moss, 5 Wheat. 189; Allen *v.* Maine Cent. R. Co., 79 Me. 327; Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228; Hall *v.* Dimond, 63 N. H. 565; Mottram *v.* Heyer, 5 Den. 629; Rosenthal *v.* Weir, 170 N. Y. 148; Jenks *v.* Fullmer, 160 Pa. 527.

discovered. It may be that the directors' assent to the transfer is not irrevocable (apart from the question of mistake) until the parties have acted upon it.

Subsequent conduct of parties founded on mistaken construction does not alter the contract. Again, the legal effect of a transaction cannot be altered by the subsequent conduct of the parties: and it makes no difference if that conduct is founded on a misapprehension of the original legal effect. A man who acts on a wrong construction of his own duties under a contract he has entered into, does not thereby entitle himself, though the acts so done be for the benefit of the other party, to have the contract performed by the other according to the same construction (*m*). This decision was put to some extent upon the ground that relief cannot be given against mistakes of law. But it is submitted that this is not a case where the distinction is really material. Suppose the party had not construed the contract wrongly, but acted on an erroneous recollection of its actual contents, the mistake would then have been one of fact, but it is obvious that the decision must have been the same. Still less can a party to a contract resist the performance of it merely on the ground that he misunderstood its legal effect at the time (*n*).[11] Every party to an instrument has a right to assume that the others intend it to operate according to the proper sense of its actual expressions (*o*).[12]

451] * **Unless such that apart from mistake it would amount to variation by mutual consent.** It must be remembered, however, that where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the

(*m*) *Midland G. W. Ry. of Ireland* v. *Johnson* (1858) 6 H. L. C. 798, 811, per Lord Chelmsford. On the other hand, one who takes a wider view of his rights under a contract than the other party will admit, is free to waive that dispute and enforce the contract to the extent which the other does admit: *Preston* v. *Luck* (1884) 27 Ch. Div. 497.

(*n*) *Powell* v. *Smith* (1872) L. R. 14 Eq. 85, 41 L. J. Ch. 734. The dictum in *Wycombe Ry. Co.* v. *Donnington Hospital* (1866) L. R. 1 Ch. 273, cannot be supported in any sense contrary to this.

(*o*) Per Knight Bruce L.J. *Bentley* v. *Mackay* (1869) 4 D. F. & J. 285. Cp. Ch. VI., pp. *255, *256, above.

[11] Hawralty *v.* Warren, 18 N. J. Eq. 124.

[12] Arnold *v.* Arnold, 14 Ch. D. 270, 284. "If parties understand an agreement differently, and neither of them makes known to the other his construction of it, and it is afterwards reduced to writing and duly executed, they are bound, in equity, as well as at law, by the terms of the written instrument, which in such cases is to be construed by the court." Sawyer *v.* Hovey, 3 Allen. 331, 333; Miller *v.* Lord, 11 Pick. 11; Deutsch *v.* Pratt, 149 Mass. 415, 420; Phillip *v.* Gallant, 62 N. Y. 256; Rickerson *v.* Insurance Co., 149 N. Y. 307; Johnston *v.* Patterson, 114 Pa. 398; Clark *v.* Lillie, 39 Vt. 405.

Court (*p*).[13] To this extent its original effect, though it cannot be *altered*, may be *explained* by the conduct of the parties. And moreover, if both parties to a contract act on a common mistake as to the construction of it, this may amount to a variation of the contract by mutual consent (*q*). And a mistake of one party induced, though innocently, by the other has the same effect as a common mistake (*r*). This is in truth another illustration of the leading principle. Here the conduct of the parties in performing the contract with variations would deny an intention to vary it if the true construction were present to their minds. It might be said that they cannot mean to vary their contract if they do not know what it really is. But the answer is that their true meaning is to perform the contract at all events according to their present understanding of it, and thus the mistake is immaterial. Practically such a mistake is likely to represent a real original intention incorrectly expressed in the contract: so that principle and convenience agree in the result.

(*p*) *Forbes* v. *Watt* (1872) L. R. 2 Sc. & D. 214. Evidence of the construction put on an instrument by *some* of the parties is of course inadmissible: *McClean* v. *Kennard* (1874) L. R. 9 Ch. 336, 349. 43 L. J. Ch. 323. And a party who has acted on one of two possible constructions of an obscure agreement cannot afterwards enforce it according to the other: *Marshall* v. *Berridge* (1881) 19 Ch. Div. 233, 241, 51 L. J. Ch. 329.

(*q*) 6 H. L. C. pp. 812–3. In the particular case the appellants were an incorporated company, and therefore it was said could not be thus bound: *sed qu.*

(*r*) *Wilding* v. *Sanderson* [1897] 2 Ch. 534, 66 L. J. Ch. 684, C. A.; *Stewart* v. *Kennedy* (No. 2) (1890) 15 App. Ca. 75, 108.

[13] Chicago *v.* Selden, 9 Wall. 50, 54; Insurance Co. *v.* Dutcher, 95 U. S. 269, 273; Topliff *v.* Topliff, 122 U. S. 121; District of Columbia *v.* Gallaher, 124 U. S. 505; Nickerson *v.* Railroad Co., 3 McCrary, 455; Gronstadt *v.* Withoff, 21 Fed. Rep. 253; Central Trust Co. *v.* Railroad Co., 34 Fed. Rep. 254; Leavitt *v.* Windsor, etc., Co., 54 Fed. Rep. 439; Sanders *v.* Munson, 74 Fed. Rep. 649; Lyman *v.* Kansas City R. Co., 101 Fed. Rep. 636; Haydel *v.* Mutual Life Assoc., 104 Fed. Rep. 718; Fitzgerald *v.* First Bank, 114 Fed. Rep. 474; Hall *v.* First Bank, 133 Ill. 234; Childer *v.* Bank, 147 Ind. 430; Stone *v.* Clarke, 1 Met. 378; Winchester *v.* Glazier, 152 Mass. 316, 323; St. Louis Gas Light Co. *v.* St. Louis, 46 Mo. 121; Paxton *v.* Smith, 41 Neb. 56; Jackson *v.* Perrine, 35 N. J. L. 137; Woolsey *v.* Funke, 121 N. Y. 87; Sattler *v.* Hallock, 160 N. Y. 291, 300; Mosier *v.* Parry, 6 Ohio St. 388; Coleman *v.* Grubb, 23 Pa. 393, 409; Schlegel *v.* Herbein, 174 Pa. 504; Hosmer *v.* McDonald, 80 Wis. 54.

It was held in National Water Works *v.* School District, 48 Fed. Rep. 523, that this doctrine was not applicable to the contracts of municipal corporations where the public interest was involved. But see Thomas *v.* Railway Co., 81 Fed. Rep. 911; Cincinnati *v.* Cincinnati Gas Co., 53 Ohio St. 278.

Where the meaning of the instrument is clear in the eye of the law, the error of the parties cannot control its effect. Railroad Co. *v.* Trimble, 10 Wall. 367; Russell *v.* Young, 94 Fed. Rep. 45 (C. C. A.); Hershey *v.* Luce, 56 Ark. 320; Gardner *v.* Caylor, 24 Ind. App. 521; Insurance Co. *v.* Doll, 35 Md. 89; Glynn *v.* Moran, 174 Mass. 233; St. Paul, etc., Ry. Co. *v.* Blackmar, 44 Minn. 514; Humphreys *v.* New York, etc., R. Co., 121 N. Y. 435; Borley *v.* McDonald, 69 Vt. 309.

As to what constitutes ambiguity, see O'Brien *v.* Miller, 168 U. S. 287, 296.

Forfeiture incurred by mistake. Again, mistake, in the sense of omission by pure forgetfulness to do something that ought to have been done, is not a ground for a court of equity in its discretion (assuming that it has jurisdiction) to relieve against forfeiture (*s*).

452] ***Special cases where mistake is of importance.** What then are the special classes of cases in which mistake is of importance, and which have given rise to the language formerly current on the subject? They are believed to be as follows:

1. **As excluding true consent.** Where mistake is such as to exclude real consent, and so prevent the formation of any contract, there the seeming agreement is void. Of this we shall presently speak at large (Part 2 of this chapter).

2. **In expressing a true consent.** Where a mistake occurs in expressing the terms of a real consent, the mistake may be remedied by the equitable jurisdiction of the court. Of this also we shall speak separately (Part 3).

3. **Renunciation of rights.** A renunciation of rights in general terms is understood not to include rights of whose actual or possible existence the party was not aware. This is in truth a particular case under No. 2.

All these exceptions may be considered as more apparent than real.

4. **Payment of money.** Money paid under a mistake of fact may be recovered back.

This is a real exception, and the most important of all. Yet even here the legal foundation of the right is not so much the mistake in itself as the failure of the supposed consideration on which the money was paid; and the question is not of avoiding an existing obligation but of creating a new one.

B. *Mistake of Fact and of Law.*

Mistake of Fact and of Law. It is an obvious principle that citizens must be presumed for all public purposes to know the law,[14] or rather that they cannot be allowed to allege ignorance of it as an excuse. As has often been said, the administration of justice would

(*s*) *Barrow* v. *Isaacs* [1891] 1 Q. B. 417, 60 L. J. Q. B. 179, C. A.

[14] See in 3 Harv. L. Rev. 165, a criticism as to this mode of stating the presumption.

otherwise be impossible. Practically the large judicial discretion which can be exercised in criminal law may be trusted to prevent the rule from operating too harshly in particular cases. On the other hand it would lead to hardship and injustice not remediable by any judicial dis*cretion if parties were always to be bound in mat- [453 ters of private law by acts done in ignorance of their civil rights. There is an apparent conflict between these two principles which has given rise to much doubt and discussion (*t*). But the conflict, if indeed it be not merely apparent, is much more limited in extent than has been supposed.

How far the distinction applicable. It is often said that relief is given against mistake of fact but not against mistake of law. But neither branch of the statement is true without a great deal of limitation and explanation. We have already seen that in most transactions mistake is altogether without effect. There such a distinction has no place. Again, there are the many cases where, as we have pointed out above, knowledge or notice is a condition precedent to some legal consequence. By the nature of these cases it generally if not always happens that the subject-matter of such knowledge, or of the ignorance which by excluding it excludes its legal consequences, is a matter of fact and not of law. The general presumption of knowledge of the law does so far apply, no doubt, that a person having notice of ma-

(*t*) Savigny, followed by Vangerow and other later writers, strikes out a general rule thus: Where mistake is a special ground of relief (and there only), the right to such relief is excluded by negligence. Ignorance of law is presumed to be the result of negligence, but the presumption may be rebutted by special circumstances, *e.g.*, the law being really doubtful at the time. There is much to be said for this doctrine on principle, but it will not fit English law as now settled on the most important topic, viz., recovering back money paid; for there, so long as the ignorance is of fact, negligence is no bar: means of knowledge are material only as evidence of actual knowledge: *Kelly* v. *Solari* (1841) 9 M. & W. 54, 11 L. J. Ex. 10; *Townsend* v. *Crowdy* (1860) 8 C. B. N. S. 477, 29 L. J. C. P. 300. The only limitation is that the party seeking to recover must not have waived all inquiry: per Parke B. 9 M. & W. 59; and per Williams J. 8 C. B. N. S. 494. [Onondaga Bank *v.* United States, 64 Fed. Rep. 703, 704; Brown *v.* Tillinghast, 84 Fed. Rep. 71; Rutherford *v.* Melvor, 21 Ala. 750; Devine *v.* Edwards, 87 Ill. 177; Brown *v.* C. C. & R. Gravel Road Co. 56 Ind. 110; Lewellen *v.* Garrett, 58 Ind. 442; Appleton Bank *v.* McGilvray, 4 Gray, 518; Stuart *v.* Sears, 119 Mass. 143; State Bank *v.* Buhl, 129 Mich. 193; Fraker *v.* Little, 24 Kan. 598; Koontz *v.* Bank, 51 Mo. 275; Lyle *v.* Shinnebarger, 17 Mo. App. 66; Bank *v.* Eltinge, 40 N. Y. 391; Lawrence v. Bank, 54 N. Y. 432; Mayer v. Mayor, etc., of N. Y., 63 N. Y. 455; City Bank *v.* Nat. Bank, 45 Tex. 203; Neal *v.* Read, 7 Baxt. 333; Guild *v.* Baldridge, 2 Swan, 295; Alston *v.* Richardson, 51 Tex. 1. But see *contra*, Brummitt *v.* McGuire, 107 N. C. 351.] See now for full discussion of Anglo-American authorities, Mr. M. M. Bigelow's notes to Story's Eq. Jurisp. 13th ed. ss. 111, 140; Keener on Quasi-Contracts, Ch. 2.

terial facts cannot be heard to say that he did not know the legal effect of those facts. All these, however, are not cases of relief against mistake in any correct sense.

Where common mistake excludes real agreement, ignorance of private right is equivalent to ignorance of fact. Then come the apparent exceptions **454]** to the general rule, *which we have numbered 1, 2 and 3. As to No. (1) it is at least conceivable that a common mistake as to a question of law should go so completely to the root of the matter as to prevent any real agreement from being formed. It is laid down by very high authority "that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts (*u*): but this does not touch the prior question whether there is a contract at all. On cases of this class English decisions go to this extent at all events, that ignorance of particular private rights is equivalent to ignorance of fact (*v*).[15] As to No. (2) the principle appears to be the same.

Rectification of instruments: relief given against mistake of draftsman though not against a deliberate choice of the parties as to contents of instruments. A. and B. make an agreement and instruct C. to put it into legal form. C. does this so as not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be equally given in either case. In neither is there any reason for holding the parties to a contract they did not really make.

Authority, so far as it goes, is in favour of what is here advanced (*x*).[16] A common mistake of parties as to the effect of a par-

(*u*) *Bank of U. S.* v. *Daniel* (1838) (Sup. Ct. U. S.) 12 Peters, 32, 56; but see *Daniell* v. *Sinclair* (J. C.) (1881) 6 App. Ca. 181, 190. The language of modern American authority persists in the old sharp distinction: *Upton* v. *Tribilcock* (1875) 91 U. S. 45, 50. Common mistake as to a *collateral* matter of law does not of course avoid a contract: *Eaglesfield* v. *Marquis of Londonderry* (1876) 4 Ch. D. 693.

(*v*) *Bingham* v. *Bingham* (1748) 1 Ves. Sr. 126; *Broughton* v. *Hutt* (1858) 3 DeG. & J. 501; *Cooper* v. *Phibbs* (1867) L. R. 1 H. L. 149, 170; of which cases a fuller account is given below.

(*x*) *Hunt* v. *Rousmaniere's Adm.* (1828) (Sup. Ct. U. S.) 1 Peters, 1, 13, 14.

[15] See Jones *r.* Clifford, 3 Ch. D. 779, 792; Blakeman *r.* Blakeman, 39 Conn. 320; Baker *v.* Massey, 50 Ia. 399, 404; Gardiner *v.* Menage, 41 Minn. 417; Griffith *r.* Towuley, 69 Mo. 13; Freichnecht *v.* Meyer, 39 N. J. Eq. 551; King *v.* Doolittle, 1 Head, 77; Trigg *r.* Read, 5 Humph. 529; Harlan *r.* Central Phosphate Co., 62 S. W. Rep. 614 (Tenn. Ch.); Webb *r.* City Council of Alexandria, 33 Gratt. 168, 175, 176.

[16] It is well established that relief will be given under such circumstances although the mistake arose from ignorance of law. Snell *r.* Insurance Co., 98 U. S. 85; Griswold *r.* Hazard, 141 U. S. 260, 284; Oliver *v.* Insurance

ticular instrument is sufficient ground for varying a consent order founded on the mistaken opinion (*y*). There is clear authority that on the other hand a court of equity will not reform an instrument by inserting in it a clause which the parties deliberately agreed to leave out (*z*),[17] nor substitute for the form of security the parties have chosen another form,[18] which they deliberately *considered [455 and rejected (*a*), although their choice may have been determined by a mistake of law. The reason of these decisions is that in such cases the form of the instrument, by whatever considerations arrived at, is part of a real agreement. The parties have not been deprived by mistake or ignorance of the means of an effective choice of courses, but have made an effective choice which some or one of them afterwards mislikes.

Renunciation of rights: distinction as to compromise or deliberate abandonment. As to No. (3), there is quite sufficient authority to show that a renunciation of rights under a mistake as to particular applications of law is not conclusive, and some authority to show that it is the same even if the mistake is of a general rule of law. The deliberate renunciation or compromise of doubtful rights is of course binding; it would be absurd to set up ignorance of the law as an

(*y*) *Allcard* v. *Walker* [1896] 2 Ch. 369, 65 L. J. Ch. 660.

(*z*) *Lord Irnham* v. *Child* (1781) 1 Bro. C. C. 92.

(*a*) See note (*x*), preceding page.

Co., 2 Curtis, 277, 298–9; Bailey *v.* Insurance Co., 4 McCrary, 221; Sampson *v.* Mudge, 13 Fed. Rep. 260; Abraham *v.* Insurance Co., 40 Fed. Rep. 717; Railway Co. *v.* Green, 114 Fed. Rep. 676; Larkins *v.* Biddle, 21 Ala. 252; Stedwell *v.* Anderson, 21 Conn. 139; Bank *v.* Insurance Co., 31 Conn. 517, 529; Butterfield *v.* McNamara, 54 Conn. 94; Dinwiddie *v.* Self, 145 Ill. 290 (cp. Atherton *v.* Roche, 192 Ill. 252); Nowlin *v.* Pyne, 47 Ia. 293; Reed *v.* Root, 59 Ia. 359; Courtright *v.* Courtright, 63 Ia. 356; Scales *v.* Ashbrook, 1 Met. (Ky.) 358; Lear *v.* Prather, 89 Ky. 501; Canedy *v.* Marcy, 13 Gray, 373; Benson *v.* Markoe, 37 Minn. 30; Green *v.* Railroad Co., 12 N. J. Eq. 165; McMillan *v.* Fish, 29 N. J. Eq. 610; Truesdell *v.* Lehman, 47 N. J. Eq. 218; Pitcher *v.* Hennessey, 48 N. Y. 415; McKay *v.* Simpson, 6 Ired. Eq. 452; Kornegay *v.* Everett, 99 N. C. 30; Clayton *v.* Freet, 10 Ohio St. 544; Brock *v.* Odell, 44 S. C. 22; McKenzie *v.* McKenzie, 52 Vt. 271; Tabor *v.* Cilley, 53 Vt. 487; Green Bay Co. *v.* Hewitt, 62 Wis. 316; Bank *v.* Mann, 100 Wis. 596.

[17] Betts *v.* Gunn, 31 Ala. 219; Clark *v.* Hart, 57 Ala. 390; Rector *v.* Collins, 46 Ark. 167; Hicks *v.* Coody, 49 Ark. 425; Ligon's Admr. *v.* Rogers, 12 Ga. 281; Stafford *v.* Staunton, 88 Ga. 298; Andrew *v.* Spurr, 8 Allen, 412; Lee *v.* Kirby, 104 Mass. 420, 430; Mead *v.* Norfolk R. Co., 89 Va. 296; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245. See Leonard *v.* Wills, 24 Kan. 231. Cp. Martin *v.* Railroad Co., 36 N. J. Eq. 109.

[18] Hunt *v.* Rousmaniere's Admr., 1 Pet. 1. "Where the parties adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted." Lanning *v.* Carpenter, 48 N. Y. 408; Hicks *v.* Coody, 49 Ark. 425; Baldwin *v.* Insurance Co., 60 Ia. 497; Marshall *v.* Westrope, 98 Ia. 324; Leavitt *v.* Palmer, 3 N. Y. 19, 38; Greene *v.* Smith, 160 N. Y. 533.

objection to the validity of a transaction entered into for the very reason that the law is not accurately known (*b*).[19] A compromise deliberately entered into under advice, the party's agents and advisers having the question fully before them, cannot be set aside on the ground that a particular point of law was mistaken or overlooked (*c*). Conduct equivalent to renunciation of a disputed right is equally binding, at least when the party has the question fairly before him. Thus in *Stone* v. *Godfrey* (*d*) the plaintiff had been advised on his title unfavourably indeed, but in such a way as to bring before him the nature of the question and give him a fair opportunity of considering whether he should raise it. Adopting, however, the opinion he had obtained, he acted upon it for a considerable time, and in a manner which amounted to representing to all persons interested that he had determined not to raise the question. It was held that although the mistake as to title might in the absence of such conduct well be a **456]** ground of relief, a *subsequent discovery that the correctness of the former opinion was doubtful did not entitle him to set up his claim anew. In *Rogers* v. *Ingham* (*e*) a fund had been divided between two legatees under advice, and the payment agreed to at the time. One of the legatees afterwards sued the executor and the other legatee for repayment, contending that the opinion they had acted upon was erroneous; it was held that the suit could not be maintained. Similarly where creditors accepted without question payments under a composition deed to which they had not assented, and which, as it was afterwards decided, was for a technical reason, not binding on non-assenting creditors, it was held that they could not afterwards treat the payments as made on account of the whole debt, and sue for the balance. They might have guarded themselves by accepting the payments conditionally, but not having done so they were bound (*f*). In *Re Saxon Life Assurance Society* (*g*) it was held that a creditor of a company was not bound by a release given in consideration of

(*b*) Cp. the remarks on compromises in Ch. IV., p. *193 above.

(*c*) *Stewart* v. *Stewart* (1839) 6 Cl. & F. 911, 49 R. R. 267; see the authorities reviewed, 6 Cl. & F. pp. 966–970, 49 R. R. 276–279.

(*d*) (1854) 5 D. M. & G. 76.

(*e*) (1876) 3 Ch. Div. 351, 46 L. J. Ch. 322.

(*f*) *Kitchin* v. *Hawkins* (1866) L. R. 2 C. P. 22.

(*g*) (1862) 2 J. & H. 408, 412 (the *Anchor case*).

[19] Bank *v.* Geary, 5 Pet. 99, 114; Morris *v.* Munroe, 30 Ga. 630; Stover *v.* Mitchell, 45 Ill. 213; Fisher *v.* May, 2 Bibb, 448; McClellan *v.* Kennedy, 8 Md. 230, 248; Hall *v.* Wheeler, 37 Minn. 522; Warren *v.* Williamson, 8 Baxt. 427; Smith *v.* Penn, 22 Gratt. 402.

The rule is the same as to a mistake regarding a fact on the existence of which the parties take chances. Sears *v.* Grand Lodge, 163 N. Y. 374.

having the substituted security of another company, which security was a mere nullity, being given in pursuance of an invalid scheme of amalgamation. Here the mistake was obviously not of a general rule of law; and perhaps the case is best put on the ground of total failure of consideration (*h*).[20]

Money paid by mistake recoverable only when the mistake is of fact. As to No. (4), the subject of recovering back money paid by mistake does not properly fall within our scope. It is here, however, that the distinction between mistakes of fact and of law does undoubtedly prevail. While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact (*i*), money *paid [457 under a mistake of law cannot in any case be recovered (*k*).[21] Nor does anything like the qualification laid down by Lord Westbury in *Cooper* v. *Phibbs* (*l*) appear to be admitted. Ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law (*m*).[22]

An important decision of the American Supreme Court appears to assume that giving a negotiable instrument is for this purpose equiva-

(*h*) In former editions some remarks were made on *M'Carthy* v. *Decaix* (1831) 2 Russ. & My. 614, 2 Cl. & F. 568 n., 37 R. R. 250, as raising a difficulty in this connexion. As that case is no longer of authority (see *Harvey* v. *Farnie* (1882) 8 App. Ca. 43, 52, 60, 63, 52 L. J. P. 42), they are now omitted.

(*i*) Note (*t*), p. *453, *supra*.

(*k*) But as to re-opening accounts in equity, see *Daniell* v. *Sinclair* (J. C.) (1881) 6 App. Ca. 181.

(*l*) (1867) L. R. 2 H. L. at p. 170.

(*m*) See *Skyring* v. *Greenwood* (1825) 4 B. & C. 281, 28 R. R. 264; and cp. *Platt* v. *Bromage* (1854) 24 L. J. Ex. 63, where however the mis-

[20] Where a widow, under mistake as to her rights in her husband's estate, renounced the provision made for her by his will, and elected to take dower instead, but afterwards being informed of her rights, before distribution of the estate, but after the statutory period for making her election, applied to be allowed to recall her former election, and take under the will, it was held that the application should be granted. Evans' Appeal, 51 Conn. 435; Macknet *v.* Macknet, 29 N. J. Eq. 54.

[21] Lamborn *v.* County Commrs., 97 U. S. 181, 185; Jefferson County *v.* Hawkins, 23 Fla. 223; Arnold *v.* Georgia R. & B. Co., 50 Ga. 304; Downs *v.* Donnelly, 5 Ind. 496; Baldwin *v.* Foss, 71 Ia. 389; Painter *v.* Polk County, 81 Ia. 242; Norris *v.* Blethen, 19 Me. 348; Livermore *v.* Peru, 55 Me. 469; Schwarzenbach *v.* Odorless Excavating Co., 65 Md. 34; Erkens *v.* Nicolin, 39 Minn. 461; Pass *v.* Grenada County, 71 Miss. 426; Clarke *v.* Dutcher, 9 Cow. 674; Phelps *v.* Mayor, 112 N. Y. 216; Vanderbeck *v.* Rochester, 122 N. Y. 285; Valley Ry. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44; Real Est. Sav. Inst. *v.* Linder, 74 Pa. 371; Gould *v.* McFall, 118 Pa. 455; Harvey *v.* Girard, 119 Pa. 212; De la Cuesta *r.* Insurance Co., 136 Pa. 62, 658; Gilliam *v.* Alford, 69 Tex. 267. But see Northrup *v.* Graves, 19 Conn. 548; Mansfield *v.* Lynch, 59 Conn. 320; Culbreath *v.* Culbreath, 7 Ga. 64; Louisville *v.* Henning, 1 Bush, 381; Moulton *v.* Bennett, 18 Wend. 586.

[22] Gage *v.* Allen, 89 Wis. 98.

A mistake as to the construction of a contract is a mistake of law. Cincinnati *v.* Cincinnati Gas Co., 53 Ohio St. 278. A mistake of foreign law is a

lent to the payment of money, so that a party who gives it under a mistake of law has no legal or equitable defence (*n*). But, according to later English doctrine, inasmuch as "want of consideration is altogether independent of knowledge either of the facts or of the law," the defence of failure of consideration is available as between the parties to a negotiable instrument, whether the instrument has been obtained by a misrepresentation of fact or of law (*o*).

A covenant to pay a debt for which the covenantor wrongly supposes himself to be liable is valid in law, nor will equity give any relief against it if the party's ignorance of the facts negativing his liability is due to his own negligence (*p*).

Apparent exception in bankruptcy — Otherwise same rules in equity as at law. The Court of Bankruptcy will order repayment of money paid to a trustee in bankruptcy under a mistake of law: but this is no real
458] exception, for it is not like an ordinary *payment between party and party. The trustee is an officer of the Court and "is to hold money in his hands upon trust for its equitable distribution among the creditors" (*q*). In general the rule that a voluntary payment made with full knowledge of the facts cannot be recovered back is no less an equitable than a legal one: "the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded

take was not only a mistake of law, but collateral to the payment, the money being really due; *Aiken* v. *Short* (1856) 1 H. & N. 210, 25 L. J. Ex. 321, rests on the same ground, if the transaction in that case be regarded as the bare payment of another person's debt; if it be regarded as the purchase of a security, it is an application of the rule *caveat emptor*, as to which cp. *Clare* v. *Lamb* (1875) L. R. 10 C. P. 334, 44 L. J. C. P. 177.

(*n*) *Bank of U. S.* v. *Daniel* (1838) 12 Peters, 32; but this was not the only ground of the decision.

(*o*) *Southall* v. *Rigg*, *Forman* v. *Wright* (1851) 11 C. B. 481, 492, 20 L. J. C. P. 145; *Coward* v. *Hughes* (1855) 1 K. & J. 443.

(*p*) *Wason* v. *Wareing* (1852) 15 Beav. 151. Whether relief could be given in any case, unless there were fraud on the other side, *quære*.

(*q*) *Ex parte James* (1874) L. R. 9 Ch. 609, 614, per James L.J. 43 L. J. Bk. 107. This holds even after the money paid by mistake has been distributed, if the trustee still has or may have funds applicable for payment of dividends: *Ex parte Simmonds* (1885) 16 Q. B. Div. 308, 55 L. J. Q. B. 74; and it seems to extend to all officers of the Court and all branches of the Supreme Court.

mistake of fact. Hallett *v.* New England Grate Co., 105 Fed. Rep. 217; Rosenbaum *v.* United States Credit System Co., 64 N. J. L. 34.

And money paid under a mistake of foreign law may, therefore, be recovered back. Norton *v.* Marden, 15 Me. 45; Haven *v.* Foster, 9 Pick. 112; King *v.* Doolittle, 1 Head, 77, 85.

upon equitable considerations" (*r*).[23] Thus a party who has submitted to pay money under an award cannot afterwards impeach the award in equity on the ground of irregularities which were known to him when he so submitted (*s*). It has also been laid down that in a common administration suit a legatee cannot be made to refund over-payments voluntarily made by an executor (*t*): but the context shows that this was said with reference to the frame of the suit and the relief prayed for rather than to any general principle of law: moreover it was not the executor, but the persons beneficially interested, who sought to make the legatee liable.[24] But in *Bate* v. *Hooper* (*u*)[25] the point arose distinctly: certain trustees were liable to make good to their testator's estate the loss of principle incurred by their omission to convert a fund of Long Annuities: they contended that the tenant for life ought to recoup them the excess of income which she had received: but as she had not been a willing party to any over-payment (*x*), *it was decided that she could not be [459 called upon to refund the sums which the trustees voluntarily paid her. In an earlier case an executor paid interest on a legacy for several years without deducting the property tax, and it was held that he could not claim to retain out of subsequent payments the sums which he should have deducted from preceding ones (*y*).

Part II. Mistake as excluding true Consent.

Cases to be dealt with in this subdivision. In the first chapter we saw that no contract can be formed when there is a variance in terms between the proposal and the acceptance. In this case the question whether the parties really *meant* the same thing cannot arise, for they

(*r*) *Rogers* v. *Ingham* (1876) 3 Ch. Div. at p. 355, per James L.J.

(*s*) *Goodman* v. *Sayers* (1820) 2 Jac. & W. 249, 263, 22 R. R. 112.

(*t*) Per Lord Cottenham, *Lichfield* v. *Baker* (1850) 13 Beav. 447, 453.

(*u*) (1855) 5 D. M. & G. 338.

(*x*) She had in fact desired the trustees to convert the fund: see 5 D. M. & G. 340.

(*y*) *Currie* v. *Goold* (1817) 2 Madd. 163, 53 R. R. 33.

[23] Freeman *v.* Curtis, 51 Me. 140, 143; Claflin *v.* Godfrey, 21 Pick. 1, 6. But the appropriate remedy is an action at law, not a suit in equity. Lamb *v.* Cranfield, 43 L. J. Ch. (N. S.) 408; Sturgis *v.* Preston, 134 Mass. 372; Chapman *v.* Forbes, 123 N. Y. 532. See 1 Harv. L. Rev. 212.

[24] "A person who receives money as his own from an executor, who pays it under a mistaken interpretation of his testator's will, is not liable, in an action for money had and received, to a person who was entitled under the will to receive the money." Moore *v.* Moore, 127 Mass. 22. See also Beam *v.* Copeland, 54 Ark. 70; People *v.* Foster, 133 Ill. 496; Phillips *v.* McConica, 59 Ohio St. 1. But the payment may be recovered by the executor or administrator if the mistake was one of fact. Mansfield *v.* Lynch, 59 Conn. 320; Stokes *v.* Goodykoontz, 126 Ind. 535.

[25] Cp. Davis *v.* Newman, 2 Rob. (Va.) 664.

have not even *said* the same thing. A court of justice can ascertain a common intention of the parties only from some adequate expression of it, and the mutual communication of different intentions is no such expression.

We now have to deal with certain kinds of cases in which on the face of the transaction all the conditions of a concluded agreement are satisfied, and yet there is no real common intention and therefore no agreement.

Where no real common intention, each party meaning different thing. First, it may happen that each party meant something, it may be a perfectly well understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative. This is quite consistent, as we shall see, with the normal and necessary rule (Ch. VI., pp. *245, *246, above) that a promisor is bound by his promise in that meaning which his expression of it reasonably conveys.

Where there is a common intention but founded on a common error. Next, it may happen that there does exist a common intention, which, **460]** however, is founded on an assumption *made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as non-existent. Here there is in some sense an agreement: but it is nullified in its inception by the nullity of the thing agreed upon. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts: which state of facts not existing, the agreement destroys itself.[26]

In the former class of cases either one party or both may be in error: however, that which prevents any contract from being formed is not the existence of error but the want of true consent. "Two or more persons are said to consent when they agree upon the same thing in the same sense:" this consent is essential to the creation of a contract (*z*), and if it is wanting, and the facts be not otherwise such as to preclude one party from denying that he agreed in the sense

(*z*) Hannen J. in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 609; Indian Contract Act, 1872, s. 13.

[26] Approved in Nordyke *v.* Kehlor, 155 Mo. 643, 654; Irwin *v.* Wilson, 45 Ohio St. 426, 437.

of the other (*a*), it matters not whether its absence is due to the error of one party only or of both.

In the latter class of cases the error must be common to both parties. They do agree to the same thing, and it would be in the same sense, but that the sense they intend, though possible as far as can be seen from the terms of the agreement, is in fact nugatory. As it is, their consent is idle; the sense in which they agree is, if one may so speak, insensible.

In both sets of cases we may say that the agreement is nullified by fundamental error; a term it may be convenient to use in order to mark the broad distinction in *principle from those cases [461 where mistake appears as a ground of special relief.

Divisions of fundamental error. We proceed to examine the different kinds of fundamental error relating:

A. To the nature of the transaction.

B. To the person of the other party.

C. To the subject-matter of the agreement (*b*).

A. *Error as to the nature of the transaction.*

As to nature of the transaction—Thoroughgood's case. On this the principal early authority is *Thoroughgood's case* (*c*). In that case the plaintiff, who was a layman and unlettered, had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said, "If it be no otherwise I am content;" and so delivered the deed. It was in fact a general release of all claims. Under these circumstances it was adjudged that the instrument so executed was not the plaintiff's deed. The effect of this case is "that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed" (*d*);[27] it was also resolved that "it is all

(*a*) Hannen J. *l.c.*, Blackburn J. at p. 607.

(*b*) The German Civil Code has taken a new and much simplified course on the whole matter. Any kind of "declaration of intention" is voidable on the ground of fundamental error, even if the mistake is unilateral; but voidable only, and subject to the duty of compensating any party for damage incurred by relying on the validity of the act: B. G. B. ss. 119—122.

(*c*) 2 Co. Rep. 9 *b*. Cp. *Shulter's case*, 12 Co. Rep. 90 (deed falsely read to a blind man).

(*d*) Per Cur. L. R. 4 C. P. 711. It had been long before said, in 21 Hen. VII., that "if I desire a man to enfeoff me of an acre of land in

[27] Davis *v.* Snyder, 70 Ala. 315; Bank *v.* Webb, 108 Ala. 132; Yock *v.* Insurance Co., 111 Cal. 503; Meyer *v.* Haas, 126 Cal. 560; Green *v.* Maloney, 7 Houst. 22; Brooks *v.* Matthews, 78 Ga. 739; Railroad Co. *v.* Schunick, 65 Ill. 223; O'Donnell *v.* Clinton, 145 Mass. 461; Adolph *v.* Minneapolis Ry.

one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing:" but that a party **462]** executing a deed without requiring it to *be read or to have its effect explained would be bound (*e*).[28] Agreeably to this the law is stated in Sheppard's Touchstone, 56. But at present the mere reading over of a deed without an explanation of the contents would hardly be thought sufficient to show that the person executing it understood what he was doing (*f*).[29]

Dale, and he tell me to make a deed for one acre with letter of attorney, and I make the deed for two acres, and read and declare the deed to him as for only one acre, and he seal the deed, this deed is utterly void whether the feoffor be lettered or not, because he gave credence to me and I deceived him." (Keilw. 70, *b*, pl. 6.) And see the older authorities referred to in note (*i*), next page. An anonymous case to the contrary. Skin. 159, is sufficiently disposed of by Lord St. Leonards' disapproval (V. & P. 173).

(*e*) *I.e.* to this extent, that he could not say it was not his deed, apart from any question of fraud or the like.

(*f*) *Hoghton* v. *Hoghton* (1852) 15 Beav. 278, 311. In the case of a will the execution of it by a testator

Co., 58 Minn. 178; Wright *v.* McPike, 70 Mo. 175; Alexander *v.* Brogley, 62 N. J. L. 584, 63 N. J. L. 307; Jackson *v.* Hayner, 12 Johns. 469; Green *v.* North Buffalo Tshp., 56 Pa. 110; Schuylkill County *v.* Copley, 67 Pa. 386; Warner *v.* Landis, 137 Pa. 61; Coates *v.* Early, 46 S. C. 220; Cameron *v.* Estabrooks, 73 Vt. 73; Gross *v.* Drager, 66 Wis. 150; Warder Co. *v.* Whitish, 77 Wis. 430. *Contra*, Hawkins *v.* Hawkins, 50 Cal. 558 (cp. Meyer *v.* Haas, 126 Cal. 560); Chicago, etc., Ry. Co. *v.* Belliwith, 83 Fed. Rep. 437 (cp. Great Northern Ry. Co. *v.* Kasischke, 104 Fed. Rep. 440, 449); Binford *v.* Bruso, 22 Ind. App. 512. See further a full note in 32 Am. L. Reg. (N. S.) 946.

[28] Robinson *v.* Glass, 94 Ind. 211; Roach *v.* Karr, 18 Kan. 529; Leddy *v.* Barney, 139 Mass. 394; Hallenbeck *v.* Dewitt, 2 Johns. 404; Bauer *v.* Roth, 4 Rawle, 83, 94; Weller's Appeal, 103 Pa. 594.

So one able to read is bound by a contract which he signs without reading. Hazard *v.* Griswold, 21 Fed. Rep. 178; Lumley *v.* Railway Co., 71 Fed. Rep. 21; Chicago, etc., Ry. Co. *v.* Belliwith, 83 Fed. Rep. 437; Railway Co. *v.* Green, 114 Fed. Rep. 676; New York, etc., Ins. Co. *v.* McMaster, 87 Fed. Rep. 63, 67; Goetter *v.* Weil, 61 Ala. 387; Dawson *v.* Burns, 73 Ala. 111; Martin *v.* Smith, 116 Ala. 639; Brooks *v.* Matthews, 78 Ga. 739; Jossey *v.* Railroad Co., 109 Ga. 439; Georgia Medicine Co. *v.* Hyman, 117 Ga. 851; Black *v.* Railway Co., 111 Ill. 351; Rogers *v.* Place, 29 Ind. 577; Insurance Co. *v.* McWhorter, 78 Ind. 136; McCormick *v.* Molburg, 43 Ia. 561; Bonnot Co. *v.* Newman, 108 Ia. 158; Insurance Co. *v.* Hodgkins, 66 Me. 109; Eldridge *v.* Dexter, etc., Co., 88 Me. 191; Liska *v.* Lodge, 112 Mich. 635; Dellinger *v.* Gillespie, 118 N. C. 737; Greenfield's Estate, 14 Pa. 489, 496; Railroad Co. *v.* Shay, 82 Pa. 198; Johnston *v.* Patterson, 114 Pa. 398; Bishop *v.* Allen, 55 Vt. 423.

A court of equity, however, may in its discretion refuse to enforce such a contract. McElroy *v.* Maxwell, 101 Mo. 294. And if the promisee was guilty of fraud the fraud will be a defense to an action by him, though the promisor was negligent in failing to read the contract. Warden *v.* Reser, 38 Kan. 86; Alexander *v.* Brogley, 62 N. J. L. 584, 63 N. J. L. 307; Smith *v.* Smith, 134 N. Y. 62. But see Reid *v.* Bradley, 105 Ia. 220; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109.

[29] Persons dealing with an illiterate man must "show past doubt that he fully understood the object and import of the writings upon which they are proceeding to charge him." Selden *v.* Myers, 20 How. 506, 509. See also Spelts *v.* Ward, 96 N. W. Rep. 56 (Neb.).

Foster v. Mackinnon. The doctrine was expounded and confirmed by the luminous judgment of the Court of Common Pleas in *Foster* v. *Mackinnon* (*g*). The action was on a bill of exchange against the defendant as indorser. There was evidence that the acceptor had asked the defendant to put his name on the bill, telling him it was a guaranty; the defendant signed on the faith of this representation and without seeing the face of the bill. The Court held that the signature was not binding, on the same principle that a blind or illiterate man is not bound by his signature to a document whose nature is wholly misrepresented to him.[30]

A signature so obtained

"Is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended (*h*).

of sound mind after having had it read over to him is evidence, but not conclusive evidence, that he understood and approved its contents: *Fulton* v. *Andrew* (1875) L. R. 7 H. L. 448, 460, sqq. 472, 44 L. J. P. 17.

(*g*) (1869) L. R. 4 C. P. 704, 711, 38 L. J. C. P. 310.

(*h*) The same rule is laid down, and for the same reason, in a rescript of Diocletian and Maximian: Si falsum instrumentum emptionis conscriptum tibi, velut locationis quam fieri mandaveras, subscribere te non relecto sed fidem habentem suasit, neutrum contractum, in utroque alterutrius consensu deficiente, constitisse procul dubio est. C. 4. 22. plus valere, 5.

[30] Burroughs *v.* Pacific Guano Co., 81 Ala. 255; Folmar *v.* Siler, 132 Ala. 297; Wenzel *v.* Schultz, 78 Cal. 221; Wood *v.* Cincinnati Co., 96 Ga. 120; Vanbrunt *v.* Singley, 85 Ill. 281; Auten *v.* Gruner, 90 Ill. 300; Cline *v.* Guthrie, 42 Ind. 227; Webb *v.* Corbin, 78 Ind. 403; Mitchell *v.* Tomlinson, 91 Ind. 167; Lindley *v.* Hofman, 22 Ind. App. 237; Hopkins *v.* Insurance Co., 57 Ia. 203; Green *v.* Wilkie, 98 Ia. 74; Freedley *v.* French, 154 Mass. 339; Gibbs *v.* Linabury, 22 Mich. 479; Anderson *v.* Walter, 34 Mich. 113; Soper *v.* Peck, 51 Mich. 563; Aultman *v.* Olson, 34 Minn. 450; Briggs *v.* Ewert, 51 Mo. 245; Martin *v.* Smylee, 55 Mo. 577; Bank *v.* Lierman, 5 Neb. 247; Willard *v.* Nelson, 35 Neb. 651; Alexander *v.* Brogley, 62 N. J. L. 584, 63 N. J. L. 307; Marden *v.* Dorthy, 160 N. Y. 39; Porter *v.* Hardy, 10 N. Dak. 551; DeCamp *v.* Hamma, 29 Ohio St. 467; Walker *v.* Ebert, 29 Wis. 194; Griffiths *v.* Kellogg, 39 Wis. 290; Lord *v.* American Assoc., 89 Wis. 19; Keller *v.* Ruppold, 115 Wis. 636. Cp. Bedell *v.* Hering, 77 Cal. 572; Bank *v.* Johns, 22 W. Va. 520; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109.

But if the person whose signature to a negotiable instrument has been so obtained was guilty of negligence in its execution, he cannot dispute its validity in the hands of an innocent holder for value, and the better opinion is, that, as against such a holder, a person who relies as to the character of the instrument solely upon the representations of the party at whose request he signs should be deemed negligent. Leach *v.* Nichols, 55 Ill. 273; Nebecker *v.* Cutsinger, 48 Ind. 436; Ruddell *v.* Dillman, 73 Ind. 518; Baldwin *v.* Barrows, 86 Ind. 351; Yeagley *v.* Webb, 86 Ind. 424; Douglass *v.* Matting, 29 Ia. 498; Bank *v.* Steffes, 54 Ia. 214; Ort *v.* Fowler, 31 Kan. 478; Abbott *v.* Rose, 62 Me. 194; Breckenridge *v.* Lewis, 84 Me. 349; Mackey *v.* Peterson, 29 Minn. 298; Shirts *v.* Overjohn, 60 Mo. 305; Dinsmore *v.* Stimbert, 12 Neb. 433; Bank *v.* Smith, 55 N. H. 593; Chapman *v.* Rose, 56 N. Y. 137; DeCamp *v.* Hamma, 29 Ohio St. 467, 471; Ross *v.* Doland, 29 Ohio St. 473.

. . . The position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by 463] many authorities: See Com. Dig. *Fait* (B. 2) (*i*), *and is recognized by Bayley B. and the Court of Exchequer in the case of *Edwards* v. *Brown* (*k*). Accordingly it has recently been decided in the Exchequer Chamber that if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan* v. *North British Australasian Land Company* (*l*).[31] These cases apply to deeds; but the principle is equally applicable to other written contracts."

The judgment proceeds to notice the qualification of the general rule in the case of negotiable instruments signed in blank, *when the party signing knows what he is about, i. e.,* that the paper is afterwards to be filled up as a negotiable instrument (*m*).[32] But here the defendant "never intended to endorse a bill of exchange at all, but intended to sign a contract of an entirely different nature." He was no more bound than if he had signed his name on a blank sheet of paper, and the signature had been afterwards fraudulently misapplied (*n*).[33] This decision shows clearly that an instrument exe-

(*i*) Cited also by Willes J. 2 C. B. N. S. 624, and see 2 Ro. Ab. 28 S: the cases there referred to (30 E. III. 31 *b*; 10 H. VI. 5, pl. 10) show that the principle was recognized in very early times. Cp. Fleta l. 6, c. 33 § 2. Si autem vocatus dicat quod carta sibi nocere non debeat . . . vel quia per dolum advenit, ut si cartam de feoffamento sigillatam [*qu.* sigillavit or sigillaverit] cum scriptam de termino annorum sigillare crediderit, vel ut si carta fieri debuit ad vitam, illam fieri fecit in feodo et huiusmodi, dum tamen nihil sit quod imperitiae vel negligentiae suae possit imputari, ut [*qu.* ut si] sigillum suum senescallo tradiderit vel uxori, quod cautius debuit custodivisse.

(*k*) (1831) 1 C. & J. 307, 312, 35 R. R. 720, 725.

(*l*) (1863) 2 H. & C. 175, 32 L. J. Ex. 273. And it was there doubted whether a man can be estopped by mere negligence from showing that a deed is not really his deed. See per Byles J. 2 H. & C. 184, 32 L. J. Ex. 278, and per Cockburn C.J. 2 H. & C. 189, 32 L. J. Ex. 279. Mellish L.J. in *Hunter* v. *Walters* (1871) L. R. 7 Ch. 75, 87, 41 L. J. Ch. 175, mentioned this question as still open; and see *Halifax Union* v. *Wheelwright* (1875) L. R. 10 Ex. 183, 192, 44 L. J. Ex. 121. The negative answer seems to be the right one: cp. *Onward Building Society* v. *Smithson* [1893] 1 Ch. 1, 13, 14, 62 L. J. Ch. 138, C. A.

(*m*) Whether this is a branch of the general principle of estoppel or a positive rule of the law merchant was much doubted in *Swan* v. *North British Australasian Land Co.* (1863) in the Court below, 7 H. & N. 603, 31 L. J. Ex. 425. In the present judgment the Court of C. P. seems to incline to the latter view.

(*n*) L. R. 4 C. P. at p. 712.

[31] See Vaca Valley Co. *v.* Mansfield, 84 Cal. 560; McNeil *v.* Jordan, 28 Kan. 7; Chapman *v.* Veach, 32 Kan. 167; Golden *v.* Hardesty, 93 Ia. 622; Logan *v.* Miller, 106 Ia. 511; State *v.* Matthews, 44 Kan. 596; White *v.* Duggan, 140 Mass. 18; Pence *v.* Arbuckle, 22 Minn. 417; Garland *v.* Wells, 15 Neb. 598; Steffian *v.* Milmo Bank, 69 Tex. 513; Schintz *v.* McManamy, 39 Wis. 299; Nelson *v.* McDonald, 80 Wis. 605.

[32] See *infra,* p. 866 *et seq.*

[33] Nance *v.* Lary, 5 Ala. 370; Wilson *v.* Miller, 72 Ill. 616; Caulkins *v.*

cuted by a man who meant to execute not any such instrument but something of a different kind is in itself a mere nullity, though the person so executing it may perhaps be estopped from disputing it if there be negligence on his part (*o*);[34] and that, notwithstanding the *importance constantly attached by the law to the security [464 of *bona fide* holders of negotiable instruments, no exception is in this case made in their favour.

Such questions in equity generally complicated with circumstances of fraud. The existence of a fundamental error of this sort, not merely as to particulars, but as to the nature and substance of the transactions, has seldom been considered by courts of equity except in connection with questions of fraud from which it is not always practicable to disentangle the previous question, Was their any consenting mind at all? There is enough however to show that the same principles are applied.

Kennedy v. Green. Thus in *Kennedy* v. *Green* (*p*) the plaintiff was induced to execute an assignment of a mortgage, and to sign a receipt for money which was never paid to her, "*without seeing what she was setting her hand to,* by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage-money." Lord Brougham expressed a positive opinion that a plea of *non est factum* would have been sustained at law under the circumstances (*q*).[35] But his decision rested also on the defendant having

(*o*) Cp. *Simons* v. *Great Western Ry. Co.* (1857) 2 C. B. N. S. 620, where the plaintiff was held not bound by a paper of special conditions limiting the company's responsibility as carriers, which he had signed without reading it, being in fact unable at the time to read it for want of his glasses, and being assured by the railway clerk that it was a mere form. "The whole question was whether the plaintiff signed the receipt knowing what he was about": per Cockburn C.J. at p. 624. The clerk's statement distinguishes this from the class of cases cited at pp. *48, *49, above. Where a person intending to execute his will has by mistake executed a wrong document, that document cannot be admitted to probate even if the real intention would thereby be partially carried out: *In the goods of Hunt* (1875) L. R. 3 P. & D. 250, 44 L. J. P. 43.

(*p*) (1834) 3 M. & K. 699, 41 R. R. 176.

(*q*) 3 M. & K. at pp. 717, 718, 41 R. R. 190, 191 (but see the follow-

Whisler, 29 Ia. 495; First Bank *v.* Zeims, 93 Ia. 140. And see Baxendale *v.* Bennett, 3 Q. B. D. 525.

Notes stolen before delivery give no right even to a *bona fide* purchaser. Salley *v.* Terrill, 95 Me. 553; Burson *v.* Huntington, 21 Mich. 415. But a contrary doctrine was laid down in Shipley *v.* Carrol, 45 Ill. 285, and seems to be enacted in the Negot. Inst. Law, § 35. See 14 Harv. L. Rev. 243.

[34] See *infra,* p. 866 *et seq.*

[35] Burlington Co. *v.* Evans Co., 100 Ia. 469; Aultman *v.* Olson, 34 Minn. 450. But see *contra,* Wall *v.* Muster's Exec., 23 Ky. L. Rep. 556.

constructive notice of the fraud, and no costs were given to the plaintiff, her conduct being considered not free from negligence.

Vorley v. Cooke. In *Vorley* v. *Cooke* (*r*) there were cross suits for
465] fore*closure and for cancellation of the mortgage deed. The alleged mortgagor had executed the mortgage deed at the instance of his solicitor, believing it to be a covenant to produce deeds. This mortgage so obtained was assigned to a purchaser for valuable consideration without notice, against whom no relief could have been given had the deed been only voidable (p. *444, above). It was held that the deed was wholly void and no estate passed by it, and decreed accordingly that it must be delivered up to be cancelled. The somewhat similar decision in *Ogilvie* v. *Jeaffreson* (*r*) was mainly on the ground that the defendants were not purchasers without notice; the use of the words "wholly void" is therefore immaterial.

On the other hand,

"When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed" (*s*).[36]

ing note). Sir John Leach seems to have thought the estate did pass: 3 M. & K. p. 713, 41 R. R. 187. Hence the variance between the form of the decree affirmed and Lord Brougham's view of the case. Stuart V.-C.'s remark (2 Giff. 381) applies to the M. R.'s judgment, not to Lord Brougham's.

(*r*) (1857) 1 Giff. 230, 27 L. J. Ch. 185; and see the reporter's note, p. 237. This decision seems to be within the authority of *Thoroughgood's case* (which curiously enough was not cited), at all events as since construed in *Foster* v. *Mackinnon* (p. 462, above). However, James L.J. intimated an opinion that a plea of *non est factum* could not have been sustained at law either here or in *Kennedy* v. *Green: Hunter* v. *Walters* (1871) L. R. 7 Ch. at p. 84; cp. *Ogilvie* v. *Jeaffreson* (1859–60) 2 Giff. 353, 29 L. J. Ch. 905.

(*r*) See preceding note.

(*s*) *Hunter* v. *Walters* (1871) L. R. 7 Ch. 75; per Mellish L.J. at p. 88; cp. *Nat. Prov. Bank of England* v. *Jackson* (1886) 33 Ch. Div. 1; and *Lloyd's Bank, Ltd.* v. *Bullock* [1896] 2 Ch. 192, 196, 65 L. J. Ch. 680. *Empson's case* (1870) (L. R. 9 Eq. 597, where no authorities appear to have been cited) seems distinguishable. There the applicant bought land of a building society and executed without examination mortgage deeds prepared by the society's solicitor to secure the price. These deeds contained recitals that he was a member, and treated the whole transaction as an advance by the society to one of its own members. He was never admitted or otherwise treated as a member. The Court held that he was not a contributory in the winding-up of the society. Here the matter of the fictitious recitals was collateral to the main purpose of the transaction. Observe that so far as the deed professed to treat Empson as a shareholder it was void, not only voidable: otherwise it would have been too late to repudiate the shares after the winding-up order.

[36] In Terry v. Tuttle, 24 Mich. 206, 211, 212, the court held that "If a person signs and acknowledges a deed, supposing it to be a lease, without reading the same, and thereby enables his grantee to sell to an innocent purchaser for value, he cannot as against the latter deny the validity of the deed."

A conveyance from A. to B., purporting to grant that *which [466
A. has already conveyed by deed, and being obtained by B.'s fraud, is not void as a deed, and may create an estate by estoppel if it contains sufficiently clear averments (*t*).

A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission (*u*).

And it has been laid down that a man of business who executes "an instrument of a short and intelligible description cannot be permitted to allege that he executed it in blind ignorance of its real character" (*x*).[37] Probably this is to be taken as stating an inference of fact rather than a rule of law; but under such conditions the inference is irresistible.

Error as to legal character of the transaction. There may also be a fundamental error affecting not the whole substance of the transaction, but only its legal character. It is apprehended that on principle a case of this kind must be treated in the same way as those we have already considered; that is, if the two parties to a transaction contemplate wholly different legal effects, there is no agreement: but this will not prevent an act done by either party from having any other effect which it can have by itself and which it is intended to have by the party doing it.

Thus if A. gives money to B. as a gift, and B. takes it as a loan, B. does not thereby become A.'s debtor (*y*),[38] but the money is not

(*t*) *Onward Building Soc.* v. *Smithson* [1893] 1 Ch. 1, 62 L. J. Ch. 138, C. A.

(*u*) *Upton* v. *Tribilcock* (1875) 91 U. S. 45, 50.

(*x*) Per Lord Chelmsford C. *Wythes* v. *Labouchere* (1858–9) 3 De G. & J. 593, 601.

(*y*) But if B. communicates to A. his intention of treating the money as a loan, and A. assents, then there is a good contract of loan. See *Hill* v. *Wilson* (1873) L. R. 8 Ch. 888: per Mellish L.J at p. 896; where it was held that an advance at first intended to be a gift had in this way

Gavagan *v.* Bryant, 83 Ill. 376; Quinn *v.* Brown, 71 Ia. 376. And see McNeil *v.* Jordan, 28 Kan. 7. Cp. McGinn *v.* Tobey, 62 Mich. 252; Marden *v.* Dorthy, 160 N. Y. 39. In Harris *v.* Smith, 40 Mich. 453, "a bill to set aside a deed which conveyed certain lands and a mortgage, on the ground that complainant had not examined it and did not know that it was a deed when she signed it, but was led to believe that it was a formal instrument for dividing certain personal property, was dismissed on her own showing that she had seen that it contained a description of land and reference to a mortgage." And cp. cases cited *supra*, p. 585, note 30.

[37] "It will not do for a man to enter into a contract, and when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained." Upton *v.* Tribilcock, 91 U. S. 45, 50; Stutz *v.* Handley, 41 Fed. Rep. 531, 534; Insurance Co. *v.* Henderson, 69 Fed. Rep. 762, 768; Royston *v.* Miller, 76 Fed. Rep. 50; Wagner *v.* National Ins. Co., 90 Fed. Rep. 395, 407; Wallace *v.* Chicago, etc., R. Co., 67 Ia. 547; Jackson *v.* Olney, 140 Mass. 195; Sanger *v.* Dun, 47 Wis. 615, 620; *supra*, p. 584, note 28.

[38] See *Re* Stevens' Est., 83 Cal. 322.

467] the less effectually delivered to B. (*z*).[39] *So, if a baker who has ordered flour of A.'s receives by a warehouseman's mistake flour of B.'s, which is more valuable, and consumes it in good faith, he is not liable to B. for the true value (*a*).[40]

We have seen however (p. *450), that mistake as to any particular effect of a contract depending on its true construction does not discharge the contracting party or entitle him to act upon his own erroneous construction.

B. *Error as to the person of the other party.*

Error in persona. Another kind of fundamental error is that which relates to the person with whom one is contracting. Where it is

been turned into a loan, and was a good consideration for a promissory note subsequently given for the amount.

(*z*) Savigny, Syst. 3. 269; Paulus. D. 44. 7. de o. et a. 3 § 1. Non satis autem est dantis esse numos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi ut obligatio constituatur. Itaque si quis pecuniam suam donandi causa dederit mihi, quamquam et donantis fuerit, et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est. As to the transfer of the property being effectual (notwithstanding Ulpian's opinion in D. 12 1. de reb. cred. 18 pr.) cp. Julianus, D. 41. 1. de acq. rer. dom. 36. The reason is that to that extent there is an intention free from error on the one part and an assent on the other. But a wholly mistaken handing over of money or goods passes no property: *R.* v. *Middleton* (1873) L. R. 2 C. C. R. 38, 44, 42 L. J. M. C. 73; *Kingsford* v. *Merry* (1856) (Ex. Ch.) 1 H. & N. 503, 26 L. J. Ex. 83; and see *Chapman* v. *Cole* (1858) 12 Gray (Mass.) 141; *R.* v. *Ashwell* (1885) 16 Q. B. D. 190, 55 L. J. M. C. 65. [Jones *v.* State, 99 Ga. 46; State *v.* Ducker, 8 Oreg. 394; State *v.* Robinson, 11 Tex. App. 403.]

(*a*) *Hills* v. *Snell* (1870) 104 Mass. 173; cp. the somewhat similar case put by Bramwell B. in *R.* v. *Middleton* (1873) L. R. 2 C. C. R. at p. 56.

39 Where a party "purchased at an administrator's sale a drill machine, which, unknown to all concerned, contained money and other valuables secreted there by the decedent, it was held that the sale passed to the purchaser the right to the machine, and every constituent part of it, but not to the valuables contained in it, which on discovery were to be held as treasure trove for the personal representatives of the deceased owner. Huthmacher *v.* Harris' Admr., 38 Pa. 491. See also Cooper *v.* Commonwealth, 110 Ky. 123; Keron *v.* Cashman, 33 Atl. Rep. 1055 (N. J.); Durfee *v.* Jones, 11 R. I. 588; Robinson *v.* State, 11 Tex. App. 403; 52 L. R. A. 136*n*.

The owner of a gold coin issued by a private individual, and of the value of $10, passed it by mistake for half a dollar to A.; A., under a like mistake, passed it to B. Held, That A. acquired no property in the gold piece, and could convey none to B. Chapman *v.* Cole, 12 Gray, 141; Filgo *v.* Penny, 2 Murphey, 182. And see Gardner *v.* Lane, 9 Allen, 492 (stated *infra*, p. 603, note 60.

40 So, in a case of barter, where A. was under an obligation to deliver to B. a specific quantity of grain, and in order to satisfy the obligation, placed the required amount of grain in B.'s bins without notifying B., who consumed it in ignorance of A.'s act, the obligation was held not discharged, since B. was entitled to inspect the grain to determine quality and quantity before accepting. Jenkins v. Mapes, 53 Ohio St. 110.

material for the one party to know who the other is, this prevents any real agreement from being formed (*b*). Such knowledge is in fact not material in a great part of the daily transactions of life, as for instance when goods are sold for ready money, or when a railway traveller takes his ticket: and then a mere absence of knowledge caused by complete indifference as to the person of the other party cannot be considered as mistake, and there can be no question of this kind. In principle, however, the intention of a contracting party is to create an obligation between himself and another certain person, and if that *intention fails to take its proper effect, it cannot be [468 allowed to take the different effect of involving him without his consent in a contract with some one else.

Boulton v. Jones. In *Boulton* v. *Jones* (*c*) an order for goods had been addressed by the defendants to a trader named Brocklehurst, who without their knowledge had transferred his business to the plaintiff Boulton. The plaintiff supplied the goods without notifying the change, and after the goods had been accepted sent an invoice in his own name, whereupon the defendants said they knew nothing of him. It was held that there was no contract, and that he could not recover the price of the goods. Possibly the person for whom the order was meant might have adopted the transaction if he had thought fit. But with the plaintiff there was no express contract, for the defendant's offer was not addressed to him; nor yet an implied one, for the goods were accepted and used by the defendants on the footing of an express contract with the person to whom their offer was really addressed. The defendants might have had a set-off against the person with whom they intended to contract (*d*).[41]

(*b*) Savigny, Syst. 3. 269; Pothier, Obl. § 19, adopted by Fry J. in *Smith* v. *Wheatcroft* (1878) 9 Ch. D. at p. 230, 47 L. J. Ch. 745. If I take a loan from A. thinking he is B.'s agent to lend me the money when he is in truth C.'s there is no contract of loan, though C. may get back his money by *condictio:* D. 12. 1. de reb. cred. 32.

(*c*) *Boulton* v. *Jones* (1857) 2 H. & N. 564, 27 L. J. Ex. 117. And see *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28, where *Boulton* v. *Jones* was followed in its full extent. But might it not be contended that according to general usage a proposal addressed to a trader at his place of business for the supply of goods in the way of that business is, in the absence of anything showing special personal considerations, a proposal to whoever is carrying on the same business continuously at the same place and under the same name?

(*d*) Cp. *Mitchell* v. *Lapage* (1816) Holt N. P. 253, 17 R. R. 633, a somewhat similar case, where the pur-

[41] If goods ordered of A. are furnished by B., and the buyer becomes aware of this fact at any time before he has used the goods, he must pay for them. Cincinnati Gas Co. *v.* Western Siemens Co., 152 U. S. 200, 202; Barnes *v.* Shoemaker, 112 Ind. 512; Orcutt *v.* Nelson, 1 Gray, 536; Mudge *v.* Oliver,

Personation. Again, if A. means to sell goods to B., and C. obtains delivery of the goods by pretending to be B.'s agent to make the con-
469] tract and receive the goods (*e*),[42] or if C., who is a *man of no means, obtains goods from A. by writing for them in the name of B., a solvent merchant already known to A., or one only colourably differing from it (*f*),[43] there is not a voidable contract between A. and C., but no contract at all; no property passes to C., and he can transfer none (save in market overt) even to an innocent purchaser. The pretended sale fails for want of a real buyer. There is only an offer on A.'s part to the person with whom alone he means to deal and thinks he is dealing.

chaser, after notice, had treated the contract as subsisting. Analogous in some ways, but really having nothing to do with any rule specially relating to mistake, is the class of cases showing that a subsisting contract cannot be performed by a person with whom it was not made: *Robson* v. *Drummond* (1831) 2 B. & Ad. 303, 36 R. R. 569; *Humble* v. *Hunter* (1848) 12 Q. B. 310, 17 L. J. Q. B. 350.

(*e*) *Hardman* v. *Booth* (1863) 1 H. & C. 803, 32 L. J. Ex. 105; cp. *Kingsford* v. *Merry* (1856) 1 H. & N. 503, 26 L. J. Ex. 83; *Hollins* v. *Fowler* (1874–5) L. R. 7 H. L. 757, 763, 795.

(*f*) *Lindsay* v. *Cundy*, *Cundy* v. *Lindsay* (1878) 3 App. Ca. 459, 47 L. J. Q. B. 481; *Ex parte Barnett* (1876) 3 Ch. D. 123, 45 L. J. Bk. 120; *Edmunds* v. *Merchants' Despatch Transport Co.*, 135 Mass. 283, decides that if A. *in person* obtains goods by pretending to be B., then, as A. is "identified by sight and hearing," property does pass. [See also Emporia Bank *v.* Shotwell, 35 Kan. 360: Robertson *v.* Coleman, 141 Mass. 231: Land Trust Co. *v.* Northwestern Bank, 196 Pa. 230. Cp. Tolman *v.* American Bank, 22 R. I. 462.] *Sed qu.* and cf. Pothier, Obl. § 19. So, if a man is persuaded to join a new company by fraudulently representing it to be identical with an older company of similar name, he does not become a shareholder: *Baillie's case* [1898] 1 Ch. 110, 67 L. J. Ch. 81.

1 Allen, 74. If the goods are sold by the purchaser before he knows that they were furnished by B., B. may recover in money had and received, the price received for them. Burton Lumber Co. *v.* Wilder, 108 Ala. 669. See also Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184. If the buyer discovers who is furnishing the goods before they are delivered, he may of course decline to receive them. Mitchell *v.* Lapage, Holt N. P. 253; Barcus *v.* Dorries, 64 N. Y. App. Div. 109.

[42] Smith Typewriter Co. *v.* Stidger, 71 Pac. Rep. 400 (Col. App.); Alexander *v.* Schwackhamer, 105 Ind. 81; Decan *v.* Shipper, 35 Pa. 239; Hamet *v.* Letcher, 37 Ohio St. 356; Edmunds *v.* Merchants' Desp. Transp. Co., 135 Mass. 283; Rodliff *v.* Dallinger, 141 Mass. 1; Hentz *v.* Miller, 94 N. Y. 64. And see Dean *v.* Yates, 22 Ohio St. 388; Moody *v.* Blake, 117 Mass. 23; Barker *v.* Dinsmore, 72 Pa. 427. *Contra*, Hawkins *v.* Davis, 8 Baxt. 506. But if A. sells goods to B., erroneously supposing him to be purchasing as agent for C., but without any representation or pretense on the part of B. that he was buying as agent for another, the contract is valid and the title to the goods passes to B. Stoddard *v.* Ham, 129 Mass. 383. Cp. *Ex parte* Barnett, 3 Ch. D. 123. And see Ellsworth *v.* Randall, 78 Ia. 141; Huffman *v.* Long, 40 Minn. 473; Kayton *v.* Barnett, 116 N. Y. 625.

[43] See Bruhl *v.* Coleman, 113 Ga. 1102; Pacific Express Co. *v.* Shearer, 160 Ill. 215; Oskamp *v.* Southern Express Co., 61 Ohio St. 341; Sword *v.* Young, 89 Tenn. 126.

Probably the principle cannot be extended to deeds. Whether any analogous doctrine applies to deeds is a question on which there does not seem to be any clear authority. We have seen that if a man seals and delivers (at any rate without culpable negligence) a parchment tendered to him as being a conveyance of his lands of Whiteacre, which is in fact a conveyance of his lands of Blackacre, it is not his deed and no estate passes. It might be argued that there is no reason why the insertion of a wrong party, if material, should not have the same result as the insertion of wrong parcels; and that if a man executes a conveyance of Whiteacre to A. as and for a conveyance of the same estate to B. it is equally not his deed. But the judgment in *Hunter* v. *Walters* (*g*) is certainly adverse to such a view.[44]

Satisfaction by a stranger to the contract. It is on the same principle that a party to whom any*thing is due under a contract is not [470 bound to accept satisfaction from any one except the other contracting party, in person where the nature of the contract requires it (*h*), or otherwise by himself, his personal representatives, or his authorized agent: and it has even been thought that the acceptance of satisfaction from a third person is not of itself a bar to a subsequent action upon the contract.[45] It seems that the satisfaction must be made in the debtor's name in the first instance and be capable of being ratified by him (*i*), and that if it is not made with his authority at the time there must be a subsequent ratification, which however need not be made before action (*k*). But these refinements have not been received without doubt (*l*): and it is submitted that the law

(*g*) (1871) L. R. 7 Ch. 75; *supra*, p. *465. On the other hand, "if A. personating B. executes a deed in the name of B. purporting to convey B.'s property, no right or interest can possibly pass by such an instrument. It is not a deed. It makes no difference in law that A. had the same name as B. if the false personation is established; still the instrument is not a deed, and that plea would be a complete answer by B. or any one claiming through him": *Cooper* v. *Vesey* (1882) 20 Ch. Div. 611, 623, 51 L. J. Ch. 862. (Kay J.; affd. in C. A. 20 Ch. Div. 627.)

(*h*) See *Robinson* v. *Davison* (1871) L. R. 6 Ex. 269, 40 L. J. Ex. 172.

(*i*) *James* v. *Isaacs* (1852) 12 C. B. 791, 22 L. J. C. P. 73; *Lucas* v. *Wilkinson* (1856) 1 H. & N. 420, 26 L. J. Ex. 13.

(*k*) *Simpson* v. *Eggington* (1856) 10 Ex. 845, 24 L. J. Ex. 312 (ratification by plea of payment or at the trial may be good).

(*l*) See per Willes J. in *Cook* v. *Lister* (1863) 13 C. B. N. S. 594, 32 L. J. C. P. 121, who considered the doctrine laid down in *Jones* v. *Broadhurst* (next note) that payment by a stranger is no payment till assent, as contrary to a well-known principle of law: the civil law being the other way expressly, and mercantile law by analogy: at the least assent ought to be presumed (cp. L. R. 10 Ch. 416).

44 But see Terry *v.* Tuttle, 24 Mich. 206, 212.

45 See *infra*, p. 840.

cannot depart in substance, especially now that merely technical objections are so little favoured, from the old maxim "If I be satisfied it is not reason that I be again satisfied" (*m*).

Assignment of contracts. So far the rule of common law. The power of assigning contractual rights which has long been recognized in equity, and which under the Judicature Act, 1873 (s. 25, sub-s. 6) is now recognized as effectual in law, does not constitute a direct exception. For we are now concerned only to ascertain the existence or non-existence of a binding contract in the first instance. But on the other hand the limit set to this power (which we have already 471] considered *under another aspect) (*n*) may be again shortly referred to as illustrating the same principle.

Generally speaking, the liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor, unless the creditor agrees to accept the liability of another person instead of the first (*o*).

The benefit of a contract can generally be transferred without the other party's consent, yet not so as to put the assignee in any better position than his assignor (*oo*). Hence the rule that the assignee is bound by all the equities affecting what is assigned. Hence also the "rule of general jurisprudence, not confined to choses in action . . that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation" (*p*), and the various consequences of its application in the equitable doctrines as to priority being gained by notice.

Rights founded on personal confidence cannot be assigned. Again, rights arising out of a contract cannot be transferred if they are coupled

(*m*) Fitzh. Ab. tit. Barre, pl. 166, repeatedly cited in the modern cases where the doctrine is discussed. See in addition to those already referred to, *Jones* v. *Broadhurst* (1850) 9 C. B. 173; *Belshaw* v. *Bush* (1851) 11 C. B. 191, 267, 22 L. J. C. P. 24.

(*n*) Ch. V., *supra*, p. *217, *sqq.*

(*o*) See p. *204, above. The exceptions to this are but partial. Thus the assignor of leaseholds remains liable on his express covenants: 1 Wms. Saund. 298. A stronger case is the transfer of shares in a company not fully paid up: but the special statutory law governing these transactions has not altogether lost sight of the principles of the general law: for (1) the transferor is not immediately discharged: (2) the company is not always bound to register the transfer.

(*oo*) Or the other party in a worse one than he was before: *Tolhurst* v. *Associated Portland Cement Manufacturers* [1901] 2 K. B. 811, 70 L. J. K. B. 1036. [This decision was reversed by the Court of Appeals [1902] 2 K. B. 660; and on appeal to the House of Lords the validity of the assignment was again upheld [1903] A. C. 414.]

(*p*) Per Willes J. *De Nicholls* v. *Saunders* (1870) L. R. 5 C. P. 589 at p. 594, 39 L. J. C. P. 297.

with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided (*q*).[46] Thus one partner cannot transfer his share so as to force a new partner on the other members of the firm without their consent: all he can give to an assignee is a right to receive what may be due to the assignor on the balance of the partnership accounts, and if the partnership *is at will, the assignment dissolves it; if [472 not, the other partners may treat it as a ground for dissolution.[47] And a sub-partner has no rights against the principal firm.

"At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent" (*r*).

In the same way a contract of apprenticeship is *prima facie* a strictly personal contract with the master;[48] this construction may be

(*q*) This statement was approved by the Supreme Court of the U. S. in *Arkansas Smelting Co.* v. *Belden Co.* (1888) 127 U. S. 379, 388.

(*r*) Cur. per Gray J. *Arkansas Smelting Co.* v. *Belden Co.* (1888) 127 U. S. 379, 387.

[46] Delaware County *v.* Diebold Safe Co., 133 U. S. 473; Burke *v.* Taylor, 152 U. S. 634, 651; The Lizzie Merry, 10 Ben. 140; Bancroft *v.* Scribner, 72 Fed. Rep. 988; Sloan *v.* Williams, 138 Ill. 43; Sprankle *v.* Truelove, 22 Ind. App. 577, 590; Smalley *v.* Greene, 52 Ia. 241; Rappleye *v.* Racine Co., 79 Ia. 220; Worden *v.* Railroad Co., 82 Ia. 735; Schoonover *v.* Osborne, 108 Ia. 453; Shultz *v.* Johnson's Admr., 5 B. Mon. 497; Clinton *v.* Fly, 10 Me. 292; Eastern Advertising Co. *v.* McGaw, 89 Md. 72; Lansden *v.* McCarthy, 45 Mo. 106; Boykin *v.* Campbell, 9 Mo. App. 495; Redhefter *v.* Leathe, 15 Mo. App. 12; Hilton *v.* Crooker, 30 Neb. 707, 716; Kase *v.* Insurance Co., 58 N. J. L. 34; Thomas *v.* Thomas, 24 Oreg. 251; King *v.* Batterson, 13 R. I. 117; Palo Pinto County *v.* Gano, 60 Tex. 249; Hodgson *v.* Perkins, 84 Va. 706. Cp. Larne *v.* Groezinger, 84 Cal. 281; Devlin *v.* Mayor, 63 N. Y. 8; New England Iron Co. *v.* Railroad Co., 91 N. Y. 153, 167; Rochester Lantern Co. *v.* Stiles Co., 135 N. Y. 209, 216; Yorke *v.* Conde, 147 N. Y. 486; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435; Liberty Paper Co. *v.* Stoner Co., 59 N. Y. App. Div. 353, affd. without opinion in 170 N. Y. 582; Mitchell *v.* Taylor, 27 Oreg. 377; Day *v.* Vinson, 78 Wis. 198. See also 18 Harv. L. Rev. 23.

[47] Matthewson *v.* Clarke, 6 How. 122; Miller *v.* Brigham, 50 Cal. 615; Marquand *v.* N. Y. Mfg. Co., 17 Johns. 525; Cochran *v.* Perry, 8 W. & S. 262; Horton's Appeal, 13 Pa. 66.

[48] Tucker *v.* Magee, 18 Ala. 99; Davis *v.* Coburn, 8 Mass. 299; Futrell *v.*

excluded however by the intention of the parties, *e.g.* if the master's executors are expressly named (*s*), or by custom (*t*).

So if an agent appoints a sub-agent without authority, the sub-agent so appointed is not the agent of the principal and cannot be an accounting party to him (*u*).[49] On the same principle it was held in *Stevens* v. *Benning* (*x*) that a publisher's contract with an author was not assignable without the author's consent. The plaintiffs, who sought to restrain the publication of a new edition of a book claimed under instruments of which the author knew nothing, and which purported to assign to them all the copyrights, &c., therein mentioned (including the copyright of the book in question) and all the agreements with authors, &c., in which the assignors, with **473]** whose firm the *author had contracted, were interested. It was decided that the instrument relied on did not operate as an assignment of the copyright, because on the true construction of the original agreement with the publishers the author had not parted with it: also that it did not operate as an assignment of the contract, because it was a personal contract, and it could not be indifferent to the author into whose hands his interests under such an engagement were entrusted. In the plaintiffs, however trustworthy, the author had not agreed or intended to place confidence: with them, however respectable, he had not intended to associate himself (*y*).[50] Similarly where persons contract to sell land as trustees, and it appears that their power to sell arises only on the death of a tenant for life who is still living, they cannot require the purchaser to take a conveyance from the tenant for life, from whom he never agreed to buy. This

(*s*) *Cooper* v. *Simmons* (1862) 7 H. & N. 707, 31 L. J. M. C. 138.

(*t*) Bac. Abr. Master and Servant, E.

(*u*) *Cartwright* v. *Hateley* (1791) 1 Ves. jun. 292. Cp. Indian Contract Act, 1872, s. 193.

(*x*) 1 K. & J. 168, 6 D. M. & G. 223; followed in *Hole* v. *Bradbury* (1879) 12 Ch. D. 886, and applied to an incorporated company, *Griffith* v. *Tower Publishing Co.* [1897] 1 Ch. 21.

(*y*) See 1 K. & J. at p. 174, 6 D. M. & G. at p. 229.

Vann, 8 Ired. L. 402; Biggs *v.* Harris, 64 N. C. 413; Commonwealth *v.* Leeds, 1 Ashm. 405; Stringfield *v.* Heiskell, 2 Yerg. 546.

A contract for personal services is not assignable. Chapin *v.* Longworth, 31 Ohio St. 421; Davenport *v.* Gentry's Admr., 9 B. Mon. 427.

[49] De Bussche *v.* Alt, 8 Ch. D. 286, 310. Nor can the subagent recover compensation from the principal. Hanback *v.* Corrigan, 7 Kan. App. 479; Cleaves *v.* Stockwell, 33 Me. 341; Fearn *v.* Mayers, 53 Miss. 458; Hill *v.* Morris, 15 Mo. App. 322.

[50] But in C. F. Jewett Publishing Co. *v.* Butler, 159 Mass. 517, it was held that the fact that C. F. Jewett, the president of the corporation, for whom the corporation was named, had been guilty of criminal conduct and had absconded, did not excuse the performance by an author of a contract to give a book to the corporation for publication.

would be not merely adding a party to the conveyance, but forcing a wholly new contract on the purchaser (*z*).

Peculiarities in law of agency. The law of agency, which we have already had occasion to consider (*a*), presents much more important and peculiar exceptions. Here again we find that the limitations under which those exceptions are admitted show the influence of the general rule; thus a party dealing with an agent for an undisclosed principal is entitled as against the principal to the benefit of any defence he could have used against the agent.

It will be seen later that wilful concealment of a party's identity, even in a contract not as a rule of a strictly personal kind, may in peculiar circumstances amount to fraud (*b*).

*C. *Error as to the subject-matter.* **[474**

Error as to subject-matter. There may be fundamental error concerning:

A. The specific thing supposed to be the subject of the transaction.

B. The kind or quantity by which the thing is described, or some quality which is a material part of the description of the thing, though the thing be specifically ascertained.

The question however is in substance always the same, and may be put in this form: It is admitted that the party intended to contract in this way for something; but is this thing that for which he intended to contract?

Kennedy v. Panama, &c., Mail Company. The rule governing this whole class of cases is fully explained in the judgment of the Court of Queen's Bench in the case of *Kennedy* v. *Panama, &c. Mail Company* (*c*). There were cross actions, the one to recover instalments paid on shares in the company as money had and received, the other for a call on the same shares. The contention on behalf of the shareholder was "that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented (*d*), and not merely to represent the company *bona fide* believed it, and that the difference in substance between shares in a company with such a contract and shares in a company whose

(*z*) *Bryant and Barningham's Contract* (1890) 44 Ch. Div. 218, 59 L. J. Ch. 636.

(*a*) Ch. II., p. *96, above.

(*b*) *Gordon* v. *Street* [1899] 2 Q. B. 641, 69 L. J. Q. B. 45, C. A.

(*c*) (1867) L. R. 2 Q. B. 580, 36 L. J. Q. B. 260.

(*d*) A contract with the postmaster-general of New Zealand on behalf of the Government, which turned out to be beyond his authority.

supposed contract was not binding was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another" (*e*).

The Court allowed it to be good law that if the shares applied for were really different in substance from those allotted, this contention would be right. But it is an important part of the doc-
475] trine (*f*) that the difference in *substance must be complete. In the case of fraud, a fraudulent representation of any fact material to the contract gives a right of rescission; but the misapprehension which prevents a valid contract from being formed must go to the root of the matter. In this case the misapprehension was not such as to make the shares obtained substantially different from the shares described in the prospectus and applied for on the faith of that description (*g*).[51] It was at most like the purchase of a chattel with a collateral warranty, where a breach of the warranty gives an independent right of action, but in the absence of fraud is no ground for rescinding the contract (*h*).[52]

In the particular case of taking shares in a company the contract is not in any case void, but only voidable at the option of the shareholder if exercised within a reasonable time: this, although in strictness an anomaly, is required for the protection of the company's creditors, who are entitled to rely on the register of shareholders (*i*).

We reserve for the present the question how the legal result is

(*e*) Per Cur. L. R. 2 Q. B. at p. 586.

(*f*) In Roman law as well as in the Common Law, *ibid.* at p. 588, citing D. 18. 1. de cont. empt. 9, 10, 11. By a clerical error the statement of Ulpian (*h. t.* 14) "Si autem aes pro auro veneat, non valet," is ascribed to Paulus in the report.

(*g*) So, where new stock of a company is issued and purchased on the supposition that it will have a preference which in fact the company had no power to give to it, this does not amount to a generic difference between the thing contracted for and the thing purchased: *Eaglesfield* v. *Marquis of Londonderry* (1876) 4 Ch. Div. 693.

(*h*) *Street* v. *Blay* (1831) 2 B. & Ad. 456; 36 R. R. 626.

(*i*) See cases cited pp. *479, *480, *infra*.

51 One who subscribes and pays for shares of a proposed increase of stock, but to whom, without his knowledge, old shares instead of new shares are transferred, is not liable on them as a shareholder. Stephens *v.* Follett, 43 Fed. Rep. 842. Unless he ought to have known the character of the shares transferred. Bailey *v.* Tillinghast, 99 Fed. Rep. 801, 811. A subscriber for stock not in fact authorized may recover payments made on account of his subscription. Newbegin *v.* Newton Bank, 66 Fed. Rep. 701, 74 Fed. Rep. 135; McFarlin *v.* First Bank, 68 Fed. Rep. 868. Unless he is guilty of laches. Rand *v.* Columbia Bank, 94 Fed. Rep. 349.

52 See *infra*, p. 607, n. 67.

affected when the error is due to a representation made by the other party. The exposition of the general principle, however, is not the less valuable: and we now proceed to give instances of its application in the branches already mentioned.

A. **Subdivisions: Error in corpore. Ambiguous name.** Error as to the specific thing (*in corpore*). A singular modern case of this kind is *Raffles* v. *Wichelhaus* (*k*). The declaration averred an agreement for the sale by the *plaintiff to the defendants of certain goods, [476 to wit, 125 bales of Surat cotton, *to arrive ex "Peerless" from Bombay,* and arrival of the goods by the said ship: Breach, non-acceptance. Plea, that the defendants meant a ship called the "Peerless," which sailed from Bombay in October, and that the plaintiff offered to deliver, not any cotton which arrived by that ship, but cotton which arrived by a different ship also called the "Peerless," and which sailed from Bombay in December. The plea was held good, for "The defendant only bought that cotton which was to arrive by a particular ship;" and to hold that he bought cotton to arrive in any ship of that name would have been "imposing on the defendant a contract different from that which he entered into" (*l*).[53] Misunderstanding of an offer made by word of mouth might conceivably have a like effect,[54] but obviously is, and ought to be, difficult to prove (*m*).

(*k*) (1864) 2 H. & C. 906, 33 L. J. Ex. 160.

(*l*) Per Pollock C.B. and Martin B. 2 H. & C. at p. 207. The further questions which might have arisen on the facts are of course not dealt with. Such a case can occur only where "the ordinary evidence as to the primary meanings of the words" used "shows that the words may bear more than one meaning, without showing in which of those meanings either party used them, so that we have a case of equivocation": Sir H. W. Elphinstone in L. Q. R. ii. 110.

(*m*) *Phillips* v. *Bistolli* (1824) 2 B. & C. 511, 26 R. R. 433.

53 Where the action was on an agreement to purchase a lot on Prospect street, in Waltham, and it appeared that there were two streets of that name, and that the defendant intended to purchase a lot on one of said streets, and that plaintiff intended to sell a lot on the other, it was held that there was no contract. Kyle *v.* Kavanagh, 103 Mass. 356. A somewhat similar case is Stong *v.* Lane, 66 Minn. 94.

"If one agrees to buy and the other to sell a tract of land, the cargo of a particular ship, a horse or other chattel, reference being had by them to different objects or animals, no contract is concluded." Bridgewater Iron Co. *v.* Insurance Co., 134 Mass. 433, 436. And see Hazard *v.* Insurance Co., 1 Sumn. 218, 225; Harvey *v.* Harris, 112 Mass. 32; Page *v.* Higgins, 150 Mass. 27; Cutts *v.* Guild, 57 N. Y. 229; Irwin *v.* Wilson, 45 Ohio St. 426; Reilly *v.* Gantschi, 174 Pa. 80; Sheldon *v.* Capron, 3 R. I. 171.

So where in a bargain for insurance on grain in an elevator, there was a material mistake as to which of two adjacent elevators contained the grain, the insurance company was held not liable. Mead *v.* Phenix Ins. Co., 158 Mass. 124.

54 See Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514; Rowland *v.* New York, etc., R. Co., 61 Conn. 103; Rupley *v.* Daggett, 74 Ill. 351.

Parcels included by mistake. In *Malins* v. *Freeman* (*n*) specific performance was refused against a purchaser who had bid for and bought a lot different from that he intended to buy: but the defendant had acted with considerable negligence, and the question was left open whether there was not a valid contract on which damages might be recovered at law. The case of *Calverley* v. *Williams* (*o*) shows however that the same principle has been fully recognized by courts of equity. The description of an estate sold by auction included a piece which appeared not to have been in the contemplation of the parties, and the purchaser was held not to be entitled to a conveyance of this part. **477]** "It is impossible to *say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. . . . . The question is, does it appear to have been the common purpose of both to have conveyed this part?"

Harris v. Pepperell, &c. In *Harris* v. *Pepperell* (*p*) the vendor had actually executed a conveyance including a piece which he had not intended to sell, but which the defendant maintained he had intended to buy: Lord Romilly, acting in accordance with his own former decision in *Garrard* v. *Frankel* (*q*), gave the defendant an option of "having the whole contract annulled or else of taking it in the form which the plaintiff intended." The converse case occurred in *Bloomer* v. *Spittle* (*r*), where a reservation had been introduced by mistake.[55] The principle of these cases seems to be that the Court will not hold the plaintiff bound by the defendant's acceptance of an offer which did not express the plaintiff's real intention, and which the defendant could not in the circumstances have reasonably supposed to express

(*n*) (1836–7) 2 Keen 25, 44 R. R. 178; *Dacre* v. *Gorges* (1825) 2 S. & St. 454, 25 R. R. 246, appears to belong to the same class.

(*o*) (1790) 1 Ves. jun. 210, 1 R. R. 118.

(*p*) (1867) L. R. 5 Eq. 1.

(*q*) (1862) 30 Beav. 445, 31 L. J. Ch. 604.

(*r*) (1872) L. R. 13 Eq. 427, 41 L. J. Ch. 369.

[55] In Brown *v.* Lamphear, 35 Vt. 252, the plaintiff had conveyed to the defendant a piece of land on which was a spring, from which the plaintiff's aqueduct supplied his own and other premises with water. The plaintiff had not intended to part with his right to draw water from the spring, but by mistake no reservation was made in the deed; the defendant, at the time of the purchase, did not know of the existence of the spring. The defendant was given an option either to make a conveyance to the plaintiff entitling him to use the water from the spring or to reconvey the land on repayment of the purchase money. And see Gilroy *v.* Alis, 22 Ia. 174; Harrison *v.* Talbot, 2 Dana, 258; Page *v.* Higgins, 150 Mass. 27, 32; Keene *v.* Demelman, 172 Mass. 17; Newton *v.* Tolles, 66 N. H. 136; Lawrence *v.* Staigg, 8 R. I. 256; Fehlberg *v.* Cosine, 16 R. I. 162.

it (*s*); nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not have consented to accept: but will put the parties in the same position as if the original offer were still open (*t*). The *Court having come to the conclusion that the parties did not [478 rightly understand each other, "it is not possible without consent to make either take what the other has offered" (*u*). This does not mean that a party who has accepted in good faith and in its natural sense a proposal made in explicit terms can be deprived of his right to rely on the contract merely because the proposer failed to express his own intention. In such a case the proposer is estopped from showing that his reasonably apparent meaning was not his real meaning (*x*).[56]

Ambiguous terms of contract. Similarly, "where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not contemplated by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract," and the plaintiff refuses to have the contract executed in the manner in which the defendant is willing to complete it, specific performance cannot be granted (*y*).

When the purchaser erroneously but not unreasonably supposes a portion of property to be included which is of no considerable quantity, but such as to enhance the value of the whole, this is a "mistake

(*s*) This limitation is material; cp. *Paget* v. *Marshall* (1884) 28 Ch. Div. 255, 54 L. J. Ch. 575, with *Tamplin* v. *James* (1880) 15 Ch. Div. 215. Lord Romilly's judgments do not, in terms at any rate, sufficiently attend to the principle enforced in *Tamplin* v. *James*. More lately it has been said that these decisions can be supported only on the ground of fraud, per Farwell J. *May* v. *Platt* [1900] 1 Ch. 616, 69 L. J. Ch. 357. It remains to be seen whether this criticism is itself tenable to that extent.

(*t*) For the principle of these decisions compare *Clowes* v. *Higginson* (next note) and *Leyland* v. *Illingworth* (1860) 2 D. F. & J. 252–3. *McKenzie* v. *Hesketh* (1877) 7 Ch. D. 675, 47 L. J. Ch. 231, well shows the distinction between this class of cases and those where a true contract is carried out with abatement or compensation. In *Scott* v. *Littledale* (1858) 8 E. & B. 815, 27 L. J. Q. B. 201 (a case on an equitable plea), the point of mistake (*viz.* the vendors of a specific cargo showing the purchaser a sample which in fact was of a different bulk) did not go to the essence of the contract: the correspondence of the bulk to the sample was only a collateral term which the purchaser might waive if he chose. The vendors, therefore, were at all events not entitled to rescind the contract unconditionally.

(*u*) *Clowes* v. *Higginson* (1813) 1 Ves. & B. 524, 535, 12 R. R. 284.

(*x*) *Tamplin* v. *James*, see note (*s*) last page.

(*y*) *Baxendale* v. *Seale* (1854) 19 Beav. 601, 24 L. J. Ch. 385. Cp. per Lord Eldon, *Stewart* v. *Alliston* (1815) 1 Mer. 26, 33, 15 R. R. 81; and per Sir W. Grant, *Higginson* v. *Clowes* (1808) 15 Ves. 516, 524, 10 R. R. 112.

[56] See *supra*, p. 43 *et seq.*

between the parties as to what the property purchased really consists of" so material that the contract will not be enforced (*z*).[57]

In this class of cases a simple misunderstanding on the buyer's part of the description of the property sold, if such as a reasonable **479]** and reasonably diligent man might fall *into, may be enough to relieve him from specifically performing the contract, though not from liability in damages (*a*).[58] A vendor is in the same position if his agent has by ignorance or neglect included in a contract for sale property not intended to be sold (*b*).

As to shares: It was for some time (*c*) held that a material variance between the objects of a company as described in the prospectus and in the memorandum of association would entitle a person who had taken shares on the faith of the prospectus to say that the concern actually started was not that in which he agreed to become a partner, and to have his name removed from the register. But these decisions were disapproved of in the House of Lords on the ground that "persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established" (*d*). The rights and liabilities of persons taking shares in companies are indeed of a peculiar kind; and the imposition of this special duty upon them does not affect the general truth of the principle now being considered.

Error in distinguishing numbers of shares not material. It has also been attempted to dispute the validity of a transfer of shares because the transferor had not the shares corresponding to the numbers expressed in the transfer, although he had a sufficient number of other shares in the company; but it was held that the transferee, who had in

(*z*) *Denny* v. *Hancock* (1870) L. R. 6 Ch. 1, 14.

(*a*) *Tamplin* v. *James* (1880) 15 Ch. Div. 215.

(*b*) *Alvanley* v. *Kinnaird* (1849) 2 Mac. & G. 1, 8. Cp. *Griffiths* v. *Jones* (1873) L. R. 15 Eq. 279, 42 L. J. Ch. 468.

(*c*) *Ship's case* (1865) 2 D. J. & S. 544, L. R. 3 H. L. 343; *Webster's case* (1886) L. R. 2 Eq. 741; *Stewart's case* (1866) L. R. 1 Ch. 574.

(*d*) Per Lord Chelmsford, *Oakes* v. *Turquand* (1867) L. R. 2 H. L. 325, 351, 36 L. J. Ch. 949. See acc. *Kent* v. *Freehold Land Co.* (1868) L. R. 3 Ch. 493; *Hare's case* (1869) L. R. 4 Ch. 503; *Challis's case* (1870–1) L. R. 6 Ch. 266, 40 L. J. Ch. 431; all showing that the contract is in such cases not void, but only voidable at the option of the shareholder, which must be exercised within a reasonable time. So, a person who applies for shares in a company not described as limited cannot afterwards be heard to say that he did not mean to take shares in an unlimited company: *Perrett's case* (1873) L. R. 15 Eq. 250, 42 L. J. Ch. 305.

[57] See Ellicott *v.* White, 43 Md. 145; Irick *v.* Fulton's Exrs., 3 Gratt. 193.

[58] See Ames, Cas. Eq. Jur., p. 394, n.

*substance agreed to take fifty shares in the company, could not [480 set up the mistake as against the company's creditors (*e*). "The numbers of the shares are simply directory for the purposes (*f*) of enabling the title of particular persons to be traced; but one share, an incorporeal portion of the profits of the company, is the same as another, and share No. 1 is not distinguishable from share No. 2 in the same way as a grey horse is distinguishable from a black horse" (*g*).[59]

A compromise of an action has been avoided, where by misapprehension of counsel it extended to matters which his client and he thought were not in dispute (*h*).

B. **Error as to kind, &c.** Error as to kind, quantity, or quality of the thing.

A material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description (whether alone or in addition to an individual description) may make the agreement void, either because there was never any real consent of the parties to the same thing, or because the thing or state of things to which they consented does not exist or cannot be realized.[60]

(*e*) *Ind's case* (1872) L. R. 7 Ch. 485, 41 L. J. Ch. 564.

(*f*) *Sic* in the report.

(*g*) Or house No. 2 in a street from house No. 4 in the same street, though of the same description and in equally good repair: *Leach* v. *Mullett* (1827) 3 Car. & P. 115, 33 R. R. 657.

(*h*) *Hickman* v. *Berens* [1895] 2 Ch. 638, 64 L. J. Ch. 785, C. A.

[59] Aitkins *v.* Gamble, 42 Cal. 86; Krouse *v.* Woodward, 110 Cal. 638; Caswell *v.* Putnam, 120 N. Y. 153, 157; Mayo *v.* Knowlton, 134 N. Y. 250, 253.

[60] In Gardner *v.* Lane, 9 Allen, 492, it appeared that G. F. Wonson & Bros. sold to plaintiff 135 barrels of No. 1 mackerel, and gave him a bill of sale thereof; no delivery was then made, but about two months later plaintiff called for the mackerel, and G. F. Wonson went with him to a wharf, where a large quantity was stored, and counted out eighty-five barrels of mackerel, which both supposed to be No. 1, and these were delivered to plaintiff and left there; that they then went to a store where there were barrels in rows, and Wonson counting off two rows containing, as he said, fifty barrels, marked the barrel at the end of each row, and gave to plaintiff a storage receipt in the name of his firm of Geo. F. Wonson & Bros. Before the same were removed the defendant, a creditor of Wonson & Bros. caused an attachment to be levied upon all of the property mentioned, and plaintiff thereupon replevied it. The two rows of barrels in the store numbered but forty-eight, and contained only salt. A portion of the quantity on the wharf was No. 1 mackerel and a portion was No. 3. Held: That no property in the barrels of No. 3 mackerel and of salt had passed to plaintiff. The court say, p. 499: "Where parties to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished, or set apart, and subsequently a delivery is made, by mistake, of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery. They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them; the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent." Cp. S. C., 12 Allen, 39; Vigers *v.* Sanderson, [1901] 1 K. B. 608; Irwin *v.* Wilson, 45 Ohio St. 426.

Genus: Thornton v. Kempster. In *Thornton* v. *Kempster* (*i*) the common broker of both parties gave the defendant as buyer a sale note for *Riga Rhine* hemp, but to the plaintiff as seller a note for *St. Petersburg clean* hemp. The bought and sold notes were the only evidence of the terms of the sale. The Court held that "the contract must be on the one side to sell and on the other side to accept one and the same thing": here the parties so far as appeared had never agreed that the one should buy and the other accept the same thing; consequently there was no agreement subsisting between them.

481] *In a case of this kind however there is not even an agreement in terms between the offer and the acceptance.

Quantity. A curious case of error in quantity happened in *Henkel* v. *Pape* (*k*), where by the mistake of a telegraph clerk an order intended to be for three rifles only was transmitted as an order for fifty. The only point in dispute was whether the defendant was bound by the message so transmitted, and it was held that the clerk was his agent only to transmit the message in the terms in which it was delivered to him.[61] The defendant had accepted three of the fifty rifles sent, and paid the price for them into Court: therefore the question whether he was bound to accept any did not arise in this case. It is settled however by former authority that when goods ordered are sent together with goods not ordered, the buyer may refuse to accept any, at all events "if there is any danger or trouble attending the severance of the two" (*l*).[62]

(*i*) 5 Taunt. 786, 15 R. R. 658.

(*k*) (1870) L. R. 6 Ex. 7, 40 L. J. Ex. 15.

(*l*) *Levy* v. *Green* (1857) 8 E. & B. 575, in Ex. Ch. 1 E. & E. 969, 27 L. J. Q. B. 111, 28 *ib.* 319, per Byles J. 1 E. & E. at p. 976; and cp. *Hart* v. *Mills* (1846) 15 M. & W. 85, 15 L. J. Ex. 200, where a new contract was implied as to part of the goods which was retained; but in that case the quality as well as the quantity of the goods sent was not in conformity with the order.

[61] Verdin *v.* Robertson, 10 Ct. Sess. Cas. (3d series) 35; Postal Tel. Co. *v.* Schaefer, (Ky.) 62 S. W. Rep. 1119; Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030; Pepper *v.* Telegraph Co., 87 Tenn. 554, accord. Western Union Tel. Co. *v.* Shotter, 71 Ga. 760; Western Union Tel. Co. *v.* Flint River Co., 114 Ga. 576; Ayer *v.* Western Union Tel. Co., 79 Me. 493; Haubelt *v.* Rea & Page Mill Co., 77 Mo. App. 672, *contra*. See also Morgan *v.* People, 59 Ill. 58; Wilson *v.* Railway Co., 31 Minn. 481; Howley *v.* Whipple, 48 N. H. 488; Durkee *v.* Vermont Central R. Co., 29 Vt. 137.

The question has been disputed on the continent of Europe also. See Lyon-Caen et Renault, Traité de Droit Commercial, Vol. III, § 23.

If the receiver of the telegram had reason to know, from the price named in a telegraphic offer, that an error must have been made, clearly an acceptance will not bind the sender to the offer in the form in which it was delivered. Germain Fruit Co. *v.* Western Union Tel. Co., 137 Cal. 598.

[62] Rommel *v.* Wingate, 103 Mass. 327; Deutsch *v.* Pratt, 149 Mass. 415, 421;

Price. The principle of error in quantity preventing the formation of a contract is applicable to an error as to the price of a thing sold or hired (*m*).[63] As there cannot be even the appearance of a contract when the acceptance disagrees on the face of it with the proposal, this question can arise only where there is an unqualified acceptance of an erroneously expressed or understood proposal. If the proposal is misunderstood by the acceptor, it is for him to show that the misunderstanding was reasonable. "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the *simple statement that he has made a mistake" (*n*). A. [482 makes an offer to B. to take a lease of a named farm, specifying as its contents land amounting to 250 acres; B.'s agent, who meant to invite offers for only 200 acres, accepts A.'s offer without examining its particulars. Here there is a contract binding on B., and A. is entitled to specific performance to the extent of B.'s power to give it, with a proportionate reduction of the rent (*o*).

If, on the other hand, the proposal is by accident wrongly expressed, the proposer must show that the acceptor could not reasonably have supposed it in its actual form to convey the proposer's real intention. This occurred in *Webster* v. *Cecil* (*p*), where the defendant sent a written offer to sell property and wrote 1,100*l.* for 2,100*l.* by a mistake in a hurried addition of items performed on a separate piece of paper. This paper was kept by him and produced to the Court. On receiving the acceptance he discovered the mistake and at

(*m*) D. 19. 2. locati, 52. Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur. Sed et si ego minoris me locare sensero, tu pluris te conducere, utique non pluris erit conductio quam quanti ego putavi.

(*n*) *Tamplin* v. *James* (1880) 15 Ch. Div. 215, 217 (Baggallay L.J.).

(*o*) *McKenzie* v. *Hesketh* (1877) 7 Ch. D. 675, 47 L. J. Ch. 231.

(*p*) (1861) 30 Beav. 62.

Landesman *v.* Gummersell, 16 Mo. App. 459; Croninger *v.* Crocker, 62 N. Y. 151; Southwell *v.* Breezley, 5 Oreg. 143; Perry *v.* Mt. Hope Iron Co., 16 R. I. 318; Barton *v.* Kane, 17 Wis. 37. Cp. Downer *v.* Thompson, 6 Hill, 208; Bowers *v.* Worth, 129 N. C. 36; Brownfield *v.* Johnson, 128 Pa. 254.

[63] Greene *v.* Bateman, 2 Woodb. & M. 359; Rovegno *v.* Deffarari, 40 Cal. 459; Peerless Glass Co. *v.* Pacific Crockery Co., 121 Cal. 641; Railroad Co. *v.* Jackson, 24 Conn. 514; Rowland *v.* New York, etc., R. Co., 61 Conn. 103; Rupley *v.* Daggett, 74 Ill. 351; Turner *v.* Webster, 24 Kan. 38; Harran *v.* Foley, 62 Wis. 584. See also Star Glass Co. *v.* Langley, 64 Ga. 576, 578; Fear *v.* Jones, 6 Ia. 169, 170.

On a sale at auction of a block of land subdivided into separate lots, defendant became the purchaser. A bill for specific performance having been filed, complainant proved that the premises were put up to be sold by the lot; but it appearing that defendant not unreasonably supposed that the block was offered as an entirety, and that he intended his bid as the price for the whole block, the bill was dismissed. Coles *v.* Bowne, 10 Paige, 526.

once gave notice of it. It appeared that the plaintiff had reason to know the real value of the property. Under the circumstances specific performance was refused. The case is explained by James L.J. as one "where a person snapped at an offer which he must have perfectly well known to be made by mistake." (*q*).[64]

Material attribute. But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing. For some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely, without that **483]** quality, *is not that to which the common intention of the parties was directed, and the agreement is void.

Conditions necessary to avoid transaction on this ground. An error of this kind will not suffice to make the transaction void unless—

(1) It is such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind (*r*);

(2) and the error is also common to both parties.

Thus we read "Mensam argento coopertam mihi *ignoranti* pro solida vendidisti *imprudens;* nulla est emptio, pecuniaque eo nomine data condicetur" (*s*). Again, "Si aes pro auro veneat, non valet" (*t*). "If a bar [is] sold as gold, but [is] in fact brass, the vendor being innocent, the purchaser may recover" (*u*).[65] This, however, is not to be taken too largely. What does *pro auro*, as and for gold, imply as

(*q*) *Tamplin* v. *James* (1880) 15 Ch. D. at p. 221.

(*r*) Savigny, Syst. § 137 (3. 283).

(*s*) D. 18. 1. de cont. empt. 41 s. 1.

(*t*) D. eod. tit. 14, cited and adopted by the Court of Q. B. in *Kennedy* v. *Panama, &c. Mail Co.*, p. *474, *supra*.

(*u*) Per Lord Campbell C.J. *Gompertz* v. *Bartlett* (1853) 2 E. & B. 849, 854, 23 L. J. Q. B. 65.

[64] See Hume *v.* United States, 132 U. S. 406; Moffett *v.* Rochester, 178 U. S. 373; Shelton *v.* Ellis, 70 Ga. 297; Turner *v.* Webster, 24 Kan. 38; Burkhalter *v.* Jones, 32 Kan. 5; Chute *v.* Quincy, 156 Mass. 189; First Bank *v.* Hayes, 64 Ohio St. 100; Everson *v.* International Granite Co., 65 Vt. 658. "Where a proposition to sell goods is sent by a writing, that, by mistake, is ambiguous; and, knowing of such ambiguity, the receiver of the writing claiming an improbable meaning, unreasonably favorable to himself, and not intended or thought of by the sender, and without notice to the sender or inquiry of him as to his intended meaning, orders the goods, obtains and uses them, such receiver of the goods is liable to the seller of the same for the value of the goods used, as if no proposition had been sent." Butler *v.* Moses, 43 Ohio St. 166.

[65] A. agreed to sell a cow as a barren cow for $80. If a breeder the cow was worth about $1,000. Before transfer of possession A. discovered the cow was with calf. It was held he could rescind the bargain. Sherwood *v.* Wal-

here used? It implies that the buyer thinks he is buying, and the seller that he is selling, a golden vessel: and further, that the object present to the minds of both parties as that in which they are trafficking—the object of their common intention—is not merely this specific vessel, but this specific vessel, being golden. Then, and not otherwise, the sale is void.[66]

If the seller fraudulently represents the vessel as golden, knowing that it is not, the sale is (as between them) not void but voidable at the option of the buyer. For if both parties have been in innocent and equal error it would be unjust to let either gain any advantage: but a party who has been guilty of fraud has no right to complain of having been taken at his word; and it is conceivable that it might be for the interest of the buyer to affirm the transaction, as if the vessel supposed by the fraudulent seller to be of *worthless base [484 metal should turn out to be a precious antique bronze. Probably the results are the same if the buyer's belief is founded even on an innocent representation made by the seller. This seems to be assumed by the language of the Court in *Kennedy* v. *Panama, &c. Mail Company* (*x*). We shall recur to this point presently. Or in an ordinary case the buyer may choose to treat the seller's affirmation as a warranty, and so keep the thing and recover the difference in value.

Again, if the sale of the specific vessel is made in good faith with a warranty of its quality, the vendor must compensate the purchaser for breach of the warranty, but the sale is not even voidable. For the existence of a separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the specific chattel at all events.[67] Whether a particular affirmation as to the

(*x*) (1867) L. R. 2 Q. B. 580, 587, 36 L. J. Q. B. 260, p. *474, *supra.*

ker, 66 Mich. 568. Cp. Wheat *v.* Cross, 31 Md. 99; Wood *v.* Boynton, 64 Wis. 265; White *v.* Stelloh, 74 Wis. 435; McQuaid *v.* Ross, 85 Wis. 492.

In this connection may also be considered mistakes as to the legal validity of negotiable paper. Such validity is usually regarded as impliedly warranted by the seller. Meyer *v.* Richards, 163 U. S. 385, criticising Littauer *v.* Goldman, 72 N. Y. 508. See *post*, p. 654, n. 5. But a mutual mistake as to the solvency of the maker of a note does not affect a sale of the note. Hecht *v.* Batcheller, 147 Mass. 335; Bicknall *v.* Waterman, 5 R. I. 43.

[66] See Bridgewater Iron Co. *v.* Enterprise Ins. Co., 134 Mass. 433, 436; Kowalke *v.* Milwaukee Electric Co., 103 Wis. 472.

[67] Thornton *v.* Wynn, 12 Wheat. 183; Lyon *v.* Bertram, 20 How. 149; Trumbull *v.* O'Hara, 71 Conn. 172; Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554; Woodruff *v.* Graddy, 91 Ga. 333; Pound *v.* Williams, 47 S. E. Rep. 218; Ga. Code, § 3556; Crabtree *v.* Kile, 21 Ill. 180; Owens *v.* Sturges, 67 Ill. 366; Kemp *v.* Freeman, 42 Ill. App. 500 (but see *contra*, Sparling *v.* Marks, 86 Ill. 125); Marsh *v.* Low, 55 Ind. 271; Hoover *v.* Sidener, 98 Ind.

quality of a specific thing sold be only a warranty, or the sale be "conditional, and to be null if the affirmation is incorrect," is a question of fact to be determined by the circumstances of each case (*y*).

Error must be common. Accordingly, when the law is stated to be that "a party is not bound to accept and pay for chattels, unless they

(*y*) See per Wightman J. *Gurney* v. *Womersley* (1854) 4 E. & B. 133, 142, 24 L. J. Q. B. 46; *Bannerman* v. *White* (1861) 10 C. B. N. S. 844, 31 L. J. C. P. 28, Finch Sel. Ca. 531; *Azémar* v. *Casella* (1867) L. R. 2 C. P. 431, 677, 36 L. J. C. P. 124. The Roman law is the same as to a sale with warranty: D. 19. 1. de act. empt. 21 § 2. expld. by Savigny, Syst. 3. 287. The whole of Savigny's admirable expcsition of so-called *error in substantia* in §§ 137, 138 (3. 276 *sqq.*), deserves careful study. Of course the conclusions in detail are not always the same as in our law; and the fundamental difference in the rules as to the actual transfer of property in goods sold (as to which, see Blackburn on the Contract of Sale, Part 2, Ch. 3) must not be overlooked. But this does not affect the usefulness and importance of the general analogies.

290; Wulschner *v.* Ward, 115 Ind. 219, 222; Lightburn *v.* Cooper, 1 Dana, 273; H. W. Williams Transportation Line *v.* Darius Cole Transportation Co., 88 N. W. Rep. 473; Merrick *v.* Wiltse, 3 Minn. 41; Lynch *v.* Curfman, 65 Minn. 170 (cp. Close *v.* Crossland, 47 Minn. 500); Voorhees *v.* Earl, 2 Hill, 288; Cary *v.* Greeman, 4 Hill, 625; Muller *v.* Eno, 14 N. Y. 597; Day *v.* Pool, 52 N. Y. 416; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 269; Kase *v.* John, 10 Watts, 107; Freyman *v.* Knecht, 78 Pa. 141; Eshleman *v.* Lightner, 169 Pa. 46; Kauffman Milling Co. *v.* Stuckey, 40 S. C. 110; Hull *v.* Caldwell, 3 S. Dak. 451; Allen *v.* Anderson, 3 Humph. 581; Wright *v.* Davenport, 44 Tex. 164; Hoadly *v.* House, 32 Vt. 179; Matteson *v.* Holt, 45 Vt. 336; Mooers *v.* Gooderham, 14 Ont. 451. Many jurisdictions in the United States, however, allow rescission of an executed sale for breach of warranty. Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Thompson *v.* Harvey, 86 Ala. 519; Hodge *v.* Tufts, 115 Ala. 366; Plant *v.* Condit, 22 Ark. 454, 458; Righter *v.* Roller, 31 Ark. 170, 173; Polhemus *v.* Heiman, 45 Cal. 573; Hoult *v.* Baldwin, 67 Cal. 610 (cp. Cal. Civ. Code, § 1786); Rogers *v.* Hanson, 35 Ia. 283; Upton Mfg. Co. *v.* Huiske, 69 Ia. 557; Eagle Iron Works *v.* Des Moines Ry. Co., 101 Ia. 289; Timken Carriage Co. *v.* Smith, (Neb.) 99 N. W. Rep. 183; Whalen *v.* Gordon, (Ia. C. C. A.) 95 Fed. Rep. 305; Code, art. 2520; Flash *v.* American Glucose Co., 38 La. Ann. 4 (based on the civil law); Craver *v.* Hornburg, 26 Kan. 94; Weybrich *v.* Harris, 31 Kan. 92; Gale Mfg. Co. *v.* Stark, 45 Kan. 606; Cutler *v.* Gilbreth, 53 Me. 176; Milliken *v.* Skillings, 89 Me. 180 (see also Noble *v.* Bushwell, 96 Me. 73); Taymon *v.* Mitchell, 1 Md. Ch. 496; McCeney *v.* Duvall, 21 Md. 166; Horner *v.* Parkhurst, 71 Md. 110 (cp. Horn *v.* Buck, 48 Md. 358, 372; Columbian Iron Works *v.* Douglas, 84 Md. 44, 64); Bradford *v.* Manly, 13 Mass. 139; Perley *v.* Balch, 23 Pick. 283; Dorr *v.* Fisher, 1 Cush. 271, 273; Bryant *v.* Isburgh, 13 Gray, 607; Smith *v.* Hale, 158 Mass. 178; Gilmore *v.* Williams, 162 Mass. 351, 352; Branson *v.* Turner, 77 Mo. 489; Johnson *v.* Whitman Works, 20 Mo. App. 100; Kerr *v.* Emerson, 64 Mo. App. 159; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Edwards *v.* Noel, 88 Mo. App. 434; Davis *v.* Hartlerode, 37 Neb. 864 (see also McCormick Co. *v.* Knoll, 57 Neb. 790); Sloan *v.* Wolf Co., (Neb. C. C. A.) 124 Fed. Rep. 190; Canham *v.* Plano Mfg. Co., 3 N. Dak. 229 (cp. N. Dak. Civ. Code, § 3988); Byers *v.* Chapin, 28 Ohio St. 300; Boothby *v.* Scales, 27 Wis. 626; Croninger *v.* Paige, 48 Wis. 229; Warder *v.* Fisher, 48 Wis. 338; Minn. Threshing Co. *v.* Wolfram, 96 Wis. 481; Parry Mfg. Co. *v.* Tobin, 106 Wis. 286; Optenburg *v.* Skelton, 109 Wis. 241, 244. See also Sparling *v.* Marks, 86 Ill. 125; Mader *v.* Jones, 1 Russ. & Chesley (Nova Scotia), 82.

The propriety of the decisions last cited is supported by the present editor in 16 Harv. L. Rev. 465 and 4 Col. L. Rev. 195, but criticised by Professor Burdick in 4 Col. L. Rev. 1, 455.

are really such as the vendor professed to sell, and the vendee intended to buy" (*z*) the condition is not *alternative but strictly con- [485 junctive. A sale is not void merely because the vendor professed to sell, or the vendee intended to buy, something of a different kind. It must be shown that the object was in fact neither such as the vendor professed to sell nor such as the vendee intended to buy.

And so in the case supposed the sale will not be invalidated by the mistake of the buyer alone, if he thinks he is buying gold; not even if the seller believes him to think so, and does nothing to remove the mistake, provided his conduct does not go beyond passive acquiescence in the self-deception of the buyer.

Smith v. Hughes. In a case (*a*) where the defendant bought a parcel of oats by sample, believing them to be old oats, and sought to reject them when he found they were new oats, it was held that "a belief on the part of the plaintiff that the defendant was making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief was induced by some misrepresentation of the plaintiff or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats." "There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor" (*b*); and therefore the question is whether we have to do merely with a motive *operating on the buyer to [486 induce him to buy, or with one of the essential conditions of the contract (*c*). "Videamus, quid inter ementem et vendentem actum sit" (*d*): "the intention of the parties governs in the making and in the construction of all contracts" (*e*); this is the fundamental rule

(*z*) Per Cur. *Hall* v. *Conder* (1857) 2 C. B. N. S. 22, 41, 26 L. J. C. P. 138, 143.

(*a*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597, 40 L. J. Q. B. 221; per Cockburn C.J. p. 603; per Hannen J. p. 610. The somewhat refined distinction here taken does not seem to exist in the civil law. D. 19. 1. de act. empt. 11 § 5: Savigny, 3. 293, according to whom it makes no difference whether there be on the part of the vendor ignorance, passive knowledge, or even actual fraud: the sale being wholly void in any case.

(*b*) *Ibid.* per Blackburn J. at p. 607.

(*c*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597, per Cockburn, C.J.

(*d*) Julianus in D. 18. 1 de cont. empt. 41 pr.

(*e*) Per Cur. *Bannerman* v. *White* (1861) 10 C. B. N. S. 844, 860, 31 L. J. C. P. 28, 32.

by which all questions, even the most refined, on the existence and nature of a contract must at last come to be decided.

Cox v. Prentice. Another curious case of this class is *Cox* v. *Prentice* (*f*). The declaration contained a count in assumpsit as on a warranty, and the common money counts. The nature of the material facts will sufficiently appear by the following extract from the judgment of Bayley J.:—

"What did the plaintiffs bargain to buy and the defendants to sell? They both understand [*sic*] that the one agreed to buy and the other to sell a bar containing such a quantity of silver as should appear by the assay, and the quantity is fixed by the assay and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented but a smaller quantity. The plaintiff therefore may rescind the contract and bring money had and received, having offered to return the bar of silver."

And by Dampier J.:—"The bargain was for a bar of silver of the quality ascertained by the assay-master, and it is not of that quality. It is a case of mutual error." These judgments went farther than was necessary to the decision (*g*), for a verdict had been taken only for the difference in value.[68] It would seem that the sale was good, and the mistake affected only the fixing of the price; the contract being to pay for the real quantity of silver, not for the quantity found by a particular assay.

(*f*) (1815) 3 M. & S. 344, 16 R. R. 288.

(*g*) And certainly farther than the civil law: see D. 18. 1. de cont. empt. 14, where though a bracelet "quae aurea dicebatur" should be found "magna ex parte aenea," yet "venditionem esse constat ideo, quia auri aliquid habuit."

68 When a piece of land, by mistake supposed to contain a given number of acres or feet, is sold and paid for at so much an acre or foot, and turns out to contain either more or less, the vendor or purchaser, as the case may be, can recover the difference in value. Solinger *v.* Jewett, 25 Ind. 479; Fly *v.* Brooks, 64 Ind. 50; Paige *v.* Sherman, 6 Gray, 511; Tarbell *v.* Bowman, 103 Mass. 341; Cardinal *v.* Hadley, 158 Mass. 352; Wilson *v.* Randall, 67 N. Y. 338; Paine *v.* Upton, 87 N. Y. 327; Gallup *v.* Bernd, 132 N. Y. 370; Jenks *v.* Fritz, 7 W. & S. 201; Franco-Texan Co. *v.* Simpson, 1 Tex. Civ. App. 600; Boschen's Ex. *v.* Jurgen's Ex., 92 Va. 756; Hull *v.* Watts, 95 Va. 10; Bartlett *v.* Bartlett, 37 W. Va. 235. See also Bigham *v.* Madison, 103 Tenn. 358; Rogers *v.* Pattie, 96 Va. 498.

If A. buys from B., and pays for, a mass of oats at a fixed sum per bushel, the quantity being estimated by the quantity of a portion of the mass which has been measured, which both suppose to contain 500 bushels, though in fact it contains but 500 half-bushels, A. can recover from B. for the excess of the estimated over the real quantity. Wheadon *v.* Olds, 20 Wend. 174. And see Devine *v.* Edwards, 87 Ill. 177.

If copartners make a settlement based on their understanding of what the firm books showed to be the state of their accounts, relief may be had if by reason of a mutual mistake in such understanding one party paid to the other more or less than was his due. Moors *v.* Bigelow, 158 Mass. 60; Locke *v.* Locke, 166 Mass. 435; McGunn *v.* Hanlin, 29 Mich. 476; Cobb *v.* Cole, 44 Minn. 278.

***Cases of misdescription on sales of real property distinguished.** It [487 is important to distinguish from the cases above considered another class where persons who have contracted for the purchase of real property or interests therein have been held entitled at law (*h*) as well as in equity (*i*)[69] to rescind the contract on the ground of a misdescription of the thing sold in some particular materially affecting the title, quantity, or enjoyment of the estate. In some of these cases language is used which, taken alone, might lead one to suppose the agreement absolutely void; and in one or two (*e.g., Torrance* v. *Bolton*) there is some real difficulty in drawing the line. But they properly belong to the head of Misrepresentation, or else (which may be the sounder view where applicable) (*k*) are cases where the contract is rather broken than dissolved. A man is not bound to take a house or land not corresponding to the description by which he bought it any more than he is bound to accept goods of a different denomination from what he ordered, or of a different quality from the sample. Mistake or no mistake, the vendor has failed to perform his contract. The purchaser may say: "You offered to sell me a freehold: that means an unincumbered freehold, and I am not bound to take a title subject to covenants" (*l*): or, "You offered to sell an absolute reversion in fee simple: I am not to be put off with an equity of redemption and two or three Chancery suits (*m*). I rescind the contract and claim back *my deposit." Cases of this kind, there- [488 fore, are put aside for the present.

Subject-matter not in existence. Again, an agreement is void if it relates to a subject-matter (whether a material subject of ownership or a

(*h*) *Flight* v. *Booth* (1834) 1 Bing. N. C. 370, 41 R. R. 599; *Phillips* v. *Caldcleugh* (1868) L. R. 4 Q. B. 159, 38 L. J. Q. B. 68.

(*i*) *Stanton* v. *Tattersall* (1853) 1 Sm. & G. 529; *Earl of Durham* v. *Legard* (1865) 34 Beav. 611, 34 L. J. Ch. 589; *Torrance* v. *Bolton* (1872) L. R. 8 Ch. 118, 42 L. J. Ch. 177. See authorities collected in Dart V. & P. 114 *sqq.*

(*k*) The difference is purely theoretical; for if it be an actual breach of contract the purchaser can recover only nominal damages: *Bain* v. *Fothergill* (1873–4) L. R. 7 H. L. 158, 43 L. J. Ex. 243, confirming *Flureau* v. *Thornhill* (1776) 2 W. Bl. 1078. [Cp. Day *v.* Singleton [1899] 2 Ch. 320. In the United States substantial damages are generally recoverable if the defendant was guilty of any fraud or other misconduct, and in some jurisdictions damages for loss of the bargain are always recoverable. Sedgwick on Damages (8th ed.), § 1008 *et seq.;* Sutherland on Damages §§ 78, 99, 578, *et seq.*] The analogy suggested in the text should perhaps be confined to cases where the misdescription goes to matter of title. One cannot compare a specific sale of land to a non-specific sale of goods: but the contract is not merely to sell specific land, but to give a certain kind of title.

(*l*) *Phillips* v. *Caldcleugh* (1868) L. R. 4 Q. B. 159, 38 L. J. Q. B. 68.

(*m*) *Torrance* v. *Bolton* (1872) L. R. 8 Ch. 118; see at p. 124.

[69] Hood *v.* Smith, 79 Ia. 621.

particular title or right) contemplated by the parties as existing but which in fact does not exist.[70] Herein, as before, everything depends on the intention of the parties, and the question is whether the existence of the thing contracted for or the state of things contemplated was or was not presupposed as essential to the agreement. Such is presumed to be the understanding in the case of sale. We may conveniently use the illustrations given on this point in the Indian Contract Act (*n*).

Illustrations. *a.* A. agrees to sell to B. a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

Couturier v. Hastie. This was assumed in the House of Lords and by all the judges in *Couturier* v. *Hastie* (*o*),[71] where the only question in dispute was on the effect of the special terms of the contract.

(*n*) S. 20; the rule is rather widely stated: Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

(*o*) (1856) 5 H. L. C. 673, 25 L. J. Ex. 253. For a fuller account of the case, and the relation of this class of cases to the doctrine of impossibility of performance, see pp. *419, *420, above.

[70] Quoted and applied in Riegel *v.* American Ins. Co., 153 Pa. 134. In that case a creditor holding as security a policy on the life of his debtor surrendered the policy to the company for a paid-up policy of less than half the face of the original policy. At the time, unknown to both parties, the insured had been dead ten days. The company was held bound to reinstate the original policy and pay it in full.

[71] In Duncan *v.* New York Ins. Co., 138 N. Y. 88, the parties rescinded a contract of insurance on the assumption that the vessel insured had reached port. In fact the vessel was lost. It was held that the rescission was not binding and the insurance could be recovered. See also, on the general question, Vinal *v.* Continental Co., 32 Fed. Rep. 343; Paine *v.* Pacific Ins. Co., 51 Fed. Rep. 689; United States *v.* Charles, 74 Fed. Rep. 142; Griffith *v.* Sebastian Co., 49 Ark. 24; Fleetwood *v.* Brown, 109 Ind. 567; Fritzler *v.* Robinson, 70 Ia. 500; Rice *v.* Dwight Mfg. Co., 2 Cush. 80, 86; Bridgewater Iron Co. *v.* Insurance Co., 134 Mass. 433, 436; Blaney *v.* Rogers, 174 Mass. 277, 280; McGoren *v.* Avery, 37 Mich. 120; Gibson *v.* Pelkie, 37 Mich. 380; Sherwood *v.* Walker, 66 Mich. 568; Nordyke Co. *v.* Kehlor, 155 Mo. 643; Marvin *v.* Bennett, 8 Paige, 312, 321; Rheel *v.* Hicks, 25 N. Y. 289; Harlem *v.* Lehigh Co., 35 Pa. 287; Muhlenberg *v.* Henning, 116 Pa. 138; King *v.* Doolittle, 1 Head, 77; Ketchum *v.* Catlin, 21 Vt. 191; Bedell *v.* Wilder, 65 Vt. 406. Where one having a claim against a foreign government, in ignorance that it had been allowed, gave to another an irrevocable power of attorney to prosecute it, and entered into a contract to pay him a percentage of what might be recovered, in consideration of his agreeing to use his efforts to bring the claim to a favorable issue, the contract was ordered to be canceled on the ground of mistake. Allen *v.* Hammond, 11 Pet. 63.

"But this principle has no application where one voluntarily purchases such right, title, or interest in property as another may have, even if both

b. A. agrees to buy from B. a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void (*p*).[72]

*We may add a like example from the Digest. A. agrees with [489 B. to buy a house belonging to B. The house has been burnt down, but neither A. nor B. knows it. Here there is not a contract for the sale of the land on which the house stood, with compensation or otherwise, but the sale is void (*q*).

Same principle applied to sale of shares. In like manner a sale of shares in a company will not be enforced if at the date of the sale a petition for winding-up has been presented of which neither the vendor nor the purchaser knew (*r*). But the ignorance of the buyer only in similar circumstances does not of itself invalidate the sale. It seems however that the sale would be voidable on the ground of fraud if the seller knew of the buyer's ignorance, but that such knowledge should be distinctly and completely alleged (*s*). An agreement to take new shares in a company which the company has no power to issue is also void, and money paid under it can be recovered back (*t*).

To annuities and life interests. *c.* A. being entitled to an estate for the life of B. agrees to sell it to C. B. was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

(*p*) Pothier, *Contrat de Vente*, § 4, cited 5 H. L. C. 678, says: "Si donc, ignorant que mon cheval est mort, je le vends à quelqu'um, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet." Cp. Code Civ. 1601. "Si au moment de la vente la chose vendue était périe en totalité, la vente serait nulle": and so Italian Code, 1461.

(*q*) Paulus in D. 18. 1. de cont. empt. 57, pr. Domum emi cum eam et ego et venditor combustam ignoremus; Nerva, Sabinus, Cassius, nihil venisse quamvis area maneat, pecuniamque solutam condici posse aiunt. Cp. Papinian, eod. tit. 58. Arboribus quoque vento defectis vel absumptis igne dictum est emptionem fundi non videri esse contractam si contemplatione illarum arborum, veluti oliveti, fundus comparabatur, sive sciente sive ignorante venditore.

(*r*) *Emmerson's case* (1866) L. R. 1 Ch. 433, expld. L. R. 3 Ch. 391, per Page Wood L.J.

(*s*) *Rudge* v. *Bowman* (1868) L. R. 3 Q. B. 689, 697. The Roman lawyers seem to have treated the presumption of *dolus* as absolute if the seller knew the facts. See the continuation of the passages above cited.

(*t*) *Bank of Hindustan* v. *Alison* (1870) L. R. 6 C. P. 54, in Ex. Ch. *ib.* 222, 40 L. J. C. P. 1, 117; *Ex parte Alison* (1874) L. R. 15 Eq. 394, 9 Ch. 1, 24; *Ex parte Campbell* (1873) L. R. 16 Eq. 417, L. R. 9 Ch. 1, 12, 42 L. J. Ch. 771.

parties are in error as to the extent or value of that title or interest, or even if in fact the seller has no right." Sears *v.* Leland, 145 Mass. 277, 278.

72 "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void." Sale of Goods Act, § 6.

This was so held at law in *Strickland* v. *Turner* (*u*).[73] There, at the date when the sale of a life annuity was completed, the life had **490]** dropped unknown to both vendor *and purchaser; it was held that the purchase money might be recovered back as on a total failure of consideration. So in *Hitchcock* v. *Giddings* (*x*) a remainderman in fee expectant on an estate tail had sold his interest, a recovery having been already suffered unknown to the parties: a bond given to secure the purchase money was set aside. "Here is an estate which if no recovery had been suffered was a good one. Both parties, being equally ignorant that a recovery had been suffered, agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives however he is purchasing something, that he is purchasing a vested interest. He is not aware that such interest has already been defeated . . . [The defendant] has sold that which he had not—and shall the plaintiff be compelled to pay for that which the defendant had not to give?" (*y*). More recently, in *Cochrane* v. *Willis* (*z*), an agreement had been made between a remainderman and the assignee of a tenant for life of a settled estate, founded on the assignee's supposed right to cut the timber. The tenant for life was in fact dead at the date of the agreement. The Court refused to enforce it, as having been entered into on the supposition that the tenant for life was alive, and only intended to take effect on that assumption. So a life insurance cannot be revived by the payment of a premium within the time allowed for that purpose by the original contract, but after the life has dropped unknown to both insurers and assured, although it was in existence when the premium became due, and although the insurers have waived proof of the party's health, which by the terms of renewal they might have required: the waiver applies to the proof of health of a man assumed to be alive, not to the fact of his being alive (*a*).[74]

(*u*) (1852) 7 Ex. 208, 22 L. J. Ex. 115.

(*x*) (1817) 4 Pri. (Ex. in Eq.) 135, and better in Dan. 1, 18 R. R. 725.

(*y*) Dan. at p. 7, 18 R. R. 729.

(*z*) (1865) L. R. 1 Ch. 58, 35 L. J. Ch. 36.

(*a*) *Pritchard* v. *Merchants' Life Insurance Society* (1858) 3 C. B. N. S. 622, 27 L. J. C. P. 169. For the somewhat different treatment of the contract of marine insurance, where at the date of effecting the policy the risk has been determined without the knowledge of the parties, see *Bradford* v. *Symondson* (1881) 7 Q. B. Div. 456, 50 L. J. Q. B. 582.

[73] Allen *v.* Hammond, 11 Pet. 63, 71. If the seller had known that the life had dropped, the sale would have been fraudulent. Thayer *v.* Knote, 59 Kan. 181; Haviland *v.* Willets, 141 N. Y. 35.

[74] See Bennecke *v.* Insurance Co., 105 U. S. 355; Misselhorn *v.* Mutual Assoc., 30 Fed. Rep. 545; Insurance Co. *v.* Ruse, 8 Ga. 534, 545; Miller *v.* Insurance Co.,

***Purchase of property already one's own.** The case of *Bingham* v. [491
Bingham (*b*), which was relied on in the argument of *Cochrane* v. *Willis*, and in the judgment of Turner L.J. must be considered as belonging to this class. As in *Cochrane* v. *Willis*, the substance of the facts was that a purchaser was dealing with his own property, not knowing that it was his. This consideration seems to remove the doubt expressed by Story (*c*), who criticizes it as a case in which relief was given against a mere mistake of law. But, with all respect for that eminent writer, his objection is inapplicable. For the case does not rest on mistake as a ground of special relief at all. There was a total failure of the supposed subject-matter of the transaction, or perhaps we should rather say it was legally impossible. We have already pointed out the resemblance of this class of cases to some of those considered in the last chapter. The one party could not buy what was his own already, nor could the other (in the words of the judgment as reported) be allowed "to run away with the money in consideration of the sale of an estate to which he had no right" (*d*). So we find it treated in the Roman law quite apart from any question of mistake, except as to the right of recovering back money paid under the agreement. A stipulation to purchase one's own property is "naturali ratione inutilis" as much as if the thing was destroyed, or not capable of being private property (*e*). Such an agreement is naught both *at law and in equity, without reference to the belief or [492
motive which determined it.

Agreement to pay rent for one's own property. Moreover the difficulty was cleared up by Lord Westbury, though not quite on this broad ground, in a case exactly similar in principle. In *Cooper* v. *Phibbs* (*f*) A. agreed to take a lease of a fishery from B., on the assumption that A. had no estate and B. was tenant in fee. Both parties were mistaken at the time as to the effect of a previous settlement; and in truth A. was tenant for life and B. had no estate at all. It was held that this agreement was invalid.

(*b*) (1748) 1 Ves. Sr. 126, Belt's Supp. 79.

(*c*) Eq. Jurisp. § 124.

(*d*) The case is considered, among other authorities, and upheld on the true ground, in *Stewart* v. *Stewart* (1839) 6 Cl. & F. at p. 968; cp. the remarks of Hall V.-C. in *Jones* v. *Clifford* (1876) 3 Ch. D. 779, 790, 45 L. J. Ch. 809, and of Lindley L.J. in *Huddersfield Banking Co.* v. *H. Lister & Son, Ltd.* [1895] 2 Ch. 273, 281.

(*e*) Gaius in D. 44. 7. de. obl. et act. 1 § 10. Suae rei emptio non valet, sive sciens, sive ignorans emi; sed si ignorans emi, quod solvero repetere potero, quia nulla obligatio fuit: Pomponius, D. 18. 1. de cont. empt. 16 pr.

(*f*) (1867) L. R. 2 H. L. 149.

110 Ill. 102; Riegel *v.* American Ins. Co., 140 Pa. 193. Cp. Sears *v.* Grand Lodge, 163 N. Y. 374.

Lord Westbury's explanation of ignorantia iuris. Lord Westbury stated the ground of the decision as follows:—"The result therefore is that at the time of the agreement for the lease which it is the object of this petition (*g*) to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted under the impression given to them by their father that he (their father) was the owner of the fishery and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said '*Ignorantia iuris haud excusat*'; but in that maxim the word '*ius*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*ius*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed **493]** themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand" (*h*).[75]

Broughton v. Hutt. The principle here laid down also covers *Broughton* v. *Hutt* (*i*). There the heir-at-law of a shareholder in a com-

(*g*) A Cause Petition in the Irish Court of Chancery.
(*h*) L. R. 2 H. L. 170.
(*i*) (1858) 3 De G. & J. 501.

[75] In Martin *v.* McCormick, 8 N. Y. 331, the plaintiff was the owner in fee simple of a house and lot; both he and defendant supposed, however, that plaintiff's title was subject to a term for a hundred years in the defendant. Plaintiff paid defendant $1,800 for an assignment of the supposed term. Held, that he could recover the money as paid by mistake. See also O'Neal *v.* Phillips, 83 Ga. 556; Phillips *v.* O'Neal, 85 Ga. 142, 87 Ga. 727; Jordan *v.* Stevens, 51 Me. 78; Berry *v.* American Ins. Co., 132 N. Y. 49; Lawrence *v.* Beaubien, 2 Bailey, 623; Harlan *v.* Central Phosphate Co., 62 S. W. Rep. 614.

But cp. Hamblin *v.* Bishop, 41 Fed. Rep. 74; Leal *v.* Terbush, 52 Mich. 100; Clapp *v.* Hoffmann, 159 Pa. 531.

In Alton *v.* First Bank, 157 Mass. 341, 343, Holmes, J., in delivering the opinion of the court, said: "Lord Westbury sometimes is supposed to have taken a distinction as to the effect of a mistake of law according to whether the mistaken principle is general or special. Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170. But in the often quoted passage of his judgment he only meant that certain words, such as ownership, marriage, settlement, etc., import both a conclusion of law and facts justifying it, so that when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such assertion is a mistake of fact."

pany joined with several other shareholders in giving a deed of indemnity to the directors, believing that the shares had descended to him as real estate, whereas they were personal estate. The deed was held to be void as against him in equity at all events, and probably at law.[76] "The plaintiff never intended to be bound unless he was a shareholder, and the defendants never intended him to be bound unless he was so." Here the mistake was plainly one of fact within Lord Westbury's definition, namely as to the character of the shares by the constitution of the particular company. It is submitted, however, that an erroneous fundamental assumption made by both parties even as to a general rule of law might well prevent any valid agreement from being formed.

Assignment of lease for lives. In the same way an agreement to assign a lease for lives would be inoperative if all the lives had dropped unknown to the parties. But the only thing which the parties can here be supposed, in the absence of expressed condition or warranty, to assume as essential is that the lease is subsisting, that is, that at least one of the lives is, not that they all are still in existence. Where the assignor of a lease for the lives of A., B., and C., expressly covenanted with the assignee that the lease was a subsisting lease for the lives of A., B., and C., and the survivors and survivor of them, this was held to be only a covenant that the lease was subsisting, and not that all the lives were in being at the date of the assignment (*k*). That is, his contract was interpreted, according to the general practice and understanding of conveyancers, as a contract to transfer an *existing lease for three lives, not necessarily a lease for three [494 lives all existing.

Results where only one party is ignorant of the material fact. If in any state of things otherwise resembling those just now discussed we find, instead of ignorance of the material fact on both sides, ignorance on the one side and knowledge on the other, then the matter has to be treated differently. Suppose A. and B. are the contracting parties; and let us denote by X. a fact or state of facts materially connected with the subject-matter of the contract, which is supposed by A. to

(*k*) *Coates* v. *Collins* (1871) L. R. 6 Q. B. 469, in Ex. Ch. 7 Q. B. 144, 41 L. J. Q. B. 90.

[76] In Gross *v.* Leber, 47 Pa. 520, the sons and administrators of one who had been a trustee, supposing that because they were his administrators, they were also trustees in the place of their father, executed a bond for the payment of a debt due by the *cestui que trust* as they supposed was their duty as such trustees; it was held that equity would relieve against the enforcement of the bond. And see Wilson *v.* Insurance Co., 60 Md. 150.

exist, but which in truth does not exist, and is known by B. not to exist. Then we have to ask these questions:—

1. Does A. intend to contract only on the supposition that X. exists? which may be put in another way thus: If A.'s attention were called to the possibility of his belief in the existence of X. being erroneous, would he require the contract to be made conditional on the existence of X.?

2. If so—Does B. know that A. supposes X. to exist?

3. If B. knows this—Does he also know that A. intends to contract only on that supposition?

If the answer to any one of these questions is in the negative, it seems there is a binding contract (*l*). But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that if this question be answered in the affirmative, an affirmative answer to the third question will often follow by an almost irresistible inference. Thus if a purchaser of a reversionary interest subject to prior life interests knows that one of these has ceased, and nothing is said about it at the time of the contract, then the purchaser can hardly expect anybody to believe either that he himself overlooked the material importance of the fact, or that he was not aware of the vendor's ignorance of it, or that he supposed that the vendor would not treat it as material (*m*).[77] So
495] in *the case already cited (*n*) of the sale of shares after a petition for the winding up of the company had been presented, a distinct allegation in the pleadings that the seller knew of the buyer's ignorance of that fact, would, it seems, have been sufficient to constitute a charge of fraud.

If the questions above stated be all answered in the affirmative, either by positive proof or by probable and uncontradicted presumption from the circumstances, then it may be considered either that the case becomes one of fraud, or at least that the party who knew the true state of the facts, and also knew the other party's intention to contract only with reference to a supposed different state of facts, is precluded from denying that he understood the contract in the same sense as that other, namely, as conditional on the existence of the supposed state of facts.

(*l*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597, *supra*, p. 485.

(*m*) See *Turner* v. *Harvey* (1821) Jac. 169, 23 R. R. 15.

(*n*) *Rudge* v. *Bowman* (1868) L. R. 3 Q. B. 689, 37 L. J. Q. B. 193.

[77] See Thayer *v.* Knote, 59 Kan. 181; Trecy *v.* Jefts, 149 Mass. 211; Haviland *v.* Willets, 141 N. Y. 35; Irwin *v.* Wilson, 45 Ohio St. 426, 435.

Fundamental error produced by misrepresentation. On a similar principle (as we have already mentioned incidentally) it is certain that where fundamental error of one party is caused by a fraudulent misrepresentation, and probable that where it is caused by an innocent misrepresentation on the part of the other, that other is estopped from denying the validity of the transaction if the party who has been misled thinks fit to affirm it.

Does it follow that the contract is in its inception not void, but voidable at the option of the party misled?[78] Not so: for the fraud or negligence of the other must not put him in any worse position as regards third persons. These, if the transaction be simply voidable, are entitled to treat it as valid until rescinded, and may acquire indefeasible rights under it: if it be void they can acquire none, however blameless their own part in the matter may be (*o*). Thus there is a real difference between a contract voidable at the option of one party and a void agreement whose nullity the other is estopped as against him from asserting. *In the case of contracts to take [496 shares in companies an anomaly is admitted, as we have seen, for reasons of special necessity, and the contract is treated as at most voidable. But even here there must be an original *animus contrahendi* to this extent, that the shareholder was minded to have shares in some company. An application for shares signed in absolute ignorance of its true nature and contents, like the bill in *Foster* v. *Mackinnon* (*p*), could not be the foundation of a binding contract to take shares. An allotment in answer to such an application would be a mere proposal, and whether it were accepted or not would have to be determined by the ordinary rules of law in that behalf (see Ch. I.).

Mistakes in sale by sample. We may here call attention to the rule concerning sales by sample which may be gathered from *Heilbutt* v. *Hickson* (*q*) and is stated by Mr. Benjamin to this effect: "If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection and unknown to both parties."

Here we have a common error as to a material fact, namely the character of the sample itself by which the character of the bulk is

(*o*) *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. 704, 38 L. J. C. P. 310, *supra*, p. 462.

(*p*) See note (*o*), last page.

(*q*) (1872) L. R. 7 C. P. 438, 41 L. J. C. P. 228; Benjamin on Sale, 646.

[78] See Gardner *v.* Lane, 12 Allen, 39, 98 Mass. 517.

to be tested. But it is possible to put the parties in the same position as if their erroneous assumption had been correct, and therefore their contract, instead of being avoided, is upheld according to their true intention, *i.e.*, as if the sample had been what they both supposed it to be.[79] If they had themselves discovered the mistake in time they would have made the same contract with reference to a proper sample in place of the defective one. The result is thus the converse of that which occurs when the error goes to the matter of the whole agreement, as in the cases we have been considering. It may, however, **497]** be more simply arrived at on the broad ground that *reference to a sample does not exclude the general duty of the seller to furnish merchantable goods answering the description in the contract (*r*).[80]

A mistake in the sample exhibited on a sale, in the sense of its being taken from a bulk different from that which is intended and expressed to be sold, may wholly prevent the formation of a contract (*s*).

Rights and remedies of party to a void agreement. It appears that the authorities which have been adduced that a party to an apparent agreement which is void by reason of fundamental error has more than one course open to him.

He may wait until the other party seeks to enforce the alleged agreement and then assert the nullity of the transaction by way of defence. If he think fit he may also take the opportunity of seeking by counterclaim to have the instrument sued on set aside (*t*).

Or he may right himself, if he prefers it, by coming forward actively as plaintiff. When he has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the reality of such agreement, he may recover back his money as having been paid without any consideration (the action " for money

(*r*) *Drummond* v. *Van Ingen* (1887) 12 App. Ca. 284, 56 L. J. Q. B. 563.

(*s*) *Megaw* v. *Molloy* (1878) 2 L. R. Ir. 530.

(*t*) *Storey* v. *Waddle* (1879) 4 Q. B. Div. 289, seems to overrule virtually the doctrine assumed in *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876) 1 C. P. D. 145, 45 L. J. C. P. 401, that it is needful for this purpose to obtain a transfer of the action to the Chancery Division.

[79] Drummond *v.* Van Ingen, 12 A. C. 284; Coates *v.* Cook, 101 Ga. 586. But if the seller is not the manufacturer, and there is a latent defect in the sample, unknown to both parties, there is no warranty that the bulk shall correspond to the sample, as it was supposed to be. Dickinson *v.* Gay, 7 Allen, 29. It would seem, however, that the contract or sale might be avoided on the ground of mistake.

[80] The seller is under a double obligation, (1) to furnish merchantable goods answering to the description in the contract; (2) to furnish goods like the sample. These obligations are not identical. Mody *v.* Gregson, L. R. 4 Ex. 49; Drummond *v.* Van Ingen, 12 A. C. 284; Gould *v.* Stein, 149 Mass. 570; Miamisburg Twine Co. *v.* Wohlhuter, 71 Minn. 484.

received" of the old practice) (*u*). He paid on the supposition that he was discharging an obligation, whereas there was in truth no obligation to be discharged.

Moreover he may sue in the Chancery Division, whether anything has been done under the supposed agreement or not, to have the transaction declared void and to be relieved from any possible claims in respect thereof (*x*).

***Election to adopt originally void agreement.** On the other hand, [498 although he is entitled to treat the supposed agreement as void, and is not as a rule prejudiced by anything he may have done in ignorance of the true state of the facts, yet after that state of facts has come to his knowledge he may nevertheless elect to treat the agreement as subsisting: or, as it would be more correct to say, he may carry into execution by the light of correct knowledge the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction (except in a case where there is also misrepresentation, see p.* 495), for there is nothing to confirm, but he enters into a new one.

It might be thought to follow that in cases within the Statute of Frauds or any other statute requiring certain forms to be observed, we must look not to the original void and improperly so-called agreement, but to the subsequent election or confirmation in which the only real agreement is to be found, to see if the requirements of the statute have been complied with. No express authority has been met with on this point. But analogy is in favour of a deliberate adoption of the form already observed being held sufficient for the purpose of the new contract (*y*).

A note on Bracton's treatment of the subject of fundamental error will be found in the Appendix (*z*).

Part III. Mistake in expressing true Consent.

Mistake in expressing intention: generally occurs in writing. This occurs when persons desiring to express an intention which when expressed

(*u*) *E.g.*, *Cox* v. *Prentice* (1815) 3 M. & S. 344, 16 R. R. 288.

(*x*) All causes and matters for (*inter alia*) the setting aside or cancellation of deeds or other written instruments (which formerly belonged to the exclusive jurisdiction of equity) are assigned to the Chancery Division by s. 34 of the Supreme Court of Judicature Act, 1873.

(*y*) *Stewart* v. *Eddowes* (1874) L. R. 9 C. P. 311, 43 L. J. C. P. 204, *supra*, p. *164.

(*z*) Note H. This passage is not included in the portions edited by Prof. Maitland in "Bracton and Azo."

499] carries with it legal conse*quences have by mistake used terms which do not accurately represent their real intention. As a rule it can occur only when the intention is expressed in writing. It is possible to imagine similar difficulties arising on verbal contracts, as for example if the discourse were carried on in a language imperfectly understood by one or both of the speakers. But we are not aware that anything of this kind has been the subject of judicial decision (*a*). The general result of persons talking at cross purposes is that there is no real agreement at all. This class of cases has already been dealt with. We are now concerned with those where there does exist a real agreement between the parties, only wrongly expressed. Such mistakes as we are now about to consider were, even before the Judicature Acts, not wholly disregarded by courts of law; but they are fully and adequately dealt with only by the jurisdiction which was formerly peculiar to courts of equity. We shall see that this jurisdiction is exercised with much caution and within carefully defined limits.

Classification of cases according to the remedies applicable. On the whole the cases of mistake in expressing intention fall into three classes:—

1. Those which are sufficiently remedied by the general rules of construction.

2. Those which are remedied by special rules of construction derived from the practice of courts of equity.

3. Those which require peculiar remedies administered by the Court in its equitable jurisdiction.

We proceed to take the classes of cases above mentioned in order.

1. *General Rules.*

Clerical errors, &c. We have already seen that the more obvious forms of mistaken expression, mechanical errors as we may call 500] *them, can be dealt with in the ordinary course of interpretation (*b*).[81] A few more authorities may now be added.

(*a*) See however *Phillips* v. *Bistolli* (1824) 2 B. & C. 511, 26 R. R. 433, which comes near the supposed case.

(*b*) Chap. VI., p. *255, above.

[81] Illustrations of the treatment of clerical or grammatical errors, as corrected, may be found in Cowles Electric Co. *v.* Lowrey, 79 Fed. Rep. 331; English's Exr. *v.* McNair's Admr., 34 Ala. 40; Wood *v.* Coman, 56 Ala. 283; Cox *v.* Britt, 22 Ark. 567; Hancock *v.* Watson, 18 Cal. 137; Sprague *v.* Edwards, 48 Cal. 239; Kellogg *v.* Mix, 37 Conn. 243; Railroad Co. *v.* Spear, 32 Ga. 550; Stow *v.* Steel, 45 Ill. 328; Canal & Dock Co. *v.* Russell, 68 Ill. 426; Aulick *v.* Wallace, 12 Bush, 531; Marston *v.* Bigelow, 150 Mass. 45;

General intent prevails over particular mistaken or repugnant expressions. In a case in the House of Lords the rule was laid down and acted upon that "both courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty" (*c*). Here a draft agreement for a separation deed had by mistake been copied so as to contain a stipulation that the husband should be indemnified against his own debts: but it was held that the context and the nature of the transaction clearly showed that the wife's debts were meant, and that in framing the deed to be executed under the direction of the Court in pursuance of the agreement the mistake must be corrected accordingly. So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to the usual frame of such instruments, were inserted by mistake (*d*).

An agreement has even been set aside chiefly, if not entirely, on the ground that the unreasonable character of it was enough to satisfy the Court that neither party could have understood its true effect: such at least appears to be the meaning of Lord Eldon's phrase, "a surprise on both parties" (*e*). The agreement itself purported to bind the tenant of a leasehold renewable at arbitrary (and in fact always increasing) fines at intervals of seven years to grant an underlease at a fixed rent with a perpetual right of renewal. The lessor was in his last sickness, and there was evidence that he was not fit to attend to business. Charges of fraud were made, as usual in such cases, but *not sustained: the decision might, however, have [501 been put on the ground of undue influence, and was so to some extent by Lord Redesdale.

General words restrained by context. Again, there is legal as well as equitable jurisdiction to restrain the effect of general words if it

(*c*) *Wilson* v. *Wilson*, 5 H. L. C. 40, 66, per Lord St. Leonards, and see his note, V. & P. 171.

(*d*) *Re De la Touche's settlement* (1870) L. R. 10 Eq. 599, 603, 40 L. J. Ch. 85; where however the mistake was also established by evidence.

(*e*) *Willan* v. *Willan* (1809–10) 16 Ves. 72, 84; affirmed in Dom. Proc. 2 Dow, 275, 278. But the facts were very peculiar, and the case has been seldom cited for a generation or more.

King *v.* Merritt, 67 Mich. 194; Fowler *v.* Woodward, 26 Minn. 347; Brookman *v.* Kurzman, 94 N. Y. 272; Hoffman *v.* Riehl, 27 Mo. 554; Nettleton *v.* Billings, 13 N. H. 446; Emerson *v.* White, 29 N. H. 482; Tenney *v.* Lumber Co., 43 N. H. 343; Sessons *v.* Sessons, 2 Dev. & B. Eq. 453; Davis *v.* Boggs, 20 Ohio St. 550; Dodd *v.* Bartholomew, 44 Ohio St. 171; Walters *v.* Bredin, 70 Pa. 235; Jenkins *v.* Jenkins, 148 Pa. 216; Eatherly *v.* Eatherly, 1 Coldw. 461; Carnagy *v.* Woodcock, 2 Munf. 234; Liston *v.* Jenkins, 2 W. Va. 62.

sufficiently appears by the context that they were not intended to convey their apparent unqualified meaning. It was held in *Browning* v. *Wright* (*f*) that a general covenant for title might be restrained by special covenants among which it occurred. And the same principles was again deliberately asserted shortly afterwards (in a case to the particular facts of which it was, however, held not to apply) :—

"However general the words of a covenant may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words" (*g*).[82]

Similarly the effect of general words of conveyance is confined to property of the same kind with that which has been specifically described and conveyed (*h*). When there is a specific description of a particular kind of property, followed by words which *prima facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the property not specifically described, on the principle *expressio unius est exclusio alterius* (*i*).

(*f*) (1799) 2 B. & P. 13, 26, 5 R. R. 521; but it was also thought the better construction to take the clause in question as being actually part of a special covenant, and so no general covenant at all.

(*g*) *Hesse* v. *Stevenson* (1803) 3 B. & P. 565, 574.

(*h*) *Rooke* v. *Lord Kensington* (1856) 2 K. & J. 753, 771, 25 L. J. Ch. 795. The same principle applies to general words in the statement of a company's objects in its memorandum of association: *Ashbury, &c. Co.* v. *Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ex. 185.

(*i*) *Denn* v. *Wilford* (1826) 8 Dowl. & Ry. 549. The case was a curious one. A fine had been levied of (*inter alia*) twelve messuages and twenty acres of land in Chelsea. The conusor had less than twenty acres of land in Chelsea, but nineteen messuages. It was decided that although all the messuages would have passed under the general description of land if no less number of messuages had been mentioned, yet the mention of twelve messuages prevented any greater number from passing under the description of land; and that parol evidence was admissible to show first that there were in fact nineteen messuages, this being no more than was necessary to explain the nature and character of

[82] Sumner *v.* Williams, 8 Mass. 162, 214, 217; Linton *v.* Allen, 154 Mass. 432; Cole *v.* Hawes, 2 Johns. Cas. 203; Whallen *v.* Kauffman, 19 Johns. 97; Bender *v.* Fromberger, 4 Dall. 436; Bricker *v.* Bricker, 11 Ohio St. 240; Miller *v.* Heller, 7 S. & R. 32, 40. Cp. Estabrook *v.* Smith, 6 Gray, 572.

The extent of the condition of a bond may be restrained by the recitals. Bell *v.* Bruen, 1 How. 169, 183; Union Pacific Co. *v.* Artist, 60 Fed. Rep. 365; Canton Inst. *v.* Murphy, 156 Mass. 305; Kellogg *v.* Scott, 58 N. J. Eq. 344; Nat. Mech. Bkg. Assn. *v.* Conkling, 90 N. Y. 116.

"If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." *Ex parte* Dawes, 17 Q. B. D. 275, 286; quoted with approval in Williams *v.* Barkley, 165 N. Y. 48, 57. See *post*, n. 85.

*2. *Peculiar Rules of Construction in Equity.* [502

Such rules have been introduced by courts of equity in dealing with:

A. General words.

B. Stipulations as to time.

C. Penalties.

A. *Restriction of General Words.*

Restricted construction of general words carried farther than by common law: especially in releases. We have seen that courts both of law and of equity have assumed a power to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent general sense.

Courts of equity went farther, and did the like if the same conviction could be arrived at by evidence external to the instrument. Thus general words of conveyance (*k*)[83] and an unqualified covenant for title (*l*),[84] though not accompanied as in *Browning* v. *Wright* (*m*) by other qualified covenants, have been restrained on proof that they were not meant to extend to the whole of their natural import.

This jurisdiction, in modern times a well established one, is exercised chiefly in dealing with releases. "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given" (*n*).[85] This *includes the proposition that [503

the property; next (as a consequence of the construction thereupon adopted by the Court) which twelve out of the nineteen messuages were intended. And see further the notes to *Roe* v. *Tranmarr* (1758) 2 Sm. L. C.

(*k*) *Thomas* v. *Davis* (1757) 1 Dick. 301.

(*l*) *Coldcot* v. *Hill*, 1 Ch. Ca. 15, *sed qu.* for the case looks very like admitting contemporaneous conversation to vary the effect of a solemn instrument, and that without any mistake or fraud being made out, which is quite contrary to the modern rule.

(*m*) (1799) 2 B. & P. 13, 5 R. R. 521, last page.

(*n*) Per Lord Westbury, *L. & S. W. Ry. Co.* v. *Blackmore* (1870) L. R. 4 H. L. at p. 623, 39 L. J. Ch. 713; cp. *Lindo* v. *Lindo* (1839) 1 Beav. 496, 506, 49 R. R. 419, 425; *Farewell* v. *Coker* (1726) cited 2 Mer. 353; Dav. Conv. 5. pt. 2. 622–4.

[83] See Bowlin *v.* Silver, 19 Ky. L. Rep. 788.

[84] Taylor *v.* Gilman, 25 Vt. 411.

[85] Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 581; Lumley *v.* Wabash Railway Co., 76 Fed. Rep. 66; French *v.* Arnett, 15 Ind. App. 674; Blair *v.* Chicago & Alton Co., 89 Mo. 383; McIntyre *v.* Williamson, 1 Edw. Ch. 34; Jeffreys *v.* Southern Ry. Co., 127 N. C. 377. Cp. Jackson *v.* Ely, 57 Ohio St. 450.

in equity "a release shall not be construed as applying to something of which the party executing it was ignorant" (*o*).[86] There is at least much reason to think that it matters not whether such ignorance was caused by a mistake of fact or of law (*p*).

In particular a release executed on the footing of accounts rendered by the other party, and assuming that they are correctly rendered, may be set aside if those accounts are discovered to contain serious errors, and this, in a grave case, even after many years (*q*). It would be otherwise however if the party had examined the accounts himself and acted on his own judgment of their correctness. An important application of this doctrine is in the settlement of partnership affairs between the representatives of a deceased partner (especially when they are continuing partners) and the persons beneficially interested in his estate (*r*).

A releasor, however, cannot obtain relief if he has in the meanwhile acted on the arrangement as it stands in such a way that the parties cannot be restored to their former position (*s*).

B. *Stipulations as to Time.*

Rule as to such stipulations. It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal pro-
504] *mises, and "where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do" (*t*).

Accordingly, when by the terms of a contract one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterwards claim the performance of the contract if the stipulation as to time were construed according to its literal terms. The rule of the common law was that

(*o*) Per Wilde B. *Lyall* v. *Edwards* (1861) 6 H. & N. 337, 348, 30 L. J. Ex. 193, 197. This was a case of equitable jurisdiction under the C. L. P. Act, 1854; but before that Act courts of law would not allow a release to be set up if clearly satisfied that a court of equity would set it aside: *Phillips* v. *Clagett* (1843) 11 M. & W. 84, 12 L. J. Ex. 275.

(*p*) See the cases considered at p. *454, above.

(*q*) *Gandy* v. *Macaulay* (1885) 31 Ch. Div. 1, where no accounts had been rendered or examined at all; twenty years had elapsed and the releasee was dead.

(*r*) *Millar* v. *Craig* (1843) 6 Beav. 433, Lindley on Partnership, 490.

(*s*) *Skilbeck* v. *Hilton* (1866) L. R. 2 Eq. 587; but *qu.* whether the principle was rightly applied in the particular case.

(*t*) Notes to *Peeters* v. *Opie*, 2 Wms. Saund. 743; and see Ch. VI., p. *261, above.

[86] But see *contra*, Kirchner v. New Home Co., 135 N. Y. 182.

"time is always of the essence of the contract." When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it (*u*).

The rule of equity, which now is the general rule of English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. And if it appears that, though they named a specific day for the act to be done, that which they really contemplated was only that it should be done within a reasonable time; then this view will be acted upon, and a party who according to the letter of the contract is in default and incompetent to enforce it will yet be allowed to enforce it in accordance with what the Court considers its true meaning.[87]

"Courts of equity have enforced contracts specifically, where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive, and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit if the purchase be not completed within a certain time; yet the Court is in the constant habit of relieving *against the lapse of time: and so in the [505 case of mortgages, and in many instances relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract."

So said Lord Redesdale in a judgment which has taken a classical rank on this subject (*x*). Contracts between vendors and purchasers of land are however the chief if not the only classes of cases to which the rule has been habitually applied (*y*).

(*u*) *Parkin* v. *Thorold* (1852) 16 Beav. 59, 65.

(*x*) *Lennon* v. *Napper* (1802) 2 Sch. & L. 684, cited by Knight Bruce L.J., *Roberts* v. *Berry* (1853) 3 D. M. & G. at p. 289, 22 L. J. Ch. 398, and again adopted by the L.JJ. in *Tilley* v. *Thomas* (1867) L. R. 3 Ch. 61.

(*y*) See per Cotton L.J. 4 C. P. D. at p. 249.

87 Time is held to be of the essence of the contract in equity, only in case of direct stipulation or of necessary implication. Taylor *v.* Longworth, 14 Pet. 172; Kentucky Distillers' Co. *v.* Warwick Co., 109 Fed. Rep. 280, 282 (C. C. A.); Steele *v.* Branch, 40 Cal. 3; Keller *v.* Fisher, 7 Ind. 718; Snowman *v.* Harford, 55 Me. 197; Barnard *v.* Lee, 97 Mass. 92; Bomier *v.* Caldwell, 8 Mich. 463; Gill *v.* Bradley, 21 Minn. 15; Austin *v.* Wacks, 30 Minn. 335; Ewins *v.* Gordon, 49 N. H. 444, 459; Brock *v.* Hidy, 13 Ohio St. 306; Huffman *v.* Hummer, 17 N. J. Eq. 263; King *v.* Ruckman, 21 N. J. Eq. 599; Edgerton *v.* Peckham, 11 Paige, 352; Hubbell *v.* Von Schoening, 49 N. Y. 326; Tiernan *v.* Roland, 15 Pa. St. 429; Jackson *v.* Ligon, 3 Leigh, 161, 186; Jarvis *v.* Cowger's Heirs, 41 W. Va. 268.

And equity sometimes disregards even an express stipulation that time shall be of the essence. Cheney *v.* Libby, 134 U. S. 68; Camp Mfg. Co. *v.* Parker, 91 Fed. Rep. 705 (C. C. A.).

As to making time of the essence of the contract. It was once even supposed that parties could not make time of the essence of the contract by express agreement; but it is now perfectly settled that they can, the question being always what was their true intention (*z*), or rather "what must be judicially assumed to have been their intention" (*a*). "If the parties choose even arbitrarily, provided both of them intend to do so, to stipulate for a particular thing to be done at a particular time," such a stipulation is effectual. There is no equitable jurisdiction to make a new contract which the parties have not made (*b*).[88] The fact that time is not specified, or not so specified as to be of the essence of the contract, does not affect the general right of either party to require completion on the other part within a reasonable time, and give notice of his intention to rescind the contract if the default is continued (*c*),[89] as on the other 506] hand conduct of the party *entitled to insist on time as of the essence of the contract, such as continuing the negotiations without an express reservation after the time is past, may operate as an implied waiver of his right (*d*).[90] In mercantile contracts the presumption,

(*z*) *Seton* v. *Slade* (1802) 7 Ves. 265, 275, 6 R. R. 124, and notes to that case in 2 Wh. & T. L. C.: *Parkin* v. *Thorold* (1852) 16 Beav. 59.

(*a*) Grove J. in *Patrick* v. *Milner* (1877) 2 C. P. D. 342, 348, 46 L. J. C. P. 537.

(*b*) Per Alderson B. *Hipwell* v. *Knight* (1835) 1 Y. & C. Ex. Eq. 415, 41 R. R. 304. And see the observations of Kindersley V.-C. to the same effect in *Oakden* v. *Pike* (1865) 34 L. J. Ch. 620.

(*c*) This is the true and only admissible meaning of the statement that time can be made of the essence of a contract by subsequent express notice. Per Fry J. *Green* v. *Sevin* (1879) 13 Ch. D. 589, 599; per Turner L.J. *Williams* v. *Glenton* (1866) L. R. 1 Ch. 200, 210.

(*d*) *Webb* v. *Hughes* (1870) L. R. 10 Eq. 281, 39 L. J. Ch. 606, and see note (*h*).

88 "There is no doubt that time may be made of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the nature of the property, or the avowed objects of the seller or the purchaser." Taylor *v.* Longworth, 14 Pet. 172, 174; Cheney *v.* Libby, 134 U. S. 68; Waterman *v.* Banks, 144 U. S. 394; Myers *v.* League, 62 Fed. Rep. 654; Grey *v.* Tubbs, 43 Cal. 359; Quinn *v.* Roath, 37 Conn. 16; Steele *v.* Biggs, 22 Ill. 643; Ewing *v.* Crouse, 6 Ind. 312; Prince *v.* Griffin, 27 Ia. 514; Scarlett *v.* Stein, 40 Md. 512, 525; Goldsmith *v.* Guild, 10 Allen, 239; Grigg *v.* Landis, 21 N. J. Eq. 494; Wells *v.* Smith, 7 Paige, 22; Benedict *v.* Lynch, 1 Johns. Ch. 370; Scott *v.* Fields, 7 Ohio, 376; Holbrook *v.* Investment Co., 30 Oreg. 259; Hicks *v.* Aylsworth, 13 R. I. 562, 566.

89 Chabot *v.* Winter Park Co., 34 Fla. 258; Austin *v.* Wacks, 30 Minn. 335, 340; Bullock *v.* Adams' Exr., 20 N. J. Eq. 367; Wiswall *v.* McGowan, 1 Hoffm. Ch. 125, 139; Schmidt *v.* Reed, 132 N. Y. 108; Kirby *v.* Harrison, 2 Ohio St. 326; Thompson *v.* Dulles, 5 Rich. Eq. 370.

90 So conduct inducing a belief that strict performance will not be required. Cheney *v.* Libby, 134 U. S. 68; Camp Mfg. Co. *v.* Parker, 91 Fed. Rep. 705 (C. C. A.).

if any, is that time where specified is an essential condition (*e*).[91] An express promise to do a thing "as soon as possible" binds the promisor to do it within a reasonable time, with an undertaking to do it in the shortest practicable time (*f*). The principles of our jurisprudence on this head are well embodied by the language of the Indian Contract Act, s. 55:

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[The Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract] (*g*).

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time: but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so (*h*).[92]

*C. *Relief against Penalties.* [507

Especially as to mortgages. In like manner penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial perform-

(*e*) Per Cotton L.J. *Reuter* v. *Sala* (1879) 4 C. P. Div. at p. 249, 48 L. J. C. P. 492.

(*f*) *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q. B. Div. 670, 673.

(*g*) *Macbryde* v. *Weekes* (1856) 22 Beav. 533 (contract for a lease of working mines).

(*h*) "It constantly happens that an objection is waived by the conduct of the parties," per James L.J. *Upperton* v. *Nickolson* (1871) 6 Ch. at p. 443, 40 L. J. Ch. 401. And see Dart, V. & P. 424.

91 Bowes *v.* Shand, 2 App. Cas. 455; Norrington *v.* Wright, 115 U. S. 188; Cleveland Rolling Mills *v.* Rhodes, 121 U. S. 255; Camden Iron Works *v.* Fox, 34 Fed. Rep. 200; Cromwell *v.* Wilkinson, 18 Ind. 365; New Bedford Copper Co. *v.* Southard, 95 Me. 209; Crane *v.* Wilson, 105 Mich. 554; Redlands Assoc. *v.* Gorman, 76 Mo. App. 184; Blossom *v.* Shotter, 59 Hun, 481, affd. without opinion, 128 N. Y. 679.

Cp. McFadden *v.* Henderson, 128 Ala. 221; Browne *v.* Patterson, 165 N. Y. 460.

92 Brassell *v.* McLemore, 50 Ala. 476; Lounsbury *v.* Beebe, 46 Conn. 291; Ewins *v.* Gordon, 49 N. H. 444, 460; Peck *v.* Brighton, 69 Ill. 200; Thayer *v.* Star Mining Co., 105 Ill. 540; Foley *v.* Crow, 37 Md. 51; Dressel *v.* Jordan, 104 Mass. 407; Grigg *v.* Landis, 21 N. J. Eq. 494; Ewins *v.* Gordon, 49 N. H. 444; Dunn *v.* Steubing, 120 N. Y. 232; Benson *v.* Cutler, 53 Wis. 107.

ance of that which was really contemplated can be otherwise secured (*i*). The most important application of this principle is to mortgages. A court of equity treats the contract as being in substance a security for the repayment of money advanced, and that portion of it which gives the estate to the mortgagee as mere form, "and accordingly, in direct violation of the [form of the] contract," it compels the mortgagee to reconvey on being repaid his principal, interest and costs (*k*). Here again the original ground on which equity interfered was to carry out the true intention of the parties. But it cannot be said here, as in the case of other stipulations as to time, that everything depends on the intention. For the general rule "once a mortgage, and always a mortgage" cannot be superseded by an express agreement so as to make a mortgage absolutely irredeemable (*l*).[93] However, limited restrictions on the mutual remedies of the mortgagor and mortgagee, as by making the mortgage for a term certain,

(*i*) In addition to the authorities cited below, see the later case of *Ex parte Hulse* (1873) L. R. 8 Ch. 1022, 43 L. J. Ch. 261.

(*k*) Per Romilly M.R. *Parkin* v. *Thorold* (1852) 16 Beav. 59, 68; and see Lord Redesdale's judgment in *Lennon* v. *Napper*, p. *505, *supra*. As to the old theory of an "equity of redemption" being not an estate but a merely personal right, and its consequences, see Lord Blackburn's remarks, 6 App. Ca. at p. 714.

(*l*) *Howard* v. *Harris*, 1 Vern. 190; *Cowdry* v. *Day* (1859) 1 Giff. 316, see reporter's note at p. 323; 1 Ch. Ca. 141, 29 L. J. Ch. 39. The C. A. was divided, in a peculiar case, as to the application of this principle: *Marquess of Northampton* v. *Pollock* (1890) 45 Ch. Div. 190, 59 L. J. Ch. 745; the opinion of the majority was upheld in H. L. [1892] A. C. 1, 61 L. J. Ch. 49. See now *Noakes & Co.* v. *Rice* [1902] A. C. 24.

[93] Peugh *v.* Davis, 96 U. S. 332; Fields *v.* Helms, 82 Ala. 449; Pierce *v.* Robinson, 13 Cal. 116, 125; Walker *v.* Farmers' Bank, 6 Del. Ch. 81; Bearss *v.* Ford, 108 Ill. 16; Seymour *v.* Mackay, 126 Ill. 341; Reed *v.* Reed, 75 Me. 264, 272; Batty *v.* Snook, 5 Mich. 231; Marshall *v.* Thompson, 39 Minn. 137; Wilson *v.* Drumrite, 21 Mo. 325; Weathersly *v.* Weathersly, 40 Miss. 462; Vanderhaize *v.* Hugues, 13 N. J. Eq. 244; Youle *v.* Richards, 1 Saxt. Ch. 534; Clark *v.* Henry, 2 Cow. 324; Macauley *v.* Smith, 132 N. Y. 524; Mooney *v.* Byrne, 163 N. Y. 86; Robinson *v.* Willoughby, 65 N. C. 520, 523, 524; Stover *v.* Bounds, 1 Ohio St. 107. Cp. De Martin *v.* Phelan, 47 Fed. Rep. 761; 115 Cal. 538.

The rule, however, does not prevent a sale of his equity of redemption by a mortgagor to the mortgagee; though in examining the transaction "principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question." Villa *v.* Rodriguez, 12 Wall. 323, 339; Russell *v.* Southard, 12 How. 139, 154; Peugh *v.* Davis, 96 U. S. 332, 337; Savings Soc. *v.* Davidson, 97 Fed. Rep. 696; Oakley *v.* Shelley, 129 Ala. 467; West *v.* Reed, 55 Ill. 242; Hicks *v.* Hicks, 5 G. & J. 75; Trull *v.* Skinner, 17 Pick. 213; Fallis *v.* Insurance Co., 7 Allen, 46; De Lancey *v.* Finnegan, 86 Minn. 254; Odell *v.* Montross, 68 N. Y. 498, 504; Randall *v.* Sanders, 87 N. Y. 578; McLeod *v.* Bullard, 86 N. C. 210; Shaw *v.* Walbridge, 33 Ohio St. 1; Tripler *v.* Campbell, 22 R. I. 262; Hall *v.* Hall, 41 S. C. 163; Swarm *v.* Boggs, 12 Wash. 246.

are allowed and are not uncommon in practice. Also there may be such a thing as an absolute sale with an option of repurchase on certain conditions; and if such is really the nature of the transaction, equity will give no relief against the necessity of observing those conditions (*m*).[94]

*"That this Court will treat a transaction as a mortgage, al- [508 though it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true" (*n*).[95] "But it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem" (*o*).

(*m*) *Davis* v. *Thomas* (1830) 1 Russ. & M. 506, 32 R. R. 257.

(*n*) See *Douglas* v. *Culverwell* (1862) 31 L. J. Ch. 543; and so also at common law, *Gardner* v. *Cazenove* (1856) 1 H. & N. 423, 435, 438, 26 L. J. Ex. 17, 19, 20. [See McAnnulty *v.* Seick, 59 Ia. 586; Blanchard *v.* Fearing, 4 Allen, 118; Howard *v.* Odell, 1 Allen, 85; Reeve *v.* Dennett, 137 Mass. 315; Fuller *v.* Parrish, 3 Mich. 211; Pinch *v.* Willard, 108 Mich. 204; Barry *v.* Hamburg-Bremen Ins. Co. 110 N. Y. 1.]

(*o*) Per Lord Cottenham C. *Williams* v. *Owen* (1840) 5 M. & Cr. 303, 306, 12 L. J. Ch. 207, 48 R. R. 322.

94 "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants," per Marshall, C. J., in Conway's Exrs. *v.* Alexander, 7 Cr. 218, 237; Wallace *v.* Johnstone, 129 U. S. 58; Beck *v.* Blue, 42 Ala. 32; Henley *v.* Hotaling, 41 Cal. 22; Vance *v.* Anderson, 113 Cal. 532; Spence *v.* Steadman, 49 Ga. 133; Hanford *v.* Blessing, 80 Ill. 188; Hughes *v.* Sheaff, 19 Ia. 335; Robertson *v.* Moline, etc., Co., 106 Ia. 414; Bigler *v.* Jack, 114 Ia. 667; Flagg *v.* Mann, 14 Pick. 467; Cornell *v.* Hall, 22 Mich. 377; Daniels *v.* Johnson, 24 Mich. 430; Buse *v.* Page, 32 Minn. 111; Turner *v.* Kerr, 44 Mo. 429; Slutz *v.* Desenberg, 28 Ohio St. 371; Tripler *v.* Campbell, 22 R. I. 262; Ruffier *v.* Womack, 30 Tex. 332; Rich *v.* Doane, 35 Vt. 125; Swarm *v.* Boggs, 12 Wash. 246; Smith *v.* Crosby, 47 Wis. 160; Kunert *v.* Strong, 103 Wis. 74.

95 See Russell *v.* Southard, 12 How. 139; Peugh *v.* Davis, 96 U. S. 332; Pierce *v.* Robinson, 13 Cal. 116; French *v.* Burns, 35 Conn. 359; Ruckman *v.* Alwood, 71 Ill. 155; Story *v.* Springer, 155 Ill. 25; Moore *v.* Wade, 8 Kan. 380; Reeder *v.* Gorsuch, 55 Kan. 553; Reed *v.* Reed, 75 Me. 264; Booth *v.* Robinson, 55 Md. 419; Pickett *v.* Wadlow, 94 Md. 564; Campbell *v.* Dearborn, 109 Mass. 130; Klein *v.* McNamara, 54 Miss. 90; O'Neill *v.* Capelle, 62 Mo. 202; Riley *v.* Starr, 48 Neb. 243; Saunders *v.* Stewart, 7 Nev. 200; Sweet *v.* Parker, 22 N. J. Eq. 453; Pace *v.* Bartles, 47 N. J. Eq. 170; Horn *v.* Keteltas, 46 N. Y. 605; Carr *v.* Carr, 52 N. Y. 251, 260; Kraemer *v.* Adelsberger, 122 N. Y. 467; Mooney *v.* Byrne, 163 N. Y. 86; Wilson *v.* Giddings, 28 Ohio St. 554; Gibbs *v.* Penny, 43 Tex. 560; Loving *v.* Milliken, 59 Tex. 423; Temple Bank *v.* Warner, 92 Tex. 226; Hills *v.* Loomis, 42 Vt. 562; Snavely *v.* Pickle, 29 Gratt. 27; Wilcox *v.* Bates, 26 Wis. 465; Lamson *v.* Moffatt, 61 Wis. 153.

But the evidence showing that the transaction was in reality a mortgage must be clear and satisfactory. Cadman *v.* Peter, 118 U. S. 73; Satterfield *v.* Malone, 35 Fed. Rep. 445; Rogers *v.* Edwards, 81 Ala. 568; Strong *v.* Strong, 126 Ill. 301; Sloan *v.* Becker, 34 Minn. 491; Paucake *v.* Cauffman, 114 Pa. 113; Becker *v.* Howard, 75 Wis. 415.

General rule. The manner in which equity deals with mortgage transactions is only an example of a more general rule:—

"Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve" (*p*).

This applies not only to securities for the payment of money but to all cases "where a penalty is inserted merely to secure the enjoyment of a collateral object" (*q*). In all such cases the penal sum was originally recoverable in full in a court of law, but actions brought to recover penalties stipulated for by bonds or other agreements, and land conveyed by way of mortgage, have for a long time been governed by statutes (*r*).

509] *It would lead us too far beyond our present object to discuss the cases in which the question, often a very nice one, has arisen, whether a sum agreed to be paid upon a breach of contract is a penalty or liquidated damages. It may be noted however in passing that "the words *liquidated damages* or *penalty* are not conclusive as to the character of the sum stipulated to be paid." This must be determined from the matter of the agreement (*s*).[96]

(*p*) Per Lord Hatherley C. *Thompson* v. *Hudson* (1869) L. R. 4 H. L. 1, 15, 38 L. J. Ch. 431.

(*q*) Per Lord Thurlow, *Sloman* v. *Walter* (1784) 1 Bro. C. C. 418. *Re Dagenham Dock Co.* (1873) L. R. 8 Ch. 1022, is a good modern example.

(*r*) As to common money bonds 4 & 5 Anne, c. 16 (3 in Rev. Stat.) s. 13. As to other bonds and agreements 8 & 9 Will. III, c. 11, s. 8. The statutes (some of which have been repealed by Statute Law Revision Acts) are collected and reviewed in *Preston* v. *Dania* (1872) L. R. 8 Ex. 19, 42 L. J. Ex. 33. A mortgagee suing in ejectment, or on a bond given as collateral security, may be compelled by rule of Court to reconvey on payment of principal, interest, and costs: 7 Geo. II. c. 20, C. L. P. Act 1852 (15 & 16 Vict. c. 76) s. 219. Bonds of the kind last mentioned hardly occur in modern practice.

(*s*) Per Bramwell B. in *Betts* v. *Burch* (1859) 4 H. & N. 506, 511, 28 L. J. Ex. 267, 271. The later cases on this subject are—*Magee* v. *Lavell* (1874) L. R. 9 C. P. 107, 43 L. J. C. P. 131 (authorities discussed by Jessel M.R.); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886) 11 App. Ca. (Sc.) 332; *Wallis* v. *Smith* (1882) 21 Ch. Div. 243, 52 L. J. Ch. 145; *Willson* v. *Love* [1896] 1 Q. B. 626, 65 L. J. Q. B. 474, C. A. Cp. *Weston* v. *Metrop. Asylum District* (1882) 9 Q. B. Div. 404, 51 L. J. Q. B. 399, on the similar question of a penal rent. In the Indian Contract Act the knot is cut by abolishing the distinction altogether: see s. 74.

[96] See Sun Publishing Co. *v.* Moore, 183 U. S. 642; Newton *v.* Wooley, 105 Fed. Rep. 541; Chicago Wrecking Co. *v.* United States, 106 Fed. Rep. 306;

3. *Peculiar Defences and Remedies derived from Equity.*

A. *Defence against Specific Performance.*

When by reason of a mistake (*e.g.*, omitting some terms which were part of the intended agreement) a contract in writing fails to express the real meaning of the parties, the party interested in having the real and original agreement adhered to (*e.g.*, the one for whose benefit the omitted term was) is in the following position.

If the other party sues him for the specific performance of the contract as expressed in writing, it will be a good defence if he can show that the written contract does not represent the real agreement: and this whether the contract is of a kind required by law to be in writing or not.[97] Thus specific performance has been refused where a clause *had been introduced by inadvertence into the contract (*t*). [510 It is sometimes said with reference to cases of this class that the remedy of specific performance is discretionary. But this means a judicial and regular, not an arbitrary discretion. The Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood" (*u*).

On the other hand a party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract.[98] Thus in the case of

(*t*) *Watson* v. *Marston* (1853) 4 D. M. & G. 230, 240.

(*u*) *Watson* v. *Marston*, last note.

Brooks *v.* Wichita, 114 Fed. Rep. 297; Scofield *v.* Tompkins, 95 Ill. 190; Goodyear Co. *v.* Selz, 157 Ill. 186; Radloff *v.* Haase, 196 Ill. 365; McIntire *v.* Cagley, 37 Ia. 676; Dwinel *v.* Brown, 54 Me. 468, 471; Willson *v.* Mayor, 83 Md. 203; Wallis *v.* Carpenter, 13 Allen, 19; Guerin *v.* Stacey, 175 Mass. 595; Garst *v.* Harris, 177 Mass. 72; Trustees *v.* Walrath, 27 Mich. 232; Morris *v.* McCoy, 7 Nev. 399; Whitfield *v.* Levy, 35 N. J. L. 149; Bagley *v.* Peddie, 16 N. Y. 469; Curtis *v.* Van Bergh, 161 N. Y. 47; Thoroughgood *v.* Walker, 2 Jones L. 15; Wheedon *v.* American Trust Co. 128 N. C. 69; Knox Blasting Co. *v.* Grafton Stone Co., 64 Ohio St. 361; Salem *v.* Anson, 41 Oreg. 562; Shreve *v.* Brereton, 51 Pa. 175; Burgoon *v.* Johnston, 194 Pa. 61; Yenner *v.* Hammond, 36 Wis. 277.

[97] Bradford *v.* Bank, 13 How. 57, 66; Osborn *v.* Phelps, 19 Conn. 63, 73; Lucas *v.* Mitchell, 3 A. K. Marsh. 244, 246; Bradbury *v.* White, 4 Me. 391; Chambers *v.* Livermore, 15 Mich. 381, 389; Best *v.* Stow, 2 Sandf. Ch. 298; Averett *v.* Lipscombe, 76 Va. 404.

But where the defendant's mistake is only as to the legal effect of the contract, this is no defense. Caldwell *v.* Depew, 40 Minn. 528.

[98] Independently of the Statute of Frauds, no good reason can be given why, in a case of mistake, he should not be permitted to do so; and in this country it is generally held that a plaintiff may, in the same suit, have a written contract reformed for mistake, and the contract thus reformed specifically enforced. Murphy *v.* Rooney, 45 Cal. 78; Rogers *v.* Atkinson, 1 Kelly, 12, 23–25; Hunter *v.* Bilyeu, 30 Ill. 228; Schwass *v.* Hershey, 125 Ill. 653;

Townshend v. *Stangroom* (*x*) (referred to by Lord Hatherley when V.-C. as perhaps the best illustration of the principle) (*y*), there were cross suits (*z*), one for the specific performance of a written agreement as varied by an oral agreement, the other for specific performance of the written agreement without variation; and the fact of the parol variations from the written agreement being established, both suits were dismissed. And the result of a plaintiff attempting to enforce an agreement with alleged parol variations, if the defendant disproves the variations and chooses to abide by the written agreement,

(*x*) (1801) 6 Ves. 328, 5 R. R. 312.

(*y*) *Wood* v. *Scarth* (1855) 2 K. & J. 33, 42.

(*z*) Under the Judicature Acts there would be an action and counterclaim.

Popplein *v.* Foley, 61 Md. 381; Mosby *v.* Wall, 23 Miss. 81; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Stone *v.* Bellows, 14 N. H. 175, 201; Kelley *v.* McKinney, 5 Lea, 164; Fishack *v.* Ball, 34 W. Va. 644; Waterman *v.* Dutton, 6 Wis. 265.

In some of the cases cited the contract was within the Statute of Frauds, but in other cases it is held that a court of equity has no power, on oral evidence, to reform a contract within the statute, so as to make it apply to a subject-matter to which, as written, it does not refer. May *v.* Platt, [1900] 1 Ch. 616; Osborn *v.* Phelps, 19 Conn. 63; Elder *v.* Elder, 10 Me. 80. Cp. Cline *v.* Hovey, 15 Mich. 18; Davis *v.* Ely, 104 N. C. 16; Lee *v.* Hills, 66 Ind. 474.

In Glass *v.* Hulbert, 102 Mass. 24, the plaintiff asked that a deed made to him should be so reformed as to accord with the oral agreement of the parties, by making it include land omitted by fraud or mistake. It was held that such relief must be denied. "Rectification by making the contract include obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writing at all." To the same effect are Andrews Co. *v.* Youngstown Co., 39 Fed. Rep. 353, 354; Churchill *v.* Rogers, 3 T. B. Mon. 81; Goode *v.* Riley, 153 Mass. 585, 587; Macomber *v.* Peckham, 16 R. I. 485; Westbrook *v.* Harbeson, 2 McCord's Eq. 112.

There are decisions, however, and numerous *dicta*, to the effect that a deed of, or contract to convey land may be rectified so as to conform to an oral agreement by making it include land to which its written terms do not apply. Johnson *v.* Bragge, [1901] 1 Ch. 28; McDonald *v.* Yungbluth, 46 Fed. Rep. 836; De Jarnett *v.* Cooper, 59 Cal. 703; Stevens *v.* Holman, 112 Cal. 345; Trout *v.* Goodman, 7 Ga. 383; Wall *v.* Arrington, 13 Ga. 88; Willis *v.* Henderson, 4 Scam. 13; Conway *v.* Gore, 24 Kan. 389; Taylor *v.* Deverell, 43 Kan. 469; Worley *v.* Tuggle, 4 Bush, 168; Philpott *v.* Elliott, 4 Md. Ch. 273; Judson *v.* Miller, 106 Mich. 140; Craig *v.* Kittredge, 23 N. H. 231; Hitchins *v.* Pettingill, 58 N. H. 386; Wiswall *v.* Hall, 3 Paige, 313; De Peyster *v.* Hasbrouck, 11 N. Y. 582; Smith *v.* Greely, 14 N. Y. 378; Beardsley *v.* Duntley, 69 N. Y. 577, 584; Neininger *v.* State, 50 Ohio St. 394; Blodgett *v.* Hobert, 18 Vt. 414; Petesch *v.* Hambach, 48 Wis. 443.

The statute does not prevent the rectification of a deed so as to restrain its terms as written, and make them conform to the oral agreement. Cook *v.* Preston, 2 Root, 78; Warrick *v.* Smith, 137 Ill. 504; Hileman *v.* Wright, 9 Ind. 126; Athey *v.* McHenry, 6 B. Mon. 50; Worley *v.* Tuggle, 4 Bush, 168; Elder *v.* Elder, 10 Me. 80, 90; Andrews *v.* Andrews, 81 Me. 337; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 321; Goode *v.* Riley, 153 Mass. 585; West *v.* Mahaney, 86 Mich. 121; Gillespie *v.* Moon, 2 Johns. Ch. 585; Newsom *v.* Bufferlow, 1 Dev. Eq. 379; Busby *v.* Littlefield, 31 N. H. 193; Dennis *v.* Northern Pac. Co., 20 Wash. 320.

may be a decree for the specific performance of the agreement as it stands at the plaintiff's cost (*a*).

*But it is open to a plaintiff to admit a parol addition or varia- [511
tion made for the defendant's benefit, and so enforce specific performance, which the defendant might have successfully resisted if it had been sought to enforce the written agreement simply. This was settled in *Martin* v. *Pycroft* (*b*):[99] "The decision of the Court of Appeal proceeded on the ground that an agreement by parol to pay 200*l.* as a premium for . . . a lease [for which there was a complete agreement in writing not mentioning the premium] was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.* The case introduced no new principle as to the admissibility of parol evidence" (*c*).

Relation of this doctrine to Statute of Frauds. It is to be observed (though the observation is now familiar) that these doctrines are in principle independent of the Statute of Frauds (*d*). What the fourth section of the Statute of Frauds says is that in respect of the matters comprised in it no agreement not in writing and duly signed shall be sued upon. This in no way prevents either party from showing that the writing on which the other insists does not represent the real agreement; the statute interferes only when the real agreement cannot be proved by a writing which satisfies its requirements. Then there is nothing which can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement, because it is not in writing. A good instance of this state of things is *Price* v. *Ley* (*e*). The suit was brought mainly to set aside the

(*a*) See *Higginson* v. *Clowes* (1808) 15 Ves. 516, 525, 10 R. R. 112; and such appears to be the real effect of *Fife* v. *Clayton* (1807) 13 Ves. 546, *S.C.* more fully given, with the decree, 1 C. P. Cooper (temp. Cottenham) 351. In this case Lord Eldon laid hold on the plaintiff's offer in general terms to perform the agreement as amounting to an offer to perform "what the Court, upon hearing all the circumstances, should be of opinion was the agreement." See the notes to the case in 9 R. R. 220. But after a plaintiff has failed to support his own construction of an agreement which the Court thinks ambiguous, he cannot take advantage of such an offer contained in his own pleadings "to take up the other construction which the defendant was at one time willing to have performed": *Clowes* v. *Higginson* (1813) 1 Ves. & B. 524, 535, 12 R. R. 284.

(*b*) (1852) 2 D. M. & G. 785, 22 L. J. Ch. 94.

(*c*) Per Stuart V.-C. *Price* v. *Ley* (1863) 4 Giff. at p. 253.

(*d*) See per Lord Redesdale in *Clinan* v. *Cooke* (1802) 1 Sch. & Lef. 22, 33–39, 9 R. R. 3, 7–10.

(*e*) (1863) 4 Giff. 235, affirmed on appeal, 32 L. J. Ch. 534.

[99] Park *v.* Johnson, 4 Allen, 259; Anderson *v.* Kennedy, 51 Mich. 467; Ives *v.* Hazard, 4 R. I. 14.

written agreement, and so far succeeded. It appears not to have been seriously attempted to insist upon the real agreement which had not been put into writing.

512] *B. *Rectification of Instruments.*

When the parties to an agreement have determined to embody their common intention in the appropriate and conclusive form, and the instrument meant to effect this purpose is by mistake so framed as not to express the real intention which it ought to have expressed, it is possible in many cases to correct the mistake by means of a jurisdiction formerly peculiar to courts of equity, and still reserved, as a matter of procedure, to the Chancery Division.

Courts of equity "assume a jurisdiction to reform instruments which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties (*f*). And of necessity, in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument." Relief will not be refused though the party seeking relief himself drew the instrument; for "every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake" (*g*).[2] The jurisdiction is a substantive and independent one, so that it does not matter whether the party seeking relief would or would not be

(*f*) The Court need not decide the point of construction; it is enough that serious doubt exists whether the terms express the true intention: *Walker* v. *Armstrong* (1856) 8 D. M. & G. 531, 25 L. J. Ch. 738. The judgment of Knight Bruce L.J. is entertaining as well as profitable.

(*g*) *Ball* v. *Storie* (1823) 1 Sim. & St. 210, 219, 24 R. R. 170.

[1] "Where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." Hunt *v.* Rousmaniere's Admr., 1 Pet. 1, 13; Walden *v.* Skinner, 101 U. S. 577, 583; Essex *v.* Insurance Co., 3 Mason, 6, 10; Stone *v.* Hale, 17 Ala. 557; Cake *v.* Peet, 49 Conn. 501; West *v.* Suda, 69 Conn. 60; Miller *v.* Davis, 10 Kan. 541; Inskoe *v.* Proctor, 6 T. B. Mon. 311; Smith *v.* Jordan, 13 Minn. 264; Wall *v.* Meilke, 89 Minn. 232; Tesson *v.* Insurance Co., 40 Mo. 33; Loss *v.* Obry, 22 N. J. Eq. 52; McKay *v.* Simpson, 6 Ired. Eq. 452; Gower *v.* Sterner, 2 Whart. 75; Gammaye *v.* Moore, 42 Tex. 170.

If an instrument which requires a seal is by mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed or otherwise. Gaylord *v.* Pelland, 169 Mass. 356.

If necessary the court will not only reform the instrument in which the mistake occurred, but all subsequent instruments which have perpetuated it. Marks *v.* Taylor, 23 Utah, 152.

[2] Baldwin *v.* National Hedge Co., 73 Fed. Rep. 574. See also Corrigan *v.* Tiernay, 100 Mo. 276.

able to get the benefit of the true intention of the contract by any other form of remedy (*h*).[3] It would be neither practicable nor desirable to discuss in this place the numerous cases in which this jurisdiction has been exemplified. The most important thing to be known about a discretionary power of this kind is whether there is any settled rule by which its exercise is limited. In this case there are ample authorities to show that there is such a *rule, and they expound [513 it so fully that there is very little left to be added by way of comment.

Principles on which courts of equity will rectify instruments. The manner in which the Court proceeds is put in a very clear light by the opening of Lord Romilly's judgment in the case of *Murray* v. *Parker* (*i*):

"In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to express it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

Previous agreement in writing not allowed to be varied. In the case of "a previous agreement in writing which is unambiguous" the Court cannot admit parol evidence to rectify the final instrument executed in accordance with such agreement any more than it could allow the party to maintain a suit, while the agreement was yet executory, first to rectify the agreement by parol evidence and then execute it as rectified—which, as we have seen, it will not do. For this would be to "reform [the instrument] by that evidence, which, if [the instrument] rested *in fieri*, would be inadmissible to aid in carrying it into execution" (*k*).[4]

Oral evidence of the real agreement admissible in the absence of any other if not contradicted. If there be no previous agreement in writing, the modern rule is that a deed may be rectified on oral evidence of what was the real intention of the parties at the time, if clear and uncontradicted.

(*h*) ***Druiff* v. *Lord Parker*** (1868) L. R. 5 Eq. 131. 37 L. J. Ch. 241.

(*i*) (1854) 19 Beav. 305, 308.

(*k*) Per Lord St. Leonards, *Davies* v. *Fitton* (1842) 2 Dr. & War. 225, 233; foll. by Farwell J., *May* v. *Platt* [1900] 1 Ch. 616, 69 L. J. Ch. 357.

[3] But "where the intention of the parties to a contract is sufficiently apparent to be recognized in any court, the fact that a word is omitted is no sufficient reason for bringing a party into a court of equity for a reformation of the contract." Railroad Co. *v.* Spear, 32 Ga. 550.

[4] But see *contra*, Schwass *v.* Hershey, 125 Ill. 653.

But if the alleged mistake is positively denied by any party to the instrument, parol evidence alone is inadmissible to prove it. The rule is contained in two judgments given by Lord St. Leonards in the Irish Court of Chancery.

514] *He said in *Alexander* v. *Crosbie* (*l*):

"In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established, by parol evidence, even though there is nothing in writing to which the parol evidence may attach."

What is here meant by "clearly established" is shown by his later statement in *Mortimer* v. *Shortall* (*m*), applying the general rule of equity practice that the Court will not act merely on "oath against oath": "There is no objection to correct a deed by parol evidence, when you have anything beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses, *and the defendant by his answer denies the case set up by the plaintiff*, the plaintiff appears to be without a remedy. Here I am not acting upon parol evidence alone; the documents in the cause, and the subsequent transactions, corroborate the parol evidence, and leave no doubt in my mind as to a mistake having been made."

Again, it was said in a case on the equity side of the Court of Exchequer, where the whole subject was considerably discussed:

"It seems that the Court ought not in any case, *where the mistake is denied or not admitted by the answer*, to admit parol evidence, and upon that evidence to reform an executory agreement" (*n*).

On the other hand, when the mistake is admitted, or not positively denied, written instruments have repeatedly been reformed on parol evidence alone (*o*).[5]

(*l*) (1835) Ll. & G. temp. Sugden, 145, 150, 46 R. R. 183, 185. Cp. *Davies* v. *Fitton* (1842) 2 Dr. & War. 233.

(*m*) (1842) 2 Dr. & War. 363, 374.

(*n*) Per Alderson B. *Atty.-Genl.* v. *Sitwell* (1835) 1 Y. & C. Ex. 559, 583; *Olley* v. *Fisher* (1886) 34 Ch. D. 367, 56 L. J. Ch. 208, seems to put this rule wholly on the Statute of Frauds: but it has since been decided that the statute does not apply to an action for rectification of a marriage settlement: *Johnson* v. *Bragge* [1901] 1 Ch. 28, 70 L. J. Ch. 41.

(*o*) *Townshend* v. *Stangroom* (1891) 6 Ves. 328, 334, 5 R. R. 312; *Ball* v. *Storie* (1823) 1 Sim. & St. 210, 24 R. R. 170; *Druiff* v. *Lord Parker* (1868) L. R. 5 Eq. 131, 37 L. J. Ch. 141; *Ex parte National Provincial Bank of England* (1876) 4 Ch. D. 241, 46 L. J. Bk. 11; *Welman* v. *Welman* (1880) 15 Ch. D. 570, 49 L. J. Ch. 736, where a power of revocation appearing in the first draft had been struck out in the instrument as it finally stood, and there was nothing to show how this had happened.

5 Hudspeth *v.* Thomason, 46 Ala. 470; Wyche *v.* Green, 11 Ga. 159, 169; Jones *v.* Sweet, 77 Ind. 187; Coale *v.* Merryman, 35 Md. 382; Canedy *v.* Marcy,

*** What must be proved: common intention of parties different from expressed intention.** Thus far as to the nature of the evidence required; next let us see what it must prove. It is indispensable that the evidence should amount to "proof of a mistake common to all the parties" (*p*), *i.e.* a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed: it matters not, as we have seen, by whom the actual oversight or error is made which causes the expression to be wrong. The leading principle of equity on the head of rectification,—that there must be clear proof of a real agreement on both parties different from the expressed agreement, and that a different intention or mistake of one party alone is no ground to vary the agreement expressed in writing,—was distinctly laid down by Lord Hardwicke as long ago as 1749 (*q*).[6] [515

The same thing was very explicitly asserted in *Fowler* v. *Fowler* (*r*):

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should

(*p*) Per Lord Romilly M.R. *Bentley* v. *Mackay* (1869) 31 Beav. at p. 151.

(*q*) *Henkle* v. *Royal Exch. Assce. Co.* 1 Ves. Sr. 318.

(*r*) (1859) 4 De G. & J. 250, 264.

13 Gray, 373; Goode *v.* Riley, 153 Mass. 585; McMillan *v.* Fish, 29 N. J. Eq. 610; Clayton *v.* Freet, 10 Ohio St. 544; Huss *v.* Morris, 63 Pa. 367; Shattuck *v.* Gay, 45 Vt. 87; and *supra*, p. *510, n. 98.

[6] And see Durham *v.* Insurance Co., 22 Fed. Rep. 468; Keith *v.* Woodruff, 136 Ala. 443; Ward *v.* Yorba, 123 Cal. 447; Eureka *v.* Gates, 137 Cal. 89, 94; Brainard *v.* Arnold, 27 Conn. 617, 624; Baldwin *v.* Kerlin, 46 Ind. 426; Schoonover *v.* Dougherty, 65 Ind. 463; Royer Wheel Co. *v.* Miller, 18 Ky. L. Rep. 1831; Atlantic, etc., Coal Co. *v.* Maryland Coal Co., 64 Md. 302; Sawyer *v.* Hovey, 3 Allen, 331; Ludington *v.* Ford, 33 Mich. 123; Nebraska Trust Co. *v.* Ignowski, 54 Neb. 398; Ramsey *v.* Smith, 32 N. J. Eq. 28; Gough *v.* Williamson, 62 N. J. Eq. 526; Lyman *v.* Insurance Co., 17 Johns. 373, 377; Nevius *v.* Dunlap, 33 N. Y. 676; Bryce *v.* Insurance Co., 55 N. Y. 240; Mead *v.* Insurance Co., 64 N. Y. 453; Born *v.* Schrenkeiser, 110 N. Y. 55; Curtis *v.* Albee, 167 N. Y. 360; Stewart *v.* Gordon, 60 Ohio St. 170; King *v.* Holbrook, 38 Oreg. 452; Cooper *v.* Insurance Co., 50 Pa. 299; Diman *v.* Railroad Co., 5 R. I. 130.

But the instrument will be rectified when, by reason of mistake on the part of the plaintiff, and fraud on the part of the defendant, it fails, as written, to express the agreement actually made. Elliott *v.* Sackett, 108 U. S. 132; Simmons Creek Co. *v.* Doran, 142 U. S. 417; Trenton Co. *v.* Clay Co., 80 Fed. Rep. 46; Dulo *v.* Miller, 112 Ala. 687; Essex *v.* Day, 52 Conn. 483; Berger *v.* Ebey, 88 Ill. 269; New *v.* Wambach, 42 Ind. 456; Roszell *v.* Roszell, 109 Ind. 354; Williams *v.* Hamilton, 104 Ia. 423; Metcalf *v.* Putnam, 9 Allen, 97; Smith *v.* Jordan, 13 Minn. 264; Henderson *v.* Stokes, 42 N. J. Eq. 586; Wells *v.* Yates, 44 N. Y. 525; Kilmer *v.* Smith, 77 N. Y. 226; Hay *v.* Insurance Co., 77 N. Y. 235; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40; Husted *v.* Van Ness, 158 N. Y. 104; Day *v.* Day, 84 N. C. 408; Railroad Co. *v.* Steinfeld, 42 Ohio St. 449; Archer *v.* California Lumber Co., 24 Oreg. 341; Cook *v.* Liston, 192 Pa. 19; Clack *v.* Hadley, 64 S. W. Rep. 403 (Tenn. Ch.); James *v.* Cutler, 54 Wis. 172.

be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description.[7] It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of a mistake. In the latter case you can only act upon the mutual and 516] con*current intention of all parties for whom the court is virtually making a new written agreement" (*s*).[8]

Proof of one party's intention will not do. So it has been laid down by the American Supreme Court that Equity may compel parties to

(*s*) 4 De G. & J. at pp. 264–5.

[7] The ordinary rule of evidence in civil actions that a fact must be "proved by a preponderance of evidence, does not apply to such a case as this. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals, that the contrary was the fact." Hudson Iron Co. *v.* Stockbridge Iron Co., 102 Mass. 45, 49. Compare Wall *v.* Meilke, 89 Minn. 232, 240, where the court said: "We have referred to the early case in this court of Guernsey *v.* American Ins. Co. [17 Minn. 83] in which it was said that a mistake, in order to warrant the reformation and correction of a written instrument, must be established 'clear of all reasonable doubt.' That case has never been followed in this court, and certainly part of the language used was erroneous. The true rule is that equity will not reform an instrument on the ground of mistake unless the evidence is clear and convincing." See further Simmons Creek Co. *v.* Doran, 142 U. S. 417; Van Fleet *v.* Sledge, 45 Fed. Rep. 743; Insurance Co. *v.* Henderson, 69 Fed. Rep. 762; Pope *v.* Hooper, 90 Fed. Rep. 451, 453; Fulton *v.* Colwell, 112 Fed. Rep. 831; Hinton *v.* Insurance Co., 63 Ala. 488; Smith *v.* Allen, 102 Ala. 406 (cp. Miller *v.* Morris, 123 Ala. 164); Hochstein *v.* Berghauser, 123 Cal. 681; Bishop *v.* Insurance Co., 49 Conn. 167; Miner *v.* Hess, 47 Ill. 170; Linn *v.* Barkey, 7 Ind. 69; Tufts *v.* Larned, 27 Ia. 330; Brundige *v.* Blair, 43 Kan. 364; Tucker *v.* Madden, 44 Me. 206; Fessenden *v.* Ockington, 74 Me. 123; Andrews *v.* Andrews, 81 Me. 337; Insurance Co. *v.* Crane, 16 Md. 260; Stiles *v.* Willis, 66 Md. 552; Tripp *v.* Hasceig, 20 Mich. 254; State *v.* Frank, 51 Mo. 98; Henderson *v.* Stokes, 42 N. J. Eq. 586; Whelen *v.* Osgoodby, 62 N. J. Eq. 571; Lyman *v.* Insurance Co., 2 Johns. Ch. 630; Coles *v.* Bowne, 10 Paige, 526; Ford *v.* Joyce, 78 N. Y. 618; Allison Bros. Co. *v.* Allison, 144 N. Y. 21; Christopher St. Ry. Co. *v.* Twenty-third St. Ry. Co., 149 N. Y. 51 (cp. Southard *v.* Curley, 134 N. Y. 148); Ely *v.* Early, 94 N. C. 1; Potter *v.* Potter, 27 Ohio St. 84; Neininger *v.* State, 50 Ohio St. 394; Stewart *v.* Gordon, 60 Ohio St. 170; Shively *v.* Welch, 2 Oreg. 288; Edmond's Appeal, 59 Pa. 220; Sylvius *v.* Kosek, 117 Pa. 67; Davidson *v.* Greer, 3 Sneed, 384; Clack *v.* Hadley, 64 S. W. Rep. 403 (Tenn. Ch.); Goodell *v.* Field, 15 Vt. 448; Robinson *v.* Braiden, 44 W. Va. 183; Harter *v.* Christoph, 32 Wis. 245; Blake Co. *v.* Insurance Co., 73 Wis. 667; Meiswinkel *v.* St. Paul Ins. Co., 75 Wis. 147.

Where the fact of a mistake in an instrument is admitted, a preponderance of evidence may be sufficient to show what was intended to have been inserted in place of the erroneous matter. Bunse *v.* Agee, 47 Mo. 270.

[8] St. Anthony Falls Co. *v.* Merriman, 35 Minn. 42.

perform their agreement, but has no power to make agreements for parties, and then compel them to execute the same (*t*); to the same effect in *Rooke* v. *Lord Kensington* (*u*) by Lord Hatherley when V.-C.; and more recently by James L. J. when V.-C. in *Mackenzie* v. *Coulson* (*x*). On this principle, as we have already seen, the jurisdiction to rectify instruments does not extend beyond particular expressions. The Court cannot alter that form of instrument which the parties have deliberately chosen (*t*).

The Court therefore cannot act on proof of what was intended by one party only (*y*).[9] And when an instrument contains a variety of provisions, and some of the clauses may have been passed over without attention, "the single fact of there being no discussion on a particular point will not justify the Court in saying that a mistake committed on one side must be taken to be mutual" (*z*). The Court will not rectify an instrument when the result of doing so would be to affect interests already acquired by third parties on the faith of the instrument as it stood (*a*).

Without derogation from the above general rules, a contract of insurance is liberally construed for the purpose of reforming the policy founded upon it in accordance with the true intention (*b*).[10]

Possible exception where one party acts as other's agent. There exists a rare class of cases (we know of only two complete instances at present, and none in a Court of *Appeal) in which the rule [517 that a common mistake must be shown may admit of modification. This is where one party acts as another's agent in preparing an instrument which concerns them both—(in both the particular cases referred to an intended husband had the marriage settlement prepared in great haste and without any advice being taken on the wife's

(*t*) *Hunt* v. *Rousmaniere's Adm.* (1828) 1 Peters, 1, 14.

(*u*) (1856) 2 K. & J. 753, 764, 25 L. J. Ch. 795.

(*x*) (1869) L. R. 8 Eq. 368, 375. Cp. *Bonhote* v. *Henderson* [1895] 1 Ch. 742, 64 L. J. Ch. 556, affd. [1895] 2 Ch. 202, C. A.

(*y*) *Hills* v. *Rowland* (1853) 4 D. M. & G. 430, 436.

(*z*) *Thompson* v. *Whitmore* (1860) 1 J. & H. 268, 276.

(*a*) *Blackie* v. *Clark* (1852) 15 Beav. 595.

(*b*) *Equitable Insurance Company* v. *Hearne* (1874) 20 Wallace (Sup. Ct. U. S.) 494.

[9] *Supra*, note 6. "A mistake on one side may be ground for rescinding, but not for reforming a written agreement." Hearne *v.* Insurance Co., 20 Wall. 488, 491; Moffett, etc., Co. *v.* Rochester, 178 U. S. 373; Dulany *v.* Rogers, 50 Md. 524, 533; Benson *v.* Markoe, 37 Minn. 30; Stewart *v.* Gordon, 60 Ohio St. 170; Diman *v.* Railroad Co., 5 R. I. 130.

[10] Insurance Co. *v.* Hearne, 20 Wall. 494.

part)—and that other gives no definite instructions, but relies on the good faith and competence of the acting party to carry out the true intention. Here the acting party takes on himself the duty of framing a proper instrument—such an instrument, in fact, as would be sanctioned by the Court if the Court had to execute the agreement. And the instrument actually prepared, and executed by the other party on the assumption that it is properly framed, may be corrected accordingly (*c*).[11]

But cases of this kind would perhaps be better put on the ground that the acting party is estopped by his conduct, having taken on himself a fiduciary relation and duty, from denying that the intention of the other party was in fact the common intention of both. Compare p. *495, above.

Reformation of settlements according to previous articles. The most frequent application of the jurisdiction of equity to rectify instruments is in the case of marriage and other family settlements (*d*), when there is a discrepance between the preliminary memorandum or articles and the settlement as finally executed. As to marriage settlements, the distinction was formerly held that if both the articles and the settlement were ante-nuptial, the settlement should be taken in case of variance as a new agreement superseding the articles, unless expressly mentioned to be made in pursuance of the articles; but **518]** that *a post-nuptial settlement would always be reformed in accordance with ante-nuptial articles. The modern doctrine of the Court has modified this as follows, so far as regards settlements executed after preliminary articles but before the marriage:

Special rules as to this. 1. When the settlement purports to be in pursuance of articles previously entered into, and there is any variance, the variance will be presumed to have arisen from mistake.

2. When the settlement does not refer to the articles, it will not be presumed, but it may be proved, that the settlement was meant

(*c*) *Clark* v. *Girdwood* (1877) 7 Ch. Div. 9, 47 L. J. Ch. 116, on the authority of *Corley* v. *Lord Stafford* (1857) 1 De G. & J. 238, where however there was no rectification: a later and very similar case is *Lovesy* v. *Smith* (1880) 15 Ch. D. 655, 49 L. J. Ch. 809. The Court of Appeal does not seem likely to extend this jurisdiction. See *Tucker* v. *Bennett* (1887) 38 Ch. Div. 1, 57 L. J. Ch. 507.

(*d*) See further on this subject Dav. Conv. 3, pt. 1. Appx. No. 3.

11 Williams *v.* North German Ins. Co., 24 Fed. Rep. 625; Abraham *v.* North German Ins. Co., 40 Fed. Rep. 717; Palmer *v.* Hartford Ins. Co., 54 Conn. 488; Esch *v.* Home Ins. Co., 78 Ia. 334. Cp. Scott *v.* Duncan, 1 Dev. Eq. 403. And see the cases cited *supra*, note 6, *ad fin.*

to be in conformity with the articles, and that any variance arose from a mistake.

In the first case the Court will act on the presumption, in the second on clear and satisfactory evidence of the mistake (*e*).

A settlement may be rectified even against previous articles on the settlor's uncontradicted evidence of departure from the real intention, if no further evidence can be obtained (*f*).

The fact that a provision inserted in a settlement (*e.g.* restraint on anticipation of the income of the wife's property) is in itself usual and is generally considered proper, is not a ground for the Court refusing to strike it out when its insertion is shown to have been contrary to the desire of the parties and to the instructions given by them (*g*). There is however a general presumption, in the absence of distinct or complete evidence of actual intention, that the parties intend a settlement to contain dispositions and provisions of the kind usual under the circumstances (*h*).

***At whose suit rectification may be had.** It is not necessary that a [519 person claiming to have a settlement rectified should be or represent a party to the original contract, or be within the consideration of it (*i*).[12] But a deed which is wholly voluntary in its inception cannot be reformed if the grantor contests it, but must stand or fall in its original condition without alteration (*k*);[13] the reason of this has been explained to be that an agreement between parties for the due execution of a voluntary deed is not a contract which the Court can interfere to enforce (*l*). The Court has power, however, to set aside a volun-

(*e*) *Bold* v. *Hutchinson* (1855) 5 D. M. & G. 558, 567, 568. In reforming a settlement the intent rather than the literal words of the articles will be followed: for a modern instance see *Cogan* v. *Duffield* (1876) 2 Ch. Div. 44, 45 L. J. Ch. 307. As to the general principles on which courts of equity construe instruments creating executory trusts, see *Sackville-West* v. *Viscount Holmesdale* (1870) L. R. 4 H. L. 543, 555, 565, 39 L. J. Ch. 505.

(*f*) *Smith* v. *Iliffe* (1875) L. R. 20 Eq. 666, 44 L. J. Ch. 755; *Hanley* v. *Pearson* (1879) 13 Ch. D. 545.

(*g*) *Torre* v. *Torre* (1853) 1 Sm. & G. 518.

(*h*) See p. *500, above.

(*i*) *Thompson* v. *Whitmore* (1860) 1 J. & H. 268, 273.

(*k*) *Broun* v. *Kennedy* (1863) 33 Beav. at p. 147.

(*l*) *Lister* v. *Hodgson* (1867) L. R. 4 Eq. at p. 34.

12 But see Cook *v.* Walker, 21 Ga. 370.

13 Randall *v.* Ghent, 19 Ind. 271; Schoonover *v.* Dougherty, 65 Ind. 463, 467; Shears *v.* Westover, 110 Mich. 505; Mudd *v.* Dillon, 166 Mo. 110; Mulock *v.* Mulock, 31 N. J. Eq. 594; Powell *v.* Morisey, 98 N. C. 426; Meeks *v.* Stillwell, 54 Ohio St. 541; Willey *v.* Hodge, 104 Wis. 81. See also Miller *v.* Savage, 62 N. J. Eq. 746. This seems to have been overlooked in Atherton *v.* Roche, 192 Ill. 252, though for another reason relief was refused.

tary deed in part only at the suit of the grantor if he is content that the rest should stand (*m*).[14]

The Court will exercise caution in rectifying a voluntary settlement at the instance of the settlor alone and on his own evidence (*n*).

Rectification as alternative to cancellation. An agreement will not be cancelled at the suit of one party when he has rejected a proper offer to rectify it. It was agreed between A. and B. that A. should give B. the exclusive right of using a patent in certain districts: a document was executed which was only a licence from A. to B. Some time afterwards B. complained that this did not carry out the intention, and A., admitting it, offered a rectification. B. refused this and sued for cancellation. Held that the relief prayed for could not be granted (*o*).

In certain cases already mentioned for another purpose (*p*) the plaintiff sought to reform an instrument, and satisfied the Court that it did not represent what was his own intention at the time of execution, but failed to establish that the other party's intention was the same; and the Court gave the defendant his choice of **520]** "having *the whole contract annulled, or else of taking it in the form which the plaintiff intended" (*q*). The anomalous character of these cases has already been pointed out.

Disentailing deeds. The Court is not prevented by the Fines and Recoveries Act, ss. 40, 47, from exercising its ordinary jurisdiction to rectify the resettling part of a disentailing assurance (*r*).

Agreement executed by court. An agreement cannot be rectified after it has been adjudicated upon by a competent Court and performed under the direction of that Court (*s*).

Mistake in wills. It is sometimes said, but inexactly, that in certain cases wills may be rectified on the ground of mistake (*t*).

(*m*) *Turner* v. *Collins* (1871) L. R. 7 Ch. 329, 342, 41 L. J. Ch. 558; and see per Turner L.J. *Bentley* v. *Mackay* (1869) 4 D. F. & J. 286.

(*n*) *Bonhote* v. *Henderson* [1895] 1 Ch. 742, 64 L. J. Ch. 556, affd. [1895] 2 Ch. 202, C. A.

(*o*) *Laver* v. *Dennett* (1883) 109 U. S. 90.

(*p*) *Supra*, pp. *476—*478.

(*q*) *Harris* v. *Pepperell* (1867) L. R. 5 Eq. 1, 5; *Garrard* v. *Frankel* (1862) 30 Beav. 445, 31 L. J. Ch. 604; *Bloomer* v. *Spittle* (1872) L. R. 13 Eq. 427, 41 L. J. Ch. 369. See *May* v. *Platt* [1900] 1 Ch. 616, 69 L. J. Ch. 357.

(*r*) *Hall-Dare* v. *Hall-Dare* (1885) 31 Ch. Div. 251, 55 L. J. Ch. 154.

(*s*) *Caird* v. *Moss* (1886) 33 Ch. Div. 22, 55 L. J. Ch. 854.

(*t*) On this point, see the Appendix, Note I.

[14] Mitchell *v.* Mitchell, 40 Ga. 11; Deischer *v.* Price, 148 Ill. 383; Purvines *v.* Harrison, 151 Ill. 219; Andrews *v.* Andrews, 12 Ind. 348; Day *v.* Day, 84 N. C. 408.

Minor points of procedure. Actions for the rectification of instruments must be assigned to the Chancery Division; but where a statement of defence to an action brought in another Division is accompanied by a counterclaim for rectification, this is not a sufficient reason for transferring the action (*u*).

When a conveyance is rectified the order of the Court is sufficient without a new deed. A copy of the order is indorsed on the deed which is to be rectified (*x*).

Consent orders. A consent order, being founded on agreement of the parties, may be set aside for mistake if the facts would justify setting aside an agreement on any of the grounds considered in the foregoing discussion (*y*). So where the mistake as to the effect of the order is on one side only, but induced, however innocently, by the act of the other (*z*).

(*u*) *Storey* v. *Waddle* (1879) 4 Q. B. Div. 289.

(*x*) *White* v. *White* (1872) L. R. 15 Eq. 247, 42 L. J. Ch. 288.

(*y*) *Huddersfield Banking Co.* v. *Lister & Son* [1895] 2 Ch. 273, 64 L. J. Ch. 523, C. A.

(*z*) *Wilding* v. *Sanderson* [1897] 2 Ch. 534, 66 L. J. Ch. 684, C. A.

521] *CHAPTER X.

MISREPRESENTATION AND FRAUD.

PART I.— *Generally.*

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PART I.— GENERALLY.

Misrepresentation by fraud or deceit. The consent of one party to a contract may be caused by a misrepresentation made by the other of some matter, such that, if he had known the truth concerning it, he would not have entered into the contract. Putting off for a while the

closer definition of the term, we see at once that there is a broad distinction between fraudulent and innocent misrepresentation. A statement may be made with knowledge of its falsehood and intent to mislead the other party, or with reckless ignorance as to its truth or falsehood. In either of these cases the making of such a statement is morally wrong and also wrongful in a legal sense, and the conduct of the party making it is called Fraud or Deceit, and may be a substantive wrong giving rise to a claim for redress in damages, independent of any contract. The present writer has endeavoured to discuss this aspect of it elsewhere (*a*).

Innocent statements. On the other hand a man is generally safe, for the purpose now being considered, in stating as true that which he believes to be true. Still more is he safe in giving his opinion, as an opinion, for what it may be worth. If he communicates at the same time the grounds on which he formed his opinion, or reasonable means of access to those grounds, he has done all that an honest man can do.

***Deceit in relation to contract.** Whenever consent to a contract is [522 obtained by deceit, the contract is voidable at the option of the party deceived, subject to the conditions to be presently mentioned. The other party cannot take advantage of his own wrong. We shall see that the working of this rule involves careful definition and distinction; but the substance of the law now rests on fairly broad and simple grounds. A man who makes positive statements to the intent that others should act upon them is bound, at least, to state only what he believes to be true (*b*).

Constructive or legal fraud. The combination of this principle with the still wider principle of responsibility for the acts and defaults of agents in the course of their employment gives rise to difficult questions, and in some cases to consequences of apparent hardship. A man who had no fraudulent intention, or who has not even been personally negligent, may be liable as for fraud. The ground of liability in such cases is shortly described as "constructive fraud," or perhaps less aptly "legal fraud." The word "constructive" negatives actual fraud, but affirms that the actual conditions will have

(*a*) In "The Law of Torts," Ch. viii.

(*b*) The House of Lords has decided in *Derry* v. *Peek* (1889) 14 App. Ca. 337, 58 L. J. Ch. 864, that there is no general duty to use any degree whatever of diligence in ascertaining facts, as distinct from bare belief, in making positive statements intended for other people to act on.

similar consequences. "Constructive possession" signifies, in the same way, that an owner out of possession has certain advantages originally given only to possessors; "constructive delivery" is a change of legal possession without change of physical custody; and we speak of "constructive notice" where the existence of means of knowledge dispenses with the proof of actual knowledge.

Former vagueness of judicial language. It must be remembered that for a long time equity judges and text writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term "Fraud" as *nomen generalissimum* (*c*). "Constructive
523] *fraud" was made to include almost every class of cases in which any transaction is disallowed, not only on grounds of fair dealing between the parties, but on grounds of public policy (*d*). This lax and ambiguous usage of the word was confusing in the books and not free from confusion in practice. Plaintiffs were too apt to make unfounded charges of fraud in fact, while a defendant who could and did indignantly repel such charges might sometimes divert attention from the real measure of his duties. Cases in which there was actual fraud or culpable recklessness of truth were not sufficiently distinguished from cases in which there was only a failure to fulfil a special duty. But it seems needless at this day to pursue an obsolete verbal controversy.

Estoppel. Innocent representations are not necessarily harmless to the person making them. They may give rise to liability, or, as it is more exact to say, representations may give rise to liability without any need for determining whether they are innocent or otherwise (a matter sometimes far from easy to determine) (*e*), in various ways. A statement made on quite reasonable grounds may nevertheless be defamatory and actionable; but this is remote from our subject. The rule of estoppel comes nearer to it. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter

(*c*) James L.J. L. R. 8 Ch. at p. 124.

(*d*) See Story's Eq. Jurisp. ch. vii.

(*e*) Cp. *Wasatch Mining Co.* v. *Crescent Mining Co.* (1893) 148 U. S. 293, 298, per Cur.:— "In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same state of facts an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case."

his own previous position, the former is concluded from averring against the latter a different state of things as existing at *the [524
same time" (*f*). And "whatever a man's real intention may be," he is deemed to act wilfully "if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it" (*g*). The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effects on the substantive rights of parties.

Representation as term of contract. Again, the existence of a certain state of facts, or the truth of a certain assertion, may be made a condition or term of a contract, apart from any question of good faith, so that if the fact be otherwise the proposed contract may never become binding, or else there may be a non-performance or breach of the contract, with the usual consequences. Such conditions or terms are in some important kinds of contracts implied by special rules of law.

Overlapping of distinct grounds of liability. It will be observed that these possible qualities of a representation are not mutually exclusive. One and the same statement may well be a deceit and a breach of contract and capable of operating by estoppel (*h*).

The exploded doctrine of "making representations good." During a certain time some judges in the Court of Chancery seem to have thought that under certain conditions a representation which is not operative as part of a contract, or by way of estoppel, or as amounting to an actionable wrong, may still be binding on the person making it. But, when these three effects are duly considered, it appears that there is no other way in which it can be binding.

To say that a man is answerable for the truth of his statement is to say that it is his legal duty to see that it *is borne out or to [525
make compensation for its not being borne out. We need not here dwell on cases of deceit, or of estoppel independent of contract. Then, if the statement is of a fact, and made as an inducement to another person to enter into a contract, the substance of the duty can only be that the person making the statement undertakes that it is true. In

(*f*) *Pickard* v. *Sears* (1837) 6 A. & E. 469, 45 R. R. 538.

(*g*) *Freeman* v. *Cooke* (1848) 2 Ex. 654, 18 L. J. Ex. 114, Finch Sel. Ca. 483. See further Bigelow on Estoppel, 4th ed. 1886, ch. xviii.

(*h*) See per Lord Blackburn in *Brownlie* v. *Campbell* (1880) 5 App. Ca. 925, 953. A hint of this was already given by Parke B. in *Freeman* v. *Cooke*, last note: see the end of the judgment.

that case must not his undertaking be a contract or a term in the contract? For if not, why should it bind him? It might peradventure work an estoppel also, but for all practical intents the estoppel is merged in the contract.

Representation of the future operates as promise if at all. If, on the other hand, the statement is of something to be performed in the future, it must be a declaration of the party's intention unless it is a mere expression of opinion. But a declaration of intention made to another person in order to be acted on by that person is a promise or nothing. And if the promise is binding, the obligation laid upon its utterer is an obligation by way of contract and nothing else: promises *de futuro,* if binding at all, must be binding as contracts (*i*).[1] There is no middle term possible. A statement of opinion or expectation creates, as such, no duty. If capable of creating any duty, it is a promise. If the promise is enforceable, it is a contract. The description of promise or contract in a cumbrous and inexact manner will not create a new head of law. "There must be a contract in order to entitle the party to obtain any relief" (*k*).

PART II.— MISREPRESENTATION AND NON-DISCLOSURE.

No general positive duty of disclosure. So far nothing has been said of any affirmative duty to tell the whole truth in relation to the 526] matter of a contract, *as distinct from the negative duty of telling nothing but the truth, or at least what one honestly holds for truth. In general one is not bound in law to disclose in the treaty for a contract all known facts which may be material to the other party's judgment, nor even to remove a mistake not induced by one's own act (*l*). Non-disclosure of a material fact which one was not specially bound to disclose is no defence to an action for specific per-

(*i*) Lord Selborne, *Maddison* v. *Alderson* (1883) 8 App. Ca. at p. 473.

(*k*) Per Cozens-Hardy J. *Re Fickus* [1900] 1 Ch. 331, 334. Earlier authorities on the supposed equitable doctrine of "making representations good" are discussed in the Appendix, Note K, which is now preserved not so much for any probable use to practitioners as for the sake of students who may still be perplexed by some of these cases. No such doctrine, I understand, has ever become current in America.

(*l*) *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597, 40 L. J. Q. B. 221.

[1] Comstock *v.* Herron, 55 Fed. Rep. 807; Brightman *v.* Hicks, 108 Mass. 246; Bragg *v.* Danielson, 141 Mass. 195; Knowlton *v.* Keenan, 146 Mass. 86; Dawe *v.* Morris, 149 Mass. 188; Prescott *v.* Jones, 69 N. H. 305, 307; White *v.* Ashton, 51 N. Y. 280. But see The M. F. Parker, 88 Fed. Rep. 853; Beatty *v.* Western College, 177 Ill. 280; Ricketts *v.* Scothorn, 57 Neb. 51, where promises were enforced on the ground of estoppel.

formance (*m*). And if one party asks a question which the other is not bound to answer, and it is not answered, he is not entitled to treat the other's silence as a representation (*n*); that is, when there is really nothing beyond silence. A very slight departure from passive acquiescence might be enough to convert a lawful though scarcely laudable reserve into an actionable deceit. This must in every case be a question of fact.

But such duties are implied in certain contracts. There are several kinds of contracts, however; such that the one party must in the ordinary course of business take from the other, wholly or to a great extent, the description of the subject-matter of the contract. Now the parties may if they please make any part of that description a term or even a preliminary condition (*o*) of the contract. Whether they have done so is a question of construction (*p*). But therein the nature of the contract, and the extent to which an erroneous description or material omission may deprive either party of the benefit to be reasonably expected, will justly count for much. More than this *fixed [527 rules on this point have been established as to particular classes of contracts, and in some of these they go to the extent of a positive duty of disclosure; not only that all information given shall be true, but that all material information shall be fully as well as truly given. The character and stringency of the duties thus imposed varies according to the specific character and risks of the contract. It will be convenient to take a view of the classes of contracts thus treated before we examine in detail the universal rules as to Deceit. These classes are believed to be the following. It is by no means certain, however, that the same principle may not be applicable in other forms. The development of modern commerce may bring into prominence new kinds of transactions in which the subject-matter of the contract, or a material part of it, is within the peculiar knowledge of

(*m*) *Turner* v. *Green* [1895] 2 Ch. 205, 64 L. J. Ch. 539.

(*n*) *Laidlaw* v. *Organ* (1817) 2 Wheat. 178: a sale of tobacco; the buyer knew, and the seller did not, that peace had been concluded between the U. S. and England; the seller asked if there was any news affecting the market price; the buyer gave no answer, nor did the seller insist on one. Held that the buyer's silence was not fraudulent. Cp. I. C. A. s. 17, illustration (*d*).

(*o*) In such a case it has been said that there is not a conditional promise, but either an absolute promise or no promise at all: Langdell, § 28. But see Holmes, "The Common Law," 304.

(*p*) *Behn* v. *Burness* (1863) Ex. Ch. 3 B. & S. 751, 32 L. J. Q. B. 204; *Bannerman* v. *White* (1861) 10 C. B. N. S. 844, 31 L. J. C. P. 28, Finch Sel. Ca. 473.

one party, and the other has to rely, in the first instance at all events, on the correctness of the statements made by him.

Contracts specially treated. (A) Insurance.

(B) Suretyship and guaranty (as to certain incidents only).

(C) Sales of land.

(D) Family settlements.

(E) The contract of partnership, and thence, by analogy, contracts to take shares in companies and contracts of promoters.

We proceed to follow out these topics in order. And first we shall say something in general of representations which amount to a condition or a warranty.

Representations amounting to Warranty or Condition.

Distinction between warranty and condition. The law on this subject is to be found chiefly in the decisions on the sale of goods; the principles however are of general importance, and not without analogies, as we shall presently see, in other doctrines formerly treated as peculiar
528] to equity. We therefore mention the leading *points in this place, though very briefly. In the first place a buyer has a right to expect a merchantable article answering the description in the contract (*q*);[2] but this is not on the ground of warranty, but because the seller does not fulfil the contract by giving him something different. "If a man offers to buy *peas* of another and he sends him *beans*, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead it is a

(*q*) *Jones* v. *Just* (1868) L. R. 3 Q. B. 197, 204, 37 L. J. Q. B. 89; *Drummond* v. *Van Ingen* (1887) 12 App. Ca. 284, 56 L. J. Q. B. 563; Sale of Goods Act, 1893, ss. 13, 14.

[2] Dushane *v.* Benedict, 120 U. S. 630; Babcock *v.* Trice, 18 Ill. 420; Doane *v.* Dunham, 65 Ill. 512; McClung *v.* Kelly, 21 Ia. 508; Warren *v.* Arctic Ice Co., 74 Me. 475; Hastings *v.* Lovering, 2 Pick. 214; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Gould *v.* Stein, 149 Mass. 570; Murchie *v.* Cornell, 155 Mass. 60; Alden *v.* Hart, 161 Mass. 576; Whitaker *v.* McCormick, 6 Mo. App. 114; Howard *v.* Hoey, 23 Wend. 350; Carleton *v.* Lombard, 149 N. Y. 137, 601; Bierman *v.* City Mills Co., 151 N. Y. 482; Cullen *v.* Bimm, 37 Ohio St. 236, 240; Jennings *v.* Gratz, 3 Rawle, 168; Brantley *v.* Thomas, 22 Tex. 270; Hood *v.* Bloch, 29 W. Va. 244; Morehouse *v.* Comstock, 42 Wis. 626. But see *contra*, Ryan *v.* Ulmer, 108 Pa. 332; Ulmer *v.* Ryan, 137 Pa. 309. See also De Witt *v.* Berry, 134 U. S. 306; White *v.* Oakes, 88 Me. 367; Ivans *v.* Laury, 67 N. J. L. 153; Waeber *v.* Talbot, 167 N. Y. 48; Sellers *v.* Stevenson, 163 Pa. 262.

non-performance of it" (*r*).[3] So that, even if it be a special term of the contract that the buyer shall not refuse to accept goods bought by sample on the score of the *quality* not being equal to sample, but shall take them with an allowance, he is not bound to accept goods of a different *kind* (*s*).[4] It is open to the parties to add to the ordinary description of the thing contracted for any other term they please, so as to make that an essential part of the contract: a term so added is a *condition*. If it be not fulfilled, the buyer is not bound to accept

(*r*) Lord Abinger C. B. in *Chanter* v. *Hopkins* (1838) 4 M. & W. at p. 404, 51 R. R. 654, 655; "as sound an exposition of the law as can be," per Martin B. *Azémar* v. *Casella* (1867) (Ex. Ch.) L. R. 2 C. P. 677, 679, 36 L. J. C. P. 263. There is a class of cases, however, in which it is commonly, and perhaps conveniently, said that there is a *warranty* that the goods shall be merchantable besides the *condition* that they shall answer the description: *Mody* v. *Gregson* (1868) L. R. 4 Ex. 49, 38 L. J. Ex. 12.

(*s*) *Azémar* v. *Casella* (1867) L. R. 2 C. P. 431, in Ex. Ch. 677, 36 L. J. C. P. 124, 263.

[3] "In strictness, both warranty and rescission import that the subject is within the contract, and passed to the purchaser by its operation. The rejection of articles of a different kind or description, not answering to the terms of the contract, does not stand upon the ground of rescission; nor does the right to return them depend upon the existence of a warranty." Mansfield *v.* Trigg, 113 Mass. 350, 354, 355; Pope *v.* Allis, 115 U. S. 363; Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. Rep. 159, 162; Coit *v.* Schwartz, 29 Kan. 344, 347; Fogg's Admr. *v.* Rodgers, 84 Ky. 558; Columbian, etc., Co. *v.* Douglas, 84 Md. 44.

But it is generally held that the sale of goods by a particular description may also be treated as a warranty that they answer the description. Dushane *v.* Benedict, 120 U. S. 630; Babcock *v.* Trice, 18 Ill. 420; Morse *v.* Moore, 83 Me. 473; Osgood *v.* Lewis, 2 H. & G. 495; Hastings *v.* Lovering, 2 Pick. 214; Wilson *v.* Lawrence, 139 Mass. 318; Gould *v.* Stein, 149 Mass. 570; Edgar *v.* Breck, 172 Mass. 581; Whitaker *v.* McCormick, 6 Mo. App. 114; Van Wyck *v.* Allen, 69 N. Y. 61; White *v.* Miller, 71 N. Y. 118; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260; Morse *v.* Union Stock Yard Co., 23 Oreg. 289; Borrekins *v.* Bevan, 3 Rawle, 23; Hoffman *v.* Dixon, 105 Wis. 315.

"The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can be adduced why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial." Wolcott *v.* Mount, 36 N. J. L. 262, 266, 267; Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. Rep. 159, 165.

[4] So, if goods sold are to be taken with all faults, the buyer cannot reject them for faults not inconsistent with their identity as goods of the kind described, but would not be obliged to accept them if of a different kind. Whitney *v.* Boardman, 118 Mass. 242.

the goods.[5] "Condition" is purposely not defined by the Sale of Goods Act, though "warranty" is (*t*).[6] On a bargain and sale of specific goods with a warranty the buyer cannot reject them (*u*),[7] but

(*t*) Sect. 62, and see App. II., note (*a*), in Mr. Chalmer's edition of the Act.

(*u*) Sale of Goods Act, s. 53; *Heyworth* v. *Hutchinson* (1867) L. R. 2 Q. B. 477, 36 L. J. Q. B. 270; but as to the application of the rule in the particular case see Benjamin, p. 936, 4th ed.

[5] On a bargain and sale of a specific article, described as a certain substance, the purchaser is not bound to accept, or keep it, if it turns out to be a different substance. Varley *v.* Whipp, [1900] 1 Q. B. 513; Henshaw *v.* Robbins, 9 Met. 83; Hawkins *v.* Pemberton, 51 N. Y. 198.

In Lord *v.* Grow, 39 Pa. 88, it was held that on a sale of personal property on inspection, there is no engagement on the part of the vendor that it is of the kind it is sold for, though the difference in species be not discoverable by inspection. See also Mahaffey *v.* Ferguson, 156 Pa. 156. *Contra*, that there is an implied warranty to that effect, see Fogg's Admr. *v.* Rodgers, 84 Ky. 558; Henshaw *v.* Robbins, 9 Met. 83; Wolcott *v.* Mount, 36 N. J. L. 262; 38 N. J. L. 496; Hawkins *v.* Pemberton, 51 N. Y. 198.

So it is held that there is an implied warranty on the sale of a note, bill, bond, or certificate of stock, that it is a genuine obligation of the sort it purports to be and is sold for. Utley *v.* Donaldson, 94 U. S. 29; Snyder *v.* Reno, 38 Ia. 329; Russell *v.* Critchfield, 75 Ia. 69; Smith *v.* McNair, 19 Kan. 330; Ware *v.* McCormack, 96 Ky. 139; Merriam *v.* Wolcott, 3 Allen, 258; Worthington *v.* Cowles, 112 Mass. 30; Ripley *v.* Case, 86 Mich. 261; Brown *v.* Ames, 59 Minn. 476; Palmer *v.* Courtney, 32 Neb. 773; Wood *v.* Sheldon, 42 N. J. L. 421; Frank *v.* Lanier, 91 N. Y. 112; Bank *v.* Gallaudet, 120 N. Y. 298; McClure *v.* Central Trust Co., 165 N. Y. 108; Dumont *v.* Williamson, 18 Ohio St. 515; Aldrich *v.* Jackson, 5 R. I. 218; Giffert *v.* West, 33 Wis. 617. So on the sale of a judgment. Flandrau *v.* Hammond, 148 N. Y. 129. Or mortgage, Waller *v.* Staples, 107 Ia. 738.

It has been held that on the sale of a negotiable note there is no implied warranty that it is not void for usury. Littauer *v.* Goldman, 72 N. Y. 506. But the correctness of this decision has been denied. Meyer *v.* Richards, 163 U. S. 385, 411; Wood *v.* Sheldon, 42 N. J. L. 421, 425; Hannum *v.* Richardson, 48 Vt. 508; Daskam *v.* Ullman, 74 Wis. 474.

There is no warranty on the sale of a note that the maker is solvent. Hecht *v.* Batcheller, 147 Mass. 335. But to sell a note with knowledge that the maker is insolvent and to conceal that fact is fraudulent. Sebastian May Co. *v.* Codd, 77 Md. 293; Brown *v.* Montgomery, 20 N. Y. 287; Rothmiller *v.* Stein, 143 N. Y. 581, 592.

On a sale of bonds or certificates of stock purporting to be issued by a corporation, there is an implied warranty that they are genuine, *i. e.*, not forgeries, but not that their issuance was within the power of the corporation, or that they were not fraudulently issued by its officers. Otis *v.* Cullum, 92 U. S. 447; Harvey *v.* Dale, 96 Cal. 160; First Bank *v.* Drew, 191 Ill. 186; Higgins *v.* Illinois Bank, 193 Ill. 394; Harter *v.* Elzroth, 111 Ind. 159; Maze *v.* Owingsville Banking Co., 23 Ky. L. Rep. 574; White *v.* Robinson, 50 Mich. 73; Bank *v.* Kurtz, 99 Pa. 344. But see as to the law of Louisiana, Meyer *v.* Richards, 163 U. S. 358. One who presents a power of attorney to transfer stock, upon the faith of which the corporation issues to him a new certificate of stock, impliedly warrants the genuineness of the power of attorney. Oliver *v.* Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610; Railroad Co. *v.* Richardson, 135 Mass. 473.

[6] On the propriety of the distinction between these so-called conditions and warranties, see 1 Col. L. Rev. 71; 16 Harv. L. Rev. 465.

[7] In this country wherever rescission is allowed for breach of warranty, *a fortiori*, the buyer may refuse to receive the goods. See *ante*, p. 607, n. 67; also 16 Harv. L. Rev. 467.

he may obtain compensation by way of deduction from the price, or by a cross action (*v*).[8]

*No small confusion has been caused by the use of the word [529 *warranty* where the thing meant in the first instance is really a *condition*. The proper meaning of *warranty* appears to be an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either by the nature of the case or by the agreement of the parties, is "collateral to the main purpose of such contract" (*x*). The so-called implied warranties of quality, fitness, and condition of goods sold are really conditions; if the goods tendered in performance of the contract do not satisfy those conditions, they may be rejected. But the buyer may, if he thinks fit, accept the goods and claim damages for the defect; in other words, he may treat the breach of condition as a breach of warranty. And after goods have been accepted, or the property in specific goods contracted for has passed to the buyer, "the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the Contract as repudiated, unless there be a term of the contract, express or implied, to that effect" (*y*).[9] Conditions of this kind include a warranty from the first, and may be reduced to a warranty if the buyer does not take advantage of them in time. But a condition and a warranty are not therefore the same thing.

Similar questions have not unfrequently arisen on the construction of charter-parties. Thus in *Behn* v. *Burness* (*z*)[10] it was agreed that the plaintiff's ship "now in the port of Amsterdam" should go to an English port and load a cargo of coals. The ship did not in fact reach the port of *Amsterdam till some days after the date of [530 the contract. It was held that the description of her as in the port of

(*v*) The reduction of the price can be only the actual loss of value: any further damages must be the subject of a counter-claim (under the old practice a separate action): *Mondel* v. *Steel* (1841) 8 M. & W. 858, 871, 10 L. J. Ex. 426.

(*x*) See note (*t*), above.

(*y*) Sale of Goods Act, 1893, s. 11.

(*z*) (1863) 3 B. & S. 751, 32 L. J. Q. B. 204. Was the charter-party void or only voidable? See O. W. Holmes, The Common Law, 329. I submit that it was void, but the plaintiff would have been estopped from showing that his own statement that his ship was in the port of Amsterdam was not true: cp. pp. *495, *496, above.

8 Gilmore *v.* Williams, 162 Mass. 352.

9 See 4 Col. L. Rev. 195.

10 See also Ollive *v.* Booker, 1 Ex. 416; Bentsen *v.* Taylor, [1893] 2 Q. B. 274; Davison *v.* Von Lingen, 113 U. S. 40; Gray *v.* Moore, 37 Fed. Rep. 266; The B. F. Bruce, 50 Fed. Rep. 123; Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530; Langdell, Summary of Contracts, § 28.

Amsterdam was a condition, and that by its non-fulfilment the defendant was discharged from his obligation to load a cargo. It should be remembered that the use of the word "warrant" or "warranty" is not conclusive, the question being what is the true intention of the contract as a whole (*a*). We pass on to the contracts above mentioned as being under exceptional rules.

A. *Insurance.*

Concealment of material facts will avoid a contract of insurance of any kind (*b*).

Marine insurance: duty of disclosure. As to marine insurance, not only misrepresentation but concealment (*c*) of a material fact, "though made without any fraudulent intention, vitiates the policy" (*d*),[11] that is, makes it voidable at the underwriter's election (*e*).

For this purpose a material fact does not, on the one hand, mean only such a fact as is "material to the risks considered in their own nature"; nor on the other hand does it include everything that might influence the underwriter's judgment: the rule is "that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which under-
531] writers do in practice act" (*f*).[12] *The only exception is that the insured is not bound to communicate anything which is such matter of general knowledge that he is entitled to assume the under-

(*a*) See *Barnard* v. *Faber* [1893] 1 Q. B. 340, 62 L. J. Q. B. 159, C. A. "A stipulation may be a condition, though called a warranty in the contract": Sale of Goods Act, 1893, s. 11.

(*b*) *Seaton* v. *Heath* [1899] 1 Q. B 782, 792, 68 L. J. Q. B. 631, C. A. (revd. in H. L. on facts only [1900] A. C. 135, 69 L. J. Q. B. 409).

(*c*) This is the usual word, but *non-disclosure* would be more accurate.

(*d*) *Ionides* v. *Pender* (1874) L. R. 9 Q. B. 531, 537, 43 L. J. Q. B. 227, 2 Wms. Saund. 555–9.

(*e*) See *Morrison* v. *Universal Marine Insurance Co.* (1873) L. R. 8 Ex. 197, 205, 42 L. J. Ex. 115.

(*f*) Parsons on Insurance, adopted per cur. *Ionides* v. *Pender* (1874) L. R. 9 Q. B. at p. 539. What falls within this description is a question of fact: *Stribley* v. *Imperial Marine Insurance Co.* (1876) 1 Q. B. D. 507, 45 L. J. Q. B. 396. And the policy will be vitiated by concealment of a fact material to guide the underwriter's judgment, though not material to the risk insured against in itself: *Rivaz* v. *Gerussi* (1880) 6 Q. B. Div. 222. 50 L. J. Q. B. 176.

11 McLanahan *v.* Insurance Co., 1 Pet. 170, 185; Hart *v.* British Ins. Co., 80 Cal. 440; Fiske *v.* Insurance Co., 15 Pick. 310, 316; Stocker *v.* Insurance Co., 6 Mass. 220, 225; Howell *v.* Insurance Co., 7 Ohio, 276, 282; Insurance Co. *v.* Stoney, Harper, 235.

12 Insurance Co. *v.* Ruden's Admr., 6 Cr. 338; Rosenheim *v.* Insurance Co., 33 Mo. 230.

writer knows it already (*g*) :[13] and the obligation extends not only to facts actually within the knowledge of the assured, but to facts which in the ordinary course of business he ought to know, though by the fraud or negligence of his agent he does not know them (*h*).[14]

Life insurance. As regards life insurance, the assured is bound to disclose all material facts within his knowledge affecting the life on which the insurance is made (*i*). But where that life is not his own but some other person's, that person is not his agent, and if "the life" or his referees make false statements which are passed on in good faith by the assured, their falsehood will not of itself avoid the contract (*k*).[15]

Practically life policies are almost always framed with some sort of express reference to the statements made by the assured as to the health and circumstances of "the life." Not unfrequently it is pro-

(*g*) *Morrison* v. *Universal Marine Insurance Co.* (1873) L. R. 8 Ex. 40, 42 L. J. Ex. 115.

(*h*) *Proudfoot* v. *Montefiore* (1867) L. R. 2 Q. B. 511, 36 L. J. Q. B. 225. This applies only to the agent through whom the insurance was actually effected: *Blackburn* v. *Vigors* (1887) 12 App. Ca. 531, 57 L. J. Q. B. 114; unless there is a continuous negotiation by more than one agent: *Blackburn* v. *Haslam* (1888) 21 Q. B. D. 144, 57 L. J. Q. B. 479. Non-disclosure by an agent of the assured, without fraudulent intention, has been held to avoid the policy only to the extent of the loss or risk arising from the particular facts so withheld: *Stribley* v. *Imperial, &c. Co.*, note (*f*), *supra:* but see per Lord Watson, 12 App. Ca. at p. 540.

(*i*) See authorities collected in *London Assurance* v. *Mansel* (1879) 11 Ch. D. 363, 48 L. J. Ch. 331.

(*k*) *Wheelton* v. *Hardisty*, 8 E. & B. 232, in Ex. Ch. 285, 26 L. J. Q. B. 265, 27 *ib.* 241. The judges appear to have been inclined to restrict the view taken before and since of the *uberrima fides* generally required in this contract, unless the dicta (which in any case decide nothing) can be taken as limited to the special case before them.

[13] Ruggles *v.* Insurance Co., 4 Mason, 74, 80; Kohne *v.* Insurance Co., 1 Wash. C. C. 158; Folsom *v.* Insurance Co., 8 Blatchf. 170; De Longuemere *v.* Insurance Co., 10 Johns. 120; Insurance Co. *v.* Stoney, Harper, 235.

The assured's failure to disclose material facts is not excused on the ground that they were actually known to the underwriters unless the knowledge of the latter was as full and particular as his own information. Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; Moses *v.* Insurance Co., 1 Wash. C. C. 385.

[14] Cp. Ruggles *v.* Insurance Co., 4 Mason, 74; Insurance Co. *v.* Ruggles, 12 Wheat. 408; Folsom *v.* Insurance Co., 8 Blatchf. 170. In Snow *v.* Insurance Co., 61 N. Y. 160, it was held that a person at Liverpool, having directed a marine insurance to be procured at New York, and having subsequently received intelligence of a loss before his order was executed, was not bound to transmit news of the loss, or countermand the order by ocean telegraph, although such telegraph was then "used by merchants and others, whenever in their judgment the interests of their business required the necessary expense," the telegraph having been in operation between the two places about three months, the rates being high, and the messages both ways averaging but about twenty-nine per day. Cp. Proudfoot *v.* Montefiore, *supra.* See also as to non-disclosure by an agent, Hamblet *v.* City Ins. Co., 36 Fed. Rep. 118.

[15] See also Penn Ins. Co. *v.* Mechanics' Bank, 72 Fed. Rep. 413, 437.

vided that the declaration of the assured shall be the basis of the contract; and if the declaration thus made part of the contract is not **532]** confined to the belief of the party,[16] but is positive and *unqualified, then the contract is avoided by any part of the statement being in fact untrue (*l*),[17] though not to the knowledge of the assured (*m*),[18] or by the concealment of any material fact (*n*).[19]

On the same ground the grant of a life annuity by the Commissioners for the Reduction of the National Debt was set aside at the suit of the Crown, the age of the life having been mis-stated; not so much on the ground of misrepresentation simply, as because, considering the statutory powers and duties of the commissioners, "it was an essential part of the contract itself that the representation should be true" (*o*).

The principles applicable to insurance against accidents are the same (*p*).

Fire insurance. The contract of fire insurance is treated in somewhat the same way as that of marine insurance (which it resembles

(*l*) It need not be shown that the particular mis-statement was material: *Anderson* v. *Fitzgerald* (1853) 4 H. L. C. 484. Cp. *Thomson* v. *Weems* (1884) (Sc.) 9 App. Ca. 671.

(*m*) *Macdonald* v. *Law Union Insurance Co.* (1874) L. R. 9 Q. B. 328, 43 L. J. Q. B. 131.

(*n*) *London Assurance* v. *Mansel* (1879) 11 Ch. D. 363, 48 L. J. Ch. 331. Probably a material fact means for this purpose a fact such that its concealment makes the statement actually furnished, though literally true, so misleading as it stands as to be in effect untrue.

(*o*) *A. G.* v. *Ray* (1874) L. R. 9 Ch. 397, 407, 43 L. J. Ch. 321, per Mellish L.J. expressly comparing the case of a life policy where the representations of the assured are made the basis of the contract.

(*p*) *Bawden* v. *London, Edinburgh & Glasgow Assce. Co.* [1892] 2 Q. B. 534, 61 L. J. Q. B. 792, C. A., a curious example of the insurers being bound by their agent's knowledge.

16 When the statement is confined to the belief of the party, to avoid the policy it must appear that it was untrue in some respect material to the risk, and that he knew of its incorrectness. Insurance Co. *v.* France, 94 U. S. 561; Insurance Co. *v.* Gridley, 100 U. S. 614; Clapp *v.* Mass. Benefit Assn., 146 Mass. 519; Louis *v.* Connecticut Ins. Co., 58 N. Y. App. Div. 137.

17 Jeffries *v.* Insurance Co., 22 Wall. 47; Insurance Co. *v.* France, 91 U. S. 510; Rice *v.* Fidelity Co., 103 Fed. Rep. 427; Alabama Ins. Co. *v.* Garner, 77 Ala. 210; Supreme Lodge *v.* M'Laughlin, 108 Ill. App. 85; Cushman *v.* Insurance Co., 63 N. Y. 404. And see Miller *v.* Insurance Co., 36 Ia. 216; Insurance Co. *v.* Wise, 34 Md. 582; Campbell *v.* Insurance Co., 98 Mass. 381; Rice *v.* Insurance Co., 17 Minn. 497.

18 Campbell *v.* Insurance Co., 98 Mass. 381, 396; Cushman *v.* Insurance Co., 63 N. Y. 404, 409; Insurance Co. *v.* Pyle, 44 Ohio St. 19; Blooming Grove Ins. Co. *v.* McEnerney, 102 Pa. 335; Freedman *v.* Provident Ins. Co., 182 Pa. 64; Powers *v.* Insurance Co., 50 Vt. 630.

19 As to concealment, see Phenix Ins. Co. *v.* Raddin, 120 U. S. 183, 192 (disapproving London Assurance *v.* Mansel, 11 Ch. D. 363); Equitable Assurance Soc. *v.* McElroy, 83 Fed. Rep. 631; Cable *v.* United States Ins. Co., 111 Fed. Rep. 19; Mutual Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; Insurance Co. *v.* Wise, 34 Md. 582; Mallory *v.* Insurance Co., 47 N. Y. 52.

in being a contract of indemnity) (*q*),[20] though not to the same extent.[21] The description of the insured premises annexed to a fire policy amounts to a warranty (or rather a condition) that at the date of the policy the premises correspond to the description, or at least have not been altered so as to increase the risk; and also that during the time specified in the policy the assured will not voluntarily make any alteration in them such as to increase the risk. The description must be the basis of the contract, for the terms of insurance can be calculated only on the supposition *that the description in the [533 policy shall remain substantially true while the risk is running (*r*).[22] Where an insurance is expressed to be "on same rate terms and identical interest" as other existing insurance on the same property, this is a condition of the contract (*s*).

Description of goods in bill of lading, &c. The effect of a misdescription of the goods in a bill of lading, apart from any fraudulent intention, *e.g.* of avoiding payment of a higher rate of freight, is not precisely settled: but it seems that at most it would limit the carrier's liability to what the value of the goods would be if the description were correct (*t*).[23]

B. *Suretyship and Guaranty.*

Misrepresentation avoids contract. The contract of suretyship "is one in which there is no universal obligation to make disclosure" (*u*);

(*q*) *Darrell* v. *Tibbitts* (1880) 5 Q. B. Div. 560, 50 L. J. Q. B. 33.

(*r*) *Sillem* v. *Thornton* (1854) 3 E. & B. 868, 23 L. J. Q. B. 362; where it was held accordingly that the addition of a third story to a house described as being of two stories was of a material alteration, and discharged the insurer: and see further, as to what amounts to material misdescription, *Forbes & Co.'s claim* (1875) L. R. 19 Eq. 485, 44 L. J. Ch. 761.

(*s*) And the use of the word "warranted" makes no difference: *Barnard* v. *Faber* [1893] 1 Q. B. 340, 62 L. J. Q. B. 159, C. A.

(*t*) *Lebeau* v. *General Steam Navigation Co.* (1872) L. R. 8 C. P. 88, 42 L. J. C. P. 1. The point decided is that the addition of the words "Weight, value and contents unknown" by the shipowner is an entire waiver of the description.

(*u*) *Railton* v. *Mathews* (1844) 10 Cl. & F. 934; and see per Romer L.J.

[20] Insurance Co. *v.* Hamill, 6 Gill, 87; Wilson *v.* Hill, 3 Met. 66.

[21] Clark *v.* Insurance Co., 8 How. 235, 249; Beebe *v.* Insurance Co., 25 Conn. 51; Insurance Co. *v.* Bachler, 44 Neb. 549; Burritt *v.* Insurance Co., 5 Hill, 188; Armour *v.* Insurance Co., 90 N. Y. 450, 456; Insurance Co. *v.* Harmer, 2 Ohio St. 452, 462; Arthur *v.* Palatine Ins. Co., 35 Oreg. 27; Niagara Ins. Co. *v.* Miller, 120 Pa. 504.

[22] Stetson *v.* Insurance Co., 4 Mass. 330, 337; Chase *v.* Insurance Co., 20 N. Y. 52; Insurance Co. *v.* Horan, 89 Pa. 438. It is well settled that concealment or fraud on the part of the shipper which deceives the carrier as to the true value of the goods limits the carrier's liability. 5 Am. & Eng. Encyc. (2d ed.), 345.

[23] See Thoron *v.* The Mississippi, 76 Fed. Rep. 375; Savannah Co. *v.* Collins, 77 Ga. 376; Fassett *v.* Ruark, 3 La. Ann. 694.

but it has peculiar incidents after it is formed, which bring it within our present scope. A surety is released from his obligation by any misrepresentation, or concealment amounting to misrepresentation, of a material fact on the part of the creditor (*x*).[24] The language used in different cases is hardly consistent: the later decisions establish however that the rule is not parallel to that of marine insurance. The creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no **534]** difference between *law and equity (*y*).[25]

Surety is entitled to know real nature of transaction. But the surety is entitled to know the real nature of the transaction he guarantees and of the liability he is undertaking: and he generally and naturally looks to the creditor for information on this point, although he usually is acting at the debtor's request and as his friend, and so relies on him for collateral information as to general credit and the like. In that case the creditor's description of the transaction amounts to, or is at least evidence of, a representation that there is nothing further that might not naturally be expected to take place between the parties to a transaction such as described. Whether a circumstance not disclosed is such that by implication it is represented not to exist depends on the nature of the transaction and is generally a question of fact (*z*). Thus where the suretyship was for a cash credit opened with the principal debtor by a bank, and the cash credit was in fact applied to pay off an old debt to the bank, the House of Lords held that the bank was not bound to disclose this, no actual agreement being alleged or shown that the money should be so applied, and the thing being one which

Seaton v. *Heath* [1899] 1 Q. B. 782, 792.

(*x*) Fry J. *Davies* v. *London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. at p. 475, 47 L. J. Ch. 511.

(*y*) *Pledge* v. *Buss* (1860) Johns. 663; *Wythes* v. *Labouchere* (1858–9) 3 De G. & J. 593, 609, approving *North British Insurance Co.* v. *Lloyd* (1854) 10 Ex. 523, 24 L. J. Ex. 14.

(*z*) *Lee* v. *Jones* (1863) 14 C. B. N. S. 386, in Ex. Ch. 17 C. B. N. S. 482, 503, 34 L. J. C. P. 131, 138, which may be taken as a judicial commentary on the rule given in *Hamilton* v. *Watson* (1845) 12 Cl. & F. 109.

[24] White *v.* Life Assn. of America, 63 Ala. 419, 424; Doughty *v.* Savage, 28 Conn. 146; Graves *v.* Bank, 10 Bush, 23.

[25] Magee *v.* Insurance Co., 92 U. S. 93; Van Arsdale *v.* Howard, 5 Ala. 596; Wilkerson *v.* Crescent Ins. Co., 64 Ark. 80; Ham *v.* Greve, 34 Ind. 18; Bank *v.* Anderson Co., 65 Ia. 692; Bank *v.* Stevens, 39 Me. 532; Harrison *v.* Insurance Co., 8 Mo. 37, 40, 41; Sooy *ads.* State, 39 N. J. L. 135, 143; Bank *v.* Brownell, 9 R. I. 168; Warren *v.* Branch, 15 W. Va. 21, 35. See Ames's Cas. Suretyship, 283, n. 1.

the surety might naturally expect to happen (*a*).[26] So the creditor is not bound to tell the surety that the proposed guaranty is to be substituted for a previous one given by another person (*b*). But the surety is not liable if there is a secret agreement or arrangement which substantially varies the nature of the transaction or of the liability to be undertaken: as where the surety guarantees payment for goods to be sold to the principal debtor, but the real bargain, concealed from the surety, is that the debtor shall pay for the goods a nominal price, exceeding the market *price, and the excess shall [535 be applied in liquidation of an old debt (*c*):[27] or where the loan to be guaranteed is obtained not in the ordinary way, but by an advance of trust funds of which the principal debtor himself is a trustee (*d*). In *Lee* v. *Jones* (*e*) there was a continuing guaranty of an agent's liabilities in account with his employers. He was in fact already indebted to them beyond the whole amount guaranteed by the surety's agreement, which was so worded as to cover existing as well as future liabilities. The surety was not informed of this, and the recitals in the agreement, though not positively false, were of a misleading and dissembling character. The majority of the Court of Exchequer Chamber held that there was evidence of "studied effort to conceal the truth" amounting to fraud. And on the whole it appears from this case and *Railton* v. *Mathews* (*f*) that the concealment from the surety of previous defaults of the principal debtor, when there is a continuing guaranty of conduct or solvency, is in itself evidence of fraud.[28] Where a person has become a surety on the faith of the

(*a*) *Hamilton* v. *Watson* (1845) 12 Cl. & F. 109; *acc. Pledge* v. *Buss* (1860) Johns. 663.

(*b*) *North British Insurance Co.* v. *Lloyd* (1854) 10 Ex. 523, 24 L. J. Ex. 14.

(*c*) *Pidcock* v. *Bishop* (1825) 3 B. & C. 605, 27 R. R. 430; I. C. A. § 143, illust. *b*.

(*d*) *Squire* v. *Whitton* (1848) 1 H. L. C. 333, decided however chiefly on the broader ground that there cannot be a contract of suretyship *in blank*, for no creditor was ever named or specified to the surety.

(*e*) (1863) 17 C. B. N. S. 482, 34 L. J. Ex. 131.

(*f*) (1844) 10 Cl. & F. 934.

[26] Cp. United States *v.* American Bonding Co., 89 Fed. Rep. 921, 925; Gano *v.* Farmers' Bank, 20 Ky. L. Rep. 197.

[27] Crossley *v.* Stanley, 112 Ia. 24.

[28] National Bank *v.* Fidelity Co., 89 Fed. Rep. 819 (C. C. A.); Saint *v.* Wheeler, etc., Co., 95 Ala. 362; Wilson *v.* Monticello, 85 Ind. 10; Bellevue Assoc. *v.* Jeckel, 20 Ky. L. Rep. 460; Deposit Bank *v.* Hearne, 20 Ky. L. Rep. 1019; Bank *v.* Cooper, 36 Me. 179; 39 Me. 542; Ætna Ins. Co. *v.* Fowler. 108 Mich. 557; Capital Ins. Co. *v.* Watson, 76 Minn. 387; Harrison *v.* Insurance Co., 8 Mo. App. 37; Third Bank *v.* Owen, 101 Mo. 558; Sooy *ads.* State, 39 N. J. L. 135; Newark *v.* Stout, 52 N. J. L. 35; Dinsmore *v.* Tidball, 34 Ohio St. 411; Smith *v.* Josselyn, 40 Ohio St. 409; Lauer Brewing Co. *v.* Riley, 195 Pa. 449; Railroad Co. *v.* Ling, 18 S. C. 116; Connecticut Ins. Co. *v.* Chase, 72 Vt. 176. Cp. Etting *v.* Bank. 11 Wheat. 59; Roper *v.* Trustees, 91 Ill. 518; Insurance Co. *v.* Holway, 55 Ia. 571; Cumberland Assoc. *v.* Gibbs, 119 Mich.

creditor's representation that another will become co-surety, he is not bound if that other person does not join;[29] and in equity it makes no difference that the guaranty was under seal (*g*). Where a guaranty was given to certain judgment creditors in consideration of their postponing a sale under an execution already issued against the principal debtor, but in fact they did not stop the sale, being unable to do so without the consent of other persons interested, it was held that
536] the guaranty was inoperative (*h*); but perhaps this case is best accounted for as one of simple failure of consideration; for the consideration for the guaranty was not merely the credit given to the principal debtor, but the immediate stopping of the sale.

Beyond this no positive duty to give information. The authorities, taken as a whole, establish that as between creditor and surety there is in point of law no positive duty to give information as to the relations between the creditor and the principal debtor, but the surety is discharged if there is actual misrepresentation, and that silence may in a particular case be equivalent to an actual representation, whether it is so being a question of fact (*i*). So far as these rules attach special duties to the creditor they do not apply to a mere contract of indemnity (*k*).

C. *Sales of Land.*

Contract voidable for material misdescription. A misdescription materially affecting the value, title, or character of the property sold will make the contract voidable at the purchaser's option, and this not-

(*g*) *Rice* v. *Gordon* (1847) 11 Beav. 265; *Evans* v. *Bromridge* (1856) 2 K. & J. 174, 8 D. M. & G. 100, 25 L. J. Ch. 334. The rule does not apply if the surety's remedies are not really diminished: *Cooper* v. *Evans* (1867) L. R. 4 Eq. 45, 36 L. J. Ch. 431, where the principal debtor had not executed the bond, but had executed a separate agreement under seal.

(*h*) *Cooper* v. *Joel* (1859) 1 D. F. & J. 240.

(*i*) Cp. I. C. A. ss. 142–144. S. 143: "Any guarantee which the creditor has obtained *by means of* keeping silence as to a material circumstance is invalid" is probably not intended to go beyond the English law.

(*k*) *Way* v. *Hearn* (1862) 13 C. B. N. S. 292, 32 L. J. C. P. 34; but the point of that case is rather that there was no misrepresentation *dans locum contractui*. Cp. *Seaton* v. *Heath* (1899) [1900] A. C. 135, 69 L. J. Q. B. 409.

318; Howe Machine Co. *v.* Farrington, 82 N. Y. 121; Bostwick *v.* Van Voorhis, 91 N. Y. 353; Hallettsville *v.* Long, 11 Tex. Civ. App. 180; Insurance Co. *v.* Mabbett, 18 Wis. 667.

29 Jordan *v.* Loftin, 13 Ala. 547; Deering Co. *v.* Peugh, 17 Ind. App. 400; Johnston *v.* Cole, 102 Ia. 109; Goff *v.* Bankston, 35 Miss. 518; Hill *v.* Sweetser, 5 N. H. 168. Cp. Moss *v.* Riddle, 5 Cr. 351; Twenty-sixth Ward Bank *v.* Stearns, 148 N. Y. 515; Cowan *v.* Baird, 77 N. C. 201; Miller *v.* Stem, 12 Pa. 383; State *v.* Welbes, 12 S. Dak. 339; Smith *v.* Doak, 3 Tex. 215; New Home Co. *v.* Simon, 104 Wis. 120.

withstanding special conditions of sale providing that errors of description shall be matter for compensation only.[30] *Flight* v. *Booth* (*l*) is a leading case on this subject. The contract was for the sale of leasehold property, and the lease imposed restrictions against carrying on several trades, of which the particulars of sale named only a few: it was held that the purchaser might rescind the contract and recover back his deposit. Tindal C.J. put the reason of the case on exactly the same grounds which, as we shall imme*diately see, have [537 been relied on in like cases by courts of equity.

"Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

The rule so stated has been unanimously approved in the Court of Appeal (*m*).

So in *Phillips* v. *Caldcleugh* (*n*), where the contract was for the sale of "a freehold residence"—which means free of all incumbrances (*o*)[31]—and it appeared that the property was subject to restrictive covenants of some kind, the purchaser was held entitled to rescind, though the covenants were in a deed prior to that fixed by the contract as the commencement of the title.

Specific performance and compensation. Questions of this kind arise chiefly in suits for specific performance between vendors and purchasers of real estate, when it is found that the actual tenure, quantity, or description of the property varies from that which was stated in the contract. The effect of the conditions of sale in the particular instance has almost always to be considered, and the result of the

(*l*) (1834) 1 Bing. N. C. 370, 377, 41 R. R. 599, 604.

(*m*) *Re Fawcett and Holmes* (1889) 42 Ch. Div. 150, 58 L. J. Ch. 763.

(*n*) (1868) L. R. 4 Q. B. 159, 161, 38 L. J. Q. B. 68.

(o) *Halsey* v. *Grant* (1806) 13 Ves. 73, 77, 9 R. R. 143, 145.

30 Stevens *v.* Giddings, 45 Conn. 507; Keating *v.* Price, 58 Md. 532; Spurr *v.* Benedict, 99 Mass. 463; King *v.* Knapp, 59 N. Y. 462; Mulvey *v.* King, 39 Ohio St. 491.

31 "In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate." Garnett *v.* Macon, 6 Call, 308, 368; Washington *v.* Ogden, 1 Black, 450; Murphin *v.* Scovell, 41 Minn. 262; Christian *v.* Cabell, 22 Gratt. 82; Spencer *v.* Sandusky, 46 W. Va. 582. So also on a sale of stock. McClure *v.* Central Trust Co., 165 N. Y. 108.

variance may be very different according to these, and according to the amount and importance of the discrepance between the description and the fact. A complete or nearly complete system of rules has been established by the decisions.

(i.) **Where variance not substantial contract enforceable, but with compensation, at suit of either party.** "If the failure is not substantial, equity will interfere" and enforce the contract at the instance of either party with proper compensation (*o*).[32] The purchaser, **538]** "if *he gets substantially that for which he bargains, must take a compensation for a deficiency in the value" (*p*).[33] Here the contract is valid and binding on both parties, and the case is analogous to a sale of specific goods with a collateral warranty.

(ii.) **Where variance substantial and capable of pecuniary estimation, party misled may rescind contract, or enforce it with compensation.** There is a second class of cases in which the contract is voidable at the option of the purchaser, so that he cannot be forced to complete even with compensation at the suit of the vendor, but may elect either to be released from his bargain or to perform it with compensation. "Generally speaking, every purchaser has a right to take what he can get, with compensation for what he cannot get" (*q*), even where he is not bound to accept what the other has to give him (*r*).[34]

(o) *Halsey* v. *Grant* (1806) 13 Ves. 73, 77, 9 R. R. 143, 145.

(*p*) *Dyer* v. *Hargrave* (1805) 10 Ves. 506, 508, 8 R. R. 36, 37.

(*q*) *Hughes* v. *Jones* (1861) 3. D. F. & J. 307, 315, 31 L. J. Ch. 83; *Leyland* v. *Illingworth* (1860) 2 D. F. & J. 248, 252.

(*r*) "If a person possessed of a term for 100 years contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey the term." Per Lord Eldon, *Wood* v. *Griffith* (1818) 1 Swanst. at p. 54, 18 R. R. 27 (though in this case not with compensation, see next page): and see *Mortlock* v. *Buller* (1804) 10 Ves. 292, 315, 7 R. R. 417.

32 But in Silliman *v.* Gillespie, 48 W. Va. 374, 377, where there was a mistake as to the boundaries of the land, the court said: "If the vendor does not want the sale rescinded, he can agree to take a less purchase price and thus make a binding contract, but the court cannot compel him to do so. Pratt *v.* Bowman, 37 W. Va. 715, 723."

33 Hepburn *v.* Auld. 5 Cr. 262, 278; Robbins *v.* Martin, 43 La. Ann. 488; Foley *v.* Crow, 37 Md. 51; King *v.* Bardeau, 6 Johns. Ch. 38; Winne *v.* Reynolds, 6 Paige, 407, 412; Stoddart *v.* Smith, 5 Binney, 355, 362, 363; Creigh's Admr. *v.* Boggs, 19 W. Va. 240, 252. See further, Ames's Cas. Eq. Juris., Ch. 2, § V.

34 Bell *v.* Thompson, 34 Ala. 633; Marshall *v.* Caldwell, 41 Cal. 611; Lancaster *v.* Roberts, 144 Ill. 213; Jones *v.* Shackelford, 2 Bibb, 410; Wilson *v.* Cox, 50 Miss. 133; Luckett *v.* Williamson, 31 Mo. 54; Keator *v.* Brown, 57 N. J. Eq. 600; Voorhees *v.* De Myer, 3 Sandf. Ch. 614; Jacobs *v.* Locke, 2 Ired. Eq. 286; Erwin *v.* Myers, 46 Pa. 96; Harbers *v.* Gadsden, 6 Rich. Eq. 284; Heirs of Roberts *v.* Lovejoy, 60 Tex. 253; Clarke *v.* Reins, 12 Gratt. 98, 111.

However a purchaser's conduct may amount to an affirmation of the contract and so deprive him of the right to rescind, but without affecting the right to compensation (*s*); again, special conditions may exclude the right to insist on compensation and leave only the right to rescind (*t*).

Under this head fall cases of misdescription affecting the value of the property, such as a statement of the existence of tenancies, not showing that they are under leases for *lives at a low rent (*u*); [539 or an unqualified statement of a recent occupation at a certain rent, the letting value of the property having been meanwhile ascertained to be less, and that occupation having been peculiar in its circumstances (*x*); or the description of the vendor's interest in terms importing that it is free from incumbrances—such as "immediate absolute reversion in fee simple"—where it is in fact subject to undisclosed incumbrances (*y*).

The treatment of this class of cases in equity is analogous to the rules applied at common law to the sale of goods not specifically ascertained by sample or with a warranty: see p. *527, above.

Exceptions. The doctrine that a vendor who has less than he undertook to sell is bound to give so much as he can give with an abatement of the price applies, it is to be understood, only where the vendor has contracted to give the purchaser something which he professed to be, and the purchaser thought him to be, capable of giving. Where a husband and wife had agreed to sell the wife's estate (her interest being correctly described and known to the purchaser), and the wife

(*s*) *Hughes* v. *Jones*, note (*q*) above.

(*t*) *Cordingley* v. *Cheesebrough* (1862) 3 Giff. 496, 4 D. F. & J. 379, 31 L. J. Ch. 617, where the purchaser claiming specific performance with compensation, and having rejected the vendor's offer to annul the contract and repay the purchaser his costs, was made to perform the contract unconditionally. See further as to the effect of conditions of this kind *Mawson* v. *Fletcher* (1870) L. R. 6 Ch. 91, 40 L. J. Ch. 131; *Re Terry & White's Contract* (1886) 32 Ch. Div. 14, 55 L. J. Ch. 345. The authorities were reviewed by Buckley J., *Jacobs* v. *Revell* [1900] 2 Ch. 858, 69 L. J. Ch. 879.

(*u*) *Hughes* v. *Jones* (1861) 3 D. F. & J. 307, 31 L. J. Ch. 83.

(*x*) *Dimmock* v. *Hallett* (1866) 2 Ch. 21, 36 L. J. Ch. 146.

(*y*) *Torrance* v. *Bolton* (1872) 8 Ch. 118, 42 L. J. Ch. 177. Of the peculiar character of the non-disclosure in that case presently. Cp. *Phillips* v. *Caldcleugh* (1868) L. R. 4 Q. B. 159, p. 510, 38 L. J. Q. B. 68, above. As to the proper mode of assessing compensation in a case of mis-statement of profits, see *Powell* v. *Elliot* (1875) L. R. 10 Ch. 424.

would not convey, the Court refused to compel the husband to convey his own interest alone for an abated price (*z*).[35]

Specific performance with compensation is granted only where the compensation is capable of assessment: for example, not where the defect consists of undisclosed restrictive covenants (*a*). Also the Court will not order vendors who sell as trustees to perform their con-
540] tract with *compensation, on account of the prejudice to the cestui que trust which might ensue (*b*).

Purchaser can recover compensation after completion. It is now settled (after many conflicting decisions and dicta) that a purchaser otherwise entitled to compensation can recover it after he has taken a conveyance and paid the purchase-money in full (*c*).

(iii.) **Where variance not capable of estimation, option to rescind simply.** But lastly the variance may be so material (either in quantity, or as amounting to a variance in *kind*) as to avoid the sale altogether and to prevent not merely the general jurisdiction of the Court as to compensation, but even special provisions for that purpose, from having any application.[36] "If a man sells freehold land, and it turns

(*z*) *Castle* v. *Wilkinson* (1870) 5 Ch. 534, 39 L. J. Ch. 843; in *Barker* v. *Cox* (1876) 4 Ch. D. 464, 46 L. J. Ch. 62, the full purchase-money had been paid and the facts were otherwise peculiar.

(*a*) *Rudd* v. *Lascelles* [1900] 1 Ch. 815, 69 L. J. Ch. 396.

(*b*) *White* v. *Cuddon* (1842) 8 Cl. & F. 766.

(*c*) *Palmer* v. *Johnson* (1884) 13 Q. B. Div. 351, 53 L. J. Q. B. 348. See the former cases there discussed.

[35] Peeler *v.* Levy, 26 N. J. Eq. 330; Murdock *v.* Lantz, 34 Ohio St. 589, 598; Clarke *v.* Reins, 12 Gratt. 98. Cp. Richards *v.* Doyle, 36 Ohio St. 37.

If the wife of a vendor of land refuses to release her dower by joining in the execution of the deed, it is held in some States that the purchaser may obtain specific performance with an abatement from the purchase price. Wingate *v.* Hamilton, 7 Ind. 73; Martin *v.* Merritt, 57 Ind. 41; Zebley *v.* Sears, 38 Ia. 507; Woodbury *v.* Luddy, 14 Allen, 1; Davis *v.* Parker, 14 Allen, 94; Wright *v.* Young, 6 Wis. 127; Conrad *v.* Schwamb, 53 Wis. 378. *Contra*, Riesz's Appeal, 73 Pa. 485; Reilly *v.* Smith, 25 N. J. Eq. 158. And see Sternberger *v.* McGovern, 56 N. Y. 12; Bostwick *v.* Beach, 103 N. Y. 414; Lucas *v.* Scott, 41 Ohio St. 636. "If the refusal of the wife is made in bad faith, or by the procurement of the husband, merely to enable him to escape his just obligation, the court may decree a conveyance by the husband alone, and compel him to give indemnity by mortgage or otherwise against the claim of the wife." Peeler *v.* Levy, 26 N. J. Eq. 330, 335; Young *v.* Paul, 2 Stockt. Ch. 401. Where the wife refused to carry out a contract to convey a tract of land, part of which, being the homestead, could not be conveyed by the husband alone, the court refused to compel the purchaser to take the remainder with compensation. Donner *v.* Redenbaugh, 61 Ia. 269.

[36] Hall *v.* Loomis, 63 Mich. 709.

out to be copyhold, that is not a case for compensation (*d*); so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting because it belongs to somebody else . . . in all those cases the Court simply says it will avoid the contract, and will not allow either party to enforce it unless the person who is prejudiced by the error be willing to perform the contract without compensation" (*e*).[37] A failure of title as to a part of the property sold which, though small in quantity, is important for the enjoyment of the whole, may have the *same effect (*f*).[38] This class of **[541** cases agrees with the last in the contract being voidable at the option of the party misled, but it differs from it in this, that if he elects to adopt the contract at all he must adopt it unconditionally, since compulsory performance with compensation would here work the same injustice to the one party that compulsory performance without compensation would work to the other. Such was the result in the case now cited of the real quantity of the property falling short by nearly one-half of what it had been supposed to be (*g*). But in a later

(*d*) Specific performance refused where the land was enfranchised copyhold and the minerals were reserved to the lord: *Bellamy* v. *Debenham* [1891] 1 Ch. 412, 60 L. J. Ch. 166, C. A. And conversely, a man who buys an estate as copyhold is not bound to accept it if it is in fact freehold. For "the motives and fancies of mankind are infinite; and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another": *Ayles* v. *Cox* (1852) 16 Beav. 23. As to leaseholds, it is a settled though perhaps not a reasonable rule that a contract to sell property held under a lease is *prima facie* a contract to show title to an original lease: *Camberwell and S. London Building Society* v. *Holloway* (1879) 13 Ch. D. 754, 49 L. J. Ch. 361.

(*e*) *Earl of Durham* v. *Legard* (1865) 34 Beav. 611, 34 L. J. Ch. 589.

(*f*) *Arnold* v. *Arnold* (1880) 14 Ch. Div. 270. Where particulars of sale were misleading as to boundaries and frontage, the purchaser was held entitled to rescind unconditionally: *Brewer* v. *Brown* (1884) 28 Ch. D. 309, 54 L. J. Ch. 605.

(*g*) The price asked had been fixed by reference to the rental alone. *Qu.* how the case would have stood could a price proportional to the area have been arrived at. And see *Swaisland* v. *Dearsley* (1861) 27 Beav. 430 (where it is left doubtful whether the purchaser could or could not have enforced the contract with compensation). Cp. D. 18. 1. de cont. empt. 22–24, enunciating precisely the same principle as that applied by our courts of equity. Hanc legem venditionis: *Si quid sacri vel religiosi est, eius venit nihil,* supervacuam non esse, sed ad modica loca pertinere: ceterum si omne religiosum, vel sacrum, vel publicum venierit, nullam esse emptionem: and see *eod. tit.* 18, 40 *pr.* In *Whittemore* v. *Whittemore* (1869) L. R. 8 Eq. 603, a case of material deficiency in quantity, it was held that a condition of sale providing generally that errors of description should

37 See Durkin *v.* Cobleigh, 156 Mass. 108; Drew *v.* Wiswall, 183 Mass. 554, as to liability on collateral agreements to contracts for the sale of land.

38 Keating *v.* Price, 58 Md. 532.

case where the vendors were found to be entitled only to an undivided moiety of the property which they had professed to sell as an entirety, the Court found no difficulty in ordering specific performance with an abatement of half the price at the suit of the purchaser, as no injustice would be done to the vendors, who would be fully paid for all
542] they really had to sell (*h*).[39] The real question *is whether the deficiency is such as to be fairly capable of a money valuation (*i*).

Where it is in vendor's power to make good his representations. It seems that where it is in the vendor's power to make good the description of the property, but not by way of money compensation, he can enforce the contract on condition of doing so, but not otherwise. A lot of building land (part of a larger estate intended to be sold together) was sold under restrictive conditions as to building, and in particular that no public-house was to be built; the purchaser assumed from the plan and particulars of sale, and in the opinion of the Court with good reason, that the whole of the adjoining property would be subject to like restrictions. One small adjacent plot had in fact been reserved by the vendor out of the estate to be sold, so that it would be free from restrictive covenants; but this did not sufficiently appear from the plan. The vendor sued for specific performance. It was held that he was entitled to a decree only on the terms of entering into a restrictive covenant including the reserved plot (*k*).

This third class of cases may be compared (though not exactly) to a sale of goods subject to a condition or "warranty in the nature of a condition," so that the sale is "to be null if the affirmation is incorrect" (*l*).

be only matter of compensation did apply, but another excluding compensation for errors in quantity did not; so that on the whole the purchaser could not rescind, but was entitled to compensation.

(*h*) *Bailey* v. *Piper* (1874) L. R. 18 Eq. 683, 43 L. J. Ch. 704: *Horrocks* v. *Rigby* (1878) 9 Ch. D. 180, 47 L. J. Ch. 800, where the moiety was so incumbered that the vendor in the result get nothing but an indemnity: *Wheatley* v. *Slade* (1830) 4 Sim. 126, 33 R. R. 100. is practically overruled by these cases. Similarly as to leasehold: *Burrow* v. *Scammell* (1881) 19 Ch. D. 175, 51 L. J. Ch. 296, where apparently *Bailey* v. *Piper* was overlooked. *Maw* v. *Topham* (1854) 19 Beav. 576, is distinguishable, as there the purchaser knew or ought to have known that a good title could not be made to the whole.

(*i*) See *Dyer* v. *Hargrave* (1805) 10 Ves. at p. 507, 8 R. R. at p. 38; and on the distinction of the different classes of cases generally, per Amphlett B. *Phillips* v. *Miller* (1875) L. R. 10 C. P. 427–8, 44 L. J. C. P. 265.

(*k*) *Baskcomb* v. *Beckwith* (1869) L. R. 8 Eq. 100, 38 L. J. Ch. 536.

(*l*) *Bannerman* v. *White* (1861) 10 C. B. N. S. 844, 31 L. J. C. P. 28.

[39] Marshall *v.* Caldwell, 41 Cal. 611; Erwin *v.* Myers, 46 Pa. 96. But see Olson *v.* Lovell, 91 Cal. 506.

Deposit, &c., recoverable in equity as well as at law. A purchaser who in a case falling under either of the last two heads exercises his option to rescind the contract may sue in the Chancery Division to have it set aside, and recover back in the same action any deposit and expenses already paid under the contract (*m*). And it seems that there is an independent right to sue in equity for the return of the deposit and expenses, at all events if there are any accompanying circumstances to afford ground for *equitable jurisdiction, such [543 as securities having been given of which the specific restitution is claimed (*n*).

General duty of vendor to give correct description. To return to the more general question, it is the duty of the vendor to give a fair and unambiguous description of his property and title. And, notwithstanding the current maxim about *simplex commendatio,* language of general commendation—such as a statement that the person in possession is a most desirable tenant—is deemed to include the assertion that the vendor does not know of any fact inconsistent with it. A contract obtained by describing a tenant as "most desirable" who had paid the last quarter's rent in instalments and under pressure has been set aside at the suit of the purchaser (*o*). If the vendor does not intend to offer for sale an unqualified estate, the qualifications should appear on the face of the particulars (*p*).

Concealment in particulars not excused by correct statement in conditions only read out at the sale: Torrance v. Bolton. In *Torrance* v. *Bolton* (*q*) an estate was offered for sale as an immediate reversion in fee simple. At the auction conditions of sale were read aloud from a manuscript, but no copy given to the persons who attended the sale. One of these conditions showed that the property was subject to three mortgages. The plaintiff in the suit had bid and become the purchaser at the sale, but without having, as he alleged, distinctly heard the conditions or understood their effect. The Court held that the particulars were misleading; that the mere reading out of the conditions of sale

(*m*) *E.g. Stanton* v. *Tattersall* (1853) 1 Sm. & G. 529; *Torrance* v. *Bolton* (1872) L. R. 8 Ch. 118, 42 L. J. Ch. 177.

(*n*) *Aberaman Ironworks Co.* v. *Wickens* (1868) L. R. 4 Ch. 101, where the contract having been rescinded by consent before the suit was held not to deprive the Court of jurisdiction.

(*o*) *Smith* v. *Land and House Property Corporation* (1884) 28 Ch. Div. 7, 51 L. T. 718.

(*p*) *Hughes* v. *Jones* (1861) 3 D. F. & J. 307, 314, 31 L. J. Ch. 83. As to the duty of disclosing restrictive covenants: *Ebsworth and Tidy's Contract* (1889) 42 Ch. Div. 23, 47, 51, 58 L. J. Ch. 665.

(*q*) (1872) L. R. 8 Ch. 118, 42 L. J. Ch. 177.

was not enough to remove their effect and to make it clear to the mind of the purchaser what he was really buying; and that he was entitled to have the contract rescinded and his deposit returned. Mere silence as to facts capable of influencing a buyer's judgment, but not **544]** *such as the seller professes or undertakes to communicate, is not of itself any breach of duty (*r*).

A misleading description may be treated as a misrepresentation even if it is in terms accurate: for example, where property was described as "in the occupation of A." at a certain rental, and in truth A. held not under the vendor, but under another person's adverse possession (*s*), or where immediate possession is material to the purchaser, and the tenant holds under an unexpired lease for years which is not disclosed (*t*). A misleading statement or omission made by mere heedlessness or accident may deprive a vendor of his right to specific performance, even if such that a more careful buyer might not have been misled (*u*).

Duty of purchaser in special cases. All this proceeds on the supposition that the vendor's property and title are best known to himself, as almost always is the case. But the position of the parties may be reversed: a person who has become the owner of a property he knows very little about may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract, and even an executed conveyance pursuant to it, voidable at the vendor's option (*x*). So it is where the purchaser has done acts unknown to the vendor which alter their position and rights with reference to the property: as where there is a coal mine under the land and the purchaser has trespassed upon it and raised coal without the vendor's knowledge; for here the proposed purchase involves a buying up of rights against the purchaser of which the owner is not aware (*y*).

545] On a sale under the direction of the Court a person *offering to buy is not under any extraordinary duty of disclosure. It is not the law "that, because information on some material point or points is offered, or is given on request, by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor

(*r*) *Coaks* v. *Boswell* (1886) 11 App. Ca. 232–235.

(*s*) *Lachlan* v. *Reynolds* (1853) Kay 52, 23 L. J. Ch. 8.

(*t*) *Caballero* v. *Henty* (1874) L. R. 9 Ch. 447, 43 L. J. Ch. 635.

(*u*) *Jones* v. *Rimmer* (1880) 14 Ch. Div. 588, 49 L. J. Ch. 775.

(*x*) *Haygarth* v. *Wearing* (1871) L. R. 12 Eq. 320; 40 L. J. Ch. 577. Cp. the Indian Transfer of Property Act, 1882, s. 55.

(*y*) *Phillips* v. *Homfray* (1871) L. R. 6 Ch. 770, 779.

requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated" (*z*).

Effect of special conditions as to title. Vendors of land may, and constantly do in practice, sell under conditions requiring the purchaser to assume particular states of fact and title. But such conditions must not be misleading as to any matter within the vendor's knowledge (*a*). "The vendor is not at liberty to require the purchaser to assume as the root of his title that which documents within his possession show not to be the fact, even though those documents may show a perfectly good title on another ground:" and if this is done even by a perfectly innocent oversight on the part of the vendor or his advisers, specific performance will not be enforced (*b*). A special condition limiting the time for which title is to be shown must be fair and explicit, and "give a perfectly fair description of the nature of that which is to form the root of title" (*c*).

Non-disclosure of defect of title not actually known to vendor: Wilde v. Gibson. The House of Lords decided in *Wilde* v. *Gibson* (*d*) that the vendor's silence as to a right of way over the property, of the existence of which he was not known to be *aware, was no ground for set- [546
ting aside the contract. This reversed the decision of Knight Bruce V.-C. (*e*), who held that the silence of the particulars taken together with the condition of the property (for the way had been enclosed) amounted to an assertion that no right of way existed. In any view it seems an extraordinary, not to say dangerous, doctrine to say that a vendor is not bound to know his own title, so far at least as with ordinary diligence he may know it: and the case is severely criticized by Lord St. Leonards (*f*). The Irish case relied on by the Lords as a direct authority may be distinguished on the ground

(*z*) *Coaks* v. *Boswell* (1886) 11 App. Ca. 232, 440, 55 L. J. Ch. 761, revg. s. c. 27 Ch. Div. 424, mainly on the facts.

(*a*) *Heywood* v. *Mallalieu* (1883) 25 Ch. D. 357, 53 L. J. Ch. 492 (definite adverse claims known to a vendor must be disclosed even if he thinks them unfounded).

(*b*) *Broad* v. *Munton* (1879) 12 Ch. Div. 131, per Cotton L.J. at p. 149, 48 L. J. Ch. 837: whether this would be sufficient ground for rescinding the contract, *quære*, per Jessel M.R. 12 Ch. Div. at p. 142: *Nottingham Brick Co.* v. *Butler* (1886) 16 Q. B. Div. 778, 55 L. J. Q. B. 280, where the vendor's solicitor erroneously denied the existence of restrictive covenants contained in deeds prior to those which he had read. Cf. L. Q. R. ii. 414, 415.

(*c*) *Marsh and Earl Granville* (1883) 24 Ch. Div. 11, 22, 53 L. J. Ch. 81, where the purchaser was held not bound to accept as the commencement of title a voluntary deed not stated in the contract to be such.

(*d*) (1848) 1 H. L. C. 605.

(*e*) S. C. *nom. Gibson* v. *D'Este* (1843) 2 Y. & C. 542.

(*f*) Sugd. Law of Property, 614, 637, &c.

that the representation there made by the lessor that there was no right of way was made not merely with an honest belief, but with a reasonable belief in its truth (*g*).

The decision in *Wilde* v. *Gibson* was much influenced by the purchaser's case having been rested in the pleadings to a certain extent upon charges of actual fraud, which however were abandoned in argument: the doctrine of constructive notice, it was said, could not be applied in support of an imputation of direct personal fraud. Even so the result in modern practice would only be that the plaintiff would have to pay the costs occasioned by the unfounded charges; he would not lose any relief for which he otherwise showed sufficient grounds (*h*). And on examining the pleadings it is difficult to find any imputation sufficient to justify the grave rebukes expressed in the judgments (*i*). It was also said by Lord Campbell that a court of equity will not set aside an executed conveyance on the ground **547]** of misrepresentation or concealment, but *only for actual fraud (*k*): but this dictum has not been followed.[40] Where copyhold land has been sold as freehold, apparently in good faith, the sale was set aside after conveyance (*l*). Here, however, the seller had notice when he bought the land himself that some part of it at least was copyhold. On the other hand there may be a want of diligence on the purchaser's part which, although not such as to deprive him of the right of rescinding the contract before completion, would preclude him from having the sale set aside after conveyance (*m*).

General rule. As a general result of the authorities there seems to be no doubt that on sales of real property it is the duty of the party

(*g*) Indeed the Court seems to have thought it *was* true, notwithstanding the adverse result of an indictment for stopping the alleged public way: *Legge* v. *Croker* (1811) 1 Ball & B. 506, 12 R. R. 49, Sugd. *op. cit.* 657.

(*h*) *Hilliard* v. *Eiffe* (1874) L. R. 7 H. L. 39; see next chapter.

(*i*) The bill in *Gibson* v. *D'Este*, which is to be found in the printed cases of 1848, has the words "carefully concealed" in one passage: "fraudulently concealed" in another may mean, of course, fraudulently in a technical sense.

(*k*) 1 H. L. C. 632.

(*l*) *Hart* v. *Swaine* (1877) 7 Ch. D. 42, 47 L. J. Ch. 5, but the decision was doubted by Cotton L.J. in *Soper* v. *Arnold* (1887) 37 Ch. Div. 96, at p. 102, 57 L. J. Ch. 145; also in *Haygarth* v. *Wearing* (1871) L. R. 12 Eq. 320, 40 L. J. Ch. 577, an executed conveyance was set aside on simple misrepresentation. In *Soper* v. *Arnold*, affirmed in H. L. (1889) 14 App. Ca. 429, 59 L. J. Ch. 214, the point in issue was different, and the defect in title was disclosed on the face of the abstract.

(*m*) *M'Culloch* v. *Gregory* (1855) 1 K. & J. 286, 24 L. J. Ch. 246, where a will was mis-stated in the abstract so as to conceal a defect of title, but the purchaser omitted to examine the originals.

[40] Lindsey *v.* Veasy, 62 Ala. 421; Spurr *v.* Benedict, 99 Mass. 463. See also Keene *v.* Demelman, 172 Mass. 17.

acquainted with the property to give substantially correct information, at all events to the extent of his own actual knowledge (*n*), of all facts material to the description or title of the estate offered for sale, but not of extraneous facts affecting its value: the seller, for example, is not bound to tell the buyer what price he himself gave for the property (*o*).

Exception as to occupation leases. The general rule seems not applicable as between lessor and lessee, where the letting is for an occupation by the lessee himself, and so far as concerns any physical fact which can be discovered by inspection; for in ordinary circumstances the landlord is entitled to assume that the *tenant will go and [548 look at the premises for himself, and therefore is not bound to tell him if they are in bad repair or even ruinous (*p*).[41]

D. *Family Settlements.*

Duty of full disclosure. In the negotiations for family settlements and compromises it is the duty of the parties and their professional agents not only to abstain from misrepresentations, but to communi-

(*n*) See *Joliffe* v. *Baker* (1883) 11 Q. B. Div. 255, 52 L. J. Q. B. 609, but that case is of little authority, if any, on the question of contract: see per A. L. Smith J. in *Palmer* v. *Johnson* (1884) 12 Q. B. D. at p. 37, explaining his own part in *Joliffe* v. *Baker*. Neither vendors nor their solicitors are bound to answer a general inquiry as to non-apparent incumbrances: *Re Ford and Hill* (1879) 10 Ch. Div. 365.

(*o*) 3 App. Ca. 1267.

(*p*) *Keates* v. *Earl Cadogan* (1851) 10 C. B. 591, 20 L. J. C. P. 76. The general rule does apply as to matters of title: *Mostyn* v. *West Mostyn Coal, &c. Co.* (1876) 1 C. P. D. 145, 45 L. J. C. P. 401.

41 See Doyle *v.* Union Pacific Co., 147 U. S. 413; Gallagher *v.* Button, 73 Conn. 172; Foster *v.* Peyser, 9 Cush. 242; Krueger *v.* Ferrant, 29 Minn. 385, 388; Naumberg *v.* Young, 44 N. J. L. 331, 344; Clyne *v.* Helmes, 61 N. J. L. 358; Cleves *v.* Willoughby, 7 Hill, 83.

For many other decisions showing that the rule of *caveat emptor* applies between landlord and tenant, see 18 Am. & Eng. Encyc. (2d. ed.) 613. Cp. Willcox *v.* Hines, 96 Tenn. 148, 328, 100 Tenn. 538. If, however, there is a secret dangerous defect, as infection, of which the landlord knows and the tenant does not, the landlord is liable, if he fails to disclose the defect, for injury resulting to the tenant. Moore *v.* Parker, 63 Kan. 52; Minor *v.* Sharon, 112 Mass. 477; O'Malley *v.* Twenty-five Associates, 178 Mass. 555, 558; Kern *v.* Myll, 80 Mich. 525 (see S. C., 94 Mich. 477); Towne *v.* Thompson, 68 N. H. 317, 320; Cate *v.* Blodgett, 70 N. H. 316, 317; Cesar *v.* Kountz, 60 N. Y. 229. In England and Massachusetts, on a lease of a furnished house for a short term, there is an implied warranty that the premises are tenantable. Smith *v.* Marrable, 11 M. & W. 5; Wilson *v.* Finch-Hatton, 2 Ex. D. 336; Ingalls *v.* Hobbs, 156 Mass. 348. But other States seem indisposed to accept this doctrine. Fisher *v.* Lighthall, 4 Mackey, 82; Davis *v.* George, 67 N. H. 393; Murray *v.* Albertson, 50 N. J. L. 167; Franklin *v.* Brown, 118 N. Y. 110; Edwards *v.* McLean, 122 N. Y. 302.

cate to the other parties all material facts within their knowledge affecting the rights to be dealt with. The omission to make such communication, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court must insist on" (*q*). "Without full disclosure honest intention is not sufficient," and it makes no difference if the non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld (*r*). The operation of this rule is not affected by the leaning of equity, as it is called, towards supporting re-settlements and similar arrangements for the sake of peace and quietness in families (*s*).

E. *Partnership, Contracts to take Shares in Companies, and Contracts of Promoters.*

Contracts to take shares. The contract of partnership is always described as one in which the utmost good faith is required. So far as **549]** this principle applies to the relations of partners after the *partnership is formed, it belongs to the law of partnership as a special and distinct subject; and in fact the principle is worked out in definite rules to such an extent that it is seldom appealed to in its general form. But it also applies to the transactions preceding the formation of a partnership, or rather its full and apparent constitution. For example, an intending partner must not make a private profit out of a dealing undertaken by him on behalf of the future firm (*t*).[42] There is little or no direct authority to show that a person inviting another to enter into partnership with him is bound not only to abstain from mis-statement, but to disclose everything within his knowledge that is material to the prospects of the undertaking. But the existence of such a duty (the precise extent of which must be determined in each case by the relative position and means of knowledge of the parties) is postulated by the stringent rules which have been laid

(*q*) *Gordon* v. *Gordon* (1816–9) 3 Sw. 400, 473, 19 R. R. 241, 242.

(*r*) *Ib.* 477, 19 R. R. 244. How far does this go? It can hardly be a duty to communicate mere gossip on the chance of there being something in it. Probably the test is (as in the case of marine insurance, p. *530, above) whether the judgment of a reasonable man would be affected. Cp. *Heywood* v. *Mallalieu* (1883) 25 Ch. D. 357, 53 L. J. Ch. 492.

(*s*) *Ib.*; *Fane* v. *Fane* (1875) L. R. 20 Eq. 698.

(*t*) Lindley on Partnership, 325; *Fawcett* v. *Whitehouse*, (1829) 1 Russ. & M. 132, 32 R. R. 163. Yet the duty is incident, not precedent, to the contract of partnership; for if there were not a complete contract of partnership there would be no duty at all. [See Uhler *v.* Semple, 20 N. J. Eq. 288, 292.]

[42] Densmore Oil Co. *v.* Densmore, 64 Pa. 43, 50.

down as binding on the promoters of companies. These are expressed with the more strictness, inasmuch as the public to whom promoters address themselves are for the most part not versed in the particular kind of business proposed, but are simply persons in search of an investment for their money, and with slight means at hand, if any, of verifying the statements made to them.

Prospectus must be both positively and negatively correct. "The public," it is said, "who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess" (*u*): and those who issue a prospectus inviting people to take shares on the faith of the representations therein contained are bound "not only to abstain from stating as fact that which is not so, but to omit no one *fact within their [550 knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares" (*x*). Therefore if untrue or misleading representations are made as to the character and value of the property to be acquired by a company for the purposes of its operations (*y*), the privileges and position secured to it, the amount of capital (*z*), or the amount of shares already subscribed for (*a*), a person who has agreed to take shares on the faith of such representations, and afterwards discovers the truth, is entitled to rescind the contract and repudiate the shares, if he does so within a reasonable time and before a winding-up has given the company's creditors an indefeasible right to look to him as a contributory.[43] For full information on this subject the reader is referred to Lord Lindley's treatise (*b*).

(*u*) Lord Chelmsford in *Central Ry. Co. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99, 113, 36 L. J. Ch. 849.

(*x*) Kindersley V.-C. *New Brunswick, &c. Co.* v. *Muggeridge* (1860) 1 Dr. & Sm. 363, 381, 30 L. J. Ch. 242, adopted by Lord Chelmsford, *l. c.*

(*y*) *Reese River Silver Mining Co.* v. *Smith* (1869) L. R. 4 H. L. 64, 39 L. J. Ch. 849, affg. s. c. *nom. Smith's case* (1867) L. R. 2 Ch. 604.

(*z*) *Central Ry. Co. of Venezuela* v. *Kisch, supra.*

(*a*) *Wright's case* (1871) L. R. 7 Ch. 55, 41 L. J. Ch. 1; *Moore & De la Torre's case* (1874) L. R. 18 Eq. 661, 43 L. J. Ch. 751.

(*b*) Lindley on Companies, 72, 589 *sqq.* Mere communication to the

[43] See Upton *v.* Tribilcock, 91 U. S. 45; Scott *v.* Deweese, 181 U. S. 202; Upton *v.* Englehart, 3 Dill. 496; Insurance Co. *v.* Turner, 61 Ga. 561; Negley *v.* Hagerstown Co., 86 Md. 692; Sherman *v.* American Stove Co., 85 Mich. 169; Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655; Ramsey *v.* Thompson Mfg. Co., 116 Mo. 313; Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188; Bosley *v.* National Machine Co., 123 N. Y. 550; State *v.* Jefferson Turnp. Co., 3 Humph. 305; Crump *v.* U. S. Mining Co., 7 Gratt. 352; Virginia Land Co. *v.* Haupt, 90 Va. 533; Waldo *v.* Railroad Co., 14 Wis. 575.

Duty of promoter to company. There is likewise a fiduciary relation between a promoter and the company in its corporate capacity, which imposes on the promoter the duty of full and fair disclosure in any transaction with the company, or even with persons provisionally representing the inchoate company before it is actually formed (*c*).[44] Promoters who form a company for the purpose of buying their 551] property are not entitled to *deal with that company as a stranger (*d*). They must either provide it with "a board of directors who can and do exercise an independent and intelligent judgment on the transaction" (*e*) or give full notice that the directors are not independent; there may be cases in which all the original members of the company necessarily have such notice (*f*). "The old familiar principles of the law of agency and of trusteeship have been extended and very properly extended to meet such cases" (*g*). A shareholder may be entitled to rescind his contract with the company on the ground of a material misrepresentation in a preliminary prospectus issued by promoters before the company was formed (*h*).

Companies Act, 1900, s. 10. The Companies Act, 1900, repealing and superseding the less stringent provisions of the Companies Act, 1867, enacts that every company prospectus "must state" a number of specified particulars. The consequences of disobedience are not expressed, unless in the case of wilful falsehood (*i*), but it would seem

company is not a sufficient repudiation. The shareholder must do something to alter his status as a member: per Lindley L.J. *Re Scottish Petroleum Co.* (1883) 23 Ch. Div. 435. The critical date is that of the petition, not the order, in the winding-up: *Whiteley's case* [1899] 1 Ch. 770, 68 L. J. Ch. 365.

(*c*) *New Sombrero Phosphate Co.* v. *Erlanger* (1877) 5 Ch. Div. 73, per James L.J. at p. 118, 46 L. J. Ch. 425; affd. in H. L. *nom. Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Ca. 1218, 48 L. J. Ch. 73; *Bagnall* v. *Carlton* (1877) 6 Ch. Div. 371, 47 L. J. Ch. 30; and see the whole subject (the details of which belong to company law) discussed in *Lagunas Nitrate Co.* v. *Lagunas Synd.* [1899] 2 Ch. 392, 68 L. J. Ch. 699, C. A.

(*d*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Ca. at p. 1268.

(*e*) *Ib.* at pp. 1229, 1236, 1255.

(*f*) *Lagunas Nitrate Co.* v. *Lagunas Synd.* [1899] 2 Ch. 392, 68 L. J. Ch. 699, C. A.

(*g*) *Sydney, &c. Co.* v. *Bird* (1886) 33 Ch. Div. 85, 94.

(*h*) *Re Metropolitan Coal Consumers' Assn., Karberg's case* [1892] 3 Ch. 1, 61 L. J. Ch. 741, C. A.

(*i*) By sect. 28 (if it applies to false statements in a prospectus, which is not quite clear) this is a misdemeanor.

[44] Wiser *v.* Lawler, 189 U. S. 260; Burbank *v.* Dennis, 101 Cal. 90; Yale Stove Co. *v.* Wilcox, 64 Conn. 101; Hayward *v.* Leeson, 176 Mass. 310; Exter *v.* Sawyer, 146 Mo. 302; Brewster *v.* Hatch, 122 N. Y. 349; McElhenny *v.* Hubert Oil Co., 61 Pa. 188; Simons *v.* Vulcan Oil Co., 61 Pa. 202; Densmore Oil Co. *v.* Densmore, 64 Pa. 43; Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307; Pietsch *v.* Krause, 116 Wis. 344; 36 Am. L. Reg. (N. S.) 545.

that any misstatement or omission, with knowledge of the facts (*k*), of any of these particulars will be treated as fraudulent, and that all and every of them are conclusively declared to be material. Any liability under the general law is expressly saved (*l*), so that the established case-law remains fully applicable. It would be useless to enter upon further details here; nor are we concerned with the question whether a right of action in tort is given by implication to persons who may suffer damage from the directions of the Act not being regarded.

*The Directors' Liability Act, 1890 (*m*), imposes a special re- [552
sponsibility on directors and promoters for the accuracy, to the extent of their means of knowledge, of statements made in prospectuses. This however is rather *ex delicto* than *ex contractu*.

Contract to marry. Thus much of the classes of contracts to which special duties of this kind are incident. The absence of any such duty in other cases is strongly exemplified by the contract to marry. Here there is no obligation of disclosure, except so far as the woman's chastity is an implied condition.[45] The non-disclosure of a previous and subsisting engagement to another person (*n*), or of the party's own previous insanity (*o*),[46] is no answer to an action on the promise. If promises to marry are to give a right of action, one would think the contract should be treated as one requiring the utmost good faith: but such are the decisions.

Marriage itself is not avoided even by actual fraud (*p*), but the

(*k*) See the exception in sect. 10, sub-sect. 7.

(*l*) Sub-sect. 8.

(*m*) 53 & 54 Vict. c. 64. The Act provides a partial and clumsy remedy for the mischievous consequences of *Derry* v. *Peek* (1889) 14 App. Ca. 337, 58 L. J. Ch. 864. See the Act and comments thereon in the Supplement to Lindley on Companies, 1891.

(*n*) *Beachey* v. *Brown* (1860) E. B. & E. 796, 29 L. J. Q. B. 105.

(*o*) *Baker* v. *Cartwright* (1861) 10 C. B. N. S. 124, 30 L. J. C. P. 364.

(*p*) *Moss* v. *Moss* [1897] P. 263, 269, 66 L. J. P. 154. Fraud is material only when it is such as "procures the appearance without the reality of consent," per Sir F. H. Jeune. Some of the language used in *Scott* v. *Sebright* (1886) 12 P. D. 21, 23, a decision on very peculiar facts held to come within this last-mentioned category, cannot be supported.

45 "A man is not bound by a contract to marry a lewd woman if he has entered into it in ignorance of her character." Von Storch *v.* Griffin, 77 Pa. 504; Butler *v.* Eschleman, 18 Ill. 44; Bell *v.* Eaton, 28 Ind. 468; Guptill *v.* Verback, 58 Ia. 98; Berry *v.* Bakeman, 44 Me. 164; Sheahan *v.* Barry, 27 Mich. 217, 222; Palmer *v.* Andrews, 7 Wend. 142; Foster *v.* Hanchett, 68 Vt. 319.

46 Nor that because of frequent intermarriages of related ancestors, the plaintiff's family had a hereditary taint. Simmons *v.* Simmons, 8 Mich. 318. Nor that the plaintiff had negro blood in her veins. Van Houten *v.* Morse, 162 Mass. 414. But see the remarks in that case in regard to the possible fraudulent effect of partial disclosure.

reasons for this are obviously of a different kind: nor is a marriage settlement rendered voidable by the wife's non-disclosure of previous misconduct (*q*).

Voluntary gifts. As to voluntary gifts the rule is that a gift obtained by a misrepresentation of fact made however innocently, by the donee, may be recovered back by the donor on the discovery of the mistake. Such gifts must be regarded as conditional on the truth of the representation (*r*).

553] *PART III.— FRAUD OR DECEIT.

Fraud generally includes misrepresentation. Fraud generally includes misrepresentation. Its specific mark is the presence of a dishonest intention on the part of him by whom the representation is made,[47] or of recklessness equivalent to dishonesty. In this case we have a mistake of one party caused by a representation of the other, which representation is made by deliberate words or conduct with the intention of thereby procuring consent to the contract, and without a belief in its truth.

But not always: as when a contract is made with a collateral wrongful or unlawful purpose, or without intention of performing it. There are some instances of fraud, however, in which one can hardly say there is a misrepresentation except by a forced use of language. It is fraudulent to enter into a contract with the design of using it as an instrument of wrong or deceit against the other party. Thus a separation deed is fraudulent if the wife's real object in consenting or procuring the husband's consent to it is to be the better able to renew a former illicit intercourse which has been concealed from him. "None shall be permitted to take advantage of a deed which they have fraudulently induced another to execute that they may commit an injury against morality to the injury and loss of the party by whom the deed is executed" (*s*). So it is fraud to obtain a contract for the transfer of property or possession by a representation that the property will be used for some lawful purpose, when the real intention is to use it for

(*q*) *Evans* v. *Carrington* (1860) 2 D. F. & J. 481, 30 L. J. Ch. 364. It is there said however that non-disclosure of adultery would be enough to avoid a separation deed.

(*r*) *Re Glubb, Bamfield* v. *Rogers* [1900] 1 Ch. 354, 69 L. J. Ch. 278, C. A.

(*s*) *Evans* v. *Carrington* (1860) 2 D. F. & J. 481, 501, 30 L. J. Ch. 364; cp. *Evans* v. *Edmonds* (1853) 13 C. B. 777, 22 L. J. C. P. 211, where, however, express representation was averred.

47 See School Directors *v.* Boomhour, 83 Ill. 17; Kennedy *v.* McKay, 43 N. J. L. 288.

an unlawful purpose (*t*). It has been said that it is not fraud to make a contract without any intention of performing it, because peradventure the party may think better of it and perform it after all: but this was in a case where the question arose wholly on the form of the pleadings, and in a highly *technical and now happily [554 impossible manner (*u*). And both before and since it has repeatedly been considered a fraud in law to buy goods with the intention of not paying for them (*x*).[48] Here it is obvious that the party would not enter into the contract if he knew of the fraudulent intention: but

(*t*) *Feret* v. *Hill* (1854) 15 C. B. 207, 23 L. J. C. P. 185, concedes this, deciding only that possession actually given under the contract cannot be treated as a mere trespass by the party defrauded.

(*u*) *Hemingway* v. *Hamilton* (1838) 4 M. & W. 115, 51 R. R. 497. It is by no means clear that the Court really meant to go so far: see Pref. to 51 R. R.

(*x*) *Ferguson* v. *Carrington* (1829) 9 B. & C. 59; *Load* v. *Green* (1846) 15 M. & W. 216, 15 L. J. Ex. 113; *White* v. *Garden* (1851) 10 C. B. 919, 923, 20 L. J. C. P. 166; *Clough* v. *L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 26, 41 L. J. Ex. 17; *Ex parte Whittaker* (1875) L. R. 10 Ch. 446, 449, per Mellish L.J. 44 L. J. Bk. 91; *Donaldson* v. *Farwell* (1876) 93 U. S. 631. But it is not such a "false representation or other fraud" as to constitute a misdemeanor under s. 11, sub-s. 19 of the Debtors Act, 1869: *Ex parte Brett* (1875) 1 Ch. Div. 151, 45 L. J. Bk. 17.

[48] Le Grand *v.* Eufaula Bank, 81 Ala. 123; Wollmer *v.* Lehman, 85 Ala. 274; McKenzie *v.* Rothschild, 119 Ala. 419; Taylor *v.* Miss. Mills, 47 Ark. 247; Bugg *v.* Shoe Co., 64 Ark. 12; W. W. Johnson Co. *v.* Triplett, 66 Ark. 233; Thompson *v.* Rose, 16 Conn. 71; Farwell *v.* Hanchett, 120 Ill. 573; John V. Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Brower *v.* Goodyer, 88 Ind. 572; Oswego Starch Factory *v.* Lendrum, 57 Ia. 573; Lindauer *v.* Hay, 61 Ia. 663; Reager *v.* Kendall, 19 Ky. L. Rep. 27; Dow *v.* Sanborn, 3 Allen, 181; Jordan *v.* Osgood, 109 Mass. 457; Shipman *v.* Seymour, 40 Mich. 274, 283; Koch *v.* Lyon, 82 Mich. 513; Slagle *v.* Goodnow, 45 Minn. 531; Fox *v.* Webster, 46 Mo. 181; Stewart *v.* Emerson, 52 N. H. 301; Johnson *v.* Monnell, 2 Keyes, 655; Hennequin *v.* Naylor, 24 N. Y. 139; Devoe *v.* Brandt, 53 N. Y. 462; Wright *v.* Brown, 67 N. Y. 1; Whitten *v.* Fitzwater, 129 N. Y. 626; Des Farges *v.* Pugh, 93 N. C. 31; Talcott *v.* Henderson, 31 Ohio St. 162; Wilmot *v.* Lyon, 49 Ohio St. 296; Mulliken *v.* Millar, 12 R. I. 296; Dalton *v.* Thurston, 15 R. I. 418; Belding *v.* Frankland, 8 Lea, 67; Lee *v.* Simmons, 65 Wis. 523. But in Pennsylvania, unless the buyer is guilty of some misstatement or trick or artifice, the sale is not fraudulent. *Re* Lewis, 125 Fed. Rep. 143; Smith *v.* Smith, 21 Pa. 367; Bughman *v.* Bank, 159 Pa. 94. The mere non-disclosure, by a purchaser, of his insolvency does not alone amount to fraud. Biggs *v.* Barry, 2 Curtis, 259; Morrill *v.* Blackman, 42 Conn. 324; Kelsey *v.* Harrison, 29 Kan. 143; Houghtaling *v.* Hills, 59 Ia. 287; Powell *v.* Bradlee, 9 G. & J. 220, 275, 276; Diggs *v.* Denny, 86 Md. 116; Illinois Leather Co. *v.* Flynn, 108 Mich. 91; Bidault *v.* Wales, 19 Mo. 36; Nichols *v.* Pinner, 18 N. Y. 295; Hennequin *v.* Naylor, 24 N. Y. 139; Morris *v.* Talcott, 96 N. Y. 100, 107, 108; Talcott *v.* Henderson, 31 Ohio St. 162; Rodman *v.* Thalheimer, 75 Pa. 232; Garbutt *v.* Bank, 22 Wis. 384; Consolidated Milling Co. *v.* Fogo, 104 Wis. 92. But the fact that the buyer had no reasonable expectation of paying may justify the inference of an intention not to pay. Wilk *v.* Key, 117 Ala. 285; Deere *v.* Morgan, 114 Ia. 287; Watson *v.* Silsby, 166 Mass. 57. Cp. Burchinell *v.* Hirsch, 5 Col. App. 500; Knitting Co. *v.* Blanchard, 69 N. H. 447; Smith *v.* Bank, 164 N. Y. 386.

the fraud is not so much in the concealment as in the character of the intention itself. It would be ridiculous to speak of a duty of disclosure in such cases. Still there is ignorance on the one hand and wrongful contrivance on the other, such as to bring these cases within the more general description of fraud given in Ch. IX. p. *439, above.

Right of rescinding fraudulent contract. The party defrauded is entitled, and in modern times has always been entitled at law as well as in equity, to rescind the contract. "Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches" (*y*).[49]

Elements of fraud. We shall now consider the elements of fraud separately: and first the false representation in itself. It does not matter whether the representation is made by express words or by conduct, nor whether it consists in the positive assertion or suggestion of that which is false, or in the active concealment of something material to be known to the other party for the purpose of deciding whether he shall enter into the contract. These elementary rules are so completely established and so completely assumed to be established in all decisions and discussions on the subject that it will suffice to give a few instances.

555] ***Examples of fraudulent representation.** There may be a false statement of specific facts: this seldom occurs in a perfectly simple form. *Canham* v. *Barry* (*z*) is a good example. There the contract was for the sale of a leasehold. The vendor was under covenant with his lessor not to assign without licence, and had ascertained that licence would not be refused if he could find an eligible tenant. The agreement was made for the purpose of one M. becoming the occupier, and the purchaser and M. represented to the vendor that M. was a respectable person and could give satisfactory references to the landlords, which was contrary to the fact. This was held to be a fraudulent misrepresentation of a material fact such as to avoid the contract. A more frequent case is where a person is induced to acquire or become a partner in a business by false accounts of its position and profits (*a*).

(*y*) Per Wilde B. *Udell* v. *Atherton* (1861) 7 H. & N. at p. 181, 30 L. J. Ex. 337.

(*z*) (1855) 15 C. B. 597, 24 L. J. C. P. 100.

(*a*) *E.g. Rawlins* v. *Wickham* (1858) 3 De G. & J. 304, 28 L. J. Ch. 188. The cases where contracts to take shares have been held voidable for misrepresentation in the prospectus are of the same kind.

[49] "The rule is universal, whatever fraud creates justice will destroy." Vreeland *v.* N. J. Stone Co., 29 N. J. Eq. 188; Jones *v.* Emery, 40 N. H. 348.

Or the representation may be of a general state of things: thus it is fraud to induce a person to enter into a particular arrangement by an incorrect and unwarrantable assertion that such is the usual mode of conducting the kind of business in hand (*b*). How far it must be a representation of existing facts will be specially considered.

What is fraudulent concealment. "Active concealment" seems to be the appropriate description for the following sorts of conduct: taking means appropriate to the nature of the case to prevent the other party from learning a material fact—such as using contrivances to hide the defects of goods sold (*c*):[50] or making a statement true in terms as far as it goes, but keeping silence as to other things which if disclosed would alter the whole effect of the statement, so that what is in fact told is a half truth equivalent to a falsehood (*d*):[51] or allowing *the other party to proceed on an erroneous belief to [556 which one's own acts have contributed (*e*). It is sufficient if it appears that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false (*f*). Thus it is where one party has made an innocent misrepresentation, but on discovering the error does nothing to undeceive the other (*g*).[52] If, when he has better knowledge, he

(*b*) *Reynell* v. *Sprye* (1852) 1 D. M. & G. 680, 21 L. J. Ch. 633.

(*c*) See Benjamin on Sale, 470.

(*d*) *Peek* v. *Gurney* (1873) L. R. 6 H. L. 392, 403, 43 L. J. Ch. 19; *Stewart* v. *Wyoming Ranche Co.* (1888) 128 U. S. 383, 388.

(*e*) *Hill* v. *Gray* (1816) 1 Stark, 434, 18 R. R. 802, as explained in *Keates* v. *Earl Cadogan* (1851) 10 C. B. 591, 600, 20 L. J. C. P. 76; *qu.* if the explanation does not really overrule the particular decision, per Lord Chelmsford, L. R. 6 H. L. 391.

(*f*) Per Blackburn J. *Lee* v. *Jones* (1863) 17 C. B. N. S. at p. 507, 34 L. J. C. P. at p. 140.

(*g*) *Reynell* v. *Sprye* (1852) 1 D. M. G. at p. 709; *Redgrave* v. *Hurd* (1881) 20 Ch. Div. at pp. 12, 13, 51 L. J. Ch. 113, but as to the difference there assumed between equity and common law see per Bowen L.J. in *Newbigging* v. *Adam* (1886) 34 Ch. Div. at p. 594, 56 L. J. Ch. 275.

50 Kenner *v.* Harding, 85 Ill. 264; Singleton's Admr. *v.* Kennedy, 9 B. Mon. 222; Croyle *v.* Moses, 90 Pa. 250.

51 "The old adage applies, that half the truth is a lie." Hadley *v.* Clinton Importing Co., 13 Ohio St. 502, 513; Gluckstein *v.* Barnes, [1900] A. C. 240, 250; Henry *v.* Vance, 23 Ky. L. Rep. 491; Newell *v.* Randall, 32 Minn. 171; Mallory *v.* Leach, 35 Vt. 156, 168.

So also "no one can evade the force of the impression which he knows another received from his words and conduct, and which he meant him to receive, by resorting to the literal meaning of his language alone." Mizner *v.* Kussell, 29 Mich. 229; Moline Plow Co. *v.* Carson, 72 Fed. Rep. 387, 391; Ennis *v.* H. Borner & Co., 100 Fed. Rep. 12 (C. C. A.); Van Houten *v.* Morse, 162 Mass. 414; Remington Co. *v.* Kezertee, 49 Wis. 409.

52 Davies *v.* Insurance Co., 8 Ch. D. 469, 475; Loewer *v.* Harris, (C. C. A.) 57 Fed. Rep. 368; Mudsill Min. Co. *v.* Watrous, (C. C. A.) 61 Fed. Rep. 163, 189; cp. Pettigrew *v.* Chellis, 41 N. H. 95.

does not remove the error to which he contributed in excusable ignorance, he is no longer excused. In effect he is continuing the representation with knowledge of its falsity.

Representation made without belief in its truth: actual knowledge of falsehood not necessary. That which gives the character of fraud or deceit to a representation untrue in fact is that it is made without positive belief in its truth; not necessarily with positive knowledge of its falsehood. Where a false representation amounts to an actionable wrong, it is always in the party's choice, as an alternative remedy, to seek rescission of the contract, if any, which has been induced by the fraud: and it is settled that a false representation may be a substantive ground of action for damages though it is not shown that the person making the statement knew it to be false. It is enough to show that he made it as being true within his own knowledge, with a view to secure some benefit to himself, or to deceive a third person, and without believing it to be true (*h*).

Effects of reckless ignorance. Mere ignorance as to the truth or falsehood of a material assertion which turns out to be untrue must be **557]** treated as *equivalent to knowledge of its untruth. "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue" (*i*). In other words, wilful ignorance may have

(*h*) *Taylor* v. *Ashton* (1843) 11 M. & W. 401, 12 L. J. Ex. 363; *Evans* v. *Edmonds* (1853) 13 C. B. 777, 22 L. J. C. P. 211.

(*i*) Per Lord Cairns, *Reese River Silver Mining Co.* v. *Smith* (1869) L. R. 4 H. L. 79; *Rawlins* v. *Wickham* (1858) 3 De G. & J. 304. 316, 28 L. J. Ch. 188. At common law the same rule was given by Maule J. in *Evans* v. *Edmonds* (1853) 13 C. B. 777, 786, 22 L. J. C. P. 211. "I conceive that if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." In *Lehigh Zinc and Iron Co.* v. *Bamford* (1893) 150 U. S. 665, 673, the Supreme Court of the United States approved a statement of the Court below which was, "in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound and must be presumed to know." [Trimble *v.* Reid, 19 Ky. L. Rep. 604; Weeks *v.* Currier, 172 Mass. 53; Arnold *v.* Teel, 182 Mass. 1, 4; Hadcock *v.* Osmer, 153 N. Y. 604.]

the same consequences as fraud (*k*). So may ignorance which, though not wilful, is reckless: as when positive assertions of fact are made as if founded on the party's own knowledge, whereas in truth they are merely adopted on trust from some other person. The proper course in such a case is to refer distinctly to the authority relied upon (*l*).[53]

However it is now settled in England that the want of any reasonable grounds for belief in one's assertion is evidence, but only evidence, that it was uttered without any real belief (*m*).[54]

Silence is equivalent to misrepresentation for these purposes if "the withholding of that which is not stated *makes that which [558 is stated absolutely false," but not otherwise (*n*).[55]

Unwarranted statement of mere expectation as present fact. If a man expects, however honestly, that a certain state of things will shortly exist, he is not thereby justified in asserting by words or conduct that it does now exist, and any such assertion, if others have acted on the faith of it to their damage, ought to be a ground of action for deceit, and is of course ground for rescinding any contract obtained by its means. A stranger who accepts a bill as agent for the

(*k*) *Owen* v. *Homan* (1851) 4 H. L. C. at p. 1035.

(*l*) *Rawlins* v. *Wickham* (1858) 3 De G. & J. at p. 313, *Smith's case* (1867) 2 Ch. at p. 611.

(*m*) *Derry* v. *Peek* (1889) 14 App. Ca. 337, 58 L. J. Ch. 864.

(*n*) *Peek* v. *Gurney* (1873) L. R. 6 H. L. 377, 390, 403, 43 L. J. Ch. 19.

53 See further Boddy *v.* Henry, 113 Ia. 462; Pieratt *v.* Young, 20 Ky. L. Rep. 1815; Nash *v.* Minnesota Title Co., 163 Mass. 574; Nickerson *v.* Mass. Title Ins. Co., 178 Mass. 308, 311; Hamlin *v.* Abell, 120 Mo. 188; Gerner *v.* Yates, 61 Neb. 100; Houston *v.* Thornton, 122 N. C. 365; Lamberton *v.* Dunham, 165 Pa. 129; Giddings *v.* Baker, 80 Tex. 308.

54 But see 14 Harv. L. Rev. 66, 184.

55 In Laidlaw *v.* Organ, 2 Wheat. 178, there was a sale of tobacco at a time when the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England. The sellers asked if there was any news affecting the market price. The buyers gave no answer, and the sellers did not insist on having one, and it was held that the silence of the buyers was not a fraudulent concealment. See also Cleaveland *v.* Richardson, 132 U. S. 318, 329; Crowell *v.* Jackson, 53 N. J. L. 656; Smith *v.* Countryman, 30 N. Y. 655, 683, 684; Dambmann *v.* Schulting, 75 N. Y. 55; Kintzing *v.* McElrath, 5 Pa. 467; Neill *v.* Shamburg, 158 Pa. 263; Fisher *v.* Budlong, 10 R. I. 525, 527, 528.

A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy the land without disclosing the existence of the mine. Smith *v.* Beatty, 2 Ired. Eq. 456; Caples *v.* Steel, 7 Oreg. 491; Harris *v.* Tyson, 24 Pa. 347. And see Williams *v.* Spurr, 24 Mich. 335; Burt *v.* Mason, 97 Mich. 127.

But otherwise between partners. Hanley *v.* Sweeney, 109 Fed. Rep. 712 (C. C. A.).

And such non-disclosure may afford ground for a court of equity to refuse specific performance of a contract. Byars *v.* Stubbs, 85 Ala. 256; Ames's Cas. Eq. Jur. 373, *n.*

drawee on the chance of his ratifying the acceptance (*o*) acts at his peril. But we have learnt from the House of Lords that directors of a tramway company may say they have statutory authority to use steam power when they only expect to obtain a consent which the statute requires (*p*). Representations of this kind, which deliberately discount the future, seem to be of a different kind from statements honestly made on erroneous information of existing facts; for they are in their nature incompatible with belief in the truth of the assertion which is actually made. This distinction is not always clearly brought out in the authorities.

Sales by auction: employment of puffer. The application of the doctrine of fraud to sales by auction is peculiar. The courts of law held the employment of a puffer to bid on behalf of the vendor to be evidence of fraud in the absence of any express condition fixing a reserve price or reserving a right of bidding; for such a practice is inconsistent with the terms on which a sale by auction is assumed to proceed, namely that the highest bidder is to be the purchaser, and is a device to put an artificial value on the thing offered for sale (*q*).[56] There existed, or was supposed to exist (*r*), in courts of
559] equity the different rule that the employment of one puffer *to prevent a sale at an undervalue was justifiable (*s*) with the extraordinary result that in this particular case a contract might be valid in equity which a court of law would treat as voidable on the ground of fraud. The Sale of Land by Auction Act, 1867 (30 & 31 Vict. c.

(*o*) *Polhill* v. *Walter* (1832) 3 B. & Ad. 114, 37 R. R. 344.

(*p*) *Derry* v. *Peek*, note (*m*) last page.

(*q*) *Green* v. *Baverstock* (1863) 14 C. B. N. S. 204, 32 L. J. C. P. 181.

(*r*) Doubt was thrown upon it in *Mortimer* v. *Bell* (1865) L. R. 1. Ch. 10, 16, 35 L. J. Ch. 25.

(*s*) *Smith* v. *Clarke* (1806) 12 Ves. 477, 483, 8 R. R. 359, 363; *Flint* v. *Woodin* (1852) 9 Ha. 618.

56 Such is generally held to be the rule in this country both at law and in equity. Veazie *v.* Williams, 8 How. 134, 153; Baham *v.* Bach, 13 La. 287; Curtis *v.* Aspinwall, 114 Mass. 187; Springer *v.* Kleinsorge, 83 Mo. 152; Towle *v.* Leavitt, 23 N. H. 360; Bowman *v.* McClenahan, 20 N. Y. App. Div. 346; Morehead *v.* Hunt, 1 Dev. Eq. 35; Woods *v.* Hall, 1 Dev. Eq. 411; McDowell *v.* Simms, 6 Ired. Eq. 278; Walsh *v.* Barton, 24 Ohio St. 28, 46; Pennock's Appeal, 14 Pa. 446; Staines *v.* Shore, 16 Pa. 200; Yerkes *v.* Wilson, 81* Pa. 9; Flannery *v.* Jones, 180 Pa. 338; Hartwell *v.* Gurney, 16 R. I. 78; Peck *v.* List, 23 W. Va. 338. But see East *v.* Wood, 62 Ala. 313; McMillan *v.* Harris, 110 Ga. 72. The rule which has been sometimes suggested (Bank *v.* Sprague, 20 N. J. Eq. 159, 165; Veazie *v.* Williams, 3 Story, 611, 621), that the fact of a puffer having been employed will not make the sale voidable, if, after the bid of the puffer, there is a bid by a real buyer before the bid at which the property is knocked down it is submitted is unsound.

48), assimilated the rule of equity to that of law. The Indian Contract Act (s. 123) adopts the rule of the common law (*t*).

Fraud in relation to marriage. Marriage is, to some extent, an exception to the general rule: but marriage, though including a contract, is so much more than a contract[57] that the exception is hardly a real one. The English rule is that "unless the party imposed upon has been deceived as to the person and thus has given no consent at all [or is otherwise incapable of giving an intelligent consent], there is no degree of deception which can avail to set aside a contract of marriage knowingly (*u*) made" (*x*).[58] Still less is a marriage rendered invalid by the parties or one of them having practised a fraud on the persons who performed the ceremony or the authorities of the State in whose jurisdiction it was performed. Where a marriage had been celebrated in due form by Roman ecclesiastics at Rome between two Protestants, who had previously made a formal abjuration (the marriage not being otherwise possible by the law of the place as it then was), it was held immaterial whether the abjuration had been sincere or not, though as to the woman there was strong evidence to show that it was not (*y*).

(*t*) "If at a sale by auction the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer."

(*u*) A ceremony of marriage may be inoperative if the woman is tricked into it by representations that it is not a marriage but a betrothal; though in this country such a case must obviously be very rare: *Ford* v. *Stier* [1896] P. 1, 65 L. J. P. 13. Here there is no such knowledge as is required for real consent.

(*x*) *Swift* v. *Kelly* (1835) 3 Knapp, 257, 293, 40 R. R. 22, 48; *Moss* v. *Moss* [1897] P. 263, 66 L. J. P. 154, and as to the different views held in America and elsewhere, see [1897] P. 273 *sqq.*

(*y*) *Swift* v. *Kelly* (1835) 3 Knapp, 257, 40 R. R. 22.

57 See Maynard *v.* Hill, 125 U. S. 190; Green *v.* State, 58 Ala. 190; Maguire *v.* Maguire, 7 Dana, 181, 183; Adams *v.* Palmer, 51 Me. 481; Lewis *v.* Tapman, 90 Md. 294; Wade *v.* Kalbfleisch, 58 N. Y. 282, 284; Bennett *v.* Bennett, 116 N. Y. 584, 598; Ditson *v.* Ditson, 4 R. I. 87, 101.

58 In this country at least one exception is generally admitted. Where at the time of her marriage to a man who does not know her to be otherwise than chaste, a woman is pregnant, the marriage will, at the suit of the husband, be declared void for fraud. Baker *v.* Baker, 13 Cal. 87; Reynolds *v.* Reynolds, 3 Allen, 605; Donovan *v.* Donovan, 9 Allen, 140; Sissung *v.* Sissung, 65 Mich. 168; Harrison *v.* Harrison, 94 Mich. 559; Morris *v.* Morris, Wright (Ohio), 630; Carris *v.* Carris, 24 N. J. Eq. 516; Allen's Appeal, 99 Pa. 196. *Contra*, Long *v.* Long, 77 N. C. 304. And see Smith *v.* Smith, 8 Oreg. 100.

Likewise concealment of a chronic contagious venereal disease. Smith *v.* Smith, 171 Mass. 404; Crane *v.* Crane, 62 N. J. Eq. 21; Anonymous, 49 N. Y. Supp. 331; Ryder *v.* Ryder, 66 Vt. 158. *Contra*, in Massachusetts if the marriage has been consummated. Vondal *v.* Vondal, 175 Mass. 383.

For a full examination of the question as to what kind of fraud will render a marriage voidable, see Bishop on Marr. & Div., §§ 165–206; 13 Harv. L. Rev. 110.

560] ***Consent of third persons obtained by fraud.** We may observe in this place that when the consent of a third party is required to give complete effect to a transaction between others, that consent may be voidable if procured by fraud, and the same rules are applied, so far as applicable, which determine the like questions as between contracting parties. Thus where the approval of the directors is necessary for the transfer of shares in a company, a false description of the transferee's condition, such as naming him "gentleman" when he is a servant or messenger, or a false statement of a consideration paid by him for the shares, when in truth he paid nothing or was paid to execute the transfer, is a fraud upon the directors, the object being to mislead them by the false suggestion of a real purchase of the shares by a man of independent position; and on a winding-up the Court will replace the transferor's name on the register for the purpose of making him a contributory (*z*).

(*z*) *Ex parte Kintrea* (1869) L. R. 5 Ch. 95, 39 L. J. Ch. 193; *Payne's case* (1869) and *Williams' case* (1869) L. R. 9 Eq. 223; Lindley on Companies, 827.

*CHAPTER XI. [561

The Right of Rescission.

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Examination of questions on rescission of voidable contracts. We have now to examine a class of conditions which apply indifferently, or very nearly so, to cases of simple misrepresentation (that is, where the truth of a representation is in any way of the essence of a contract) and cases of deceit. Some of them, indeed, extend to all contracts which are or have become voidable for any cause whatever.

The questions to be dealt with may be stated as follows:

What must be shown with regard to the representation itself to give a right to relief to the party misled?

What is the extent of that right, and within what bounds can it be exercised?

In 1888 the Supreme Court of the United States (*a*) thus summed up the points which a plaintiff in an action for the rescission of a contract must establish:—

1. That the defendant has made a representation in regard to a material fact;

(*a*) *Southern Development Co.* v. *Silva*, 125 U. S. 247, 250.

2. That such representation is false;

3. That such representation was not actually believed by the defendant (*b*) to be true;

4. That it was made with intent that it should be acted upon;

5. That it was acted on by complainant to his damage;

6. That in so acting on it the complainant was ignorant of its falsity and reasonably believed it to be true.

562] *1. As to the representation itself.

A. **It must be of matter of fact, not of law (but qu. as to deliberate fraud).** It must (except, it would seem, in a case of actual fraud) be a representation of fact, as distinguished on the one hand from matter of law, and on the other hand from a matter of mere opinion or intention.

As to the first branch of the distinction, there is authority at common law that a misrepresentation of the legal effect of an instrument by one of the parties to it does not enable the other to avoid it (*c*). And in equity there is no reason to suppose that the rule is otherwise, though the authorities only go to this extent, that no independent liability can arise from a misrepresentation of what is purely matter of law (*d*)[1]. But this probably does not apply to a

(*b*) The Court adds, on reasonable grounds. The House of Lords, as we have seen (pp. *557, *558, above), has decided otherwise for England.

(*c*) *Lewis* v. *Jones* (1825) 4 B. & C. 506, 28 R. R. 360. Not so if the actual contents or nature of the instrument are misrepresented, as we saw in Ch. IX.

(*d*) *Rashdall* v. *Ford* (1866) L. R. 2 Eq. 750, 35 L. J. Ch. 769; *Beattie* v. *Lord Ebury* (1872) L. R. 7 Ch. 777, 802, L. R. 7 H. L. 102, 130, 41 L. J. Ch. 804, 44 *ib.* 20 (the House of Lords held there was no misrepresentation at all.)

[1] That as a general rule a misrepresentation of a matter of law neither constitutes ground for avoiding a contract, nor gives rise to any independent liability. See Sturm *v.* Boker, 150 U. S. 312; Union Bank *v.* German Ins. Co., 71 Fed. Rep. 473; Martin *v.* Wharton, 38 Ala. 637; Beall *v.* McGehee, 57 Ala. 438; Davis *v.* Betz, 66 Ala. 206; People *v.* San Francisco, 27 Cal. 655; Fish *v.* Cleland, 33 Ill. 238; Dillman *v.* Nadlehoffer, 119 Ill. 567; Russell *v.* Branham, 8 Blackf. 277; Clem *v.* Railroad Co., 9 Ind. 488; Parker *v.* Thomas, 19 Ind. 213, 219; Burt *v.* Bowles, 69 Ind. 1; Clodfelter *v.* Hulett, 72 Ind. 137, 143; Insurance Co. *v.* Brehm, 88 Ind. 578; Thompson *v.* Insurance Co., 75 Me. 55; Abbott *v.* Treat, 78 Me. 121; Jaggar *v.* Winslow, 30 Minn. 263; Starr *v.* Bennett, 5 Hill, 303; Insurance Co. *v.* Reed, 33 Ohio St. 283, 293. Cp. Wall *v.* Meilke, 89 Minn. 232. In Upton *v.* Tribilcock, 91 U. S. 45, 50, the representation having been as to the law of another State, should, it is submitted, have been treated as a representation of fact. Upton *v.* Englehart, 3 Dill. 496, 501; Bethell *v.* Bethell, 92 Ind. 318; Wood *v.* Roeder, 50 Neb. 476. But see Mutual L. I. Co. *v.* Phinney, 178 U. S. 327, 341. Cp. *supra*, pp. 530, 557, n. 48.

deliberately fraudulent mis-statement of the law (*e*)[2]. The circumstances and the position of the parties may well be such as to make it not imprudent or unreasonable for the person to whom the statement was made to rely on the knowledge of the person making it: and it would certainly work injustice if it were held necessary to apply to such a case the maxim that every one is presumed to know the law. The reason of the thing seems to be that in ordinary cases the law is equally accessible to both parties, and statements about it are equally verifiable by both, or else are in the region of mere opinion. But there is no need to extend this to exceptional cases. At all events the rule applies only to pure propositions of law. The existence and actual contents of *e.g.* a private Act of Parliament are as much matters of fact as any other concrete facts (*f*).

***And not of mere motive or intention.** As to the second branch, [563 we may put aside the cases already mentioned in which the substance of the fraud is not misrepresentation, but a wrongful intention going to the whole matter of the contract. Apart from these it appears to be the rule that a false representation of motive or intention, not amounting to or including an assertion of existing facts, is inoperative. "It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact which is untrue and a promise to do something in future" (*g*).[3] On this ground was put the decision in *Vernon* v.

(*e*) *Hirschfeld* v. *London, Brighton & South Coast Ry. Co.* (1876) 2 Q. B. D. 1, 46 L. J. Q. B. 1; Bowen L.J. in *West London Commercial Bank* v. *Kitson* (1884) 13 Q. B. Div. at p. 363.

(*f*) Bowen L.J. *ubi sup.*

(*g*) Mellish L.J. *Ex parte Burrell* (1876) 1 Ch. Div. at p. 552.

[2] Townsend *v.* Cowles, 31 Ala. 428; Ross *v.* Drenkard's Admr., 35 Ala. 434; Sims *v.* Ferrill, 45 Ga. 585; Titus *v.* Rochester Ins. Co., 97 Ky. 567; Headley *v.* Pickering, 23 Ky. L. Rep. 905; Motherway *v.* Hall, 168 Mass. 333; Berry *v.* Whitney, 40 Mich. 65; Stumpf *v.* Stumpf, 7 Mo. App. 272; Westervelt *v.* Demarest, 46 N. J. L. 37; Cooke *v.* Nathan, 16 Barb. 342; Berry *v.* American Ins. Co., 132 N. Y. 49; Haviland *v.* Willets, 141 N. Y. 35; Moreland *v.* Atchison, 19 Tex. 303; Shuttler *v.* Brandfass, 41 W. Va. 201.

[3] Sawyer *v.* Prickett, 19 Wall. 146; Fenwick *v.* Grimes, 5 Cr. C. C. 439; Huber *v.* Guggenheim, 89 Fed. Rep. 598; Birmingham Co. *v.* Elyton Co., 93 Ala. 549; Harrington *v.* Rutherford, 38 Fla. 321; Gage *v.* Lewis, 68 Ill. 604; Day *v.* Fort Scott Co., 153 Ill. 293; Long *v.* Woodman, 58 Me. 49; Hazlett *v.* Burge, 22 Ia. 535; Burt *v.* Bowles, 69 Ind. 1; Livermore *v.* Land Co., 106 Ky. 140; Johnson *v.* Stockham, 89 Md. 358; Knowlton *v.* Keenan, 146 Mass. 86; Dawe *v.* Morris, 149 Mass. 188; Perkins *v.* Lougee, 6 Neb. 220; Fisher *v.* N. Y. Com. Pleas, 18 Wend. 608; Armstrong *v.* Karshner, 47 Ohio St. 276, 294; Landreth Co. *v.* Schevenel, 102 Tenn. 486; Orr *v.* Goodloe, 93 Va. 263; Buena Vista Co. *v.* Billmyer, 48 W. Va. 382; Patterson *v.* Wright, 64 Wis. 289; Sheldon *v.* Davidson, 85 Wis. 138.

But a representation of present intention is a statement of fact. "The state of a man's mind is as much a fact as the state of his digestion." Edging-

Keys (*h*), where the defendant bought a business on behalf of a partnership firm. The price was fixed at 4,500*l.* on his statement that his partners would not give more: a statement afterwards shown to be false by the fact that he charged them in account with a greater price and kept the resulting difference in their shares of the purchase-money for himself. It was held that the vendor could not maintain an action of deceit, as the statement amounted only to giving a false reason for not offering a higher price.[4] The case also illustrates the principle that collateral fraud practised by or against a third person does not avoid a contract. Here there was fraud, and of a gross kind, as between the buyer and his partners; but we must dismiss this from consideration in order to form a correct estimate

(*h*) (1810) 12 East, 632, in Ex. Ch. 4 Taunt. 488, 11 R. R. 499. The language used in the Ex. Ch. to the effect that the buyer's liberty must be co-extensive with the seller's, which is to "tell every falsehood he can to induce a buyer to purchase," is of course not to be literally accepted.

ton *v.* Fitzmauriee, 29 Ch. D. 459; Old Colony Trust Co. *v.* Dubuque Light Co., 89 Fed. Rep. 794, 802; Dean *v.* Oliver, 131 Ala. 634; Crowley *v.* Langdon, 127 Mich. 51; Swift *v.* Rounds, 19 R. I. 527. See also 9 Harv. L. Rev. 424; *ante*, p. *554, n. 48.

[4] A false reason for wanting to buy was held not to amount to fraud in Byrd *v.* Rautman, 85 Md. 414.

"The language of some cases certainly seems to suggest that had faith might make a seller liable for what are known as sellers' statements, apart from any other conduct by which the seller is fraudulently induced to forbear inquiries. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation and as to which it always has been 'understood, the world over, that such statements are to be distrusted.'" Holmes, J., in delivering the opinion of the court in Deming *v.* Darling, 148 Mass. 504, where it was held that representations that a bond "was of the very best and safest, and was an A No. 1 bond," and that "the railroad mortgage was good security for the bonds," though false and made in bad faith afforded no ground for an action. But see Stover's Admr. *v.* Wood, 26 N. J. Eq. 417.

So in Massachusetts and some other States it is held that a false statement by the seller of the price paid by him for the property is not legally fraudulent. Mackenzie *v.* Seeberger, 76 Fed. Rep. 108 (C. C. A.); Banta *v.* Palmer, 47 Ill. 99; Tuck *v.* Downing, 76 Ill. 71; Sowers *v.* Parker, 59 Kan. 12; Holbrook *v.* Connor, 60 Me. 578; Bourn *v.* Davis, 76 Me. 223; Braley *v.* Powers, 92 Me. 203, 205; Hemmer *v.* Cooper, 8 Allen, 334; Cooper *v.* Lovering, 106 Mass. 77; Way *v.* Ryther, 165 Mass. 226 (cp. Manning *v.* Albee, 11 Allen, 520; Kilgore *v.* Bruce, 166 Mass. 136). See also Page *v.* Parker, 43 N. H. 363. This result seems unsound in theory, for the amount paid by the seller is a fact and a material one, and is opposed to excellent authority. Gluckstein *v.* Barnes, [1900] A. C. 240, 247; Zang *v.* Adams, 23 Col. 408; Dorr *v.* Cory, 108 Ia. 725; Stoney Creek Co. *v.* Smalley, 111 Mich. 321; Fairchild *v.* McMahon, 139 N. Y. 290; Harlow *v.* La Brum, 151 N. Y. 278; Townsend *v.* Felthousen, 156 N. Y. 618, 627. See also Coolidge *v.* Rhodes, 199 Ill. 24; Kilgore *v.* Bruce, 166 Mass. 136; Conlan *v.* Roemer, 52 N. J. L. 53, 57; Smith, Kline & French Co. *v.* Smith, 166 Pa. 563; Edelman *v.* Latshaw, 180 Pa. 419.

of the decision as between the buyer and seller. It must be judged of as if the buyer had communicated the whole thing to his partners and charged them only with the price really given. Still the decision can hardly be supported unless on the ground of failure to prove damage. For the buyer was the agent of the firm, and in substance *made a wilfully false statement as to the extent of his [564 authority.

The Judicial Committee has held that it is clearly fraudulent for A. and B. to combine to sell property in B.'s name, B. not being in truth the owner but only an intermediate agent, and the nominal price not being the real price to be paid to the owner A., but including a commission to be retained by B. (*i*).[5] And under particular conditions a statement of intention, such as the purpose to which a proposed loan is intended to be applied, may be a material statement of fact (*k*). On principle A.'s existing intention seems to be as much a fact for B. as anything else.

Statements of matter of opinion. It needs no authority to show that a statement of what is merely matter of opinion cannot bind the person making it as if he had warranted its correctness.[6] And it is

(*i*) *Lindsay Petroleum Co.* v. *Hurd* (1874) L. R. 5 P. C. 221, 243. This no doubt cannot actually overrule the reasons given for the decision in *Vernon* v. *Keys:* for decisions of the Judicial Committee, though they carry great weight, are not binding in English Courts: see *Leask* v. *Scott* (1877) 2 Q. B. Div. 376, 46 L. J. Q. B. 576, where the C. A. refused to follow the Judicial Committee, also *Smith* v. *Brown* (1871) L. R. 6 Q. B. at p. 736, 40 L. J. Q. B. 214.

(*k*) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. Div. 459, 480, 483, 55 L. J. Ch. 650.

5 See Bunn *v.* Schnellbacher, 163 Ill. 328; Stoney Creek Co. *v.* Smalley, 111 Mich. 321; Yeoman *v.* Lasley, 40 Ohio St. 190; Limited Investment Assoc. *v.* Glendale Investment Assoc., 99 Wis. 54.

6 A statement of what is merely matter of opinion neither affords ground for rescission nor creates liability as for deceit. See further, Southern Development Co. *v.* Silva, 125 U. S. 247; Reeves *v.* Corning, 51 Fed. Rep. 774; Bement *v.* La Dow, 66 Fed. Rep. 185; Stephens *v.* Alabama Co., 121 Ala. 450; Beyer *v.* National Assoc., 131 Ala. 369; Motes *v.* People's Assoc., 137 Ala. 369; Nounnan *v.* Sutter County Co., 81 Cal. 1; Jefferson *v.* Hewitt, 95 Cal. 535; Sherwood *v.* Salmon, 2 Day, 128; Crocker *v.* Manley, 164 Ill. 282; Hunter *v.* McLaughlin, 43 Ind. 38; Neidefer *v.* Chastain, 71 Ind. 363; Clark *v.* Ralls, 50 Ia. 275; McClanahan *v.* McKinley, 52 Ia. 222; Holbrook *v.* Connor, 60 Me. 578; Bishop *v.* Small, 63 Me. 12; Gordon *v.* Parmelee, 2 Allen, 212; Manning *v.* Albee, 11 Allen, 520; Mooney *v.* Miller, 102 Mass. 217; Tucker *v.* White, 125 Mass. 344; Nash *v.* Minnesota Title Co., 159 Mass. 437; Wade *v.* Ringo, 122 Mo. 322; Akin *v.* Kellogg, 119 N. Y. 441; Lyons *v.* Briggs, 14 R. I. 222; Lake *v.* Tyree, 90 Va. 719.

So false statements as to value are immaterial. Gordon *v.* Butler, 105 U. S. 553; Cronk *v.* Cole, 10 Ind. 485; Sieveking *v.* Litzler, 31 Ind. 13; Kennedy *v.* Richardson, 70 Ind. 524; Neidefer *v.* Chastain, 71 Ind. 363; Shade *v.* Creviston, 93 Ind. 591; Van Vechten *v.* Smith, 59 Ia. 173; Lucas *v.* Crippen, 76 Ia. 507;

said that if a man makes assertions, as of matter of fact within his own knowledge, concerning that which is by its nature only matter of more or less probable repute and opinion, he is not legally answerable as for a deceit if the assertion turns out to be false (*l*). But it seems doubtful if this could be upheld at the present day. For surely the affirmation of a thing as within my own knowledge implies the affirmation that I have peculiar means of knowledge: 565] and *if I have not such means, then my statement is false and I shall justly be held answerable for it, unless indeed the special knowledge thus claimed is of a kind manifestly incredible.

Ambiguous statements. Statements which in themselves are ambiguous cannot be treated as fraudulent merely because they are false in some one of their possible senses. In such a case the party who complains of having been misled must satisfy the Court that he understood and acted on the statement in the sense in which it was false (*m*).

(*l*) *Haycraft* v. *Creasy* (1801) 2 East, 92, 6 R. R. 380. [Approved and followed in Cowley *v.* Smyth, 46 N. J. L. 380; but see *contra* Hadcock *v.* Osmer, 153 N. Y. 604; Parmlee *v.* Adolph, 28 Ohio St. 22.] Here the defendant had stated, as a fact within his own knowledge, that a person was solvent who appeared to have ample means, but turned out to be an impostor. The majority of the Court seem to have thought that the plaintiff must in the circumstances have known the defendant to be expressing only an opinion founded on that which appeared to all the world. So a statement of confident expectation of profits must be distinguished from an assertion as to profits actually made: *Bellairs* v. *Tucker* (1884) 13 Q. B. D. 562. [Sawyer *v.* Prickett, 19 Wall. 146; Tuck *v.* Downing, 76 Ill. 71; Swan *v.* Mathre, 103 Ia. 261].

(*m*) *Smith* v. *Chadwick* (1884) 9 App. Ca. 187, 51 L. J. Ch. 597, see especially per Lord Blackburn at pp. 199–201. The language used in *Hallows* v. *Fernie* (1868) L. R. 3 Ch. at p. 476, seems to go too far. Lord

Graffenstein *v.* Epstein, 23 Kan. 443; Graham *v.* Pancoast, 30 Pa. 89; Cooper *v.* Lovering, 106 Mass. 77; Poland *v.* Brownell, 131 Mass. 138; Lilienthal *v.* Suffolk Co., 154 Mass. 185; Cornwall *v.* McFarland, 150 Mo. 377; Garrison *v.* Technic Works, 55 N. J. Eq. 708, 715; Davis *v.* Meeker, 5 Johns. 354; Ellis *v.* Andrews, 56 N. Y. 83; Chrysler *v.* Canaday, 90 N. Y. 272; Saunders *v.* Hatterman, 2 Ired. L. 32; Mosher *v.* Post, 89 Wis. 602. Except where the parties have not equal means of knowledge, or means are used to prevent discovery of the real value. Mudsill Min. Co. *v.* Watrous, 61 Fed. Rep. 163 (C. C. A.); Allen *v.* Hart, 72 Ill. 104; Murray *v.* Tolman, 162 Ill. 417; O'Donnell Brewing Co. *v.* Farrar, 163 Ill. 471; Bish *v.* Beatty, 111 Ind. 403; Coulter *v.* Clark, 160 Ind. 311; Picard *v.* McCormick, 11 Mich. 68; French *v.* Ryan, 104 Mich. 625; Miller *v.* Voorheis, 115 Mich. 356; Griffin *v.* Farrier, 32 Minn. 474; Hedin *v.* Minneapolis Institute, 62 Minn. 146; Villett *v.* Moler, 82 Minn. 12, 17; Conlan *v.* Roemer, 52 N. J. L. 53; Simar *v.* Canaday, 53 N. Y. 298; People *v.* Peckens, 153 N. Y. 576, 592; Bowen *v.* Fenn, 90 Pa. 359; Edelman *v.* Latshaw, 180 Pa. 419; McClellan *v.* Scott, 24 Wis. 81; Maltby *v.* Austin, 65 Wis. 527. See also Shelton *v.* Healy, 74 Conn. 265; Elerick *v.* Reid, 54 Kan. 57; Hess *v.* Draffen, 99 Mo. App. 580; Titus *v.* Poole, 145 N. Y. 414; Handy *v.* Waldron, 18 R. I. 567; Shaw *v.* Gilbert, 111 Wis. 165, and a note on the whole question in 35 L. R. A. 417.

B. The representation must induce the contract. The representation must be such as to induce the contract (*dans locum contractui*) (*n*).[7]

No relief to a party who has acted on his own judgment. Relief cannot be given on the ground of fraud or misrepresentation to a party who has in fact not acted on the statements of the other, but has taken steps of his own to verify them, and has acted on the judgment thus formed by himself (*o*).[8]

"The Court must be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined" (*p*).

It is not perfectly free from doubt whether in any, and if in any, in what cases the possession of means of knowledge which if used would lead to the discovery of the truth will bar the party of his remedy.

As to means of knowledge: immaterial in case of active misrepresentation. In the case of active misrepresentation it is no answer *in pro- [566
ceedings either for damages or for setting aside the contract to say that the party complaining of the misrepresentation had the means

Blackburn leaves it as an unsettled question what would happen if the defendant could in turn prove the falsehood or ambiguity to be due to a mere blunder.

(*n*) Lord Brougham, *Attwood* v. *Small* (1835–8) 6 Cl. & F. 444, 49 R. R. 137; Lord Wensleydale, *Smith* v. *Kay* (1859) 7 H. L. C. 775–76.

(*o*) See for a recent example, *Farrar* v. *Churchill* (1890) 135 U. S. 609.

(*p*) *Jennings* v. *Broughton* (1853–4) 5 D. M. G. 126, 140, 22 L. J. Ch. 584; *Dyer* v. *Hargrave* (1805) 10 Ves. 505, 8 R. R. 36.

[7] Wagner *v.* National Ins. Co., 90 Fed. Rep. 395 (C. C. A); Moses *v.* Katzenberger, 84 Ala. 95; Darby *v.* Kroell, 92 Ala. 607; Bowman *v.* Carithers, 40 Ind. 90; Palmer *v.* Bell, 85 Me. 352; Ely *v.* Stewart, 2 Md. 408; Dawe *v.* Morris, 149 Mass. 188, 192; Humphrey *v.* Merriam, 32 Minn. 197; Anderson *v.* Burnett, 5 How. (Miss.) 165; American Assoc. *v.* Bear, 48 Neb. 455; Brackett *v.* Griswold, 112 N. Y. 454; Hotchkin *v.* Third Bank, 127 N. Y. 329; Foy *v.* Houghton, 83 N. C. 467; Trammell *v.* Ashworth, 99 Va. 646; Fowler *v.* McCann, 86 Wis. 427.

[8] Slaughter's Admr. *v.* Gerson, 13 Wall. 379; Clark *v.* Reeder. 158 U. S. 505, 524; Hough *v.* Richardson, 3 Story, 659; Brown *v.* Smith, 109 Fed. Rep. 26; Brewer *v.* Arantz, 124 Ala. 127; Wheeler *v.* Dunn, 13 Col. 428; Tuck v. Downing, 76 Ill. 71; Dady *v.* Condit, 163 Ill. 511; Hagee *v.* Grossman, 31 Ind. 223; Merritt *v.* Dufur. 99 Ia. 211; Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185; Buxton *v.* Jones, 120 Mich. 522; Halls *v.* Thompson, 1 S. & M. 443, 481, 482; Phibbs *v.* Buckman, 30 Pa. 401.

So where the falsity of the statement is obvious. Trammell *v.* Ashworth, 99 Va. 646, 652. But a medium who obtained property by means of alleged messages from the plaintiff's deceased husband cannot retain it on the ground that the falsity of the representations was obvious. Dean *v.* Ross, 178 Mass. 397.

of making inquiries.[9] "In the case of *Dobell* v. *Stevens* (*q*) . . . which was an action for deceit in falsely representing the amount of the business done in a public-house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he had thought proper" (*r*). The rule was the same in the Court of Chancery. It was said of a purchaser to whom the state of the property he bought was misrepresented:—"Admitting that he might by minute examination make that discovery, he was not driven to that examination, the other party having taken upon him to make a representation. . . . The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (*s*).[10] The principle is that "No man can complain that another has too implicitly relied on the truth of what he has himself stated" (*t*). And it is not enough to show that the party misled did make *some* examination on his own account; proof of cursory or ineffectual inquiries will not do (*u*). In order to bar him of his remedy, it must be shown either that he knew the true state of the facts, or that he did not rely on the facts as represented (*x*).

In 1867 the same principle was affirmed by Lord Chelmsford in the House of Lords (*y*). The suit was instituted by a shareholder in a railway company to be relieved from his contract on the ground of 567] misrepresentations contained *in the prospectus. Here it was contended that the propectus referred the intending shareholder to other documents, and offered means of further information: besides, the memorandum and articles of association (and of these at all events he was bound to take notice) sufficiently corrected the errors

(*q*) (1825) 3 B. & C. 623; 27 R. R. 441.

(*r*) Per Lord Chelmsford, L. R. 2 H. L. 121.

(*s*) *Dyer* v. *Hargrave* (1805) 10 Ves. at p. 509, 8 R. R. at p. 39.

(*t*) *Reynell* v. *Sprye* (1852) 1 D. M. & G. at p. 710; *Price* v. *Macaulay* (1852) 2 D. M. & G. 339, 346.

(*u*) *Redgrave* v. *Hurd* (1881) 20 Ch. Div. 1, 51 L. J. Ch. 113.

(*x*) *Redgrave* v. *Hurd* (1881) 20 Ch. Div. 1, 21 (Jessel M.R.).

(*y*) *Central Ry. Co. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99, 120, 36 L. J. Ch. 849. As to the earlier and indecisive case of *Attwood* v. *Small* (1835–8) 6 Cl. & F. 232, 49 R. R. 115, see now *Redgrave* v. *Hurd* (1881) 20 Ch. Div. at p. 14, 51 L. J. Ch. 113.

9 See cases cited *infra*, notes 11 and 12.

But see *contra*, Farnsworth *v.* Duffner, 142 U. S. 43; Deming *v.* Darling, 148 Mass. 504, 506; Holst *v.* Stewart, 161 Mass. 516; Brady *v.* Finn, 162 Mass. 260, 266; Mahaffey *v.* Ferguson, 156 Pa. 156 (cp. Brotherton *v.* Reynolds, 164 Pa. 134).

10 Mason *v.* Crosby, 1 Woodb. & M. 342, 353; Alger *v.* Keith, 105 Fed. Rep. 105; Burroughs *v.* Pacific Guano Co., 81 Ala. 255; Oswald *v.* McGehee, 28 Miss. 340, 353.

and omissions of the prospectus. But the objection is thus answered:—

"When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" [11]

Otherwise, it seems, in case of mere non-disclosure. This doctrine appears, also on Lord Chelmsford's authority, not to apply to the case of mere non-disclosure, without fraudulent intention, of a fact which ought to have been disclosed.

"When the fact is not misrepresented but concealed [or rather not communicated] (*z*) and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence" (*a*).

Mere assertion of title. It appears also not to apply to a mere assertion of title by a vendor of land (*b*).[12]

(*z*) See L. R. 2 H. L. 339.

(*a*) *New Brunswick, &c. Co.* v. *Conybeare* (1862) 9 H. L. C. 711, 742, 31 L. J. Ch. 297.

(*b*) *Hume* v. *Pocock* (1866) L. R. 1 Ch. 379, 385, 35 L. J. Ch. 731, where however the real contract was to buy up a particular claim of title, whatever it might be worth.

[11] See Upton *v.* Englehart, 3 Dill. 496, 501; Strand *v.* Griffith, 97 Fed. Rep. 854, 856; Gammill *v.* Johnson, 47 Ark. 335; Hicks *v.* Stevens, 121 Ill. 186; Matlock *v.* Todd, 19 Ind. 130; Ledbetter *v.* Davis, 121 Ind. 119; Carmichael *v.* Vandebur, 50 Ia. 651; McGibbons *v.* Wilder, 78 Ia. 531; McKee *v.* Eaton, 26 Kan. 226; Speed *v.* Hollingsworth, 54 Kan. 436; Roberts *v.* Plaisted, 66 Me. 335; David *v.* Park, 103 Mass. 501; Eaton *v.* Winnie, 20 Mich. 156; Cornell *v.* Crane, 113 Mich. 460; Porter *v.* Fletcher, 25 Minn. 493; Olson *v.* Orton, 28 Minn. 36; Erickson *v.* Fisher, 51 Minn. 300; Wannell *v.* Kem, 57 Mo. 478; Caldwell *v.* Henry, 76 Mo. 254; Bank *v.* Hunt, 76 Mo. 439; Cottrill *v.* Krum, 100 Mo. 397; Turner *v.* Haupt, 53 N. J. Eq. 526; Mead *v.* Bunn, 32 N. Y. 275, 280; Fargo Coke Co. *v.* Fargo Electric Co., 4 N. Dak. 219; Chamberlin *v.* Fuller, 59 Vt. 256; McClellan *v.* Scott, 24 Wis. 81; Risch *v.* Von Lilienthal, 34 Wis. 250. But see *contra*, Holst *v.* Stewart, 161 Mass. 516; Brady *v.* Finn, 162 Mass. 260, 266.

The rule does not apply in favor of the subscriber to the stock of a corporation who resists payment of an assessment on the ground of false representations as to matters controlled by the charter. Parker *v.* Thomas, 19 Ind. 213, 219; Wight *v.* Railroad Co., 16 B. Mon. 4; Railroad Co. *v.* Anderson, 51 Miss. 829.

[12] But in this country it is generally held that a person may rely upon representations as to title to land, although a search of the records would disclose their falsity. See Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Zeis *v.* Potter, 105 Fed. Rep. 671; Baker *v.* Maxwell, 99 Ala. 558; Watson *v.* Atwood, 25 Conn. 313; Backer *v.* Pyne, 130 Ind. 288; Rohroff *v.* Schultze, 154 Ind. 183; Claggett *v.* Crall, 12 Kan. 393; Carpenter *v.* Wright, 52 Kan. 221;

In a case before Lord Hatherley, when V.-C., the double question arose of the one party's knowledge that his statement was untrue, and of the other's means of learning the truth. The suit was for specific performance of an agreement to take a lease of a limestone quarry. The plaintiff made a distinct representation as to
568] the quality of the *limestone which was in fact untrue: he did not believe it to be false, but he had taken no pains to ascertain, as he might easily have done, whether it was true or not. But then the defendant had not relied exclusively upon this statement, for he went to look at the stone; still he was not a limeburner by trade, and could not be supposed to have trusted merely to what he saw, being in fact not competent to judge of the quality of limestone. The result was that the Court refused specific performance, declining to decide whether the contract was otherwise valid or not (*c*).

Attempt to deceive inspection which purchaser omits to make. The case of *Horsfall* v. *Thomas* (*d*) was decided on the same principle: there a contrivance was used to conceal a defect in a gun manufactured to a purchaser's order, but the purchaser took it without any inspection, and therefore, although the vendor intended to deceive him, had not been in fact deceived.

It might also be given as a rule that the representation must be material. But to make this quite accurate it should be stated in the converse form, namely that a material representation may be presumed to have in fact induced the contract; for a man who has obtained a contract by false representations cannot afterwards be heard to say that those representations were not material. The excuse has often been put forward that for anything that appeared the other party might no less have given his consent if the truth had been made known to him, and the Court has always been swift to reject it. When a falsehood is proved, the Court does not require positive evidence that it was successful (*e*); it rather presumes that assent would not have been given if the facts had been known (*f*). Those who have made false statements

(*c*) *Higgins* v *Samels* (1862) 2 J. & H. 460. 468, 469.

(*d*) (1862) 1 H. & C. 90, 31 L. J. Ex. 322, dissented from by Cockburn, C.J., *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at p. 605: but it seems good law.

(*e*) *Williams' case* (1869) L. R. 9 Eq. 225, *n.*

(*f*) *Ex parte Kintrea* (1869) L. R. 5 Ch. at p. 101, 39 L. J. Ch. 193.

Young *v.* Hopkins, 6 T. B. Mon. 18; Newcome *v.* Ewing, 19 Ky. L. Rep. 821; Parham *v.* Randolph, 4 How. (Miss.) 435, 451; Kiefer *v.* Rogers, 19 Minn. 32; Bailey *v.* Smock, 61 Mo. 213; Herman *v.* Hall, 140 Mo. 270; Schwenk *v.* Naylor, 102 N. Y. 683; Hunt *r.* Baker, 22 R. I. 18. And see the cases cited in note 11, *supra*, and 49 Cent. Law Jour. 245.

*cannot ask the Court to speculate on the exact share they may [569 have had in inducing the transaction (*g*);[13] or on what might have been the result if there had been a full communication of the truth (*h*); it is enough that an untrue statement has been made which was likely to induce the party to enter into the contract, and that he has done so (*i*). Special circumstances may make a representation material which in ordinary cases of the same kind of contract would not be. If a moneylender who has become notorious for harsh and oppressive dealing attracts a borrower by advertising in an assumed name, a jury may find that the contract was fraudulent (*k*). An inference or presumption of this class is of fact, not of law, and is open to contradiction like other inferences of fact (*l*).

In like manner, if there has been an omission even without fraud to communicate something which ought to have been communicated, it is too late to discuss whether the communication of it would probably have made any difference (*m*).

If it be asked in general terms what is a material fact, we may answer, by an extension of the language adopted by the Queen's Bench in a case of marine insurance (*n*), that it is anything which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business in hand.[14]

(*g*) *Reynell* v. *Sprye* (1852) 1 D. M. G. at p. 708.

(*h*) *Smith* v. *Kay* (1859) 7 H. L. C. at p. 759.

(*i*) Per Lord Denman C.J. *Watson* v. *Earl of Charlemont* (1848) 12 Q. B. 856, 864, 18 L. J. Q. B. 65. To the like effect, Jessel M.R. in *Smith* v. *Chadwick* (1884) 20 Ch. Div. at p. 44 (see however note (*l*)).

(*k*) *Gordon* v. *Street* [1899] 2 Q. B. 641, 69 L. J. Q. B. 45, C. A.

(*l*) Lord Blackburn, *Smith* v. *Chadwick* (1884) 9 App. Ca. at p. 196.

(*m*) *Traill* v. *Baring* (1864) 4 D. J. S. at p. 330.

(*n*) *Ionides* v. *Pender* (1874) L. R. 9 Q. B. 531, 43 L. J. Q. B. 227, *supra*, p. *530.

[13] Cabot *v.* Christie, 42 Vt. 121, 127; James *v.* Hodsden, 47 Vt. 127, 137. "It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough that they had material influence upon the plaintiff, although combined with other motives." Safford *v.* Grout, 120 Mass. 20, 25; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 481, 485; *Re* Gany, 103 Fed. Rep. 930; Ruff *v.* Jarrett, 94 Ill. 475; Hough *v.* Richardson, 3 Story, 659, 690; Matthews *v.* Bliss, 22 Pick. 48; Fishback *v.* Miller, 15 Nev. 428; Morgan *v.* Skiddy, 62 N. Y. 319; Butler *v.* Prentiss, 158 N. Y. 49; Wilson *v.* Carpenter, 91 Va. 183; Shaw *v.* Gilbert, 111 Wis. 165. But see Poska *v.* Stearns, 56 Neb. 541; Berkson *v.* Heldman, 58 Neb. 595. Where a party has been entrapped into a contract by fraud, and defends an action on it on that ground, it is no answer to his defense that, notwithstanding the fraud, if he will pay, his money will be so used that he will sustain no harm. Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655.

[14] Whether a representation is material or not is a question of law. Caswell *v.* Hunton, 87 Me. 277; Greenleaf *v.* Gerald, 94 Me. 91; Penn Ins. Co. *v.* Crane, 134 Mass. 56.

And contract incidental to fraudulent transaction is itself treated as fraudulent. There is an exception, but only an apparent one, to the rule that the representation must be the cause of the other party's **570]** contracting. A contract arising directly out of a *previous transaction between the same parties which was voidable on the ground of fraud is itself in like manner voidable. A. makes a contract with B., with the fraudulent intention of making it impossible by a secret scheme for B. to perform the contract. B. ultimately agrees to pay and does pay to A. a sum of money to be released from the contract: if he afterwards discovers the scheme B. can rescind this last agreement and recover the money back (*o*).

"If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain [in the particular case a secret payment to the promoter out of purchase-money], and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company or in respect of his services as an officer of the company after the company was registered" (*p*).

So it is where the parties really interested, though not the nominal parties, are the same. Thus where a sale of goods is procured by fraud, and the vendors forward the goods by railway to the purchaser's agent, and afterwards reclaim them, indemnifying the railway company, these facts constitute a good defence to an action by the purchaser's agent against the railway company, though the redelivery to the vendors was before the discovery of the fraud and arose out of an unsuccessful attempt to stop the goods *in transitu* (*q*).

C. **Must be made by a party to the contract.** The representation must be made by a party to the contract. This rule in its simple form is **571]** elementary. It *is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party (*r*).[15] Thus in *Sturge* v.

(*o*) *Barry* v. *Croskey* (1861) 2 J. & H. 1.

(*p*) Per Cur. *Hereford & S. Wales Waggon & Engineering Co.* (1876) 2 Ch. Div. 621, 626, 45 L. J. Ch. 461.

(*q*) *Clough* v. *L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. 26, 41 L. J. Ex. 17, an exceedingly instructive case: as to the misconceived act being justified by reference to the true ground of rescission afterwards discovered, cp. *Wright's case* (1871) L. R. 7 Ch. 55, 41 L. J. Ch. 1.

(*r*) See per Lord Cairns, *Smith's case*, L. R. 2 Ch. at p. 616.

[15] United States *v.* Dalles Military Road Co., 51 Fed. Rep. 629, 637; Lindsey *v.* Veasy, 62 Ala. 421; Pacific Co. *v.* Anglin, 82 Ala. 492; Fort Dearborn Bank *v.* Carter, 152 Mass. 34; Wachsmuth *v.* Martini, 154 Ill. 515; White *v.* Graves, 107 Mass. 325; Williamson *v.* Raney, Freem. Ch. (Miss.)

Starr (*s*) a woman joined with her supposed husband in dealing with her interest in a fund. The marriage was in fact void, the man having concealed from her a previous marriage. It was held that this did not affect the rights of the purchaser.

As to representations made by agents. When we come to deal with contracts made by agents the question arises to what extent the representations of the agent are to be considered as the representations of the principal for the purposes of this rule. And this question, though now practically set at rest by recent decisions, is one which has given rise to some difficulty. A false statement made by an agent with his principal's express authority, the principal knowing it to be false, is obviously equivalent to a falsehood told by the principal himself;[16] nor can it make any difference as against the principal whether the agent knows the statement to be false or not.[17] But we may also have

(*s*) (1833) 2 My. & K. 195; cp. *Wheelton* v. *Hardisty* (1857) 8 E. & B. 232, 26 L. J. Q. B. 265, 27 *ib.* 241.

112; Vass *v.* Riddick, 89 N. C. 6; Riggan *v.* Sledge, 116 N. C. 87; Dangler *v.* Baker, 35 Ohio St. 673; Kulp *v.* Brant, 162 Pa. 222; Layne *v.* Bone, 12 Lea, 667; Law *v.* Grant, 37 Wis. 548.

But the misrepresentation of a third party may induce so vital a mistake as to prevent the formation of a contract. De Perez *v.* Everett, 73 Tex. 431.

[16] Maggart *v.* Freeman, 27 Ind. 531; Watson *v.* Crandall, 7 Mo. App. 233; affd., 78 Mo. 583. See also Haskell *v.* Starbird, 152 Mass. 117; Waterbury *v.* Andrews, 67 Mich. 281.

[17] One who makes false statements to a "mercantile agency" as to his circumstances is equally liable to a subscriber to the agency to whom they are reported by it, and who relies upon them to his injury, as if they had been made originally directly to the party injured. Fechheimer *v.* Baum, 37 Fed. Rep. 167, 177; *Re* Epstein, 109 Fed. Rep. 874; *Re* Weil, 111 Fed. Rep. 897; Lindauer *v.* Hay, 61 Ia. 663; Salisbury *v.* Barton, 63 Kan. 552; Bank *v.* Mich. Barge Co., 52 Mich. 164; Hinchman *v.* Weeks, 85 Mich. 535; Silberman *v.* Munroe, 104 Mich. 352; Bank *v.* Ludlum, 46 Minn. 160; Eaton, Cole & Burnham Co. *v.* Avery, 83 N. Y. 31; Gainesville Bank *v.* Bamberger, 77 Tex. 48. Cp. Vermont Marble Co. *v.* Smith, 13 Ind. App. 457; Poska *v.* Stearns, 56 Neb. 541; Berkson *v.* Heldman, 58 Neb. 595; Macullar *v.* McKinley, 99 N. Y. 353.

If the statement made by the defendant to the mercantile agency is changed by the latter, the defendant is not liable. Wachsmuth *v.* Martini, 154 Ill. 515.

In Cortlandt Mfg. Co. *v.* Platt, 83 Mich. 419, it was held that a merchant who had made a true statement to a commercial agency was not bound to give notice of any change in his circumstances short of actual or imminent insolvency. But see Traill *v.* Baring, 4 De G. J. & S. 318, 329; Brownlie *v.* Campbell, 5 A. C. 925, 950; Cable *v.* United States Ins. Co., 111 Fed. Rep. 19, 28. In Sharpless *v.* Gummey, 166 Pa. 199, it was held that the plaintiff was not justified in relying on a statement made two and one-half years previously to a mercantile agency, and in Treadwell *v.* State, 99 Ga. 779, it was held that a statement made sixty days previously could not justifiably be relied on; but in Bradley *v.* Seaboard Bank, 167 N. Y. 427, where two years had elapsed the court said (p. 430) "the time which elapsed between the date of the statement and the date of the note does not seem to be im-

the following cases. The statement may be not expressly authorised by the principal, nor known to be untrue by him, but known to be untrue by the agent; or conversely, the statement may be not known to the agent to be untrue, and not expressly authorised by the principal, the true state of the facts being, however, known to the principal. There is no doubt that in the first case the principal is answerable, subject only to the limitation to be presently stated (*t*). In the second case there is every reason to believe that the same rule holds good, notwithstanding a much canvassed decision to the 572] contrary (*u*), which, if not overruled by the *remarks since made upon it (*x*),[18] has been cut down to a decision on a point of pleading which perhaps cannot, and certainly need not, ever arise again.

The only question is whether the representation was within the agent's authority. These distinctions have to be considered only when there is a question of fraud in the strict sense, and then chiefly when it is sought to make the principal liable in damages. Where a non-fraudulent misrepresentation suffices to avoid the contract, there it is clear that the only thing to be ascertained is whether the representation was in fact within the scope of the agent's authority. And it seems to be now the law that this is the only question even in a case of fraud. It has been so laid down by a considered judgment of the Exchequer Chamber (*y*), fully approved by later decisions of the Judicial Committee (*z*). According to this the rule is "that

(*t*) The rule applies to an agent who profits by the fraud of a sub-agent employed by him: Cockburn C.J. in *Weir* v. *Bell* (1878) 3 Ex. D. at p. 249.

(*u*) *Cornfoot* v. *Fowke* (1840) 6 M. & W. 358.

(*x*) 2 Sm. L. C. 81, 86: and see especially per Willes J. in *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 262.

(*y*) *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259, 36 L. J. Ex. 147.

(*z*) *Mackay* v. *Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394, 411, 43 L. J. P. C. 31; *Swire* v. *Francis* (1877) 3 App. Ca. 106, 47 L. J. P. C. 18.

portant. The firm cannot be heard to say that its mischievous force was operative longer than it expected it to be."

In general a statement made to one person with the expectation that it will be communicated to another is the same as if made directly to the latter. Iasigi *v.* Brown, 17 How. 183, 194; McKenzie *v.* Weineman, 116 Ala. 194; Henry *v.* Dennis, 95 Me. 24; Chubbuck *v.* Cleveland, 37 Minn. 466; Bradley *v.* Bradley, 165 N. Y. 183; Dickle *v.* Nashville Abstract Co., 89 Tenn. 431.

So if made to the community in general. Andrews *v.* Mockford, [1896] 1 Q. B. 372; Hindman *v.* Bank, 98 Fed. Rep. 562, 569; Windram *v.* French, 151 Mass. 547, 550; Ensel *v.* Levy, 46 Ohio St. 255, 264.

18 Fitzsimmons *v.* Joslin, 21 Vt. 129, 140. And see Crump *v.* United States Min. Co., 7 Gratt. 352.

the master is answerable for every such wrong," including fraud, "of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Although the master may not have authorised the particular act, yet if "he has put the agent in his place to do that class of acts," he must be answerable for the agent's conduct. It makes no difference whether the principal is a natural person or a corporation (*a*).[19] In two of the cases just referred to, a banking corporation was held to be liable for a false representation made by one of its officers in the course of the business usually conducted by him on behalf of the bank; and this involves the proposition that the party *misled is entitled to rescind the contract induced by [573 such representation.[20]

(*a*) L. R. 5 P. C. 413–5, dissenting from the dicta on this point in *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. & D. 145, which, though apparently intended to be decisive, have not been followed. *Swift* v. *Jewsbury* (1874) (Ex. Ch.) L. R. 9 Q. B. at p. 312, per Lord Coleridge C.J. Cp. I. C. A. § 238.

[19] Houldsworth *v.* Bank, 5 App. Ca. 317, 326, per Lord Selborne, L. C.; Chapleo *v.* Brunswick Benefit Bldg. Soc., 5 C. P. D. 331; Railroad Co. *v.* Franklin Bank, 60 Mr. 36; Fishkill Sav. Inst. *v.* Bank, 80 N. Y. 162, 166, 167; Cragie *v.* Hadley, 99 N. Y. 131.

[20] St. Louis, etc., Ry. Co. *v.* Johnston, 133 U. S. 566; Richardson *v.* Denegre, 93 Fed. Rep. 572 (C. C. A.); Richardson *v.* New Orleans Co., 102 Fed. Rep. 780 (C. C. A.); Richardson *v.* Olivier, 105 Fed. Rep. 277 (C. C. A.); Higgins *v.* Hayden, 53 Neb. 61; Cragie *v.* Hadley, 99 N. Y. 131; Bank *v.* Forty-second St. R. Co., 137 N. Y. 231, 241; Grant *v.* Walsh, 145 N. Y. 502; Williams *v.* Cox, 99 Tenn. 403.

The principal, whether a natural person or a corporation, cannot take the benefit of acts or negotiations of an agent without bearing the burden of any liabilities growing out of them on account of any falsehoods or frauds of the agents that accompanied them. Veazie *v.* Williams, 8 How. 134; Mason *v.* Crosby, 1 Woodb. & M. 342, 358; Doggett *v.* Emerson, 3 Story, 700, 735; Upton *v.* Englehart, 3 Dill. 496; Williamson *v.* Tyson, 105 Ala. 644; Riser *v.* Walton, 78 Cal. 490; Scofield, etc., Co. *v.* State, 54 Ga. 635; Tome *v.* Railroad Co., 39 Md. 36; Fogg *v.* Griffin, 2 Allen, 1; Jewett *v.* Carter, 132 Mass. 335; Rackemann *v.* Riverbank Co., 167 Mass. 1; Weeks *v.* Currier, 172 Mass. 53; Knappen *v.* Freeman, 47 Minn. 491; Bank *v.* Gregg, 14 N. H. 331; Presby *v.* Parker, 56 N. H. 409; Garrison *v.* Technic Electrical Works, 55 N. J. Eq. 708; Railroad Co. *v.* Schuyler, 34 N. Y. 30; Elwell *v.* Chamberlain, 31 N. Y. 611, 619; Mayer *v.* Dean, 115 N. Y. 556; Fairchild *v.* McMahon, 139 N. Y. 290; Carr *v.* National Bank, 167 N. Y. 375; Jones *v.* National Bldg. Assn., 94 Pa. 215; Insurance Co. *v.* Humble, 100 Pa. 495; McNeile *v.* Cridland, 168 Pa. 16; Meyerhoff *v.* Daniels, 173 Pa. 555; Crump *v.* U. S. Mining Co., 7 Gratt. 352; Law *v.* Grant, 37 Wis. 548; Waldo *v.* Railroad Co., 14 Wis. 575; Henderson *v.* Railroad Co., 17 Tex. 560.

That the principal is liable in an action of deceit, for the false representations made by an agent acting in the course of his business for his principal, see Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; City Bank *v.* Dun, 51 Fed. Rep. 160; Wilder *v.* Beede, 119 Cal. 646; West Florida Land Co. *v.* Studebaker, 37 Fla. 28; Rhoda *v.* Annis, 75 Me. 17; Locke *v.* Stearns, 1 Met. 560; White *v.* Sawyer, 16 Gray, 586, 589; Haskell *v.* Starbird, 152 Mass. 117; Davies *v.* Lyon, 36 Minn. 427; Hornblower *v.* Crandall, 7 Mo. App. 220, 231;

Directors and promoters. The directors and other officers of companies, acting within the functions of their offices, are for this purpose agents, and the companies are bound by their acts and conduct. Conversely, where directors employ an agent for the purposes of the company, and that agent commits a fraud in the course of his employment without the personal knowledge or sanction of the directors, the remedy of persons injured by the fraud is not against the directors, who are themselves only agents, but against the company as ultimate principal (*b*); and one director is not liable for fraud committed by another director without his authority or concurrence (*c*).[21] Reports made in the first instance to a company by its directors, if afterwards adopted by a meeting and "industriously circulated," must be treated as the representations of the company to the public, and as such will bind it (*d*). Statements in a prospectus issued by promoters before the company is in existence cannot indeed be said with accuracy to be made by agents for the company: for one cannot be an agent even by subsequent ratification for a principal not in existence and capable of ratifying at the time (*e*). But such statements also, if afterwards expressly or tacitly adopted, become the statements of the company. It is a principle of general application, by no means confined to these cases, that if A. makes an assertion **574]** to B., and B. repeats it to C. in an *unqualified manner, intending him to act upon it, and C. does act upon it, B. makes that assertion his own and is answerable for its consequences. If he would guard himself, it is easy for him to say: "This is what A. tells me, and on his authority I repeat it; for my own part I believe

(*b*) *Weir* v. *Barnett* (1877) 3 Ex. D. 32, affd. in C. A. *nom. Weir* v. *Bell* (1878) *ib.* 238, 47 L. J. Ex. 704. But a director who profited by the fraud after knowledge of it would probably be liable: see judgments of Cockburn C.J. and Brett L.J. And directors who delegated their office without authority, so that their delegate did not become the company's agent, would be liable: see the dissenting judgment of Cotton L.J. who took this view of the facts.

(*c*) *Cargill* v. *Bower* (1878) 10 Ch. D. 502, 47 L. J. Ch. 649.

(*d*) Per Lord Westbury, *New Brunswick, &c. Co.* v. *Conybeare* (1862) 9 H. L. C. 711, 725, 31 L. J. Ch. 297. See further, as to what must be shown to bind a company in respect of misrepresentations inducing a person to take shares: *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178, 65 L. J. Ch. 96.

(*e*) Cp. *109, *110, above.

affd., 78 Mo. 581; Jeffrey *v.* Bigelow, 13 Wend. 518; Bennett *v.* Judson, 21 N. Y. 238; Krumm *v.* Beach, 96 N. Y. 398; Ladd *v.* Lord, 36 Vt. 194. *Contra*, Kennedy *v.* McKay, 43 N. J. L. 288; Decker *v.* Fredericks, 47 N. J. L. 469; Keefe *v.* Sholl, 181 Pa. 90.

That the rule is the same, though the principal be a corporation, see *supra*, p. 129.

[21] Gennert *v.* Ives, 102 Mich. 547; Arthur *v.* Griswold, 55 N. Y. 400; Morgan *v.* Skiddy, 62 N. Y. 319.

it, but if you want any further assurance it is to him you must look" (*f*).

Agent always liable for his own personal fraud. It is to be borne in mind that in a case of actual fraud on the part of an agent the responsibility of the principal does not in any way exclude the responsibility of the agent. "All persons directly concerned in the commission of a fraud are to be treated as principals"; and in this sense it is true that an agent or servant cannot be authorized to commit a fraud. He cannot excuse himself on the ground that he acted only as agent or servant (*g*).[22]

D. **The representation must be in the same transaction.** The representation must be made as part of the same transaction.

It is believed that the statement of the rule in this form, though at first sight vague, is really more accurate than that which presents itself as an alternative, but is in fact included in this—namely, that the representation must be made to the other party or with a view to his acting upon it. The effect of the rule is that the untruth of a representation made to a third person, or even to the party himself on some former occasion, in the course of a different transaction and for a different purpose, cannot be relied on as a ground either for rescinding a contract or for maintaining an action of deceit.[23]

Western Bank of Scotland v. Addie. Thus in *Western Bank of Scotland* v. *Addie* (*h*) the directors of the bank had made a series of flourishing but untrue reports on the condition of its affairs, in which bad debts were counted as good assets. The shareholder who sought

(*f*) *Smith's case* (1867) L. R. 2 Ch. 604, 611, p. *550, above.

(*g*) Per Lord Westbury, *Cullen* v. *Thomson's Trustees and Kerr* (1862) 4 Macq. 424, 432; *Swift* v. *Winterbotham* (1873) L. R. 8 Q. B. 244, 254, 42 L. J. Q. B. 111.

(*h*) (1867) L. R. 1 Sc. & D. 145.

22 Mechem on Agency, § 563 *et seq.;* Crosby *v.* Meeks, 108 Ga. 126.

23 Ware *v.* Brown, 2 Bond, 267; Wagner *v.* Insurance Co., 90 Fed. Rep. 395; Brickley *v.* Edwards, 131 Ind. 3; Priest *v.* White, 89 Mo. 609; Arnold *v.* Hagerman, 45 N. J. Eq. 186.

Statements as to the assets of a corporation made to a State commissioner were held not addressed to the public, so as to sustain an action of deceit by an individual relying on them in Hunnewell *v.* Duxbury, 154 Mass. 286. But see Exchange Bank *v.* Gaitskill, 18 Ky. L. Rep. 532; Hamilton Co. *v.* Milliken, 62 Neb. 116.

Representations by a seller made after a contract of sale has been consummated are not actionable. Farmers' Assoc. *v.* Scott, 53 Kan. 534.

Representations made to induce a purchase were held operative as to a further purchase made eleven months later. Reeve *v.* Dennett, 145 Mass. 23. See also Grever *v.* Taylor, 53 Ohio St. 621. Cp. Sharpless *v.* Gummey, 166 Pa. 199.

575] relief in the action *had taken additional shares on the faith, as he said, of these reports. But it was not shown that they were issued or circulated for the purpose of inducing existing shareholders to take more shares, or that the local agent of the bank who effected this particular sale of shares used them or was authorized to use them for that purpose. Thus the case rested only on the purchaser having acted under an impression derived from these reports at some former time; and that was not such a direct connexion between the false representation and the conduct induced by it as must be shown in order to rescind a contract. This, however, was not the only ground of the decision; its main principle, as explained in a later case in the House of Lords, being that a person who remains a shareholder, either by having affirmed his contract with the company or by being too late to rescind it, cannot have a remedy in damages against the corporate body for representations on the faith of which his shares were taken (*i*).[24]

Peek v. Gurney. In *Peek* v. *Gurney* (*k*) the important point is decided that the sole office of a prospectus is to invite the public to take shares in the company in the first instance. Those who take shares in reliance on the prospectus are entitled to their remedy if the statements in it are false. But those statements cannot be taken as addressed to all persons who may hereafter become purchasers of shares in the market; and such persons cannot claim any relief on the ground of having been deceived by the prospectus unless they can show that it was specially communicated to them by some further act on the part of the company or the directors.[25] Some former decisions the other way (*l*) are expressly overruled. The proceeding

(*i*) *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Ca. 317, 43 L. J. Ch. 19.

(*k*) (1873) L. R. 6 H. L. 377, 395: and see the case put by Lord Cairns as an illustration at p. 411.

(*l*) *Bedford* v. *Bagshaw* (1859) 4 H. & N. 538, 29 L. J. Ex. 59: *Bagshaw* v. *Seymour* (1856) 18 C. B. 903, 29 L. J. Ex. 62, *n*. The authority of *Gerhard* v. *Bates* (1853) 2 E. & B. 476, 22 L. J. Q. B. 365, is saved by a rather fine distinction: L. R. 6 H. L. 399.

[24] Wilson *v.* Hundley, 96 Va. 96.

[25] See the decisions on somewhat similar questions in First Bank *v.* Sowles, 46 Fed. Rep. 731; Merchants' Bank *v.* Armstrong, 65 Fed. Rep. 932; Hindman *v.* First Bank, 112 Fed. Rep. 931 (C. C. A.); Englehart *v.* Clanton, 83 Ala. 336; Talpey *v.* Wright, 61 Ark. 275; Buckley *v.* Gray, 110 Cal. 339; Lieberman *v.* First Bank, 2 Pennewill, 416; Hunnewell *v.* Duxbury, 154 Mass. 286; Gate City Co. *v.* Post, 55 Neb. 742; Morgan *v.* Skiddy, 62 N. Y. 319; Brackett *v.* Griswold, 112 N. Y. 454; Houston *v.* Thornton, 122 N. C. 365; Manhattan Brass Co. *v.* Keger, 168 Pa. 644; Moore *v.* Haviland, 61 Vt. 58.

In Wells *v.* Cook, 16 Ohio St. 67, B., the owner of a small flock of sheep apparently sound and healthy, but known by him to be diseased with a con-

there in hand was in *the nature of an action of deceit, but [576 the doctrine must equally apply to the rescission of a contract. It is otherwise, however, if the prospectus is in fact used afterwards, at any rate in conjunction with other fraudulent statements, to induce people to buy shares in the market (*m*).

Way v. Hearn. In *Way* v. *Hearn* (*n*) the action was on a promise by the defendant to indemnify the plaintiff against half of the loss he might sustain by having accepted a bill drawn by one R. Shortly before this, in the course of an investigation of R.'s affairs in which the defendant took part, R. had at the plaintiff's request concealed from the accountant employed in the matter the fact that he owed a large sum to the plaintiff; the plaintiff said his reason for this was that he did not wish his wife to know he had lent so much money upon bad security. At this time the bill which was the subject of the indemnity was not thought of; it was in fact given to get rid of an execution afterwards put in by another creditor. Here a misrepresentation as to R.'s solvency was made by R. in concert with the plaintiff, and communicated to the defendant; but it was in a transaction unconnected with the subsequent contract between the plaintiff and the defendant, and the defendant was therefore not entitled to dispute that contract on the ground of fraud.

2. **As to rights of party misled: general statement.** As to the right of the party misled. This right is one which requires, and in several modern cases of importance has received, an exact limitation and definition. It may be thus described:

The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the *contract, and insist, if that is possible, [577

(*m*) *Andrews* v. *Mockford* [1896] 1 Q. B. 372, 65 L. J. Q. B. 302, C. A.

(*n*) (1862) 13 C. B. N. S. 292, 32 L. J. C. P. 34.

tagious malady, falsely and fraudulently represented them as sound and healthy to A., acting as the known agent of C., and A., confiding in such representations, bought them for C., and with the avowed purpose of mingling them with a larger flock then belonging to C., in consequence of which mingling the united flock was infested; and A. and C. being still unaware of the existence of the disease, A. bought the united flock from C., and suffered damage from the continued spread of the disease. Held, that the representations not having been made to A. to induce him to act upon them in any manner affecting his own interests, he could not maintain an action against B. for the deceit.

on being put in the same position as if the representation had been true:

Or he may at his option rescind the contract, and claim to be restored, so far as may be, to his former position within a reasonable time (*o*) after discovering the misrepresentation, unless it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or unless any third person has in good faith and for value acquired any interest under the contract.

It will be necessary to dwell separately on the several points involved in this. And it is to be observed that the principles here considered are not confined to any particular ground of rescission, but apply generally when a contract is voidable, either for fraud or on any other ground, at the option of one of the parties; on a sale of land, for example, it is constantly made a condition that the vendor may rescind if the purchaser takes any objection to the title which the vendor is unable to remove; and then these rules apply so far as the nature of the case admits.

A. **Of affirmation and rescission in general.** As to the nature of the right in general, and what is an affirmation or rescission of the contract.

"A contract induced by fraud is not void, but voidable only at the option of the party defrauded;" in other words, valid until rescinded (*p*).[26]

(*o*) But *qu.* whether time is in itself material: see L. R. 7 Ex. 35, 8 Ex. 205.

(*p*) *Oakes* v. *Turquand* (1867) L. R. 2 H. L. 346, 375, 376.

[26] Upton *v.* Englehart, 3 Dill. 496, 504; Foreman *v.* Bigelow, 4 Cliff. 508; Wheeler *v.* McNeil, 101 Fed. Rep. 685, 688; Davis *v.* Betz, 66 Ala. 206; Nealon *v.* Henry, 131 Mass. 153; Hanrahan *v.* National Assoc., 66 N. J. L. 80; Baird *v.* Mayor, 96 N. Y. 567, 598; Dixon *v.* Wilmington Trust Co., 115 N. C. 274; Railroad Co. *v.* Steinfeld, 42 Ohio St. 449; Whitcomb *v.* Denio, 52 Vt. 382.

"A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such an action, he must first restore or offer to restore to the other party whatever may have been received by him by virtue of the contract. He may also bring an action in equity to rescind the contract, and in that action have full relief. Such an action is not founded upon a rescission but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly he may retain what he has received and bring an action at law to recover the damages sustained. This action proceeds upon an affirmance of the contract." Vail *v.* Reynolds, 118 N. Y. 297. See also Thomas *v.* Beals, 154 Mass. 51; Mlnazek *v.* Libera, 83 Minn. 288; Wilson *v.* Hundley, 96 Va. 96; Ludington *v.* Patton, 111 Wis. 208, 246.

Where the nature of the case admits of it, the party misled may affirm the contract and insist on having the representation made good. If the owner of an estate sells it as unincumbered, concealing from the purchaser the existence of incumbrances, the purchaser may if he thinks fit call on him to perform his contract and redeem the *incumbrances (*q*). If promoters of a partnership under- [578 taking induce persons to take part in it by untruly representing that a certain amount of capital has been already subscribed for, they will themselves be put on the list of contributories for that amount (*r*).

Election to avoid or affirm. It is to be remembered that the right of election, and the possibility of having the contract performed with compensation, does not exclude the option of having the contract wholly set aside. "It is for the party defrauded to elect whether he will be bound" (*s*). But if he does affirm the contract, he must affirm it in all its terms. Thus a vendor who has been induced by fraud to sell goods on credit cannot sue on the contract for the price of the goods before the expiration of the credit: the proper course is to rescind the contract and sue in trover (*t*).[27]

What shall determine election. When the contract is once affirmed, the election is completely determined; and for this purpose it is not necessary that the affirmation should be express. Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party,

(*q*) Per Romilly M.R. in *Putsford* v. *Richards* (1853) 17 Beav. 96, 22 L. J. Ch. 559. Cp. *Ungley* v. *Ungley* (1877) 5 Ch. Div. 887, 46 L. J. Ch. 854.

(*r*) *Moore and De la Torre's case* (1874) L. R. 18 Eq. 661, 43 L. J. Ch. 751.

(*s*) *Rawlins* v. *Wickham* (1853) 3 De G. & J. 304, 322, 28 L. J. Ch. 188.

(*t*) *Ferguson* v. *Carrington* (1829) 9 B. & C. 59. This is unimportant in English practice now that the old forms of action are abolished, but it is retained as a good illustration of the principle.

27 Kellogg *v.* Turpie, 93 Ill. 265; Delone *v.* Hull, 47 Md. 112; Allen *v.* Ford, 19 Pick. 217; Jones *v.* Brown, 167 Pa. 395. And see Whitlock *v.* Heard, 3 Rich. L. 88. *Contra*, Blalock *v.* Phillips, 38 Ga. 216; Wigand *v.* Sichel, 3 Keyes, 120; Crossman *v.* Universal Rubber Co., 127 N. Y. 34; Heilbronn *v.* Herzog, 165 N. Y. 98; Jaffray *v.* Wolf, 4 Okl. 303.

Though it seems impossible to support the maintenance of an action on the contract for the price before the period of credit has expired, there seems good ground for allowing the plaintiff at once to rescind the contract and instead of sueing in trover to waive the tort and sue in assumpsit, not for the price of the goods, but for their value. Barrett *v.* Koella, 5 Biss. 40; Dietz's Assignee *v.* Putcliff, 80 Ky. 650; Crown Cycle Co. *v.* Brown, 39 Oreg. 285. See further, 44 Cent. L. J. 380.

If the buyer has committed an act of bankruptcy the seller may petition him into bankruptcy, though the period of credit has not expired. *Re* Raatz, [1897] 2 Q. B. 80.

will have the same effect (*u*).[28] Taking steps to enforce the contract is a conclusive election not to rescind on account of anything known at the time (*x*).[29] A shareholder cannot repudiate his share on the ground of misrepresentations in the prospectus if he has paid a call without protest or received a dividend after he has had in his hands a report showing to a reader of ordinary intelligence that the state-

(*u*) *Clough* v. *L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. at p. 34.

(*x*) *Gray* v. *Fowler* (1873) (Ex. Ch.) L. R. 8 Ex. 249, 280, 42 L. J. Ex. 161.

28 See next note. And when the contract is once disaffirmed the election is completely determined. Farwell *v.* Myers, 59 Mich. 179; Moller *v.* Tuska, 87 N. Y. 166.

So when the contract is once affirmed. Follett *v.* Brown, 188 Ill. 244; Weaver *v.* Shriver, 79 Md. 530; Wylie *v.* Gamble, 95 Mich. 564; Paine *v.* Harrison, 38 Minn. 346; Crooks *v.* Nippolt, 44 Minn. 239; Hutton *v.* Dewing, 42 W. Va. 691.

In Kingman *v.* Stoddard, 85 Fed. Rep. 740; Simon *v.* Goodyear Co., 105 Fed. Rep. 573, 579, it was held that if a party to an executory contract which he was induced to enter into by fraud continues to carry it out and to exact performance from the other party after notice of the fraud, he cannot maintain an action for the deceit.

29 "Where a vendee purchases goods by means of such fraudulent representations as entitle the vendor to disaffirm the sale and reclaim the goods as his own property, and the vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase to recover the price, that is, as matter of law, an affirmance of the sale, and the vendor cannot thereafter set up title and claim the goods on the ground of the original fraud." Dibblee *v.* Sheldon, 10 Blatchf. 178; Bulkley *v.* Morgan, 46 Conn. 393; O'Donald *v.* Constant, 82 Ind. 212; Lowenstein *v.* Glass, 48 La. Ann. 1422; Stokes *v.* Burns, 132 Mo. 214; Stoutenburgh *v.* Konkle, 2 McCarter, 33; Lloyd *v.* Brewster, 4 Paige, 537; Conrow *v.* Little, 115 N. Y. 387; Bach *v.* Tuch, 126 N. Y. 53; Genet *v.* Delaware Canal Co., 170 N. Y. 278, 296. And see Davis *v.* Betz, 66 Ala. 206; Seavey *v.* Potter, 121 Mass. 297; Heller *v.* Elliott, 45 N. J. L. 564; Acer *v.* Hotchkiss, 97 N. Y. 395. *Contra*, Flower *v.* Brumbach, 131 Ill. 646. And see Farwell Co. *v.* Hilton, 84 Fed. Rep. 293; White *v.* Beal, 65 Ark. 278; Bolton Co. *v.* Stoker, 82 Md. 50.

So proving a claim for the price against the assignee of an insolvent vendee. Droege *v.* Ahrens, 163 N. Y. 466.

So also accepting security for the price, with knowledge of the fraud. Bridgeford *v.* Adams, 45 Ark. 136; Joslin *v.* Cowee, 52 N. Y. 90.

In Browning *v.* De Ford, 178 U. S. 196, however, defrauded vendees, who had sued for the price on the contract and attached the property sold, were held entitled to prevail over mortgagees of the property, though the mortgage was prior to the attachment, because the mortgagees had notice of the fraud. See also Nicholls *v.* McShane, 16 Col. App. 165.

And bringing an action for the purchase price in ignorance of the fraud will not preclude a subsequent rescission upon discovery of the fraud. Deere *v.* Morgan, 114 Ia. 287; Kraus *v.* Thompson, 30 Minn. 64; Goodger *v.* Finn, 10 Mo. App. 226; Paquin *v.* Milliken, 163 Mo. 79; Equitable Co. *v.* Hersee, 103 N. Y. 25; Hays *v.* Midas, 104 N. Y. 602; Lee *v.* Burnham, 84 Wis. 209. Cp. *Re* Epstein, 109 Fed. Rep. 874. Finally, "A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion." Powers *v.* Benedict, 88 N. Y. 605. And see *Re* Hirschman, 104 Fed. Rep. 69; Browning *v.* Bancroft, 8 Met. 278; Sleeper *v.* Davis, 64 N. H. 59; Singer *v.* Schilling, 74 Wis. 369. Cp. Farwell *v.* Myers, 59 Mich. 178.

ments of the prospectus *were not true (*y*), or if after discover- [579
ing the true state of things he has taken an active part in the affairs of the company (*z*),[30] or has affirmed his ownership of the shares by taking steps to sell them (*a*); and in general a party who voluntarily acts upon a contract which is voidable at his option, having knowledge of all the facts, cannot afterwards repudiate it if it turns out to his disadvantage (*b*).[31] And when the right of repudiation has once been waived by acting upon the contract as subsisting with knowledge of facts establishing a case of fraud, the subsequent discovery of further acts constituting "a new incident in the fraud" cannot revive it (*c*).[32] The exercise of acts of ownership over property acquired under the contract precludes a subsequent repudiation, but not so much because it is evidence of an affirmative election as because it makes it impossible to replace the parties in their former position; a point to which we shall come presently.

When the acts done are of this kind it seems on principle immaterial whether there is knowledge of the true state of affairs or not, unless there were a continuing active concealment or misrepresentation practised with a view to prevent the party defrauded from discovering the truth and to induce him to act upon the contract; for

(*y*) *Scholey* v. *Central Ry. Co. of Venezuela* (1867-8) L. R. 9 Eq. 266, *n.*

(*z*) *Sharpley* v. *Louth and East Coast Ry. Co.* (1876) 2 Ch. Div. 663, 46 L. J. Ch. 259.

(*a*) *Ex parte Briggs* (1866) L. R. 1 Eq. 483. 35 L. J. Ch. 320; this however was a case not of mis-stated facts, but of material departure from the objects of the company as stated in the prospectus.

(*b*) *Ormes* v. *Beadel* (1860) 2 D. F. & J. 332, 336, 30 L. J. Ch. 1.

(*c*) *Campbell* v. *Fleming* (1834) 1 A. & E. 40. This does not apply where a new and distinct cause of rescission arises: *Gray* v. *Fowler* (1873) L. R. 8 Ex. 249, 42 L. J. Ex. 161.

[30] Ogilvie *v.* Insurance Co., 22 How. 380; Upton *v.* Jackson, 1 Flipp, 413; Marten *v.* Burns Wine Co., 99 Cal. 355. See further, 26 Am. L. Reg. 16.

[31] Simon *v.* Goodyear Co., 105 Fed. Rep. 573; Griggs *v.* Woodruff, 14 Ala. 9; Thweatt *v.* McLeod, 56 Ala. 375; Davis *v.* Betz, 66 Ala. 206; Pintard *v.* Martin, 1 S. & M. Ch. 126; Rogers *v.* Higgins, 57 Ill. 244; Plympton *v.* Dunn, 148 Mass. 523; Dunks *v.* Fuller, 32 Mich. 242; Thompson *v.* Libby, 36 Minn. 287; Edwards *v.* Roberts, 7 S. & M. 544; Dennis *v.* Jones, 44 N. J. Eq. 513; Railroad Co. *v.* Row, 24 Wend. 74; Cobb *v.* Hatfield, 46 N. Y. 533; People *v.* Stephens, 71 N. Y. 527; Baird *v.* Mayor, 96 N. Y. 567, 598; Bostick *v.* Haynie, 36 S. W. Rep. 856 (Tenn. Ch.); Weisiger *v.* Richmond Machine Co., 90 Va. 795; Grannis *v.* Hooker, 31 Wis. 474. See also Dickson *v.* Patterson, 160 U. S. 584.

[32] "Although the party who seeks to rescind a contract on the ground of concealment of material facts may have confirmed the contract after acquiring knowledge of some of the facts concealed, yet if sufficient facts were unknown to him at the time of confirmation to authorize a rescission such affirmation cannot effectually prevent it." Pratt *v.* Philbrook, 41 Me. 132. See also Pierce *v.* Wilson, 34 Ala. 596, 605; Taylor *v.* Short, 107 Mo. 384; Wilson *v.* Hundley, 96 Va. 96. Cp. Alger *v.* Keith, 105 Fed. Rep. 105.

then the affirmation itself would be as open to repudiation as the original transaction. Something like this occurs not unfrequently in cases of undue influence, as we shall see in the next chapter.

Omission to repudiate within a reasonable time is evidence, and
580] may be conclusive evidence, of an election to *affirm the contract; and this is in truth the only effect of lapse of time.[33] Still it will be more convenient to consider this point separately afterwards.

Election to rescind must be communicated to other party. If on the other hand the party elects to rescind, he is to manifest that election by distinctly communicating to the other party his intention to reject the contract and claim no interest under it. One way of doing this is to institute proceedings to have the contract judicially set aside, and in that case the judicial rescission, when obtained, relates back to the date of the commencement of such proceedings (*d*).[34] Or if the other party is the first to sue on the contract, the rescission may be set up as a defence, and this is itself a sufficient act of rescission without any prior declaration of an intention to rescind (*e*). For the purposes of pleading the allegation that a contract was procured by fraud has been held to import the allegation that the party on discovering it disaffirmed the contract (*f*). Where the rescission is not declared in judicial proceedings, no further rule can be laid down than that there should be "prompt repudiation and restitution as far as possible" (*g*).

What communication sufficient. The communication need not be formal, provided it is a distinct and positive rejection of the contract, not a mere request or inquiry, which is not enough (*h*).[35] But it seems that if notwithstanding an express repudiation the other party persists in treating the contract as in force, then judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene. Espe-

(*d*) *Reese River Silver Mining Co.* v. *Smith* (1869) L. R. 4 H. L. 73–5, 39 L. J. Ch. 849. As to shares in companies, see below.

(*e*) *Clough* v. *L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. 36, 41 L. J. Ex. 17.

(*f*) *Dawes* v. *Harness* (1875) L. R. 10 C. P. 166, 44 L. J. C. P. 194. The earlier cases there cited, especially *Deposit Life Assurance Co.* v. *Ayscough* (1856) 6 E. & B. 761, 26 L. J. Q. B. 29, are not wholly consistent.

(*g*) Per Bramwell B. *Bulch-y-Plwm Lead Mining Co.* v. *Baynes* (1867) L. R. 2 Ex. 326, 36 L. J. Ex. 183.

(*h*) See *Ashley's case* (1870) L. R. 9 Eq. 263, 39 L. J. Ch. 354.

[33] Quoted with approval in Bostwick *v.* Mutual Ins. Co., 116 Wis. 392, 422.
[34] Thomas *v.* Coultas, 76 Ill. 493; Gould *v.* Bank, 86 N. Y. 75, 83.
[35] Hammond *v.* Pennock, 61 N. Y. 145, 155; Potter *v.* Taggart, 54 Wis. 395.

cially this is the case as to repudiating shares in a company. The creditors of a *company are entitled to rely on the register [581 of shareholders for the time being, and therefore it is not enough for a shareholder to give notice to the company that he claims to repudiate. A stricter rule is applied than would follow from the ordinary rules of contract (*i*). "The rule is that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up (*k*); but this rule is subject to the qualification that if one repudiating shareholder takes proceedings the others will have the benefit of them if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings, but not otherwise" (*l*). Where the original contract was made with an agent for the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed (*m*). And where good grounds for rescission exist, and the contract is rescinded by mutual consent on other grounds, those grounds not being such as to give a right of rescission, and the agent's consent being in excess of his authority, yet the rescission stands good. There is nothing more that the party can do, and when he discovers the facts on which he might have sought rescission as a matter of right he is entitled to use them in support of what is already done.[36] In *Wright's case* (*n*) the prospectus of a company contained material misrepresentations. The *directors had at a shareholder's request, and [582 on other grounds, professed to cancel the allotment of his shares, which they had no power to do, though they had power to accept a surrender. Afterwards the company was wound up, and then only was the misrepresentation made known to him. But it was held that as there was in fact a sufficient reason for annulling the contract, which the directors knew at the time though he did not, the contract

(*i*) *Kent* v. *Freehold Land, &c. Co.* (1868) L. R. 3 Ch. 493; *Hare's case* (1869) L. R. 4 Ch. 503; *Re Scottish Petroleum Co.* (1883) 23 Ch. Div. 413. But if there are several repudiating shareholders in a like position, proceedings taken by one of them and treated by agreement with the company as representative will enure for the benefit of all: *Pawle's case* (1867) L. R. 4 Ch. 497, 38 L. J. Ch. 318; *McNiell's case* (1870) L. R. 10 Eq. 503, 39 L. J. Ch. 822, apparently rests only on this ground: see review of cases per Baggallay L.J. 23 Ch. D. at p. 433.

(*k*) *I.e.* before the presentation of a winding-up petition on which an order is made: *Whiteley's case* [1899] 1 Ch. 770, 68 L. J. Ch. 365.

(*l*) Lindley L.J. 23 Ch. D. at p. 437.

(*m*) *Maynard* v. *Eaton* (1874) L. R. 9 Ch. 414, 43 L. J. Ch. 641.

(*n*) (1871) L. R. 7 Ch. 55, 41 L. J. Ch. 1; cp. *Clough* v. *L. & N. W. Ry. Co.*, *supra*, p. *570.

[36] See King *v.* Faist, 161 Mass. 449, 458.

was effectually annulled, and he could not be made a contributory even as a past member (*o*).

Right of rescission exerciseable by and against representatives. Inasmuch as the right of rescinding a voidable contract is alternative and co-extensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties (*p*). And further, as a contract for the sale of land is enforceable in equity by or against the heirs or devisees of the parties, so it may be avoided by or against them where grounds of avoidance exist (*q*).

A party exercising his option to rescind is entitled to be restored so far as possible to his former position. This includes a right to be indemnified against obligations incurred under the contract, but it is doubtful whether it extends to liabilities which are natural consequences of the contract but are not created by the contract itself; for it may be said that an indemnity which extended so far would not be distinguishable from the damages recoverable in an action for deceit; and the remedy of rescission is applicable in many cases where **583]** deceit is not in question. *It has not yet been necessary to resolve this somewhat speculative doubt (*r*).

B. **No rescission unless parties can be restored to former position.** The contract cannot be rescinded after the position of the parties has been changed so that the former state of things cannot be restored.

Where the party in fault has acted on the faith of the contract. This may happen in various ways. The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescis-

(*o*) But Wickens V.-C. thought otherwise in the Court below (L. R. 12 Eq. 331) and the correctness of the reversal is doubted by Lord Lindley (on Companies, 777).

(*p*) Including assignees in bankruptcy: *Load* v. *Green* (1846) 15 M. & W. 216, 15 L. J. Ex. 113; *Donaldson* v. *Farwell* (1876) 93 U. S. 631. [Koch *v.* Lyon, 82 Mich. 513.]

(*q*) *Gresley* v. *Mousley* (1861) 4 De G. & J. 78; and see cases cited in next chapter, *ad fin.*, and *Charter* v. *Trevelyan* (1844) 11 Cl. & F. 714, where the parties on both sides were ultimately representatives and as to the defendants through more than one succession.

(*r*) In *Newbigging* v. *Adam* (1886) 34 Ch. Div. 582, 56 L. J. Ch. 275, Bowen L.J. proposed to limit the indemnity to liabilities created by the contract; Cotton and Fry L.JJ. inclined to a larger view; but the relief actually sought came within either definition. The case went in 1888 to the House of Lords, where it turned out that in the circumstances a decision upon this branch of the case was not required, and no opinion was given on it: 13 App. Ca. 308, 57 L. J. Ch. 1066.

sion would work irreparable injury to him.[37] And here the rule applies, but with the important limitation, it seems, that he must have so acted to the knowledge of the party misled and without protest from him, so that his conduct may be said to be induced by the other's delay in repudiating the contract.[38] Thus where a policy of marine insurance is voidable for the non-disclosure of a material fact, but the delay of the underwriters in repudiating the insurance after they know the fact induces the assured to believe that they do not intend to dispute it, and he consequently abstains from effecting any other insurance, it would probably be held that it is then too late for the underwriters to rescind (*s*).

Common dealings with subject-matter of contract. Or the interest taken under the contract by the party misled may have been so dealt with that he cannot give back the same thing he received. On this principle a shareholder cannot repudiate his shares if the character and constitution of the company have in the meantime been altered. This was the case in *Clarke* v. *Dickson* (*t*), where the plaintiff *had [584

(*s*) Per Cur. *Morrison* v. *Universal Marine Insurance Co.* (1873) (Ex. Ch.) L. R. 8 Ex. at p. 205; cp. *Clough* v. *L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. at p. 35.

(*t*) (1859) E. B. & E. 148, 27 L. J. Q. B. 223.

[37] Quoted and applied in Bostwick *v.* Mutual Ins. Co., 116 Wis. 392, 422.

[38] "Where a party seeking to rescind a contract, on the ground of fraud, acts without unnecessary delay, and restores or offers to restore that which he has received, it is no defense that the wrong-doer has, by his own act, made a full restoration impossible on his part, or has entered into obligations to others. He cannot prevent a restoration as far as is within his power, by showing that he has himself done acts which prevent his being restored to his original position." Hammond *v.* Pennock, 61 N. Y. 145; Hopkins *v.* Snedaker, 71 Ill. 449; Harper *v.* Terry, 70 Ind. 264; Brown *v.* Norman, 65 Miss. 369; Butler *v.* Prentiss, 158 N. Y. 49, 63; Gates *v.* Raymond, 106 Wis. 657.

On a sale, induced by fraud, of whisky then in a United States bonded warehouse, the fraudulent vendee, in order to obtain possession, paid the tax due on the whisky. It was held that the vendor rescinding could reclaim the whisky, and need not reimburse the vendee for the sum paid for taxes; Guckenheimer *v.* Angevine, 81 N. Y. 394. Similarly in the case of other charges. Soper Lumber Co. *v.* Halsted Co., 73 Conn. 547; Snow *v.* Alley, 144 Mass. 547, 552; Weeks *v.* Currier, 172 Mass. 53.

"When without fault on the part of the one defrauded, seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied, because it would become a loophole for the escape of the fraud. Equity makes a reasonable application of the rule by requiring whatever fair dealing requires under all the circumstances of the particular case, but it does not permit the rule to become a shield for wrongdoing." Butler *v.* Prentiss, 158 N. Y. 49, 64. See also Thackrah *v.* Haas, 119 U. S. 499; McCarty *v.* New York Ins. Co., 74 Minn. 530; Mills *v.* Central R. Co., 41 N. J. Eq. 1; Henninger *v.* Heald, 51 N. J. Eq. 74; Conlan *v.* Roemer, 52 N. J. L. 53.

taken shares in a cost-book mining company. The company was afterwards registered under the Joint Stock Companies Act then in force, apparently for the sole purpose of being wound up. In the course of the winding-up the plaintiff discovered that fraudulent misrepresentations had been made by the directors. But it was by this time impossible for him to return what he had got; for instead of shares in a going concern on the cost-book principle he had shares in a limited liability company which was being wound up (*u*). It was held that it was too late to repudiate the shares, and his only remedy was by an action of deceit against the directors personally responsible for the false statements (*x*). As Crompton J. put it, "You cannot both eat your cake and return your cake" (*y*). A similar case on this point is *Western Bank of Scotland* v. *Addie* (*z*). There the company was an unincorporated joint stock banking company when the respondent took his shares in it. As in *Clarke* v. *Dickson,* it was afterwards incorporated and registered for the purpose of a voluntary winding-up. It was held as a probable opinion by Lord Chelmsford, and more positively by Lord Cranworth, that the change in the condition of the company and of its shares was such as to make restitution impossible, and therefore the contract could not be rescinded (*a*). There is some reason to think that where goods or securities have been delivered under a contract voidable by the **585]** *buyer on the ground of fraud, and before the repudiation their value has materially fallen through some cause unconnected with the fraud, this is such a change in the condition of the thing contracted for as to make restitution impossible in law (*b*).[39]

Conduct of party misled. The case is simpler where the party misled has himself chosen to deal with the subject-matter of the contract, by

(*u*) The fact of the winding-up having begun before the repudiation of the shares is of itself decisive according to the later cases under the present Companies Act; but here the point was hardly made.

(*x*) Which course was accordingly taken with success: *Clarke* v. *Dickson* (1859) 6 C. B. N. S. 453, 28 L. J. C. P. 225. These principles do not apply where a shareholder, having had his shares forfeited for non-payment of calls, and thereby ceased to be a member of the company, is sued for the calls in arrear and defends on the ground of fraud. After he is remitted to the position of a mere debtor of the company he is not bound to take any active steps: *Aaron's Reefs* v. *Twiss* [1896] A. C. 273, 65 L. J. P. C. 54.

(*y*) (1867) E. B. & E. at p. 152.

(*z*) L. R. 1 Sc. & D. 145.

(*a*) It would seem, but it does not clearly appear, that in this case also the misrepresentations were not discovered till after the commencement of the winding-up.

(*b*) *Waddell* v. *Blockey* (1879) 4 Q. B. Div. 678, 683, 48 L. J. Q. B. 517, per Thesiger L.J.

39 But see *contra*, Adam *v.* Newbigging, 13 A. C. 308; Neblett *v.* Macfarland, 92 U. S. 101; Whitcomb *v.* Denio, 52 Vt. 382.

exercising acts of ownership or the like, in such a manner as to make restitution impossible; and it is still plainer if he goes on doing this with knowledge of all the facts; if the lessee of mines, for example, goes on working out the mines after he has full information of the circumstances on which he relies as entitling him to set aside the lease (*c*).[40] So a settlement of partnership accounts or a release contained in a deed of dissolution (*d*) cannot be disputed by one of the parties if in the meantime the concern has been completely wound up and he has taken possession of and sold the partnership assets made over to him under the arrangement (*e*); and an arrangement between a company and one of its directors which has been acted upon by the company so as to change the director's position cannot afterwards be repudiated by the company (*f*). So a purchaser cannot after taking possession maintain an action to recover back his deposit (*g*).

The right to recover back money paid under an agreement on the ground of mistake, failure of consideration, or default of the other party is also subject to the same rule.[41] Thus a lessee who has entered into possession cannot recover back the premium paid by him on the ground of the lessor's default in executing the lease and doing repairs *to be done by him under the agreement (*h*): nor can a [586 party recover back an excessive payment after his own dealings have made it impossible to ascertain what was really due (*i*).

C. **No rescission against innocent purchasers for value.** The contract cannot be rescinded after third persons have acquired rights under it for value.

(*c*) *Vigers* v. *Pike* (1840–2) 8 Cl. & F. 562, 650.

(*d*) *Urquhart* v. *Macpherson* (1878) 3 App. Ca. 831.

(*e*) *Skilbeck* v. *Hilton* (1866) L. R. 2 Eq. 587.

(*f*) *Sheffield Nickel Co.* v. *Unwin* (1877) 2 Q. B. D. 214, 46 L. J. Q. B. 299.

(*g*) *Blackburn* v. *Smith* (1848) 2 Ex. 783, 18 L. J. Ex. 187; but it was also held that apart from this the objection came too late under the conditions of sale in the particular case.

(*h*) *Hunt* v. *Silk* (1804) 5 East 449, 7 R. R. 739.

(*i*) *Freeman* v. *Jeffries* (1869) L. R. 4 Ex. 189, 197, 38 L. J. Ex. 116.

[40] Hough *v.* Richardson, 3 Story, 659, 699; Bement *v.* La Dow, 66 Fed. Rep. 185; Lockwood *v.* Fitts, 90 Ala. 150; Rigdon *v.* Walcott, 141 Ill. 649; Shaeffer *v.* Sleade, 7 Blackf. 178; Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476; McCulloch *v.* Scott, 13 B. Mon. 172; Handforth *v.* Jackson, 150 Mass. 149; Marshall *v.* Gilman, 47 Minn. 131; Schiffer *v.* Dietz, 83 N. Y. 300; Precious Blood Soc. *v.* Elsythe, 102 Tenn. 40; McCrillis *v.* Carlton, 37 Vt. 139.

An unsuccessful attempt by a defrauded purchaser to sell the property to a third person was held not to destroy the right to rescind in Hoyle *v.* Southern Works, 105 Ga. 123.

[41] Chance *v.* Board of Commissioners, 5 Blackf. 441; Reed *v.* McGrew, 5 Ohio, 375; Fay *v.* Oliver, 20 Vt. 118.

The present rule is altogether, as the last one is to some extent, a corollary from the main principle that a contract induced by fraud or misrepresentation is as such not void but only voidable. The result is that when third persons have acquired rights under the transaction in good faith and for value, those rights are indefeasible. The rule is also stated to be an application of the principle of convenience "that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud" (*k*).

Fraudulent sales. Thus when a sale of goods is procured by fraud, the property in the goods is transferred by the contract (*l*),[42] subject as between the seller and the buyer to be revested by the seller exercising his option to rescind when he discovers the fraud. A purchaser in good faith from the fraudulent buyer acquires an indefeasible title (*m*)[43] now confirmed by the Sale of Goods Act, 1893, which

(*k*) *Babcock* v. *Lawson* (1880) 4 Q. B. D. at p. 400.

(*l*) *Load* v. *Green* (1846) 15 M. & W. 216, 15 L. J. Ex. 113; where it was held that a fraudulent buyer becoming bankrupt had not the goods in his order and disposition with the consent of the true owner; for the vendors became the true owners only when they elected to rescind and demanded the goods from the assignees.

(*m*) *White* v. *Garden* (1851) 10 C. B. 919, 20 L. J. C. P. 167; *Stevenson* v. *Newnham* (1853) (Ex. Ch.) 13 C. B. 285, 303, 22 L. J. C. P. 110, 115; cp. 12 App. Ca. at p. 483.

[42] Rowley *v.* Bigelow, 12 Pick. 307; Whitman *v.* Merrill, 125 Mass. 127; Barnard *v.* Campbell, 58 N. Y. 73, 75; Powers *v.* Benedict, 88 N. Y. 605, 609; Zoeller *v.* Riley, 100 N. Y. 102; Wise *v.* Grant, 140 N. Y. 593; Kellogg *v.* State, 26 Ohio St. 15, 18; Schwartz *v.* McCloskey, 156 Pa. 258; Fleming *v.* Hanley, 21 R. I. 141; Arendale *v.* Morgan, 5 Sneed, 703, 714; Williams *v.* Given, 6 Gratt. 268; Steamship Co. *v.* Burckhardt, 31 Gratt. 664. And see cases in the following note.

[43] Robinson *v.* Leir, 81 Ala. 134; Williamson *v.* Russell, 39 Conn. 406; Mears *v.* Waples, 3 Houst. 581; 4 Houst. 62; Kern *v.* Thurber, 57 Ga. 172; Railroad Co. *v.* Kerr, 49 Ill. 458; Titcomb *v.* Wood, 38 Me. 561; Hull *v.* Hinks, 21 Md. 406; Lee *v.* Portwood, 41 Miss. 109; Porell *v.* Cavanaugh, 69 N. H. 364; Padden *v.* Taylor, 44 N. Y. 371; Sinclair *v.* Healy, 40 Pa. 417; Dettra *v.* Kestner, 147 Pa. 566; Singer Mfg. Co. *v.* Sammons, 49 Wis. 316; Arnett *v.* Cloudas, 4 Dana, 300; Attenborough *v.* St. Katharine's Dock Co., 3 C. P. D. 450; and cases cited in last note.

An attaching creditor of the fraudulent buyer cannot hold the goods as against the seller exercising his right of rescission. Thompson *v.* Rose, 16 Conn. 71; Landauer *v.* Cochran, 54 Ga. 533; Schweizer *v.* Tracy, 76 Ill. 345; Oswego Starch Factory *v.* Lendrum, 57 Ia. 573; Hawes *v.* Dingley, 17 Me. 341; Jordan *v.* Parker, 56 Me. 557; Tarr *v.* Smith, 68 Me. 97; Wiggins *v.* Day, 9 Gray, 97; Goodwin *v.* Mass. Trust Co., 152 Mass. 189, 199; Bradley *v.* Obear, 10 N. H. 477; Field *v.* Stearns, 42 Vt. 106. See Sargent *v.* Sturm, 23 Cal. 359. Cp. Van Duzor *v.* Allen, 90 Ill. 499.

In this country it is generally held that one who receives property from a fraudulent buyer in payment of a precedent debt is not a *bona fide* purchaser for value, and cannot hold the property as against the defrauded seller. Commercial Bank *v.* Pirie, 82 Fed. Rep. 799 (C. C. A.); Loeb *v.* Flash, 65 Ala. 526; Adam, etc., Co. *v.* Stewart, 157 Ind. 678; Henderson *v.*

abolished a statutory exception (*n*). And a person who takes with *notice of the fraud is a lawful possessor as against third [587 persons, and as such is entitled to sue them for all injuries to the property, unless and until the party defrauded exercises his right of rescission (*o*).

The same rules hold good as to possession or other partial interests in property. A. sells goods to B., but resumes the possession, by arrangement with B., as a security for the price. Afterwards B. induces A. to re-deliver possession of the goods to him by a fraudulent misrepresentation, and thereupon pledges the goods to C., who advances money upon them in good faith and in ignorance of the fraud. This pledge is valid, and C. is entitled to the possession of the goods as against A. (*p*).[44]

(*n*) 24 & 25 Vict. c. 96, s. 100, extended the re-vesting of property in the true owner upon the thief's conviction to cases of obtaining goods by criminal fraud not amounting to larceny: *Bentley* v. *Vilmont* (1887) 12 App. Ca. 471, 57 L. J. Q. B. 18, overruling *Moyce* v. *Newington* (1878) 4 Q. B. D. 32, 48 L. J. Q. B. 125; the Sale of Goods Acts, s. 24, restores the older law.

(*o*) *Stevenson* v. *Newnham*, see note (*m*), last page.

(*p*) *Pease* v. *Gloahec* (1866) L. R. 1 P. C. 219, 35 L. J. P. C. 66. The dealings were in fact with the bill of

Gibbs, 39 Kan. 679; Hurd *v.* Bickford, 85 Me. 217; Schloss *v.* Feltus, 103 Mich. 525; Case Works *v.* Ross, 74 Mo. App. 437; Sleeper *v.* Davis, 64 N. H. 59; Stevens *v.* Brennan, 79 N. Y. 254; Eaton *v.* Davidson, 46 Ohio St. 355; Wheeling, etc., Co. *v.* Koontz, 61 Ohio St. 551; Belleville Works *v.* Samuelson, 16 Utah, 234; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29. And see Barnard *v.* Campbell, 58 N. Y. 73; Devoe *v.* Brandt, 53 N. Y. 462; Johnson *v.* Peck, 1 Woodb. & M. 334. Cp. Rodgers *v.* Comptoir d'Escomte, L. R. 2 P. C. 393; Loeb *v.* Peters, 63 Ala. 243. *Contra*, Butters *v.* Haughwout, 42 Ill. 18; Horton *v.* Williams, 21 Minn. 187; Shufeldt *v.* Pease, 16 Wis. 659. Cp. Leask *v.* Scott, 2 Q. B. D. 376; Lee *v.* Kimball, 45 Me. 172; Skilling *v.* Bollman, 73 Mo. 665; Shepard, etc., Co. *v.* Burroughs, 62 N. J. L. 469.

A transfer as security for an antecedent obligation is, *a fortiori*, not a transfer for value. Reid *v.* Bird, 15 Col. App. 116; Dinkler *v.* Potts, 90 Ga. 103; Mashburn *v.* Donnenberg Co., 117 Ga. 567; Adam *v.* Meldrum, 157 Ind. 678; Cox Shoe Co. *v.* Adams, 105 Ia. 402; Phelps *v.* Samson, 113 Ia. 145; Goodwin *v.* Mass. Trust Co., 152 Mass. 189; McGraw *v.* Solomon, 83 Mich. 442; Edson *v.* Hudson, 83 Mich. 450; Bronson Electric Co. *v.* Rheubottom, 122 Mich. 608; Kemper, etc., Co. *v.* Kidder Bank, 81 Mo. App. 280; Phœnix Co. *v.* McEvony, 47 Neb. 228; Charles P. Kellogg Co. *v.* Horkey, 61 Neb. 751; Tate *v.* Security Trust Co., 63 N. J. Eq. 559; Button *v.* Rathbone, 126 N. Y. 187, 192. But see *contra*, Chapman *v.* Hughes, 134 Cal. 641, 658; Knox *v.* McFarran, 4 Col. 586, 596; Kranert *v.* Simon, 65 Ill. 344. A transfer of negotiable paper in payment of or security for an antecedent debt must be distinguished from such a transfer of other property. A transfer of a bill or note in payment of an antecedent debt is by the weight of authority a transfer for value. 1 Ames Cas. B. & N. 650 n., and it is so provided in the Negotiable Instruments Law. Crawford, Neg. Inst. Law, § 51. On the other hand a transfer to secure a pre-existing debt was more often held not a transfer for value. 1 Ames Cas. B. & N. 650, n., but this also by the Negotiable Instruments Law is made value. Crawford, Neg. Inst. Law, § 51.

[44] The reason why the pledge to C. was valid was because B. had not only possession but title to the goods. Mere possession, whether procured with or without fraud, under a contract or without a contract, cannot enable the

Distinction where there is no contract, but goods are merely obtained by fraudulent pretences. It must be carefully observed that a fraudulent possessor cannot give a better title than he has himself, even to an innocent purchaser, if the possession has not been obtained under a contract with the true owner, but by mere false pretences as to some matter of fact concerning the true owner's contract with a third person. To put a simple case, A. sells goods to B. and desires B. to send for them. C. obtains the goods from A. by falsely representing himself as B.'s servant: now C. acquires neither property nor lawful possession, and cannot make any sale or pledge of the goods which will be valid against A., though the person advancing his money have no notice of the fraud. The result is the same if A. means to sell goods to B. & Co., and C. gets goods from A. by falsely representing himself as a member of the firm and authorized to act for them (*q*),[45] or if B., a person of no credit, gets goods from A. by trading under a name and **588]** address closely resembling *those of C., who is known to A. as a respectable trader (*r*).[46] It is also the same in the less simple case of a third person obtaining delivery of the goods by falsely representing himself as a sub-purchaser; for here there is no contract between him and the seller which the seller can affirm or disaffirm; what the seller does is to act on the mistaken notion that the property is already his by transfer from the original buyer. This was in effect the decision

lading; but as this completely represented the goods for the purposes of the case the statement in the text is simplified in order to bring out the general principle more clearly. A later case of the same kind is *Babcock* v. *Lawson* (1880) 5 Q. B. Div. 284, 49 L. J. Q. B. 408.

(*q*) *Hardman* v. *Booth* (1863) 1 H. & C. 803, 32 L. J. Ex. 105; *Hollins* v. *Fowler* (1874–5) L. R. 7 H. L. 757, 795.

(*r*) *Cundy* v. *Lindsay* (1878) 3 App. Ca. 459, 47 L. J. Q. B. 481. Otherwise where the fraud stops short of personation, and is only a false representation of the party's condition and means: *Attenborough* v. *St. Katharine's Dock Co.* (1878) 3 C. P. Div. 450, 47 L. J. Ch. 763; cp. *Edmunds* v. *Merchants' Despatch Co.* 135 Mass. 283, which goes farther.

possessor to give any right to an innocent third person, which will be good against the true owner, except where on principles of agency or under factors' acts or by the law governing negotiable paper, the possessor is given such an apparent power of disposition of the property as to bind the true owner. When a watchmaker obtains possession of a watch under a contract to clean it, he cannot make a valid pledge of it. See Baehr *v.* Clark, 83 Ia. 313; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224; Heilbronn *v.* McAleenan, 1 N. Y. Supp. 875; Rohrbough *v.* Leopold, 68 Tex. 254.

[45] See Alexander *v.* Swackhamer, 105 Ind. 81; Peters Co. *v.* Lesh, 119 Ind. 98; Moody *v.* Blake, 117 Mass. 23; Edmunds *v.* Merchants' Despatch Co., 135 Mass. 283; Hentz *v.* Miller, 94 N. Y. 64; Hamet *v.* Letcher, 37 Ohio St. 356; Decan *v.* Shipper, 35 Pa. 239; Barker *v.* Dinsmore, 72 Pa. 427; *supra*, p. 592.

[46] See Samuel *v.* Cheney, 135 Mass. 278.

of the Exchequer Chamber in *Kingsford* v. *Merry* (*s*),[47] though the case was a little complicated by the special consideration of the effect of delivery orders or warrants as "indicia of title."

Shareholder can't repudiate after winding up: Oakes v. Turquand. The decision of the House of Lords in *Oakes* v. *Turquand* (*t*), which settled that a shareholder in a company cannot repudiate his shares after the commencement of a winding-up, proceeded to a considerable extent upon the language of the Companies Act, 1862, in the section defining who shall be contributories. But the broad principles of the decision, or if we prefer to say so, of the Act as interpreted by it, are these. The rights of the company's creditors and of the shareholders are fixed at the date of the winding-up and are not to be afterwards varied. The creditors are entitled to look for payment in the first instance to all persons who are actually members of the company at the date of the winding-up. And this class includes shareholders who were entitled as against the company to repudiate their shares on the ground of fraud, but have not yet done so. For their obligations under their contracts with the company, including the duty to *contribute [589 in the winding-up, were valid until rescinded, and the creditors in the winding-up must be considered as being, to the extent of their claims, purchasers for value of the company's rights against its members. They are not entitled to any different or greater rights: no shareholder can be called upon to do more than perform his contract with the company (*u*).[48]

(*s*) (1856) 1 H. & N. 503, 26 L. J. Ex. 83 (see per Erle J. at p. 88, revg. s. c. in Court below, 11, 577, 25 L. J. Ex. 166.

(*t*) (1867) L. R. 2 H. L. 325, 36 L. J. Ch. 949. This principle applies to a voluntary as well as a compulsory winding-up: *Stone* v. *City and County Bank* (1877) 3 C. P. Div. 282, 47 L. J. C. P. 681.

(*u*) *Waterhouse* v. *Jamieson* (1870) L. R. 2 Sc. & D. 29. In *Hall* v. *Old Talargoch Lead Mining Co.* (1876) 3 Ch. D. 749, 45 L. J. Ch. 775, an action for rescission and indemnity commenced by a shareholder after a resolution for winding-up but in ignorance of it was allowed to proceed. Here however relief was claimed against the directors personally as well as the company.

47 See Henderson *v.* Williams, [1895] 1 Q. B. 521; Farquharson *v.* King, [1901] 2 K. B. 697; Collins *v.* Ralli, 20 Hun, 246, affd., 85 N. Y. 637; Soltau *v.* Gerdau, 119 N. Y. 380.

48 Cp. Banigan *v.* Bard, 134 U. S. 291; Lantry *v.* Wallace, 182 U. S. 536; Republic Ins. Co. *v.* Swigert, 135 Ill. 150. In this country an agreement between a company and shareholders that shares not fully paid up shall be considered as paid-up shares, though binding on the company, is a fraud in law on its creditors, who, when their claims are to be satisfied, may require the shareholders to pay for their shares in full. Scovill *v.* Thayer, 105 U. S. 145, 154; Insurance Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537: Bent *v.* Underdown, 156 Ind. 516; Crawford *v.* Rohrer, 59 Md. 599; A. Wight Co. *v.* Steinkemeyer, 6 Mo. App. 574; Skrainka *v.* Allen, 7 Mo. App. 434; 76 Mo. 384;

It is now settled law that the same rule applies to joint-stock companies not under the Companies Acts. And the date after which it is too late to repudiate shares may be earlier than the commencement of the winding-up. Probably the actual insolvency of the company fixes this date; at all events a shareholder cannot repudiate after the directors have convened an extraordinary meeting to consider whether the company shall be wound up. For thus, "by holding out to the body of creditors the prospect of a voluntary winding-up," the directors, who are the shareholder's agents as long as he remains a shareholder, stay the hands of the creditors from compulsory proceedings (*x*).[49] And the rule holds even if there are no unpaid creditors. "The doctrine is, that after the company is wound up it ceases to exist, and rescission is impossible" (*y*).

Persons taking as volunteers under fraudulent contract, though innocent, no better off than original defrauder. On the other hand, persons who have taken any gratuitous benefit under a fraudulent transaction, though themselves ignorant of the fraud, are in no better position than the original contriver of it.[50] Thus where a creditor was induced to give a release to a surety by a fraud practised on him by the principal debtor, of which the surety was ignorant, and the surety gave no consideration for the release, it was held that this release might be **590]** disaffirmed by the creditor on discovering the fraud. *But third persons who on the faith of the release being valid had advanced

(*x*) *Tennent* v. *City of Glasgow Bank* (1879) 4 App. Ca. 615.

(*y*) *Burgess's case* (1880) 15 Ch. D. 507, 509, 49 L. J. Ch. 541 (Jessel M.R.).

Weatherbee *v.* Baker, 35 N. J. Eq. 501. And see State Trust Co. *v.* Turner, 111 Ia. 664, and many cases cited.

But an innocent purchaser for value who bought such shares as paid-up shares is entitled to have them treated as such. Foreman *v.* Bigelow, 4 Cliff. 508; Steacy *v.* Railroad Co., 5 Dill. 348; Brant *v.* Ehlen, 59 Md. 1; Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496. And so is one to whom, in the absence of fraud, shares were issued by the company in payment for property conveyed to, or of a debt owing by it. Coit *v.* N. C. Gold Amalgamating Co., 14 Fed. Rep. 12, 119 U. S. 343; Phelan *v.* Hazard, 5 Dill. 45; New Haven Trust Co. *v.* Nelson, 73 Conn. 477; Troup *v.* Horbach, 53 Neb. 795; Rural Homestead Co. *v.* Wildes, 54 N. J. Eq. 668; Van Cott *v.* Van Brunt, 82 N. Y. 535; National Bank *v.* Illinois Lumber Co., 101 Wis. 247. But see Van Cleve *v.* Berkey, 143 Mo. 109, and 42 L. R. A. 593, n.

[49] As to the right to rescind after the insolvency of the corporation and the appointment of a receiver or assignee in bankruptcy, see 1 Am. L. Rev. (N. S.) 208 sqq.; Chubb *v.* Upton, 95 U. S. 665, 667; Lantry *v.* Wallace, 182 U. S. 536; Michener *v.* Payson, 13 N. B. R. 49; Farrar *v.* Walker, 3 Dill. 506, n.; Upton *v.* Englehart, 3 Dill. 496; Turner *v.* Insurance Co., 65 Ga. 649; Bissell *v.* Heath, 98 Mich. 472; Ruggles *v.* Brock, 6 Hun, 164; Howard *v.* Turner, 155 Pa. 349.

[50] Mendenhall *v.* Treadway, 44 Ind. 131; Hogan *v.* Wixted, 138 Mass. 270; Gordon *v.* McCarty, 3 Whart. 407; Longenecker *v.* Church, 200 Pa. 567, 575.

money to the surety to meet other liabilities would be entitled to assert a paramount claim (*z*).

D. **Rescission must be within reasonable time.** The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived.

Explanation of this: the importance of time is not per se, but as evidence of acquiescence — Authorities in equity. It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities. On the one hand it is often said that the election must be made within a reasonable time,[51] while on the other hand it has several times been explained that lapse of time as such has no positive effect of its own.[52] The Court is specially cautious in entertaining charges of fraud or misrepresentation brought forward after a long interval of time; it will anxiously weigh the circumstances, and consider what evidence may have been lost in consequence of the time that has elapsed (*a*). But time alone is no bar to the right of rescinding a voidable transaction; and the House of Lords in one case set aside a purchase of a principal's estate by his agent in another name after the lapse of more than half a century, the facts having remained unknown to the principal and his representatives for thirty-seven years (*b*). In a later case the Lord Justice Turner stated expressly that "the two proposition of a bar by length of

(*z*) *Scholefield* v. *Templer* (1859) Johns. 155, 165, 4 De G. & J. 429, 28 L. J. Ch. 452. The Court below endeavoured to provide for the payment of the third persons in question (Johns. 171), but the Court of Appeal varied the decree by making it simply without prejudice to their rights: 4 De G. & J. 435.

(*a*) Cp. *Bright* v. *Legerton* (1861) 2 D. F. & J. 606, 617.

(*b*) *Charter* v. *Trevelyan* (1844) 11 Cl. & F. 714, 740.

51 Grymes *v.* Sanders, 93 U. S. 55, 62; McLean *v.* Clapp, 141 U. S. 429, 432; Rugan *v.* Sabin, 53 Fed. Rep. 415; Scheftel *v.* Hays, 58 Fed. Rep. 457; Young *v.* Arintze, 86 Ala. 116; Burke *v.* Levy, 68 Cal. 32; Sutter *v.* Rose, 169 Ill. 66; Mills *v.* City, 59 Kan. 463; Wingate *v.* King, 23 Me. 35; Key *v.* Jennings, 66 Mo. 356, 370; Estes *v.* Reynolds, 75 Mo. 563; Pollock *v.* Smith, 49 Neb. 864; Willoughby *v.* Moulton, 47 N. H. 205; Norfolk Hosiery Co. *v.* Arnold, 49 N. J. Eq. 390; Baird *v.* Mayor, 96 N. Y. 567, 598; Davis *v.* Stuard, 90 Pa. 295.

52 Rackemann *v.* Riverbank Co., 167 Mass. 1; Bradshaw *v.* Yates, 67 Mo. 221; Whitcomb *v.* Denio, 52 Vt. 382, 390. "Delay in exercising the power of rescission is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless, in the meantime, superior rights of third persons have intervened." Williamson *v.* Railroad Co., 29 N. J. Eq. 311, 320.

time and by acquiescence are not distinct propositions." Length of time is evidence of acquiescence, but only if there is knowledge of the 591] *facts, for a man cannot be said to have acquiesced in what he did not know (*c*). Lord Campbell slightly qualified this by adding, that although it is for the party relying on acquiescence to prove the facts from which consent is to be inferred, "it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed" (*d*).

The rule has been laid down and acted upon by the Judicial Committee in this form: "In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief" (*e*).

To the same effect it has been said in the Supreme Court of the United States: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge." And the knowledge must be actual, not merely possible or potential: "the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission" (*f*).[53]

Acquiescence need not be manifested by any positive act; the question is, whether there is sufficient evidence either from lapse of time or from other circumstances of "a fixed, deliberate and unbiassed determination that the transaction should not be impeached" (*g*).[54] In

(*c*) *Life Association of Scotland* v. *Siddal* (1861) 3 D. F. & J. 58, 72, 74; on the point that there cannot be acquiescence without knowledge; cp. *Lloyd* v. *Attwood* (1858–9) 3 De G. & J. 614, 650, 29 L. J. Ch. 97; per Alderson B. *Load* v. *Green* (1846) 15 M. & W. at p. 217: "A man cannot *permit* who does not know that he has a right to refuse:" and per Jessel M.R. 1 Ch. D. 528.

(*e*) *Lindsay Petroleum Co.* v. *Hurd* (1874) L. R. 5 P. C. 241.

(*f*) *Pence* v. *Langdon* (1878) 99 U. S. at p. 581.

(*d*) 3 D. F. & J. at p. 77. The case was one not of rescinding a contract but of a breach of trust; but the principles are the same.

(*g*) Per Turner L.J. *Wright* v. *Vanderplank* (1855) 8 D. M. & G. 133, 147, 25 L. J. Ch. 753. The epithets,

[53] Veazie *v.* Williams, 8 How. 134, 158; Mudsill Min. Co. *v.* Watrous, 61 Fed. Rep. 163, 186; Newman *v.* Schwerin, 109 Fed. Rep. 942, 947; Nealon *v.* Henry, 131 Mass. 153; Baker *v.* Lever, 67 N. Y. 304; Indiana Meeting *v.* Haines, 47 Ohio St. 423; Bank *v.* Brown, 5 S. & R. 226, 234; McGee *v.* Hall, 26 S. C. 179; Wade *v.* Pulsifer, 54 Vt. 45, 65. Where a party is defrauded by another, between whom and himself special relations of trust and confidence exist, information as to the fraud, given by third persons, will not constitute notice, if the party defrauded refuses to credit such information by reason of his confidence in the other party. Marston *v.* Simpson, 54 Cal. 189.

[54] Where the party after knowledge of the fraud and an opportunity to rescind still retains the possession and use of the property, without any offer to return it, the fraud is waived and the contract becomes valid by ac-

estimating *the weight to be given to length of time as evidence [592
of acquiescence the nature of the property concerned is material (*h*).[55] And other special circumstances may prevent lapse of time even after everything is known from being evidence of acquiescence; as when nothing is done for some years because the other party's affairs are in such a condition that proceedings against him would be fruitless (*i*). "In questions of this kind it is not only time but the conduct of the parties which has to be considered" (*k*).

If a party entitled to avoid a transaction has precluded himself by his own acts or acquiescence from disputing it in his lifetime, his representatives cannot come forward to dispute it afterwards (*l*).

Special obligation of diligence in case of shareholders. It is said that holders of shares in companies are under a special obligation of diligence as to making their election, but the dicta relate chiefly if not wholly to objections apparent on the face of the memorandum or articles of association. With the contents of these a shareholder is bound to make himself acquainted, and must be deemed to become acquainted, when his shares are allotted (*m*).[56] But objections which can be taken upon these must proceed on the ground, not of fraud or misrepresentation as such, but of the undertaking in which shares are allotted being substantially a different thing from that which the prospectus described and in which the applicant offered to take shares. Nor are we aware of any case in which the rule has been applied to a repudiation of shares declared before a winding-up and on the ground of fraud or misrepresentation not apparent on the articles. Still it

however, are more specially appropriate to the particular ground of rescission (undue influence) then before the Court. More generally, the only proper meaning of acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it: per Cur. in *De Bussche* v. *Alt* (1877) 8 Ch. Div. at p. 314, 47 L. J. Ch. 386.

(*h*) 8 D. M. & G. at p. 150.

(*i*) *Scholefield* v. *Templer* (1859) 4 De G. & J. 429, 28 L. J. Ch. 452.

(*k*) *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196, 211, C. A., per Cur.

(*l*) *Skottowe* v. *Williams* (1861) 3 D. F. & J. 535, 541.

(*m*) *Central Ry. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. at p. 125; *Oakes* v. *Turquand* (1867) *ib.* at p. 352; and see Ch. IX., p. *479, above.

quiescence. Barr *v.* New York, etc., R. Co., 125 N. Y. 263, 275; Scheftel *v.* Hays, 58 Fed. Rep. 457.

[55] See Grymes *v.* Sanders, 93 U. S. 55, 62; Hoyt *v.* Latham, 143 U. S. 553; Jesup *v.* Illinois, etc., R. Co., 43 Fed. Rep. 483; Kinne *v.* Webb, 49 Fed. Rep. 512, 54 Fed. Rep. 34 (C. C. A.); Sagadahoc Co. *v.* Ewing, 65 Fed. Rep. 702 (C. C. A.); Curtis *v.* Lakin, 94 Fed. Rep. 251; Wheeler *v.* McNeil, 101 Fed. Rep. 685, 689; Cox *v.* Montgomery, 36 Ill. 396; Plympton *v.* Dunn, 148 Mass. 523; McQueen *v.* Burhans, 77 Minn. 382.

[56] "That the defendant did not read the charter and by-laws, if such were the fact, is his own fault." Upton *v.* Tribilcock, 91 U. S. 45, 50.

seems quite reasonable to hold that in the case of a shareholder's
593] *contract lapse of time without repudiation is of greater importance as evidence of assent than in most other cases.[57]

Same general rule at law. The authorities thus far cited have been from courts of equity. The same general principle was laid down in the Exchequer Chamber in 1871. "We think the party defrauded may keep the question open so long as he does nothing to affirm the contract . . . In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined" (*n*).

Fixed period of limitation by French law. The French law treats the right of having a contract judicially set aside for fraud, &c. as a substantive right of action, and limits a fixed period of ten years, running from the discovery of the truth, within which it must be exercised (*o*). There are provisions of similar effect in the procedure codes of many of the United States.

Unfounded charges of fraud discouraged: parties making them must pay costs. One or two points remain to be mentioned, which we
594] *have reserved to the last as being matter of procedure, but which depend upon general principles. Courts of justice are anxious to discover and discourage fraud in every shape, but they are no less

(*n*) Per Cur. *Clough* v. *L. & N. W. Ry. Co.* (1861) L. R. 7 Ex. at p. 34, repeated in *Morrison* v. *Universal Marine Insurance Co.* (1873) L. R. 8 Ex. at p. 203, and cited by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Ca. at p. 1277. See the remarks on delay and acquiescence in the several judgments in that case. [Adopted in Williamson *v.* Railroad Co., 28 N. J. Eq. 277, 293; S. C. on appeal, 29 N. J. Eq. 311, 320.]

(*o*) Code Civ. 1304. The Indian Limitation Act (XV. of 1877, Sch. 2, No. 114) fixes a period of three years.

57 Upton *v.* Tribilcock, 91 U. S. 45, 55; Upton *v.* Englehart, 3 Dill. 496, 501, 502.

anxious to discourage and rebuke loose or unfounded charges of fraud and personal misconduct. The facts relied on as establishing a case of fraud must be distinctly alleged and proved (*p*).[58] Where such charges are made and not proved, this will not prevent the party making them from having any relief to which he may otherwise appear to be entitled, but he must pay the costs occasioned by the unfounded charges (*q*). And in one case, where the plaintiff made voluminous and elaborate charges of fraud and conspiracy, which proved to be unfounded, the Court of Appeal not only made him pay the costs of that part of the case, but refused to allow him the costs even of the part on which he succeeded. It was held that he had so mixed up unfounded and reckless aspersions upon character with the rest of the suit as to forfeit his title to the costs which he otherwise would have been entitled to receive (*r*).

Independent jurisdiction of equity to cancel instruments for fraud, &c. The special jurisdiction of courts of equity to order the cancellation of an instrument obtained by fraud or misrepresentation is not affected by the probability or practical certainty that the plaintiff in equity would have a good defence to an action on the instrument, nor is it the less to be exercised even if the instrument is already in his

(*p*) In equity, pleading a charge of fraud in general terms would not support a bill on demurrer: *Gilbert* v. *Lewis* (1862) 1 D. J. & S. at p. 49, 32 L. J. Ch. 347, per Lord Westbury; cp. *Lawrance* v. *Norreys* (1890) 15 App. Ca. 210, 59 L. J. Ch. 681, as to allegations of concealed fraud within the Statute of Limitations.

(*q*) *Hilliard* v. *Eiffe* (1874) L. R. 7 H. L. 39, 51, 52; *London Chartered Bank of Australia* v. *Lemprière* (1873) L. R. 4 P. C. at p. 597; *Clinch* v. *Financial Corporation* (1868) L. R. 5 Eq. at p. 483, 38 L. J. Ch. 1; per Lord Cairns, *Thomson* v. *Eastwood* (1877) 2 App. Ca. at p. 243.

(*r*) *Parker* v. *McKenna* (1874) L. R. 10 Ch. 96, 123, 125, 44 L. J. Ch. 425.

58 In equity a charge of fraud in general terms will not support a bill on demurrer. Fogg *v.* Blair, 139 U. S. 118, 127; Lafayette Co. *v.* Neely, 21 Fed. Rep. 738; Lumley *v.* Wabash Ry. Co., 71 Fed. Rep. 21; Chamberlain *v.* Dorrance, 69 Ala. 40; Stevens *v.* Moore, 73 Mc. 559; Nichols *v.* Rogers, 139 Mass. 146; Nye *v.* Storer, 168 Mass. 53; McMahon *v.* Rooney, 93 Mich. 390; Small *v.* Boudinot, 1 Stockt. Ch. 381, 391; Bryan *v.* Spruill, 4 Jones Eq. 27. And the same is true at law. Hazard *v.* Griswold, 21 Fed. Rep. 178; Giles *v.* Williams, 3 Ala. 316; Reynolds *v.* Excelsior Co., 100 Ala. 296; Hynson *v.* Dunn, 5 Ark. 395; Cole *v.* Joliet Opera-house Co., 79 Ill. 96; Kingsman R. Co. *v.* Quinn, 45 Kan. 477; Bell *v.* Lamprey, 52 N. H. 41; Weld *v.* Locke, 18 N. H. 141; Service *v.* Heermance, 2 Johns. 96; Brereton *v.* Hull, 1 Denio, 75. But see *contra*, Fivey *v.* Pennsylvania R. Co., 66 N. J. L. 23.

Under the reformed procedure "pleadings must state facts and not legal conclusions, and fraud is never sufficiently pleaded except by the statement of the facts upon which the charge is based." Ockendon *v.* Barnes, 43 Ia. 615, 619; Kent *v.* Snyder, 30 Cal. 666; Capuro *v.* Insurance Co., 39 Cal. 123; Keller *v.* Johnson, 11 Ind. 337; Joest *v.* Williams, 42 Ind. 565, 568; Ladd *v.* Nystol, 63 Kan. 23; Tepoel *v.* Saunders County Bank, 24 Neb. 815; Wood *v.* Amory, 105 N. Y. 278, 282.

595] possession. He is entitled not only to have the *contract enforced against him, but to have it judicially annulled (*s*).

(*s*) *London & Provincial Insurance Co.* v. *Seymour* (1873) L. R. 17 Eq. 85, 43 L. J. Ch. 120 [Insurance Co. *v.* Hutchinson, 21 N. J. Eq. 107, 117; McHenry *v.* Hazard, 45 N. Y. 580]; and see *Hoare* v. *Bremridge* (1872) L. R. 8 Ch. 22, 42 L. J. Ch. 1, there explained and distinguished. [Cp. Insurance Co. *v.* Bailey, 13 Wall. 616; Buzzard *v.* Houston, 119 U. S. 347; Wehrman *v.* Conklin, 155 U. S. 328.] Therefore a defendant sued on an instrument which he alleges to be voidable may properly add to his defence a counter-claim for the cancellation of the instrument. It may also be proper to ask for a transfer to the Chancery Division if the action is in the Queen's Bench Division, but this is not a matter of course. See *Storey* v. *Waddle* (1879) 4 Q. B. Div. 289. Where, conversely, a purchaser sues for the return of his deposit, and the vendor counter-claims for specific performance, a transfer to the Ch. D. will generally be ordered: *London Land Co.* v. *Harris* (1884) 13 Q. B. D. 540, 53 L. J. Q. B. 536.

*CHAPTER XII. [596

DURESS AND UNDUE INFLUENCE.

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Contract voidable if consent not free. If the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. It is quite clear that it is not merely void so long as there is consent in fact (*a*).[1] The transaction might

(*a*) Co. 2 Inst. 482, and 2nd resolution in *Whelpdale's case*, 5 Co. Rep. 119. In two modern cases a marriage has been annulled on the ground that coercion, or a mixture of coercion and fraud, had gone to the point of excluding any real consent on the woman's part: *Scott* v. *Sebright* (1886) 12 P. D. 21, 56 L. J. P. 11; *Ford* v. *Stier* [1896] P. 1, 65 L. J. P. 13. The facts of both these cases were most exceptional.

[1] Findley *v.* Hulsey, 79 Ga. 670; Eberstein *v.* Willets, 134 Ill. 101; Veach *v.* Thompson, 15 Ia. 380; Lewis *v.* Bannister, 16 Gray, 500; Fairbanks *v.* Snow, 145 Mass. 153; Lyon *v.* Waldo, 36 Mich. 345; Miller *v.* Minor Co., 98

indeed be void if the party were under actual physical constraint, as if his hand were forcibly guided to sign his name;[2] but this would be not because his consent was not free, but because there was no consent at all.

What then are the circumstances which are held by English courts to exclude freedom of consent? The treatment of this question has at common law been singularly narrow and in equity singularly comprehensive.

I. *Duress at Common Law.*

The common law doctrine of Duress. At common law the coercion which will be a sufficient cause for avoiding a contract may consist in *duress* or *menace;* that is, either in actual compulsion or in the threat of it. In modern books the term *duress* is used to include both species. It is said that there must be some threatening of life or **597]** member, or of imprisonment, or some *imprisonment or beating itself. Threatening to destroy or detain, or actually detaining property, does not amount to duress (*b*).[3] And this applies to agreements not under seal as well as to deeds (*c*). The reason appears to be that the detainer is a wrong of itself, for which there is an appropriate remedy. Should the party choose to make terms instead of pursuing his rights (at all events when there is nothing to prevent him from so doing), he cannot afterwards turn round and complain that the terms were forced upon him (*d*).[4] "It must be a threatening, beating, or imprisonment of the party himself that

(*b*) Shepp. Touch. 61.

(*c*) *Atlee* v. *Backhouse* (1838) 3 M. & W. 633; *Skeate* v. *Beale* (1840) 11 A. & E. 983, 52 R. R. 558.

(*d*) See *Silliman* v. *United States* (1879) 101 U. S. 465.

Mich. 163; Mundy *v.* Whittemore, 15 Neb. 647; Oregon Pac. R. Co. *v.* Forrest, 128 N. Y. 83; Doolittle *v.* McCullough, 7 Ohio St. 299; National Bank *v.* Wheelock, 52 Ohio St. 534. But see Berry *v.* Berry, 57 Kan. 691. See further, generally, on the question of duress, 33 Am. L. Reg. 885.

[2] Fairbanks *v.* Snow, 145 Mass. 153, 154; 24 Cent. L. J. 75.

[3] Lehman *v.* Shackleford, 50 Ala. 437; Hazlerigg *v.* Donaldson, 2 Met. (Ky.) 445. Cp. French *v.* Shoemaker, 14 Wall. 314, 332; United States *v.* Huckabee, 16 Wall. 414, 432; Spaids *v.* Barrett, 57 Ill. 289; Adams *v.* Stringer, 78 Ind. 175; Williams *v.* Williams, 63 Md. 371; Vyne *v.* Glenn, 41 Mich. 112 (explained in Hackley *v.* Headley, 45 Mich. 569); Dykes *v.* Wyman, 67 Mich. 236; Vereycken *v.* Vanden Brooks, 102 Mich. 119; State *v.* Nelson, 41 Minn. 25; Foshay *v.* Ferguson, 5 Hill, 154, 158; McPherson *v.* Cox, 86 N. Y. 472, 479; Sasportas *v.* Jennings, 1 Bay, 470; Collins *v.* Westbury, 2 Bay, 211; Walker *v.* Parker, 5 Coldw. 476; Miller *v.* Miller, 68 Pa. 486.

[4] See Hackley *v.* Headley, 45 Mich. 569; Cable *v.* Foley, 45 Minn. 421; Heyyham *v.* Dettre, 89 Pa. 506.

doth make the deed,[5] or his wife" (*b*),[6] or (it seems) parent or child (*e*).[7] And a threat of imprisonment is not duress unless the imprisonment would be unlawful.[8]

(*b*) Shepp. Touch. 61. (*e*) Ro. Ab. 1. 687, pl. 5; Bac. Ab. *Duress* (B).

[5] Duress to the principal will not avoid the obligation of a surety. Hazard *v.* Griswold, 21 Fed. Rep. 178; McClintick *v.* Cummins, 3 McLean, 158; Graham *v.* Marks, 98 Ga. 67; Plummer *v.* People, 16 Ill. 358; Oak *v.* Dustin, 79 Me. 23; Fairbanks *v.* Snow, 145 Mass. 153; Robinson *v.* Gould, 11 Cush. 55; Bowman *v.* Hiller, 130 Mass. 153; Spaulding *v.* Crawford, 27 Tex. 155. At least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal. Patterson *v.* Gibson, 81 Ga. 802; Griffith *v.* Sitgreaves, 90 Pa. 161. But see Hyatt *v.* Robinson, 15 Ohio, 372, 400; Ames, Cas. Suretyship, 125, n. 9; 315, n. 1.

[6] Shepp. Touch. 61; McClintick *v.* Cummins, 3 McLean, 158, 159; Plummer *v.* People, 16 Ill. 358, 360; and duress to the husband makes voidable the wife's obligation. Brooks *v.* Berryhill, 20 Ind. 97; Bank *v.* Bryan, 62 Ia. 42; Heaton *v.* Norton Co. Bank, 59 Kan. 281; State Bank *v.* Hutchinson, 62 Kan. 9; City Bank *v.* Kusworm, 88 Wis. 188.

The threat made by a husband, through the procurement of one of the payees of a note executed by him, that unless his wife would sign it, he would poison himself, whereby she was induced to sign it, does not amount to duress, since "the maker and object of the threats were the same." Wright *v.* Remington, 41 N. J. L. 48; aff'd., *nom.* Remington *v.* Wright, 43 N. J. L. 451. And see Insurance Co. *v.* Meeker, 85 N. Y. 614; Girty *v.* Standard Oil Co., 1 N. Y. App. Div. 224.

It has been held that a deed executed by a woman in consequence of threats by her husband to abandon her if she refused, to one who has notice of the means used to procure it, is voidable for duress. Line *v.* Blizzard, 70 Ind. 23; Berry *v.* Berry, 57 Kan. 691; Tapley *v.* Tapley, 10 Minn. 448; Kocourek *v.* Marak, 54 Tex. 201; Schultz *v.* Catlin, 78 Wis. 611. Unless the grantee or promisee had notice of the duress, the wife would be bound. Gardner *v.* Case, 111 Ind. 494; Fightmaster *v.* Levi, 13 Ky. L. Rep. 412; Fairbanks *v.* Snow, 145 Mass. 153. These are properly cases not of duress, but of undue influence. See Detroit Bank *v.* Blodgett, 115 Mich. 160; Adams *v.* Irving Bank, 116 N. Y. 606, 611.

[7] Harris *v.* Carmody, 131 Mass. 51; Weiser *v.* Welch, 112 Mich. 134; Osborn *v.* Robbins, 36 N. Y. 365, 372; Owens *v.* Mynatt, 1 Heisk. 675; Schultz *v.* Culbertson, 46 Wis. 313; 49 Wis. 122. See further as to duress by threats to injure a relative, 26 L. R. A., n. 48.

[8] Eddy *v.* Herrin, 17 Me. 338; Harmon *v.* Harmon, 61 Me. 227; Hilborn *v.* Buckman, 78 Me. 482; Cribbs *v.* Sowle, 87 Mich. 340; Sanford *v.* Sornborger, 26 Neb. 295; McCormick Co. *v.* Miller, 54 Neb. 644; Alexander *v.* Pierce, 10 N. H. 494; Bodine *v.* Morgan, 37 N. J. Eq. 426; Clark *v.* Turnbull, 47 N. J. L. 265; Dunham *v.* Griswold, 100 N. Y. 224; Landa *v.* Obert, 45 Tex. 539, 548. Cp. Obert *v.* Landa, 59 Tex. 475. But see *infra*, p. *614, cases in note 46.

Threats of suit do not constitute duress. Atkinson *v.* Allen, 71 Fed. Rep. 58; Morton *v.* Morris, 72 Fed. Rep. 392; McClair *v.* Wilson, 18 Col. 82; Parker *v.* Lancaster, 84 Me. 512; Minneapolis Land Co. *v.* McMillan, 79 Minn. 287; Jones *v.* Houghton, 61 N. H. 51; York *v.* Hinkle, 80 Wis. 624.

Lawful imprisonment or detention of the person does not itself constitute duress. *Ib.*; Plant *v.* Gunton, 94 U. S. 664; Smith *v.* Atwood, 14 Ga. 402; Jones *v.* Peterson, 117 Ga. 58; Taylor *v.* Cottrell, 16 Ill. 93; Heaps *v.* Dunham, 95 Ill. 583; Neally *v.* Greenough, 25 N. H. 325. But "where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, . . . in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress." Baker *v.* Morton, 12 Wall. 150, 158; Morrill *v.*

In a case of menace the threat must be of something unlawful. This is illustrated by two rather curious modern cases, in both of which the party's consent was determined by the fear of confinement in a lunatic asylum. In *Cumming* v. *Ince* (*f*) the plaintiff had been taken to a lunatic asylum and deprived of the title deeds of certain property claimed by her. Proceedings were commenced under a commission of lunacy, but stayed on the terms of an arrangement signed by counsel on both sides, under which the deeds were to be deposited in certain custody. The plaintiff afterwards repudiated this arrangement and brought detinue for the deeds. On an issue directed to try the right to the possession of the deeds as between herself and the other parties the Court held that in any view the defendants were wrong. For if their own proceedings under the commission were justified, they could not say the plaintiff was competent to bind herself, and if not, the agreement was obtained by the fear of a merely unlawful imprisonment and therefore voidable on the ground of
598] duress. And it made no difference that *the plaintiff's counsel was party to the arrangement. His assent must be considered as enforced by the same duress: for as her agent he might well have feared for her the same evils that she feared for herself. In *Biffin* v. *Bignell* (*h*), on the other hand, the defendant was sued for necessaries supplied to his wife. She had been in a lunatic asylum under treatment for delirium tremens, and on her discharge the husband promised her 12*s.* a week to live apart from him, adding that if she would not he would send her to another asylum. The wife was accordingly living apart from the husband under this agreement. It was held that her consent to it was not obtained by duress, for under these circumstances "the threat, if any, was not of anything contrary to law, at least not so to be understood": consequently the presumption of authority to pledge the husband's credit was effectually excluded, and the plaintiff could not recover (*i*).

Money paid under circumstances of compulsion recoverable back. The narrowness of the common law doctrines above stated is considerably

(*f*) (1847–8) 11 Q. B. 112, 17 L. J. Q. B. 105.

(*h*) (1862) 7 H. & N. 877, 31 L. J. Ex. 189.

(*i*) *Qu.* whether in any case he could have recovered without showing that the wife had repudiated the arrangement.

Nightingale, 93 Cal. 452; Schommer *v.* Farwell, 56 Ill. 542; Bane *v.* Detrick, 52 Ill. 19; Rollins *v.* Lashus, 74 Me. 218; Watkins *v.* Baird, 6 Mass. 306; Hackett *v.* King, 6 Allen, 58; Sweet *v.* Kimball, 166 Mass. 332; Seiber *v.* Price, 26 Mich. 518; Fossett *v.* Wilson, 59 Miss. 1; Breck *v.* Blanchard, 22 N. H. 303, 310; Clark *v.* Pease, 41 N. H. 414; Osborn *v.* Robbins, 36 N. Y. 365; Guilleaume *v.* Rowe, 94 N. Y. 268; Reinhard *v.* City, 49 Ohio St. 257, 270; Phelps *v.* Zuschlag, 34 Tex. 371; Behl *v.* Schuett, 104 Wis. 76.

mitigated in practice, for when money has been paid under circumstances of practical compulsion, though not amounting to duress, it can generally be recovered back. This is so when the payment is made to obtain the possession of property wrongfully detained (*k*);[9] and the property need not be goods for which the owner has an immediate pressing necessity, nor need the claim of the party detaining them be manifestly groundless, to make the payment for this purpose involuntary in contemplation of law (*l*). So it is where excessive fees are taken under colour of office, though it be usual to pay them (*m*);[10] or where an excessive charge for the performance of a duty is *paid under protest (*n*).[11] The person who actually [599 receives the money may properly be sued, though he receive it only as an agent (*o*).[12] The case of one creditor exacting a fraudulent

(*k*) *Wakefield* v. *Newbon* (1844) 6 Q. B. 276, 280, 13 L. J. Q. B. 258; *Green* v. *Duckett* (1883) 11 Q. B. D. 275, 52 L. J. Q. B. 435.

(*l*) *Shaw* v. *Woodcock* (1827) 7 B. & C. 73, 31 R. R. 158.

(*m*) *Dew* v. *Parsons* (1819) 2 B. & Ald. 562, 21 R. R. 404; *Steele* v. *Williams* (1853) 8 Ex. 625, 22 L. J. Ex. 225.

(*n*) *Parker* v. *G. W. Ry. Co.* (1844) 7 M. & Gr. 253, 292, 13 L. J. C. P. 105. And see other authorities collected in notes to *Marriot* v. *Hampton* (1796) 2 Sm. L. C. 409.

(*o*) *Steele* v. *Williams*, note (*m*), last page.

[9] Elliott *v.* Swartwout, 10 Pet. 137; Maxwell *v.* Griswold, 10 How. 242; Lonergan *v.* Buford, 148 U. S. 581; Tutt *v.* Ide, 3 Blatchf. 249; Adams *v.* Schiffer, 11 Col. 15; Cobb *v.* Charter, 32 Conn. 358; Railroad Co. *v.* Pattison, 41 Ind. 312; Chase *v.* Dwinal, 7 Me. 134; Chandler *v.* Sanger, 114 Mass. 364; Hackley *v.* Headley, 45 Mich. 569, 575; Dykes *v.* Wyman, 67 Mich. 236; Fargusson *v.* Winslow, 34 Minn. 384; Clinton *v.* Strong, 9 Johns. 370; Harmony *v.* Bingham, 12 N. Y. 99; Briggs *v.* Boyd, 56 N. Y. 289; Scholey *v.* Mumford, 60 N. Y. 498; Baldwin *v.* Liverpool, etc., Co., 74 N. Y. 125; Motz *v.* Mitchell, 91 Pa. 114; Alston *v.* Durant, 2 Strobh. 257; Beckwith *v.* Frisbie, 32 Vt. 559. Cp. De la Cuesta *v.* Insurance Co., 136 Pa. 62.

Money, which he is under no legal liability to pay, obtained from a master mechanic whose business requires the employment of workmen, by inducing or threatening to induce workmen to leave his employ, and deterring or threatening to deter others from entering it, so as to render him reasonably apprehensive that he cannot carry on business without making the payment, may be recovered back. Carew *v.* Rutherford, 106 Mass. 1.

[10] "Whenever a person is compelled to pay a public officer, in order to induce him to do his duty, fees which he had no right to claim, they can be recovered back." Robinson *v.* Ezzell, 72 N. C. 231; Swift Co. *v.* United States, 111 U. S. 22; Robertson *v.* Frank Bros. Co., 132 U. S. 17; Ogden *v.* Maxwell, 3 Blatchf. 319; Magnolia *v.* Sharman, 46 Ark. 358; Cunningham *v.* Munroe, 15 Gray, 471; Westlake *v.* St. Louis, 77 Mo. 47; Amer. Steamship Co. *v.* Young, 89 Pa. 186.

[11] Railway Co. *v.* Steiner, 61 Ala. 559, 595; Railroad Co. *v.* C. V. & W. Coal Co., 79 Ill. 121; Heiserman *v.* Railroad Co., 63 Ia. 732; Panton *v.* Duluth Water Co., 50 Minn. 175; Peters *v.* Railroad Co., 42 Ohio St. 275. Cp. Potomac Coal Co. *v.* Railroad Co., 38 Md. 226; Killmer *v.* New York Central R. Co., 100 N. Y. 395; Kenneth *v.* Railroad Co., 15 Rich. L. 284.

[12] Elliott *v.* Swartwout, 10 Pet. 138; Ogden *v.* Maxwell, 9 Blatch. 319; Carew *v.* Rutherford, 106 Mass. 1; First Bank *v.* Watkins, 21 Mich. 483, 489; Bocchino *v.* Cook, 67 N. J. L. 467.

preference from a debtor as the price of his assent to a composition (*p*) is to a certain extent analogous.

But on the ground not of coercion in itself but of failure of consideration. But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are thus regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place; the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is a failure of consideration, and ignorance of material facts accounts for the payment having been made. The common principle is that if a man chooses to give away his money, or to take his chance whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise or that he really had no choice.[13] The difference between the right to recover money back under circumstances of this kind and the right to rescind a contract on the ground of coercion is further shown by this, that an excessive payment is not the less recoverable if both parties honestly supposed it to be the proper payment (*q*). We therefore dwell no farther on this topic, but proceed to consider the more extensive doctrines of equity.

600] *II. *The equitable doctrine of Undue Influence.*

The equitable doctrine. In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is whether the party was a free and voluntary agent (*r*).

Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the trans-

(*p*) *Atkinson* v. *Denby* (1861) 6 H. & N. 778, 30 L. J. Ex. 361, in Ex. Ch. 7 *ib.* 934, 31 L. J. Ex. 362. *Supra*, Ch. VII. p. *385.

(*q*) *Dew* v. *Parsons* (1819) 2 B. & Ald. 562. 21 R. R. 404.

(*r*) *Williams* v. *Bayley* (1866) L. R. 1 H. L. 200, 210, 35 L. J. Ch. 717.

[13] Swift Co. *v.* United States, 111 U. S. 22, 30; Peters *v.* Railroad Co., 42 Ohio St. 275, 285 (quoting text).

action, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment.

Generality of the principle. "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed" (*s*).[14] Such cases are thus classified by Cotton L.J. "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been *committed [601 by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused" (*t*). Yet in many cases of the second class the circumstances might, if they could be fully brought out, amount to proof of actual compulsion or fraud (*u*); so that it may perhaps be said that undue influence means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other is not specifically proved, but is inferred from an existing relation of dominion on the one part and submission on the other (*x*). Given a

(*s*) Per Lord Kingsdown, *Smith* v. *Kay* (1859) 7 H. L. C. at p. 779.

(*t*) *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, 171, 56 L. J. Ch. 1052.

(*u*) Cp. per Lindley L.J. 36 Ch. Div. at p. 183.

(*x*) In *Boyse* v. *Rossborough* (1856–7) 6 H. L. C. at p. 48, it is said that, taking the words in a wide sense, all undue influence may be resolved into coercion and fraud; but the case there considered is that of a will, in which undue influence has a more restricted meaning than in transactions *inter vivos:* see note (*i*), p. *603, *infra.*

[14] See Zimmerman *v.* Bitner, 79 Md. 115; Munson *v.* Carter, 19 Neb. 293; Fisher *v.* Bishop, 108 N. Y. 25; Long *v.* Mulford, 17 Ohio St. 484, 504, 505; Fishburne *v.* Ferguson, 85 Va. 321; *infra*, p. 736.

position of general and habitual influence, its exercise in the particular case is presumed.

General influence presumed from certain relations. But again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the domination of the other. There are many relations of common occurrence in life from which "the Court presumes confidence put" in the general course of affairs "and influence exerted" in the particular transaction complained of (*y*).

Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence, and was not **602]** given with due freedom and deliberation. They *must "take upon themselves the whole proof that the thing is righteous" (*z*). A stringent rule of evidence is imposed as a safeguard against evasions of the substantive law.

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed" (*a*).

"Nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the

(*y*) Per Lord Kingsdown, *Smith* v. *Kay* (1859) 7 H. L. C. 750, 779.

(*z*) *Gibson* v. *Jeyes* (1801) 6 Ves. 266, 276, 5 R. R. 295, 303. The like burden of proof is cast upon those who take any benefit under a will which they have themselves been instrumental in preparing or obtaining: *Fulton* v. *Andrew* (1875) L. R. 7 H. L. 448, 472, 44 L. J. P. 17. [See Tyrell *v.* Painton, [1894] Prob. 151; Keith *v.* Kellam, 35 Fed. Rep. 243, 246; Beall *v.* Mann, 5 Ga. 456; Adair *v.* Adair, 30 Ga. 102; Wood's Ex. *v.* Devers, 14 Ky. L. R. 81; Harvey *v.* Sullens, 46 Mo. 147; Waddington *v.* Buzby, 43 N. J. Eq. 154; Boisaubin *v.* Boisaubin, 51 N. J. Eq. 252; Claffey *v.* Ledwith, 56 N. J. Eq. 333; Delafield *v.* Parish, 25 N. Y. 9, 35; Matter of Will of Smith, 95 N. Y. 516; Boyd *v.* Boyd, 66 Pa. St. 283; Cuthbertson's Appeal, 97 Pa. St. 163; Wilson's Appeal, 99 Pa. St. 545; Riddell *v.* Johnson, 26 Gratt. 152; Patton *v.* Allison, 7 Humph. 320; cp. Carter *v.* Dixon, 66 Ga. 82; Carpenter *v.* Hatch, 64 N. H. 573; Post *v.* Mason, 91 N. Y. 539.]

(*a*) Per Lord Chelmsford, *Tate* v. *Williamson* (1866) L. R. 2 Ch. 55, 61.

person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy" (*b*) —a jealousy almost invincible, in Lord Eldon's words (*c*).

"In equity, persons standing in certain relations to one another, such as parent and child (*d*),[15] man and wife (*e*),[16] doctor and patient (*f*),[17]

(*b*) Lord Hatherley, *Turner* v. *Collins* (1871) L. R. 7 Ch. 329, 338.

(*c*) *Hatch* v. *Hatch*, 9 Ves. at p. 296, 7 R. R. 197.

(*d*) *Archer* v. *Hudson* (1844) 7 Beav. 551, 13 L. J. Ch. 380; *Turner* v. *Collins* (1871) L. R. 7 Ch. 329, 41 L. J. Ch. 558.

(*e*) Lord Hardwicke's remarks in *Grigby* v. *Cox* (1750) 1 Ves. sen. 517 (though not the decision, for it was not a gift but a purchase, and apparently there was no evidence to bear out the charge of collusion), and the decision in *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377, seem *contra;* but see *Cobbett* v. *Brock* (1855) 20 Beav. 524; *Page* v. *Horne* (1846–8) 11 Beav. 227; showing that there is a fiduciary relation between persons engaged to be married; and *Coulson* v. *Allison* (1860) 2 D. F. J. 521, 524, the like as to persons living together as man and wife though not lawfully married. In all these cases the burden of proof was held to be on the man (as holding under such circumstances a position of influence) to support the transaction. It may not be so however in a case of mere illicit intercourse: see *Farmer* v. *Farmer* (1848) 1 H. L. C. 724, 752.

(*f*) *Dent* v. *Bennett* (1839) 4 My. & Cr. 269, 48 R. R. 94; *Ahearne* v. *Hogan* (1844) Dru. 310; *s. v. Blackie* v. *Clark* (1852) 15 Beav. at p. 603.

[15] See Powell *v.* Powell, [1900] 1 Ch. 243; Jenkins *v.* Pye, 12 Pet. 241; Taylor *v.* Taylor, 8 How. 183; Noble *v.* Moses, 81 Ala. 530; Brown *v.* Burbank, 64 Cal. 99; Ewing *v.* Bass, 144 Ind. 1; Ashton *v.* Thompson, 32 Minn. 25; Miller *v.* Simonds, 72 Mo. 669; Berkmeyer *v.* Kellerman, 32 Ohio St. 239; Miskey's Appeal, 107 Pa. 618; Davis *v.* Strange's Exrs., 86 Va. 793. Cp. Towson *v.* Moore, 173 U. S. 17; Couchman's Adm'r. *v.* Couchman, 98 Ky. 109; Coleman's Est., 193 Pa. 605.

[16] Rogers *v.* Marshall, 13 Fed. Rep. 60; Harraway *v.* Harraway, 136 Ala. 499; White *v.* Warren, 120 Cal. 322; Lewis *v.* McGrath, 191 Ill. 401; Ilgenfritz *v.* Ilgenfritz, 116 Mo. 429; Ireland *v.* Ireland, 43 N. J. Eq. 311; Boyd *v.* De La Montagnie, 72 N. Y. 498, 502; Haack *v.* Weicken, 118 N. Y. 67, 74; Darlington's Appeal, 86 Pa. 512; Way *v.* Union Ins. Co., 61 S. C. 501. But see *contra*, Barron *v.* Willis, [1899] 2 Ch. 578; Daniels *v.* Benedict, 97 Fed. Rep. 367; Sheehan *v.* Sullivan, 126 Cal. 189; McDougall *v.* Perce, 135 Cal. 316; Hardy *v.* Van Harlingen, 7 Ohio St. 208; Ford *v.* Ford, 193 Pa. 530; Earle *v.* Chace, 12 R. I. 374. There is a fiduciary relation between persons engaged to be married. Hessick *v.* Hessick, 169 Ill. 486; Russell *v.* Russell, 60 N. J. Eq. 282; Pierce *v.* Pierce, 71 N. Y. 154; Graham *v.* Graham, 143 N. Y. 573; Kline *v.* Kline, 57 Pa. 120. And see Rockafellow *v.* Newcomb, 57 Ill. 186, where relief was given to the man. Where conveyances were made by a man to a woman with whom he was unlawfully cohabiting, it has been held that the *onus* of showing an absence of undue influence was on her. Shipman *v.* Furniss, 69 Ala. 555, 565; Leighton *v.* Orr, 44 Ia. 679; Hanna *v.* Wilcox, 53 Ia. 547. And see Bivins *v.* Jarnigan, 59 Tenn. 282. The fact that the beneficiary under a will has been living in illicit relations with the testator does not create a presumption of law that the will was executed under undue influence. Monroe *v.* Barclay, 17 Ohio St. 302; Donnelly's Will, 68 Ia. 126; Waters *v.* Reed, 129 Mich. 131; Arnault *v.* Arnault, 52 N. J. Eq. 801; *Re* Mondorf's Will, 110 N. Y. 450; Rudy *v.* Ulrich, 69 Pa. 177; Main *v.* Ryder, 84 Pa. 217.

[17] Kellogg *v.* Peddicord, 181 Ill. 22; Cadwallader *v.* West, 48 Mo. 483, 496; Bogie *v.* Nolan, 96 Mo. 85; Unruh *v.* Lukens, 166 Pa. 324; cp. Audenried's Appeal, 89 Pa. 114, 120, 121.

603] attorney and client (*g*),[18] confessor and penitent,[19] guardian and ward (*h*),[20] are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence" (*i*).

(*g*) *Gibson* v. *Jeyes* (1801) 6 Ves. 266, 5 R. R. 295; *Holman* v. *Loynes* (1854) 4 D. M. G. 270, 23 L. J. Ch. 529; *Gresley* v. *Mousley* (1861) 4 De G. & J. 78, 94.

(*h*) *Hatch* v. *Hatch* (1804) 9 Ves. 297, 7 R. R. 195; *Maitland* v. *Irving* (1846) 15 Sim. 437.

(*i*) Per Lord Penzance, *Parfitt* v. *Lawless* (1872) L. R. 2 P. & D. 462, 468, 41 L. J. P. 68. It is to be noted that this does not apply to wills [Daniel v. Hill, 52 Ala. 430, 442; Bancroft *r.* Otis, 91 Ala. 275; Bulger *v.* Ross, 98 Ala. 267 (cp. McQueen *v.* Wilson, 131 Ala. 606); Tyson *r.* Tyson's Exr's., 37 Md. 567, 583; Griffith *r.* Diffenderffer, 50 Md. 466, 483; *Re* Sparks' Will, 63 N. J. Eq. 242; *Re* Murphy's Will, 48 N. Y. App. Div. 211; Matter of Will of Smith, 95 N. Y. 516; Lee *r.* Lee, 71 N. C. 139; Herster *r.* Herster, 116 Pa. 612. But see *contra*, Morris *r.* Stoker, 21 Ga. 552, 575; Meek *r.* Perry, 36 Miss. 190, 252; Garvin *v.* Williams, 44 Mo. 465, 477; Gay *v.* Gillilan, 92 Mo. 250; Marx *r.* McGlynn, 88 N. Y. 357, 371], as to which undue influence is never presumed: *ib.*; *Boyse* v. *Rossborough* (1856–7) 6 H. L. C. 2, 49; *Hindson* v. *Weatherill* (1854) 5 D. M. & G. 301, 311, 313 [Barnes *r.* Barnes, 66 Me. 286, 297, 298; Baldwin *v.* Parker, 99 Mass. 79; Cudney *v.* Cudney, 68 N. Y. 148]; though a disposition by will may be set aside as well as an act *inter vivos* when undue influence is actually proved; but then, it seems, the influence must be such as to "overpower the volition without convincing the judgment": *Hall* v. *Hall* (1868) L. R. 1 P. & D. 482, 37 L. J. P. 40. [See Conley *v.* Nailor, 118 U. S. 127; Bowdoin College *r.* Merritt, 75 Fed. Rep. 480, 493; *Re* Nelson's Will, 39 Minn. 204; *Re* Snelling's Will, 136 N. Y. 515.] See *Walker* v. *Smith* (1861) 29 Beav. 394, where between the same parties gifts by will were supported and a gift *inter vivos* set aside. Lord Penzance added to the list of suspected relations that of promoters of a company to the company which is their creature: *Erlanger* v. *New Sombrero Phosphate Co.* (1877) 3 App. Ca. at p. 1230. But is not *personal* confidence essential to make the present doctrine applicable? And has any case gone the length of casting on a promoter the burden of proving in the first instance that a contract between him and the company was a fair one? Cp. *Eden* v. *Ridsdale's Railway Lamp and Lighting Co.* (1889) 23 Q. B. Div. 368, 58 L. J. Q. B. 579, where the duty is put on the ground of agency.

[18] Barron *r.* Willis, [1900] 2 Ch. 121; United States *v.* Coffin, 83 Fed. Rep. 337; Yonge *v.* Hooper, 73 Ala. 119; Kisling *v.* Shaw, 33 Cal. 425; Jennings *r.* McConnell, 17 Ill. 148; Zeigler *v.* Hughes, 55 Ill. 288; Hughes *r.* Wilson, 128 Ind. 491; Ryan *v.* Ashton, 42 Ia. 365; Brigham *v.* Newton, 49 La. Ann. 1539; Yeamans *r.* James, 27 Kan. 195, 207; Dunn *r.* Record, 63 Me. 17; Burnham *v.* Heselton, 84 Me. 578; Roman *v.* Mali, 42 Md. 513, 559; Merryman *v.* Euler, 59 Md. 588; Whipple *r.* Barton, 63 N. H. 613; Brown *v.* Bulkley, 1 McCarter, 451; Howell *r.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640; Whitehead *r.* Kennedy, 69 N. Y. 462, 466; Place *v.* Hayward, 117 N. Y. 487, 497; Ah Foe *r.* Bennett, 35 Oreg. 231; Greenfield's Estate, 14 Pa. 489; McMahan *v.* Smith, 6 Heisk. 167; Cooper *r.* Lee, 75 Tex. 114.

[19] See *infra*, p. 746, n. 43.

[20] See Malone *v.* Kelly, 54 Ala. 532; Ferguson *r.* Lowery, 54 Ala. 510; Wickiser *v.* Cook, 85 Ill. 68; Carter *r.* Tice, 120 Ill. 277; McParland *v.* Lar-

This and all similar specifications are merely illustrative—"As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties" (*k*). The cases in which this jurisdiction has been actually exercised are considered as merely instances of the application of a principle "applying to all the variety of relations in which dominion may be exercised by one person over another" (*l*).[21] *As to certain well-known relations, indeed, the Court is now [604 bound by authority to presume influence. As to any other relation which the Court judges to be of a confidential kind it is free to presume that an influence founded on the confidence exists, or to require such proof thereof as it may think fit.

It has even been said (*m*) that in every case where "one person obtains, by voluntary donation, a large pecuniary benefit from another," the person taking the benefit is bound to show "that the donor voluntarily and deliberately performed the act, knowing its nature and effect;" that for this purpose a voluntary donation means any transaction in which one person confers a large pecuniary benefit on another, though it may be in form a contract (*n*); and that such is the rule whether there is any confidential relation or not. But these dicta, though not expressly contradicted in any reported case, are

(*k*) Lindley L.J. in *Allcard* v. *Skinner* (1887) 36 Ch. Div. at p. 183.

(*l*) Sir S. Romilly, *arg. Huguenin* v. *Baseley* (1807) 14 Ves. 285, 9 R. R. 283; adopted by Lord Cottenham, *Dent* v. *Bennett* (1839) 4 My. & Cr. 269, 277, 48 R. R. 94, 102; *Billage* v. *Southee* (1852) 9 Ha. 534, 540. Cp. D'Aguesseau (Œuvres, 1. 299) "Parceque la raison de l'ordonnance est générale, et qu'elle comprend également tous ceux qui peuvent avoir quelque empire sur l'esprit des donateurs, vos arrêts en ont étendu la disposition aux maîtres, aux médecins, aux confesseurs." So Pothier, Tr. des donations entre-vifs, vol. vii. p. 441, in (Euvres, ed. Dupin, 1825.

(*m*) By Lord Romilly in *Cooke* v. *Lamotte* (1851) 15 Beav. 234, 240, 21 L. J. Ch. 371; and *Hoghton* v. *Hoghton* (1852) 15 Beav. 275, 298; cp. per Lord Hatherley in *Phillips* v. *Mullings* (1871) L. R. 7 Ch. 244, 246, 41 L. J. Ch. 211.

(*n*) *E.g. Cooke* v. *Lamotte* (1851) 15 Beav. 234, 21 L. J. Ch. 371; *Dent* v. *Bennett* (1839) 4 My. & Cr. 269, 273, 48 R. R. 94, 99.

kin, 155 Ill. 84; Ashton *v.* Thompson, 32 Minn. 25; Garvin *v.* Williams, 44 Mo. 465, 50 Mo. 206; Meek *v.* Perry, 36 Miss. 190; Harris *v.* Carstarphen, 69 N. C. 614; Hoppin *v.* Tobey, 9 R. I. 42; Womack *v.* Austin, 1 S. C. 421; Wade *v.* Pulsifer, 54 Vt. 45.

21 See Morley *v.* Loughnan, [1893] 1 Ch. 736, 752; Starr *v.* Lashmutt, 76 Fed. Rep. 907; Shipman *v.* Furniss, 69 Ala. 555, 564; Cleere *v.* Cleere, 82 Ala. 581; Dowie *v.* Driscoll, 203 Ill. 480; McCormick *v.* Malin, 5 Blackf. 509, 523; McClure *v.* Lewis, 72 Mo. 314, 322; Haydock *v.* Haydock, 34 N. J. Eq. 570, 574; Cowee *v.* Cornell, 75 N. Y. 91; Fisher *v.* Bishop, 108 N. Y. 25; Doheny *v.* Lacy, 168 N. Y. 213, 222; Todd *v.* Grove, 33 Md. 188, 194; Deaton *v.* Munroe, 4 Jones Eq. 39, 41; Long *v.* Mulford, 17 Ohio St. 484, 504, 505; Longenecker *v.* Zion Church, 200 Pa. 567; Bayliss *v.* Williams, 6 Coldw. 440, 442.

certainly not law. There is no general presumption against the validity of gifts as such (*o*). Where grounds of unfavourable presumption exist, it is easier to set aside a mere gift than a transaction from which the plaintiff has derived some benefit, though not adequate to what was given for it; and attempts to disguise a gift as a dealing for value are almost always fatal (*p*). Beyond this, it is conceived, the law does not go.[22]

Burden of proof where no special relation. In the absence of any special relation from which influence is presumed, the burden of proof is 605] on the person *impeaching the transaction (*q*),[23] and he must show affirmatively that pressure or undue influence was employed.

Auxiliary rules and doctrines on special points. Having thus stated the fundamental rules, we may proceed to say something more of—

(1.) The auxiliary rules applied by courts of equity to voluntary gifts in general:

(2.) The like as to the influence presumed from special relations, and the evidence required in order to rebut such presumption:

(3.) What are the continuing relations between the parties from which influence has been presumed:

(4.) From what circumstances, apart from any continuing relation, undue influence has been inferred; and herein of the doctrine of equity as to sales at an undervalue and "catching bargains":

(5.) The limits of the right of rescission.

1. As to voluntary dispositions in general. (Cp. Dav. Conv. 3. pt. 1. Appx. No. 4.)

General principles. A voluntary settlement which deprives the settlor of the immediate control of the property dealt with, though it be made not for the benefit of any particular donee, but for the benefit of the settlor's children or family generally, and free from any sus-

(*o*) If there were, the elaborate discussion which took place *e.g.* in *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, would have been superfluous.

(*p*) Also any innocent misrepresentation by the donee whereby a voluntary gift is obtained is ground in equity for avoiding the gift: *Re Glubb*, *Bamfield* v. *Rogers* [1900] 1 Ch. 354, 69 L. J. Ch. 278, C. A.

(*q*) *Blackie* v. *Clark* (1852) 15 Beav. 595; *Toker* v. *Toker* (1863) 31 Beav. 629, 3 D. J. & S. 487, 32 L. J. Ch. 322.

[22] See Brown *v.* Mercantile Co., 87 Md. 377; Hall *v.* Knappenberger, 97 Mo. 509; Haydock *v.* Haydock, 34 N. J. Eq. 570, 574; Parker's Adm. *v.* Parker's Adm., 45 N. J. Eq. 224; Doran *v.* McConlogue, 150 Pa. 98.

[23] Willemin *v.* Dunn, 93 Ill. 511; Brown *v.* Mercantile Co., 87 Md. 377; Cowee *v.* Cornell, 75 N. Y. 91; Deaton *v.* Munroe, 4 Jones Eq. 39; Pressly *v.* Kemp, 16 S. C. 334; Millican *v.* Millican, 24 Tex. 426, 445.

picion of unfair motive, is not in a much better position than an absolute and immediate gift. It seems indeed doubtful whether the Court does not consider it improvident to make in general indefinite contemplation of marriage the same kind of settlement which in contemplation and consideration of a definitely intended marriage it is thought improvident not to make (*r*).

It is conceived that the ground on which such dispositions are readily set aside at the instance of the settlor's representatives is not the imprudence of the thing alone, *but an inference from [606 that, coupled with other circumstances—such as the age, sex, and capacity of the settlor—that the effect of the act was not really considered and understood at the time when it was done (*s*).[24]

As to power of revocation. The absence of a power of revocation has often been insisted upon as a mark of improvidence in a voluntary settlement; and it has been even held to be in itself an almost fatal objection: but the doctrine now settled by the Court of Appeal is that it is not conclusive, but is only to be taken into account as matter of evidence, and is of more or less weight according to the other circumstances of each case (*t*).[25]

It was a rule of Chancery practice that a voluntary settlement could not be set aside at the suit of a defendant. The person impeaching it had to do so by a substantive proceeding in either an original or a cross suit (*u*). Under the existing practice he can proceed by counter-claim if sued on the deed.

2. Auxiliary rules as to the influence presumed from special relations.

Age, &c. not material. The principle on which the Court acts in such cases is not affected either by the age or capacity of the per-

(*r*) *Everitt* v. *Everitt* (1870) L. R. 10 Eq. 405, 39 L. J. Ch. 777; but here some of the usual provisions were omitted.

(*s*) *Ib.*; *Prideaux* v. *Lonsdale* (1863) 1 D. J. & S. 433: this ground is strongly taken by Jessel M.R. in *Dutton* v. *Thompson* (1883) 23 Ch. Div. at p. 281, 52 L. J. Ch. 661; *James* v. *Couchman* (1885) 29 Ch. D. 212, 54 L. J. Ch. 838. So common ignorance or mistake of both parties as to the effect of an instrument may sometimes be inferred on the face of it from its unreasonable or unusual character: see p. *500, *supra*.

(*t*) *Hall* v. *Hall* (1873) L. R. 8 Ch. 430, 42 L. J. Ch. 444, where the former cases are reviewed.

(*u*) *Way's trust* (1864) 2 D. J. & S. 365, 372, 34 L. J. Ch. 49; *Hall* v. *Hall* (1873) L. R. 14 Eq. 365, 377.

24 Garnsey *v.* Mundy, 24 N. J. Eq. 243.

25 Finucan *v.* Kendig, 109 Ill. 198; Brown *v.* Mercantile Co., 87 Md. 377; Dunn *v.* Dunn, 42 N. J. Eq. 431; Russell's Appeal, 75 Pa. 269; Miskey's Appeal, 107 Pa. 618; Potter *v.* Fidelity Co., 199 Pa. 366; Aylsworth *v.* Whitcomb, 12 R. I. 298; Sargent *v.* Baldwin, 60 Vt. 17.

son conferring the benefit, or by the nature of the benefit conferred (*x*).[26]

"Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in
607] order to determine it:" it will not *be considered as determined whilst the influence derived from it can reasonably be supposed to remain (*x*).

Influence presumed to continue. Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for some time after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed, independent of any sort of control (*y*).[27] It is obvious that without this extension the rule would be practically meaningless. It is said that as a general rule a year should elapse from the termination of the authority before the judgment can be supposed to be wholly emancipated: this of course does not exclude actual proof of undue influence at any subsequent time (*z*).

Evidence required to rebut presumption of influence — Father and son. With regard to the evidence to be adduced to rebut the presumption in a transaction between a father and a son who has recently attained majority, the father is bound "to show at all events that the son was really a free agent, that he had adequate independent advice . . . that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

"So again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger" (*a*).[28]

(*x*) Per Turner, L.J. *Rhodes* v. *Bate* (1866) L. R. 1 Ch. 252, 257, 260, 35 L. J. Ch. 267; *Holman* v. *Loynes* (1854) 4 D. M. & G. 270, 283, 23 L. J. Ch. 529.

(*y*) *Archer* v. *Hudson* (1844) 7 Beav. 551, 560, 13 L. J. Ch. 380; *Wright* v. *Vanderplank* (1855) 8 D. M. & G. 133, 137, 146, 25 L. J. Ch. 753.

(*z*) See per Lord Cranworth, 7 H. L. C. at p. 772.

(*a*) *Savery* v. *King* (1865) 5 H. L. C. at p. 655, 25 L. J. Ch. 482; *Casborne* v. *Barsham* (1839) 2 Beav. 76, 50 R. R. 106, seems not quite consistent with this: but there the plaintiff was not the client himself, but his assignee in insolvency, and the client's own evidence was rather favourable to the solicitor.

[26] See Barron *v.* Willis, [1900] 2 Ch. 121; McQueen *v.* Wilson, 131 Ala. 606; Pironi *v.* Corrigan, 48 N. J. Eq. 607 (quoting text); Mason *v.* Ring, 3 Abb. App. Dec. 210.

[27] Ferguson *v.* Lowery, 54 Ala. 510; McConkey *v.* Cockey, 69 Md. 286; Garvin *v.* Williams, 44 Mo. 465, 50 Mo. 206.

[28] See Tancre *v.* Pullman, 35 Minn. 476.

He must give all the reasonable advice against himself that he would have given against a third person (*b*).[29] And *he must [608 not deal with his client on his own account as an undisclosed principal. "From the very nature of things, where the duty exists that he should give his client advice, it should be disinterested advice; he cannot properly give that advice when he is purchasing himself without telling his client that he is purchasing" (*c*). If the client becomes bankrupt, his trustee is entitled to the benefit of this special duty (*d*).

The result of the decisions has been thus summed up by the Judicial Committee of the Privy Council. "The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser" (*e*). He is not absolutely bound to insist on the intervention of another professional adviser. But if he does not, he must not be surprised at the transaction being disputed, and may have to pay his own costs even if in the result it is upheld. As to gifts, the rule is that the client must have competent independent advice (*f*).

Generally —"The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the Court will not allow any transaction between the parties to stand unless there has

(*b*) *Gibson* v. *Jeyes* (1801) 6 Ves. 266, 278, 5 R. R. 295, 306. As to solicitor's charges, see *Lyddon* v. *Moss* (1859) 4 De G. & J. 104.

(*c*) *McPherson* v. *Watt* (1877) (Sc.) 3 App. Ca. 254, 272.

(*d*) *Luddy's Trustee* v. *Peard* (1886) 33 Ch. D. 500.

(*e*) *Pisani* v. *A.-G. for Gibraltar* (1874) L. R. 5 P. C. 516, 536, 540.

(*f*) *Liles* v. *Terry* [1895] 2 Q. B. 679, 65 L. J. Q. B. 34, C. A.

[29] McPherson *v.* Watt, 3 App. Ca. 254, 266; Dunn *v.* Record, 63 Me. 17; Evans *v.* Ellis, 5 Denio, 640, 643; Bank *v.* Hornberger, 4 Coldw. 531, 571. "An attorney who seeks to avail himself of a contract made with his client is bound to establish affirmatively that it was made by the client with full knowledge of all the material circumstances known to the attorney, and was in every respect free from fraud on his part, or misconception on the part of the client, and that a reasonable use was made by the attorney of the confidence reposed in him." Whitehead *v.* Kennedy, 69 N. Y. 462, 466; *Re* Bowers, 83 Fed. Rep. 944, 955; Yeamans *v.* James, 27 Kan. 195, 207; Brigham *v.* Newton, 49 La. Ann. 1539; Burnham *v.* Heselton, 84 Me. 578; Dunn *v.* Dunn, 42 N. J. Eq. 431; Place *v.* Hayward, 117 N. Y. 487, 497; Thomas *v.* Turner's Adm., 87 Va. 1. "An attorney cannot sustain a purchase from his client without showing that he communicated to such client everything necessary to enable him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling at the price offered. And the neglect of the attorney to inform himself of the true state of the facts will not enable him to sustain a purchase, from his client, for an inadequate con-

been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him" (*g*).[30]

In other words, every contract entered into by persons standing in
609] such a relation is treated as being *uberrimae *fidei*, and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other; nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence (*h*). The rule extends not only to beneficial transactions with the confidential adviser himself, but to such as confer a benefit on any one closely connected with him (*i*).

Thus a medical attendant who makes with his patient a contract in any way depending on the length of the patient's life is bound not to keep to himself any knowledge he may have professionally acquired, whether by forming his own opinion or by consulting with other practitioners, as to the probable duration of the life (*k*). Perhaps the only safe way, and certainly the best, is to avoid such contracts altogether.

In *Grosvenor* v. *Sherratt* (*l*), where a mining lease had been granted by a young lady to her brother-in-law (the son of her father's executor) and uncle, at the inducement of the said executor, "in whom she placed the greatest confidence," it was held that it was not enough for the lessees to show that the terms of the lease were fair; they ought to have shown that no better terms could possibly have been obtained; and as they failed to do this, the lease was set aside.

This comes very near to the case of an agent dealing on his own account with his principal, when "it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith."[31] Nor is the agent's duty altered

(*g*) Per Page Wood V.-C. *Tate* v. *Williamson* (1866) L. R. 1 Eq. at p. 536.

(*h*) *Molony* v. *Kernan* (1842) 2 Dr. & W. at p. 39.

(*i*) *Barron* v. *Willis* [1900] 2 Ch. 121, 69 L. J. Ch. 832, C. A.; which also shows (if authority be needed) that a mere suggestion of independent advice, not followed up, will not validate such a transaction.

(*k*) *Popham* v. *Brooke* (1828) 5 Russ. 8.

(*l*) (1860) 28 Beav. 659, 663. This is an extreme case; but there was some evidence of independent offers being discouraged.

sideration." Howell *v.* Ransom, 11 Paige, 538; Rogers *v.* Marshall, 3 McCrary, 76.

[30] Ilgenfritz *v.* Ilgenfritz, 116 Mo. 429 (quoting text).

[31] Brooks *v.* Martin, 2 Wall. 70, 85; Kimberly *v.* Arms, 129 U. S. 512, 527; Ralston *v.* Turpin, 129 U. S. 663, 674; Waddell *v.* Lanier, 62 Ala. 347, 350;

though the proposal originally came from the principal and the *principal shows himself anxious to complete the transaction as [610 it stands (*m*). The same rules apply to an executor who himself becomes the purchaser of part of his testator's estate (*n*).[32] But this obligation of agents and trustees for sale appears (as we have already considered it, p. *285, above) to be incidental to the special nature of their employment, and to be a duty founded on contract rather than one imposed by any rule of law which guards the freedom of contracting parties in general.

The duty cast upon a solicitor, or other person in a like position of confidence, who deals on his own account with his client, of disclosing all material circumstances within his knowledge, does not however bind him to communicate a "speculative and consequential" possibility which may affect the future value of the subject-matter of the transaction, but which is not more in his own knowledge than in the client's (*o*).

Family arrangements exceptionally favoured. It must not be forgotten that the suspicion with which dealings between parents and children presumably still under parental influence are regarded by courts of equity is to a certain extent counteracted by the favour with which dispositions of the kind known as family arrangements are treated. In many cases a balance has to be struck between these partly conflicting presumptions. "Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to im-

(*m*) *Dally* v. *Wonham* (1863) 33 Beav. 154.

(*n*) *Baker* v. *Read* (1854) 18 Beav. 398; where however relief was refused on the ground of seventeen years' delay.

(*o*) *Edwards* v. *Meyrick* (1842) 2 Ha. 60, 74; *Holman* v. *Loynes* (1854) 4 D. M. & G. at p. 280.

Smith *v.* Swecney, 69 Ala. 524, 527; Rubidoex *v.* Parks, 48 Cal. 215; Casey *v.* Casey, 14 Ill. 112; McCormick *v.* Malin, 5 Blackf. 509; Rochester *v.* Levering, 104 Ind. 562; Farnam *v.* Brooks, 9 Pick. 212; Rath *v.* Vanderlyn, 44 Mich. 597; Hicks *v.* Steel, 126 Mich. 408; Hegenmyer *v.* Marks, 37 Minn. 6; Merriam *v.* Johnson, 86 Minn. 61; Condit *v.* Blackwell, 22 N. J. Eq. 481; Tappan *v.* Aylsworth, 13 R. I. 582.

[32] Johnson *v.* Johnson, 5 Ala. 90; Williams *v.* Powell, 66 Ala. 20; Jones *v.* Jones, 131 Mo. 194; Farmer's Exr. *v.* Farmer, 39 N. J. Eq. 211; People *v.* Open Board, 92 N. Y. 103; Statham *v.* Ferguson, 25 Gratt. 28. And see Goodwin *v.* Goodwin, 48 Ind. 584; Handlin *v.* Davis, 81 Ky. 34.

611] peach the transaction (*p*).[33] *On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence" (*q*).

It must be observed that the rules concerning gifts, or transactions in the form of contract which are substantially gifts, from a son to a father, do not apply to the converse case of a gift from an ancestor to a descendant: there is no presumption against the validity of such a gift, for it may be made in discharge of the necessary duty of providing for descendants (*r*).[34]

Classification of relations. 3. Relations between the parties from which influence has been presumed.

It would be useless to attempt an exact classification of that which the Court refuses on principle to define or classify: but it may be convenient to follow an order of approximate analogy to the cases of well-known relations in which the presumption is fully established.

A. Relations in which there is a power analogous to that of parent or guardian.

Uncle *in loco parentis* and niece: *Archer* v. *Hudson* (1844) 7 Beav. 551, 13 L. J. Ch. 380; *Maitland* v. *Irving* (1846) 15 Sim. 437.[35] Step-father

(*p*) Perhaps it is safer to say that the "almost invincible jealousy" of the Court is reduced to "a reasonable degree of jealousy": cp. Lord Eldon's language in *Hatch* v. *Hatch* (1804) 9 Ves. at p. 296, 7 R. R. at p. 197, and *Tweddell* v. *Tweddell* (1822) Turn. & R. at p. 13, 23 R. R. 168. On the question of consideration see *Williams* v. *Williams* (1866–7) L. R. 2 Ch. 294, 304, 36 L. J. Ch. 200.

(*q*) *Baker* v. *Bradley* (1855) 7 D. M. & G. 597, 620. See also *Wallace* v. *Wallace* (1842) 2 Dr. & W. 452, 470; *Bellamy* v. *Sabine* (1835) 2 Ph. 425, 439; *Hoghton* v. *Hoghton* (1852) 15 Beav. 278, 300; and on the doctrine of family arrangement not applying when a son without consideration gives up valuable rights to his father: *Savery* v. *King* (1856) 5 H. L. C. at p. 657. A sale by a nephew to his [great] uncle of his reversionary interest in an estate of which the uncle is tenant for life is not a family arrangement: *Talbot* v. *Staniforth* (1861) 1 J. & H. 484, 501. As to the amount of notice that will affect a purchaser: *Bainbrigge* v. *Browne* (1881) 18 Ch. D. 188, 50 L. J. Ch. 522.

(*r*) *Beanland* v. *Bradley* (1854) 2 Sm. & G. 339.

[33] See Supreme Assembly *v.* Campbell, 17 R. I. 402.

[34] See Towson *v.* Moore, 173 U. S. 17; Fitch *v.* Reiser, 79 Ia. 34; Bauer *v.* Bauer, 82 Md. 241; McKinney *v.* Hensley, 74 Mo. 326; Millican *v.* Millican, 24 Tex. 426; Saufley *v.* Jackson, 16 Tex. 579; Davis *v.* Dean, 66 Wis. 100. But the unfavorable presumption may arise "where the natural position of the parties is reversed by the influence of time, and the parent has become a child, and the child is guardian to the parent." Highberger *v.* Stiffler, 21 Md. 338; Ennis *v.* Burnham, 156 Mo. 494; Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 353; Brummond *v.* Krause, 8 N. Dak. 573.

[35] Earhart *v.* Holmes, 97 Ia. 649; uncle and nephew, Hall *v.* Perkins, 3 Wend. 626; Graham *v.* Little, 3 Jones Eq. 152.

*in *loco parentis* and step-daughter: *Kempson* v. *Ashbee* (1874) 10 [612 Ch. 15, 44 L. J. Ch. 195; *Espey* v. *Lake*, 10 Ha. 260.[36] Executor of a will (apparently in a like position) and the testator's daughter: *Grosvenor* v. *Sherratt* (1860) 28 Beav. 659.

Husband of a minor's sister with whom the minor had lived for some time before he came of age: *Griffin* v. *Deveuille* (1781) 3 P. Wms. 131, *n.* But the mere fact of a minor living with a relative of full age does not raise a presumption of influence; or the presumption, if any, is rebutted by proof of business-like habits and capacity on the donor's part: *Taylor* v. *Johnston* (1882) 19 Ch. D. 603, 51 L. J. Ch. 879.

Two sisters living together, of whom one was in all respects the head of the house, and might be considered as *in loco parentis* towards the other, though the other was of mature years: *Harvey* v. *Mount* (1845) 8 Beav. 439.[37] Brother and sister, where the sister at the age of 46 executed a voluntary settlement under the brother's advice and for his benefit: *Sharp* v. *Leach* (1862) 31 Beav. 491.[38]

Husband and wife on the one part, and aged and infirm aunt of the wife on the other: *Griffiths* v. *Robins* (1818) 3 Mad. 191.[39]

Distant relationship by marriage: the donor old, infirm, and his soundness of mind doubtful; great general confidence in the donee, who was treated by him as a son: *Steed* v. *Calley* (1836) 1 Kee. 620. This rather than the donor's insanity seems the true ground of the case: see p. 644.

Keeper of lunatic asylum and recovered patient: *Wright* v. *Proud* (1806) 13 Ves. 136.

There are also cases of general control obtained by one person over another without any tie of relationship or lawful authority: *Bridgman* v. *Green* (1755) 2 Ves. Sr. 627, Wilm. 58, where a servant obtained complete control over a master of weak understanding. *Kay* v. *Smith* (1856) 21 Beav. 522, affirmed *nom. Smith* v. *Kay* (1859) 7 H. L. C. 750, where an older man living with a minor in a joint course of extravagance induced him immediately on his coming of age to execute securities for bills previously accepted by him to meet the joint expenses.

In *Lloyd* v. *Clark* (1843) 6 Beav. 309, the influence of an officer over his junior in the same regiment was taken into account as increasing the weight of other suspicious circumstances; but there is nothing in the case to warrant including the position of a superior officer in the general category of "suspected relations."

B. Positions analogous to that of solicitor.[40]

Certified conveyancer acting as professional adviser: *Rhodes* v. *Bate* (1866) L. R. 1 Ch. 252, 35 L. J. Ch. 267. Counsel and confidential adviser: *Broun* v. *Kennedy* (1863) 33 Beav. 133, 148, 4 D. J. S. 217.

[36] Bradshaw *v.* Yates, 67 Mo. 221; Berkmeyer *v.* Kellerman, 32 Ohio St. 239; step-mother and step-daughter, Powell *v.* Powell [1900], 1 Ch. 243; step-father and step-son, Givan *v.* Masterson, 152 Ind. 187; grandparent and grandchild, Brown *v.* Burbank, 64 Cal. 99; Chambers *v.* Chambers, 139 Ind. 111.

[37] Watkins *v.* Brant, 46 Wis. 419; two brothers, Todd *v.* Grove, 33 Md. 188.

[38] See Boney *v.* Hollingsworth, 23 Ala. 690; Million *v.* Taylor, 38 Ark. 428; Thornton *v.* Ogden, 32 N. J. Eq. 723; Sears *v.* Shafer, 6 N. Y. 268; Jones *v.* Jones, 120 N. Y. 589.

[39] McClure *v.* Lewis, 72 Mo. 314; Graves *v.* White, 4 Baxt. 38; nephew and aged and dying uncle, Duncombe *v.* Richards, 46 Mich. 166.

It has been decided that there is no such relation of trust and confidence between a man and his mother-in-law, that in dealings between them the latter should be supposed to act upon the assumption that there would be no concealment of facts from her. Fish *v.* Cleland, 33 Ill. 238; 43 Ill. 282; McHarry *v.* Irwin, 85 Ky. 322. See also Herron *v.* Herron, 71 Ia. 428; Zimmerman *v.* Bitner, 79 Md. 115.

[40] See Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241; Bayliss *v.* Williams, 6 Coldw. 440; Poillon *v.* Martin, 1 Sandf. Ch. 569.

Confidential agent substituted for solicitors in general management of affairs: *Huguenin* v. *Baseley* (1807) 14 Ves. 273, 9 R. R. 276 (*s*).

613] *A person deputed by an elder relation, to whom a young man applied for advice and assistance in pecuniary difficulties, to ascertain the state of his affairs and advise on relieving him from his debts: *Tate* v. *Williamson* (1866) L. R. 1 Eq. 528, 2 Ch. 55.

The relation of a medical attendant and his patient is treated as a confidential relation analogous to that between solicitor and client: *Dent* v. *Bennett* (1839) 4 My. & Cr. 269, 48 R. R. 94; *Billage* v. *Southee* (1852) 9 Ha. 534; *Ahearne* v. *Hogan* (1844) Dru. 310;[41] though in *Blackie* v. *Clark* (1852) 15 Beav. 595, 603, somewhat less weight appears to be attached to it.[42] It does not appear in the last case whether the existence of "anything like undue persuasion or coercion" (p. 604) was merely *not proved* or positively *disproved:* on the supposition that it was *disproved* there would be no inconsistency with the other authorities. For another unsuccessful attempt to set aside a gift to a medical attendant, see *Pratt* v. *Barker* (1826–28) 1 Sim. 1, 4 Russ. 507, 27 R. R. 136, there the donor was advised by his own solicitor, who gave positive evidence that the act was free and deliberate.

c. Spiritual influence.

It is said that influence would be presumed as between a clergyman or any person in the habit of imparting religious instruction and another person placing confidence in him: *Dent* v. *Bennett* (1835) 7 Sim. at p. 546, 48 R. R. p. 97.[43] There have been two remarkable modern cases of spiritual influence in which there were claims to spiritual power and extraordinary gifts on the one side, and implicit belief in such claims on the other; it was not necessary to rely merely on the presumption of influence resulting therefrom, for the evidence which proved the relation of spiritual confidence also went far to prove as a fact in each case that a general influence and control did actually result: *Nottidge* v. *Prince* (1860) 2 Giff. 246, 29 L. J. Ch. 857; *Lyon* v. *Home* (1868) L. R. 6 Eq. 655, 37 L. J. Ch. 674 (*t*).[44] In the former case at all events there was gross imposture, but the spiritual dominion alone would have been sufficient ground to set aside the gift: for the Court considered the influence of a minister of religion over a person under his direct

(*s*) *A fortiori,* where characters of steward and attorney are combined: *Harris* v. *Tremenheere* (1808) 15 Ves. 34, 10 R. R. 5. A flagrant case is *Baker* v. *Loader* (1872) L. R. 16 Eq. 49, 42 L. J. Ch. 113. Cp. *Moxon* v. *Payne* (1873) L. R. 8 Ch. 881, 43 L. J. Ch. 240, where however the facts are not given in any detail. As to a land agent purchasing or taking a lease from his principal, see also *Molony* v. *Kernan* (1842) 2 Dr. & W. 31; *Lord Selsey* v. *Rhoades* (1824–27) 2 Sim. & St. 41, 1 Bli. 1, 25 R. R. 150, 30 R. R. 1. In *Rossiter* v. *Walsh* (1843) 4 Dr. & W. 485, where the transaction was between an agent and a sub-agent of the same principals, the case was put by the bill (p. 487), but not decided, on the ground of fiduciary relation. See p. 609, above.

(*t*) In *Lyon* v. *Home* the evidence appears to have been in a very unsatisfactory condition, and on many particulars to have led to no definite conclusion: the case is therefore more curious than instructive.

[41] Cadwallader *v.* West, 48 Mo. 483, 496.

[42] And see Watson *v.* Mahan, 20 Ind. 223; Audenried's Appeal, 89 Pa. 114.

[43] Thompson *v.* Hawks, 14 Fed. Rep. 902; McQueen *v.* Wilson, 131 Ala. 606; Ross *v.* Conway, 92 Cal. 632; Dowie *v.* Driscoll, 203 Ill. 480; Good *v.* Zook, 116 Ia. 582; Caspari *v.* First Church, 12 Mo. App. 293; Ford *v.* Hennessy, 70 Mo. 580; Pironi *v.* Corrigan, 48 N. J. Eq. 607; Marx *v.* McGlynn, 88 N. Y. 357.

[44] See also Connor *v.* Stanley, 72 Cal. 556; Ross *v.* Conway, 92 Cal. 632; Middleditch *v.* Williams, 45 N. J. Eq. 726; Hides *v.* Hides, 65 How. Pr. 17.

spiritual charge to be stronger than that arising from any other relation (*u*).[45] There seems to have been also in *Norton* v. *Relly* (1764) *2 Eden, 286, [614 the earliest reported case of this class, a considerable admixture of actual fraud and imposition.

A peculiar case is *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, 56 L. J. Ch. 1052. The plaintiff, a lady of full age, had joined a religious sisterhood, apparently of her own mere motion and free will. Its rules, known to her before she applied for admission, required the members to abandon all their individual property; not necessarily to the sisterhood, but the common practice was to give it to the superior for the purposes of the sisterhood. Other rules required strict obedience to the superior, restrained communication with "externs" about the affairs of the convent, and forbade members to "seek advice of any extern without the superior's leave." At various times after entering the sisterhood the plaintiff made transfers of considerable sums of money and stock to the superior, in fact "gave away practically all she could." After some years she left the sisterhood, and after nearly six years more she claimed the return of the funds remaining in the superior's hands. It was held that, having regard to the position of the plaintiff as a member of the sisterhood, and to the rules she had undertaken to obey, especially the rules against communication with "externs," she was not a free agent at the time of making the gifts. But the majority of the Court held that her subsequent conduct amounted to confirmation.

A still later case where a weak rich man became a mere puppet in the hands of an amateur spiritual director, who used his ascendancy for the most grossly selfish ends, is *Morley* v. *Loughnan* [1893] 1 Ch. 736, 62 L. J. Ch. 515.

The authority of *Huguenin* v. *Baseley* (1807) 14 Ves. 273, 9 R. R. 276, as to this particular kind of influence, is to be found not in the judgment, which proceeds on the ground of confidential ageney, but in Sir S. Romilly's argument in reply, to which repeated judicial approval has given a weight searcely if at all inferior to that of the decision itself.

4. Circumstances held to amount to proof of undue influence, apart from any continuing relation.

Securities obtained by pressure: Williams v. Bayley. In a case where a father gave security for the amount of certain notes believed to have been forged by his son, the holders giving him to understand that otherwise the son would be prosecuted for the felony, the agreement was set aside, as well on the ground that the father acted under undue pressure and was not a free and voluntary agent, as because the agreement was in itself illegal, as being substantially an agreement to stifle a criminal prosecution (*x*).[46]

(*u*) 2 Giff. 269, 270.

(*x*) *Williams* v. *Bayley* (1866) L. R. 1 H. L. 200, 35 L. J. Ch. 717; ep. p. *329, above.

[45] See also Nachtrieb *v.* The Harmony Settlement, 3 Wall. Jr. 66; Connor *v.* Stanley, 72 Cal. 556; Orchardson *v.* Cofield, 171 Ill. 14.

[46] Sharon *v.* Gager, 46 Conn. 189; Ingalls *v.* Miller, 121 Ind. 188; Singer Mfg. Co. *v.* Rawson, 50 Ia. 634; Winfield Bank *v.* Croco, 46 Kan. 620; Thorne *v.* Pinkham, 84 Me. 103; Rau *v.* Von Zedlitz, 132 Mass. 164; Silsbee *v.* Webber, 171 Mass. 378; Benedict *v.* Roome, 106 Mich. 340; Allen *v.* Leflore Co., 78 Miss. 671; Bell *v.* Campbell, 123 Mo. 1; Lomerson *v.* Johnston, 44 N. J. Eq. 93; Ingersoll *v.* Roe, 65 Barb. 346; Eadie *v.* Slimmon, 26 N. Y. 9; Haynes *v.* Rudd, 102 N. Y. 372; Adams *v.* Irving Bank, 116 N. Y. 606; Weber *v.* Barrett, 125 N. Y. 18; Anthony *v.* Hutchins, 10 R. I. 165; Foley *v.* Greene,

615] *In *Ellis* v. *Barker* (*y*) the plaintiff's interest under a will was practically dependent as to part of its value on his being accepted as tenant of a farm the testator had occupied as yearly tenant. One of the trustees was the landlord's steward, and in order to induce the plaintiff to carry out the testator's supposed intentions of providing for the rest of the family he persuaded the landlord not to accept the plaintiff as his tenant unless he would make such an arrangement with the rest of the family as the trustees thought right. Under this pressure the arrangement was executed: it was practically a gift, as there was no real question as to the rights of the parties. Afterwards the deeds by which it was made were set aside at the suit of the plaintiff, and the trustees (having thus unjustifiably made themselves partisans as between their cestuis que trust) had to pay the costs.[47]

These are the most distinct cases we have met with of a transaction being set aside on the ground of undue influence specifically proved to have been used to procure the party's consent to that particular transaction (*z*).

Smith v. Kay. In *Smith* v. *Kay* (*a*) a young man completely under the influence and control of another person and acting under that influence had been induced to execute securities for bills which he had accepted during his minority without any independent legal advice; and the securities were set aside. There was in this case evidence of actual fraud; but it was distinctly affirmed that the decision would have been the same without it, it being incumbent on persons claiming under the securities to give satisfactory evidence of fair dealing (*b*).

(*y*) (1871) L. R. 7 Ch. 104, 41 L. J. Ch. 64.

(*z*) Cp. *Ormes* v. *Beadel* (1860) 2 Giff. 166, 30 L. J. Ch. 1, revd. 2 D. F. & J. 333, on the ground that the agreement had afterwards been voluntarily acted upon with a knowledge of all the facts.

(*a*) (1859) 7 H. L. C. 750.

(*b*) Pp. *761, *770. The securities given were for an amount very much exceeding the whole of the sums really advanced and the interest upon them: p. *778.

14 R. I. 618; Coffman *v.* Bank, 5 Lea, 232; Obert *v.* Landa, 59 Tex. 475; Landa *v.* Obert, 78 Tex. 33; Gorringe *v.* Read, 23 Utah, 120; Bank *v.* Kusworm, 88 Wis. 188. But see Russell *v.* Durham, 16 Ky. L. Rep. 516; Phillips *v.* Henry, 160 Pa. 24; Loud *v.* Hamilton, 51 S. W. Rep. 140 (Tenn.).

47 "While a man in the full possession of his faculties and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the situation of the beneficiary, and has obtained from him, even for only the benefit of other beneficiaries, large property without consideration, it will refuse to uphold the transaction thus accomplished." Adams *v.* Cowen, 177 U. S. 471, 484.

*This comes very near to the peculiar class of cases on "catching bargains" with which we shall deal presently. [616

Other circumstances from which undue influence inferred. Undue influence may be inferred when the benefit is such as the taker has no right to demand [*i.e.* no natural or moral claim] and the grantor no rational motive to give (*c*).

Undervalue. Inadequacy of the consideration, though in itself not decisive, may be an important element in the conclusion arrived at by a court of equity with respect to a contract of sale.

General rule: undervalue has of itself no effect. The general rule of equity in this matter has been thus stated by Lord Westbury: "It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition" (*d*).[48]

The established doctrine is that mere inadequacy of price is in itself of no more weight in equity than at law (*e*).[49] It is evidence of fraud, but, standing alone, by no means conclusive evidence (*f*).[50]

(*c*) *Purcell* v. *M'Namara* (1807) 14 Ves. 91, 115.

(*d*) *Tennent* v. *Tennents* (1870) L. R. 2 Sc. & D. 6, 9. For a modern instance of such a conclusion being actually drawn by the Court from a sale at a gross undervalue, see *Rice* v. *Gordon* (1847) 11 Beav. 265, 270; cp. *Underhill* v. *Horwood* (1804) 10 Ves. at p. 219; *Summers* v. *Griffiths* (1866) 35 Beav. 27, 33, and the earlier dictum there referred to of Lord Thurlow in *Gwynne* v. *Heaton* (1778) 1 Bro. C. C. 1, 9, that "to set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

(*e*) *Wood* v. *Abrey* (1818) 3 Mad. 417, 423, 18 R. R. 264, 268; *Peacock* v. *Evans* (1809) 16 Ves. 512, 517, 10 R. R. 218, 222; *Stilwell* v. *Wilkins* (1821) Jac. 280, 282, 23 R. R. 56.

(*f*) *Cockell* v. *Taylor* (1851) 15 Beav. 105, 115, 21 L. J. Ch. 545.

[48] See Eyre *v.* Potter, 15 How. 42, 60; Wann *v.* Coe, 31 Fed. Rep. 369; Juzan *v.* Toulmin, 9 Ala. 662, 686; Wiest *v.* Garman, 3 Del. Ch. 422, 442; 4 Houst. 119; Witherwax *v.* Riddle, 121 Ill. 140; Railroad Co. *v.* Commrs. of Miami Co., 12 Kan. 482; Gay *v.* Witherspoon, 13 Ky. L. Rep. 20; Hyer *v* Little, 20 N. J. Eq. 443, 459; Phillips *v.* Pullen, 45 N. J. Eq. 5; Dunn *v.* Chambers, 4 Barb. 376, 379; Parmelee *v.* Cameron, 41 N. Y. 392; Steele *v.* Worthington, 2 Ohio, 182, 195; Coffee *v.* Ruffin, 4 Coldw. 487, 507; Mann *v.* Russey, 101 Tenn. 596; Stephens *v.* Ozbourne, 107 Tenn. 572; Howard *v.* Edgell, 17 Vt. 9, 27; Jones *v.* Degge, 84 Va. 685; Hanna *v.* Kasson, 26 Wash. 568.

[49] Eyre *v.* Potter, 15 How. 42, 59, 60; Hemingway *v.* Coleman, 49 Conn. 390; Chaires *v.* Brady, 10 Fla. 133; Exrs. of Wintermute *v.* Exrs. of Snyder, 2 Green's Ch. 489, 496; Miles *v.* Dover Iron Co., 125 N. Y. 294.

[50] Hoyle *v.* Southern Saw Works, 105 Ga. 123; Talbot's Devisees *v.* Hooser, 12 Bush, 408; Davidson *v.* Little, 22 Pa. 245.

Even when coupled with an incorrect statement of the consideration it will not alone be enough to vitiate a sale in the absence of any fiduciary relation between the parties (*g*).

617] *But coupled with other circumstances may be material as evidence that consent, or freedom of consent, was wanting. But if there are other circumstances tending to show that the vendor was not a free and reasonable agent, the fact of the sale having been at an undervalue may be a material element in determining the Court to set it aside. Thus it is when one member of a testator's family conveys his interest in the estate to others for an inadequate consideration, and it is doubtful if he fully understood the extent of his rights or the effect of his act (*h*).[51] If property is bought at an inadequate price from an uneducated man of weak mind (*i*) or in his last illness (*k*),[52] who is not protected by independent advice, the burden of proof is on the purchaser to show that the vendor made the bargain deliberately and with knowledge of all the circumstances. Nay, more, when the vendor is infirm and illiterate and employs no separate solicitor, "it lies on the purchaser to show affirmatively that the price he has given is the value," and if he cannot do this the sale will be set aside at the suit of the vendor (*l*). In 1871 a case in the Court of Appeal was decided on the ground that "if a solicitor and mortgagee . . . obtains a conveyance [of the mortgaged property] from the mortgagor, and the mortgagor is a man in humble circumstances, without

(*g*) *Harrison* v. *Guest* (1855) 6 D. M. & G. 424, 8 H. L. C. 481.

(*h*) *Sturge* v. *Sturge* (1849) 12 Beav. 229, 19 L. J. Ch. 17; cp. *Dunnage* v. *White* (1818) 1 Swanst. 137, 150, 18 R. R. 33, 41.

(*i*) *Longmate* v. *Ledger* (1860) 2 Giff. 157, 163 (affirmed on appeal, see 4 D. F. & J. 402).

(*k*) *Clark* v. *Malpas* (1862) 31 Beav. 80, 4 D. F. & J. 401.

(*l*) *Baker* v. *Monk* (1864) 33 Beav. 419, 4 D. J. & S. 388, 391.

[51] Million *v.* Taylor, 38 Ark. 428; Thornton *v.* Ogden, 32 N. J. Eq. 723.

[52] "It may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside." Allore *v.* Jewell, 94 U. S. 506, 511, 512; Griffith *v.* Godey, 113 U. S. 89, 95. And see Parkhurst *v.* Hosford, 21 Fed. Rep. 827; St. Louis, etc., Ry. Co. *v.* Phillips, (C. C. A.) 66 Fed. Rep. 35; Moore *v.* Moore, 56 Cal. 89; Taylor *v.* Atwood, 47 Conn. 498; Reed *v.* Peterson, 91 Ill. 288; Perkins *v.* Scott, 23 Ia. 237; Harris *v.* Wamsley, 41 Ia. 671; Clough *v.* Adams, 77 Ia. 17; Hunter *v.* Owens, 10 Ky. L. Rep. 651; Goodrich *v.* Shaw, 72 Mich. 109; Rielly *v.* Brown, 87 Mich. 163; Clark *v.* Lopez, 75 Miss. 932; Cadwallader *v.* West, 48 Mo. 483; Tracy *v.* Sackett, 1 Ohio St. 54; Scovill *v.* Barney, 4 Oreg. 288; Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241; Varner *v.* Carson, 59 Tex. 303; Cole *v.* Getzinger, 96 Wis. 559.

any legal advice, then the onus of justifying the transaction, and showing that it was a right and fair transaction, is thrown upon the mortgagee" (*m*).[53] Still more lately the poverty and ignorance of the seller of a reversionary interest have been held enough, without infirmity of body or mind, to throw the burden of proof on the buyer (*n*).

Similarly if a purchase is made at an inadequate price *from [618 vendors in great distress, and without any professional assistance but that of the purchaser's solicitor, "these circumstances are evidence that in this purchase advantage was taken of the distress of the vendors," and the conveyance will be set aside (*o*).[54]

"Equality between the contracting parties." It has even been said that to sustain a contract of sale in equity "a reasonable degree of equality between the contracting parties" is required (*p*).[55] But such a dictum can be accepted only to this extent: that when there is a very marked inequality between the parties in social position or intelligence, or the transaction arises out of the necessities of one of them and is of such a nature as to put him to some extent in the power of the other, the Court will be inclined to give much more weight to any suspicious circumstances attending the formation of the contract, and will be much more exacting in its demands for a satis-

(*m*) Lord Hatherley C. *Prees* v. *Coke* (1870–1) L. R. 6 Ch. 645, 649: though in general there is no rule against a mortgagee buying from his mortgagor: *Knight* v. *Marjoribanks* (1849) 2 Mac. & G. 10; and see *Ford* v. *Olden* (1867) L. R. 3 Eq. 461, 36 L. J. Ch. 651. [See *supra*, p. *507, n. 93.]

(*n*) *Fry* v. *Lane* (1888) 40 Ch. D. 312, 58 L. J. Ch. 113.

(*o*) *Wood* v. *Abrey* (1818) 3 Mad. 417, 424, 18 R. R. 264, 269.

(*p*) *Longmate* v. *Ledger* (1860) 2 Giff. at p. 163, by Stuart V.C.; cp. the same judge's remarks in *Barrett* v. *Hartley* (1866) L. R. 2 Eq. at p. 794. But see the more guarded statement in *Wood* v. *Abrey*, 3 Mad. at p. 423, 18 R. R. p. 268. "A court of equity will inquire whether the parties really did meet on equal terms; and *if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress*, it will avoid the contract."

53 See Wildrick *v.* Swain, 34 N. J. Eq. 167.

54 Wheeler *v.* Smith, 9 How. 55; Lester *v.* Mahan, 25 Ala. 445; McCormick *v.* Malin, 5 Blackf. 509, 530; Esham *v.* Lamar, 10 B. Mon. 43; Admrs. of Hough *v.* Hunt, 2 Ohio, 495; McKinney *v.* Pinckard, 2 Leigh, 149.

Where plaintiff had sold and transferred to the defendant a policy of insurance of $1,477.73, which the insurance company was willing to pay if the plaintiff would place her signature to the release on the policy, and plaintiff, taking advantage of her assignee's situation, exacted his promise to pay her $477.73 for the mere inconvenience of writing her name, it was held that the promise was not binding, and that plaintiff was entitled to recover only the fair value of her services in writing her signature (which was fixed at one cent). Caplice *v.* Kelley, 23 Kan. 474, 27 Kan. 359.

55 See Dundee Works *v.* Connor, 46 N. J. Eq. 576.

factory explanation of them, than when the parties are on such a footing as to be presumably of equal competence to understand and protect their respective interests in the matter in hand. The true doctrine is well expressed in the Indian Contract Act, s. 25, expl. 2. "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given." A sale made by a person of inferior station, and for an inadequate price, was upheld by the Court of Appeal in Chancery, and ultimately by the House of Lords, when it appeared by the evidence that the vendor had entered into the
619] transaction deliberately, and *had deliberately chosen not to take independent professional advice (*q*).

Can specific performance be refused on the ground of undervalue alone? It is not so clear however that a degree of inadequacy of consideration which does not amount to evidence of fraud may not yet be a sufficient ground for refusing specific performance. The general rule as to granting specific performance, so far as it bears on this point, is that the Court has a discretion not to direct a specific performance in cases where it would be highly unreasonable to do so: it is also said that one cannot define beforehand what shall be considered unreasonable (*r*). On principle it might perhaps be doubted whether it should ever be considered unreasonable to make a man perform that which he has the present means of performing, and which with his eyes open he has bound himself to perform by a contract valid in law. And it is said in *Watson* v. *Marston* (*r*) that the Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood." Perhaps this may be considered to overrule those earlier decisions which furnish authority for refusing a specific performance simply on the ground of the apparent hardship of the contract. The question now in hand is whether inadequacy of consideration, not being such as to make the validity of the contract doubtful (*s*), is regarded as making the

(*q*) *Harrison* v. *Guest* (1855) 6 D. M. & G. 424, 8 H. L. C. 481; cp. *Rosher* v. *Williams* (1875) L. R. 20 Eq. 210, 44 L. J. Ch. 419.

(*r*) See *Watson* v. *Marston* (1853) 4 D. M. & G. 230, 239, 240, and dicta there referred to.

(*s*) Doubt as to the validity of the contract, short of the conclusion that it is not valid, has always been held a sufficient ground for refusing specific performance. Probably this arose from the habit or etiquette by which courts of equity, down to recent times, never decided a legal point when they could help it. Now that legal and equitable jurisdiction are united, the Court will consider

performance of it highly unreasonable within the meaning of the above rule: and for this purpose we assume the generality of the rule not to be affected by anything that was said in *Watson* v. *Marston*.

***Conflicting authorities collected.** In the absence of any final de- [620 cision, it is still thought right to set out the conflicting authorities and leave the matter to the reader's judgment. The opinion to which Lord Eldon at least inclined, and which was expressed by Lord St. Leonards and Lord Romilly, is, we believe, generally received as the better one. The weight of American authority seems to be on the same side.[56]

In favour of treating inadequacy of consideration as a ground for refusing specific performance.	*Contra.*
Young v. *Clark* (1720) Pre. Ch. 538.	
Saville v. *Saville* (1721) 1 P. Wms. 745.	*Collier* v. *Brown* (1788) 1 Cox 428, 1 R. R. 70.
Underwood v. *Hitchcox* (1749) 1 Ves. Sr. 279.	
Other cases of the early part of the 18th century cited from MS. in *Howell* v. *George* (1815) 1 Madd. p. 9, note (*l*).	
Day v. *Newman* (1788) 2 Cox 77, see p. 80, and *ad fin.*, 2 R. R. 1, 4;	*Anon.* Cited in *Mortimer* v. *Capper* (1782) 1 Bro. C. C. 158 (sale of an

the question of damages if an action for specific performance is brought in a case such that under the old practice the bill would have been dismissed without prejudice to an action: *Tamplin* v. *James* (1880) 15 Ch. Div. 215.

[56] Although there are dicta and cases in this country to the effect that inadequacy of consideration not amounting to evidence of fraud may be a ground for refusing specific performance. Espert *v.* Wilson, 190 Ill. 629; Powers *v.* Hale, 25 N. H. 145; Eastman *v.* Plumer, 46 N. H. 464; Osgood *v.* Franklin, 2 Johns. Ch. 1, 23; Seymour *v.* Delancy, 6 Johns. Ch. 222; Knobb *v.* Lindsay, 5 Ohio, 468, 472; Clitherall *v.* Ogilvie, 1 Dess. 250; Gasque *v.* Small, 2 Strobh. Eq. 72. The great weight of authority is in favor of the rule that inadequacy of consideration when urged as a defense against specific performance stands upon the same ground as when presented as a reason for avoiding a contract. *Supra*, pp. *616–*618; Cathcart *v.* Robinson, 5 Pet. 264, 271; January *v.* Martin, 1 Bibb, 586; Garnett *v.* Macon, 2 Marsh. Dec. 185, 246; Wollums *v.* Horsley, 14 Ky. L. Rep. 642; Shepherd *v.* Bevin, 9 Gill, 32; Young *v.* Frost, 5 Gill, 287, 313; Railroad Co. *v.* Babcock, 6 Met. 346; Lee *v.* Kirby, 104 Mass. 420; New England Trust Co. *v.* Abbott, 162 Mass. 148, 155; O'Brien *v.* Boland, 166 Mass. 481; Harrison *v.* Town, 17 Mo. 237; Ready *v.* Noakes, 29 N. J. Eq. 497; Shaddle *v.* Disbrough, 30 N. J. Eq. 370, 384; Viele *v.* Railroad Co., 21 Barb. 381; Losee *v.* Morey, 57 Barb. 561; Seymour *v.* Delancy, 3 Cow. 445, revg. S. C., 6 Johns. Ch. 222; Woodfolk *v.* Blount, 3 Hayw. 147; Fripp *v.* Fripp, Rice's Eq. 84; Sarter *v.* Gordon, 2 Hill Ch. 121; White *v.* Thompson, 1 Dev. & Bat. Eq. 493; Hale *v.* Wilkinson, 21 Gratt. 75; Talley *v.* Robinson's Assignee, 22 Gratt. 888; White *v.* McGannon, 29 Gratt. 511.

the case was of a sale at a great overvalue (nearly double the real value), and there were cross suits for specific performance and for rescission. There was nothing to show fraud, but it was considered "too hard a bargain for the Court to assist in." Both bills were dismissed.

White v. *Damon* (1802) 7 Ves. 30, 6 R. R. 71, before Lord Rosslyn.

In *Wedgwood* v. *Adams* (1843) 6 Beav. 600, 606, specific performance was not enforced against trustees for sale, when the contract (as the Court inclined to think, but with some doubt whether such could have been the real intention of the parties) bound them personally to exonerate the 621] estate from incum*brances, and it was doubtful whether these did not exceed the amount of the purchase money. But this was not like the ordinary case of an agreement between a purchaser and a vendor in his own right, since the trustees undertook a personal risk without even the chance of any personal advantage.

Faine v. *Brown* (1750) before Lord Hardwicke, cited 2 Ves. Sr. 307, and referred to by Lord Langdale in *Wedgwood* v. *Adams*, was a peculiar case: the hardship was not in any inadequacy of the purchase-money, but in the fact that the vendor would lose half of it by the condition on which he was entitled to the property.

In *Falcke* v. *Gray* (1859) 4 Drew. 651, 29 L. J. Ch. 28, there was something beyond mere inadequacy: the agreement was for a purchase at a valuation, and there was no valuation by a competent person. V.-C. Kindersley however expressed a distinct opinion that specific performance ought to be refused on the mere ground of inadequacy, even if there were none other, relying chiefly on *White* v. *Damon* and *Day* v. *Newman*.

He referred also to *Vaughan* v. *Thomas* (1783) 1 Bro. C. C. 556 (a not very intelligibly reported case, where the agreement was for the repurchase of an annuity: the statement of the facts raises some suspicion of fraud):—to *Heathcote* v. *Paignon* (1787) 2 Bro. C. C. 167 (but this and other cases there cited allotment to be made by Inclosure Commissioners; value unascertained at date of contract).

White v. *Damon* (1802) 7 Ves. 30, 34, 6 R. R. 71, 75, on re-hearing before Lord Eldon (but limited to sales by auction).

Coles v. *Trecothick* (1804) 9 Ves. 234, 246, 7 R. R. 167, 175, per Lord Eldon: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."

Western v. *Russell* (1814) 3 Ves. & B. 187, 193, 13 R. R. 178.

Borell v. *Dann* (1843) 2 Ha. 440, 450, per Wigram V.-C.

Abbott v. *Sworder* (1852) 4 De G. & Sm. 448, 461: per Lord St. Leonards, "the undervalue must be such as to shock the conscience" [*i.e.* as to be sufficient evidence of fraud: cp. Lord Eldon's dictum *supra*].

Sir Edward Fry, writing in 1858, considered this to be "the well established principle of the Court" (On Specific Performance, § 281); and this is substantially repeated in the second and third editions (3rd ed. 1892, p. 206) notwithstanding the case of *Falcke* v. *Gray*, which is said to "break the recent current of authorities."

Haywood v. *Cope* (1858) 25 Beav. 140, 153, 27 L. J. Ch. 468.

in the reporter's notes prove too much, for they are authorities not for refusing specific performance, but for actually setting aside agreements on the ground of undervalue *alone, [622 which we have seen is contrary to the modern law):—and to *Kien* v. *Stukeley* (1722) 1 Bro. P. C. 191, where specific performance was refused by the House of Lords, reversing the decree of the Exchequer in equity (but on another ground, the question of value being "a very doubtful point among the Lords," S. C. Gilb. 155 *nom. Keen* v. *Stuckley*).

The decisions in *Costigan* v. *Hastler* (1804) 2 Sch. & L. 160, and *Howell* v. *George* (1815) 1 Madd. 1, 15 R. R. 203 (though the dicta go farther), show only that a man who has contracted to dispose of a greater interest than he has will not be compelled to complete his title by purchase in order to perform the contract.

A brief notice of the French law on the head of *captation* (partly corresponding to our Undue Influence), will be found in the Appendix (*t*).

Exceptional cases of expectant heirs and reversioners. We have still to deal with an important exceptional class of cases. That which may have been a discretionary influence when the discretion of courts of equity was larger than it now is has in these cases become a settled presumption, so that fraud, or rather undue influence, is "presumed from the circumstances and condition of the parties contracting" (*u*). The term "fraud" is indeed of common occurrence both in the earlier (*u*) and in the later authorities: but "fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions" (*x*): *and this does not come within the proper meaning of fraud, [623 which is a misrepresentation (whether by untrue assertion, suppression of truth or conduct) made with the intent of creating a particular

(*t*) Note L.

(*u*) Lord Hardwicke in *Chesterfield* v. *Janssen* (1750–1) 2 Ves. Sr. at p. 125, classifies this in general terms as "a third kind of fraud:" he proceeds (at p. 157) to make a separate head of catching bargains, as "mixed cases compounded of all or several species of fraud:" but the phrase as to presumption is almost literally repeated, and it is obvious that these cases really come under his third head.

(*x*) *Per* Lord Selborne, *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. 484, 491, 42 L. J. Ch. 546.

wrong belief in the mind of the party defrauded. Perhaps the best word to use would be "imposition," as a sort of middle term between fraud, to which it comes nearer in popular language, and compulsion, which it suggests by its etymology.

The class of persons in dealing with whose contracts the Court of Chancery has thus gone beyond its general principles are those who stand, in the words of Sir George Jessel, "in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor—either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remainderman, as appears from *Tottenham* v. *Emmet* (*y*) and *Earl of Aylesford* v. *Morris* (*z*). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners" (*a*).

Motives for exceptional treatment. The Act 31 Vict.. c. 4 modified the practice of the Court of Chancery (which now continues in the Chancery Division) less than might be supposed: it is therefore necessary to give in the first place a connected view of the whole doctrine as it formerly stood.

624] 1. **Presumption of fraud.** It was considered that *persons raising money on their expectancies were at such a disadvantage as to be peculiarly exposed to imposition and fraud, and to require an extraordinary degree of protection (*b*):

2. **Public policy as to welfare of families.** And it was also thought right to discourage such dealings on a general ground of public policy, as tending to the ruin of families (*c*) and in most cases involving "a

(*y*) (1865) 14 W. R. 3.

(*z*) (1873) L. R. 8 Ch. 484, 42 L. J. Ch. 546.

(*a*) *Beynon* v. *Cook* (1875) L. R. 10 Ch. 391, *n*.

(*b*) "A degree of protection approaching nearly to an incapacity to bind themselves by any contract:" Sir W. Grant in *Peacock* v. *Evans* (1809) 16 Ves. at p. 514, 10 R. R. 218, 220.

(*c*) *Twisleton* v. *Griffith* (1716) 1 P. Wms. at p. 312; *Cole* v. *Gibbons*, 3 P. Wms. at p. 293; *Chesterfield* v. *Janssen* (1750–1) 2 Ves. Sr. at p. 158.

sort of indirect fraud upon the heads of families from whom these transactions are concealed" (*d*).

3. **Evasion of usury laws.** Moreover laws against usury were in force at the time when courts of equity began to give relief against these "catching bargains" as they are called (*e*); any transactions which looked like an evasion of those laws were very narrowly watched, and it may be surmised that when they could not be brought within the scope of the statutes the Courts felt justified in being astute to defeat them on any other grounds that could be discovered (*f*).

Extension of the doctrine. The doctrine which was at first introduced for the protection of expectant heirs was in course of time extended to all dealings whatever with reversionary interests.[57] In its finally developed form it had two branches:—

*1. As to reversionary interests, whether the reversioner were also an expectant heir or not: [625

A. The rule of law that the vendor might avoid the sale for undervalue alone;

(*d*) Per Lord Selborne, *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. 484, 492, 42 L. J. Ch. 546; *Chesterfield* v. *Janssen* (1750–1) 2 Ves. Sr. 124, 157.

(*e*) In *Wiseman* v. *Beake*, 2 Vern. 121, it appears from the statement of the facts that twenty years or thereabouts after the Restoration this jurisdiction was regarded as a novelty: for the defendant's testator "understanding that the Chancery began to relieve against such bargains" took certain steps to make himself safe, but without success, the Court pronouncing them "a contrivance only to double hatch the cheat." But in *Ardglasse* v. *Muschamp* (1684) 1 Vern. 238, it is said that many precedents from Lord Bacon's, Lord Ellesmere's, and Lord Coventry's times were produced.

(*f*) The reports of the cases on this head anterior to *Chesterfield* v. *Janssen* are unfortunately so meagre that it is difficult to ascertain whether they proceeded on any uniform principle. But the motives above alleged seem on the whole to have been those which determined the policy of the Court. On the gradual extension of the remedy cp. the remarks of Burnett J. in *Chesterfield* v. *Janssen* (1750–1) 2 Ves. Sr. at p. 145.

[57] The English doctrine, in so far as it relates to vested interests, has been denied to be in force in this country. Cribbins *v.* Markwood, 13 Gratt. 495; Mays *v.* Carrington, 19 Gratt. 74; Davidson *v.* Little, 22 Pa. 245, 252.

"A court of equity will not, in the absence of fraud or undue influence, interfere to set aside a sale by a legatee of a legacy of a fixed and certain sum of money, payable at a fixed period after the death of the testator, with interest, although such sale was made some years before the legacy was due, and for an inadequate consideration; and although the legatee was at the time of the sale a 'reckless, dissipated, improvident, and weak-minded young man.' Such a sale is not within the equity rule, which enables the court to relieve expectant heirs, remaindermen, and reversioners, from disadvantageous bargains, where both the amount or value of the interest sold, and the time of its enjoyment are uncertain." Parmelee *v.* Cameron, 41 N. Y. 392. Cp. Butler *v.* Duncan, 47 Mich. 94, stated *infra*, p. 761, n. 59.

B. The rule of evidence that the burden of proof was on the purchaser to show that he gave the full value.

It is this part of the doctrine that is changed by the Act 31 Vict. c. 4.

2. As to "catching bargains" with expectant heirs and remaindermen or reversioners in similar circumstances, *i.e.* bargains made in substance on the credit of their expectations, whether the property in expectancy or reversion be ostensibly the subject-matter of the transaction or not (*g*):

The rule of evidence that the burden of proof lies on the other contracting party to show that the transaction was a fair one. We use the present tense, for neither the last-mentioned Act nor the repeal of the usury laws, as we shall see presently, has made any change in this respect.

Former doctrine as to sales of reversionary interests. The part of the doctrine which is abrogated was intimately connected both in principle and in practice with that which remains; and though it seems no longer necessary to go through the authorities in detail, it may still be advisable to give some account of the manner in which it was applied (*h*).

The general rule established by the cases was that the purchaser was bound to give the fair market price, and to preserve abundant evidence of the price having been adequate, however difficult it might be to ascertain what the true value was. It was applied to reversionary interests of every kind, and the vendor was none the less entitled to the benefit of it if he had acted with full deliberation. The presumption originally thought to arise from transactions of this kind had in fact become transformed into *an inflexible rule of law, [626 which, consistently carried out, made it well-nigh impossible to deal with reversionary interests at all. The modern cases almost look as if the Court, finding it too late to shake off the doctrine, had sought to call the attention of the legislature to its inconvenience by extreme instances. Sales were set aside after the lapse of such a length of time as 19 years, and even 40 years (*i*). A sub-purchaser who bought at a considerably advanced price was held by this alone to have notice of the first sale having been at an undervalue (*k*).

(*g*) *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 497.

(*h*) A digest of the cases was given in the first two editions (p. 550, 2nd ed.).

(*i*) *St. Alban* v. *Harding* (1859) 27 Beav. 11; *Salter* v. *Bradshaw* (1858) 26 Beav. 161.

(*k*) *Nesbitt* v. *Berridge* (1863) 32 Beav. 280.

In one case where the price paid was 200*l.*, and the true value as estimated by the Court 238*l.*, the sale was set aside on the ground of this undervalue, though the question was only incidentally raised and the plaintiff's case failed on all other points (*l*).

Act to amend the law relating to sales of reversions, 31 Vict. c. 4. Finally Parliament found it necessary to interfere, and in 1867, by the "Act to amend the law relating to sales of reversions," 31 Vict. c. 4, it was enacted (s. 1) that no purchase (defined by s. 2 to include every contract, &c., by which a beneficial interest in property may be acquired), made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, should after January 1, 1868 (s. 3), be opened or set aside merely on the ground of undervalue. The Act is carefully limited to its special object of putting an end to the arbitrary rule of equity which was an impediment to fair and reasonable as well as to unconscionable bargains. It leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*m*).

General rules of equity as to "catching bargains" unaffected. It had already been decided (*n*) that the repeal of the usury laws (*o*) did not alter the general rules of the Court *of Chancery as to deal- [627
ings with expectant heirs. This decision was followed in *Miller* v. *Cook* (*p*), and adhered to in *Tyler* v. *Yates* (*q*), and lastly in *Earl of Aylesford* v. *Morris* (*r*) and *Beynon* v. *Cook* (*s*), and in the two latter cases it has been clearly laid down that the rules are in like

(*l*) *Jones* v. *Ricketts* (1862) 31 Beav. 130, 31 L. J. Ch. 753.

(*m*) *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 490. See also *O'Rorke* v. *Bolingbroke* (1877) 2 App. Ca. 814; *Fry* v. *Lane* (1888) 40 Ch. D. 312, 58 L. J. Ch. 113.

(*n*) *Croft* v. *Graham* (1863) 2 D. J. & S. 155.

(*o*) 17 & 18 Vict. c. 90. But before this complete repeal exceptions had been made from the usury laws in favour of certain bills of exchange and loans exceeding 10*l.* not secured on land: 3 & 4 Will. 4, c. 98, s. 7, 2 & 3 Vict. c. 37, s. 1, and comments thereon in *Lane* v. *Horlock* (1855) 5 H. L. C. 480, 25 L. J. Ch. 253.

(*p*) (1870) L. R. 10 Eq. 641, 40 L. J. Ch. 11.

(*q*) (1871) L. R. 11 Eq. 265, L. R. 6 Ch. 665, 40 L. J. Ch. 768.

(*r*) L. R. 8 Ch. 484; this may now be regarded as the leading case on the subject. It should be observed that in *Tyler* v. *Yates* a principal and surety made themselves liable for a bill which the principal had accepted during his minority, without knowing that there was no existing legal liability on the bill, and all the subsequent transactions were bound up with this: and the case was rested on this ground in the Court of Appeal (p. 671). Cp. on this point *Coward* v. *Hughes* (1855) 1 K. & J. 443, where a widow who during her husband's life had joined as surety in his promissory note executed a new note under the impression that she was liable on the old one, and without any new consideration, and the note was set aside; see *Southall* v. *Rigg* (1851) and *Forman* v. *Wright* (1851) 11 C. B. 481, 20 L. J. C. P. 145.

(*s*) (1875) 10 Ch. 389.

manner unaffected by the change in the law concerning sales of reversions. And this was confirmed by all the opinions delivered in *O'Rorke* v. *Bolingbroke* (*t*) in the House of Lords, though the particular transaction in dispute was upheld.

The effect of these rules is not to lay down any proposition of substantive law, but to make an exception from the ordinary rules of evidence by throwing upon the party claiming under a contract the burden of proving not merely that the essential requisites of a contract, including the other party's consent, existed, but also that the consent was perfectly free.

Conditions throwing burden of proof on lender. The question is therefore, what are "the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it" (*u*). Now these conditions have never been fixed by any positive authority. We have seen that the Court of Chancery has refused to define fraud, or to limit by any enumeration the standing **628]** rela*tions from which influence will be presumed. In like manner there is no definition to be found of what is to be understood by a "catching bargain." This being so we can only observe the conditions which have in fact been generally present in the bargains against which relief has been given in the exercise of this jurisdiction. These are:—

1. A loan in which the borrower is a person having little or no property immediately available, and is trusted in substance on the credit of his expectations.

Obs. It is immaterial whether there is or not any actual dealing with the estate in remainder or expression of the contingency on which the fund for payment of the principal advanced substantially depends. *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 497. It is also immaterial whether any particular property is looked to for ultimate payment. A general expectation derived from the position in society of the borrower's family, the lender intending to trade on their probable fear of exposure, may have the same effect. *Nevill v. Snelling* (1880) 15 Ch. D. 679, 702, 49 L. J. Ch. 777 (Denman J.).

2. Terms *prima facie* oppressive and extortionate (*i.e.* such that a man of ordinary sense and judgment cannot be supposed likely to give his free consent to them).

Obs. An excessive rate of interest is in itself nothing more than a disproportionately large consideration given by the borrower for the loan: and it is not sufficient, standing alone, to invalidate a contract in equity: *Webster* v. *Cook* (1867) L. R. 2 Ch. 542, where a loan at 60 per cent. per annum was upheld. Stuart V.-C. disapproved of the case in *Tyler* v. *Yates* (1871)

(*t*) (1877) 2 App. Ca. 814.

(*u*) *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 492.

L. R. 11 Eq. at p. 276, but on another point. And see *Parker* v. *Butcher* (1867) L. R. 3 Eq. 762, 767, 38 L. J. Ch. 552.[58]

3. A considerable excess in the nominal amount of the sums advanced over the amount actually received by the borrower.[59]

Obs. This appears in all the recent cases in which relief has been given: deductions being made on every advance, according to the common practice of professed money-lenders, under the name of discount, commission, and the like. The result is that the rate of interest appearing to be taken does not show anything like the terms on which the loan is in truth *made: [629 and this may be considered evidence of fraud so far as it argues a desire on the part of the lender to gloze over the real terms of the bargain. A jury could, perhaps, not be directed so to consider it in a trial where fraud was distinctly in issue; though no doubt such circumstances, or even an exorbitant rate of interest, would be made matter of observation.

4. The absence of any real bargaining between the parties, or of any inquiry by the lender into the exact nature or value of the borrower's expectations.

Obs. These circumstances are relied on in *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 496, as increasing the difficulty of upholding the transaction: cp. *Nevill* v. *Snelling* (1880) 15 Ch. D. at pp. 702–3. This again is the usual practice of the money-lenders who do this kind of business. Their terms are calculated to cover the risk of there being no security at all; moreover the borrower often wishes the lender not to make any inquiries which might end in the matter coming to the knowledge of the ancestor or other person from whom the expectations are derived. The concealment of the transaction from the ancestor was held by Lord Brougham in *King* v. *Hamlet* (1835) 2 M. & K. 456, 39 R. R. 24, 237, to be an indispensable condition of equitable relief; but this opinion is not now accepted: *Earl of Aylesford* v. *Morris* (1873 L. R. 8 Ch. at p. 491. The decision in *King* v. *Hamlet* (affirmed in the House of Lords, but without giving any reasons, 3 Cl. & F. 218, 39 R. R. 24) can be supported on the ground that the party seeking relief had himself acted on the contract he impeached so as to make restitution impossible.

It seems safe to assert that in any case where these conditions concur, the burden of proof is thrown on the lender to show that the

[58] See Brown *v.* Hall, 14 R. I. 249, where relief was given in respect of a loan secured by mortgage, and bearing interest at the rate of 5 per cent. per month, in advance, the court finding, however, that the relation of the parties was such that the lender had upon him the duty of protecting the borrower. See also Gottlieb *v.* Thatcher, 34 Fed. Rep. 435.

[59] "A dissolute spendthrift of twenty-five years gave a mortgage on all the real estate to which he was entitled as his father's heir, to a man who knew all about the circumstances, to secure the payment of an alleged loan of $5,000, for which he gave his note, and which was made up of the following items: $1,000 in cash; a former due bill for $47, given up; $199, interest credited on a previous mortgage; $110.35, paid as premium upon an insurance policy assigned to the mortgagee; $556.75, withheld by the latter to pay annual premiums thereafter as they shall fall due; and $3,200, as the purchase price of 160 acres of land worth but little more than $1,000, which the mortgagee required him to buy as a condition of lending him any money, though he had no use for the land and knew nothing about its value. Held, an unconscionable transaction, which a court of chancery could not sustain." Butler *v.* Duncan, 47 Mich. 94.

transaction was a fair one: it seems equally unsafe to assert that they must all concur, or that any one of them (except perhaps the first) is indispensable.

Can lender so situated ever exonerate himself? It may then be asked, By what sort of evidence is the lender to satisfy the Court that the borrower was not imposed on? As there is no reported case in which it was considered that the burden of proof lay upon the lender, and yet he did so satisfy the Court, it is impossible to give any certain answer to this question. It is evidently most improbable that in any case where the above-mentioned conditions are present, any satisfac-
630] tory evidence should be *forthcoming to justify the lender (*x*). Practically the question is whether in the opinion of the Court the transaction was a hard bargain (*y*)—that is, not merely a bargain in which the consideration is inadequate, but an unconscionable bargain where one party takes an unfair advantage of the other (*z*). This jurisdiction is of considerable importance in British India, and especially in the North-West Provinces, which have furnished an interesting line of cases (*a*).

An account stated for the purpose of a contract of this description is of no more validity than the contract itself, and a recital of it in the security does not preclude the borrower from re-opening the account even as against purchasers or sub-mortgagees of the original lender who have notice of the general character of the transaction. For such notice is equivalent to notice of all the legal consequences (*b*).

Terms on which relief is given. The borrower who seeks relief against a contract of this description must of course repay whatever sums have been actually advanced, with reasonable interest (according to

(*x*) "No attempt has been made to show by any independent evidence (*if such a thing could be conceived possible*) that the terms thus imposed on the plaintiff were fair and reasonable." L. R. 8 Ch. 496.

(*y*) See the judgment of the M. R. *Beynon* v. *Cook* (1875) L. R. 10 Ch. 391, *n.*, and *Nevill* v. *Snelling* (1880) 15 Ch. D. at p. 703.

(*z*) Per Jessel M.R. in *Middleton* v. *Brown* (C. A.) (1878) 47 L. J. Ch. 411; *Nevill* v. *Snelling* (1880) 15 Ch. D. 679, 49 L. J. Ch. 777, where the lender systematically took advantage of a mistaken over-payment of interest by the borrower.

(*a*) See *Kunwar Ram Lal* v. *Nil Kanth*, L. R. 20 Ind. App. 112; *Rajah Mokham Singh* v. *Rajah Rup Singh*, *ib.* 127, and cp. note (*c*), p. 345, above, and the present writer's Law of Fraud, &c., in British India (Tagore Law Lectures, 1893–4) pp. 77—79.

(*b*) *Tottenham* v. *Green* (1863) 32 L. J. Ch. 201: a case decided under the old rule as to dealings with reversionary interests, but the principles seem applicable in all cases where the burden of proof is still on the lender.

the usual practice of the Court, 5 per cent.), and the relief is granted only on those terms. Moreover it is held not unjust that he should obtain it at his own expense, since he calls in the assistance of the Court to undo the con*sequences of his own folly (*c*): and ac- [631 cordingly the general rule is to give no costs on either side (*d*).

As to the lender suing on the contract. The rule of evidence casting a special burden of proof on the lender being peculiar to equity, there was generally no defence at law to an action brought by him to enforce a contract of this kind. But since the rule of evidence established in equity now prevails in every branch of the High Court, it seems that when a lender of money sues on a special contract, whether the contract be embodied in a negotiable instrument or not, and the borrower proves facts which bring the contract within the description of a "catching bargain" as understood by Courts of equity, the lender must prove the reasonableness of the bargain (*e*); and if he fails to do so, he cannot recover on the special contract, but can recover his principal and reasonable interest as on a common count for money lent. It must be noticed that the importance of this class of cases is much diminished, though the law is not affected, by the Infants' Relief Act, 1874, which makes loans of money to infants absolutely void and forbids any action to be brought on a promise to pay debts contracted during infancy. See p. *62, *supra.*

Money-lenders Act, 1900. The Money-lenders Act, 1900 (63 & 64 Vict. c. 51), imposes special burdens on professional money-lenders by way of registration and otherwise, but does not *seem to [632 enlarge the equitable jurisdiction of the Court: for sect. 1 makes it an express condition that the transaction re-opened must in some way

(*c*) *Earl of Aylesford* v. *Morris* (1873) L. R. 8 Ch. at p. 499.

(*d*) In the cases of sales of reversions under the former law on that head the practice was for some time to treat the suit as a redemption suit, and give the purchaser his costs as a mortgagee: but the later rule was to give no costs on either side, except that the plaintiff had to bear such as were occasioned by any unfounded charges of actual fraud: *Edwards* v. *Burt* (1852) 2 D. M. & G. at p. 65: *Bromley* v. *Smith* (1859) 26 Beav. at p. 676, and costs might be given against the defendant as to any transaction in which there had been misconduct on his part: *Tottenham* v. *Green* (1863) 32 L. J. Ch. 201, 206. In *Nevill* v. *Snelling* (1880), note (*z*) last page, the plaintiff having offered before action brought to repay the sums actually advanced with interest at 5 per cent., the defendant was ordered to pay the costs: 15 Ch. D. at p. 705; cp. *Beynon* v. *Cook* (1875) L. R. 10 Ch. at p. 393, in judgment of Jessel M.R.

(*e*) *Qu.* is this a question for the jury or for the Court? *Prima facie* it should be a question of fact: but there are some analogies (*e.g.* the cases on restraint of trade) for treating it as a question of law.

be "such that a Court of equity would give relief," and a case where a Court of equity would not do so is not within the Act (*f*).

Application of principles to sales of reversionary interests by persons in dependent position. The same principles apply, so far as they are applicable to a transaction of sale as distinguished from loan, to the sale of reversionary interests by persons who are not in an independent position, as when the sale is made by a man only just of age in pursuance of terms settled while he was still an infant. Here the burden is on the purchaser to show the fairness of the transaction. He is not bound to show that the price given was absolutely adequate; but he is bound, notwithstanding the Act of 1867 (31 Vict. c. 4, p. *623, above), to show that it was such as, upon the facts known to him at the time, he might have reasonably thought adequate. Moreover he ought to see, where practicable, that the seller has independent legal advice. These rules seem to be established by *O'Rorke* v. *Bolingbroke* (*g*), which is remarkable as an almost singular instance of an impeached transaction with an "expectant heir" being upheld. There a father and son negotiated with a purchaser for the sale of the son's reversionary interest expectant on the death of the father. The sale was completed three weeks after the son came of age. The price was agreed to after some bargaining; it was founded on a statement of value furnished by a third person, and would have been adequate if the father's life had been a good one. The purchaser did not know and had no reason to believe anything to the contrary, but it was in fact a bad life. The young man took no independent advice, being "penniless, and except for his father friendless" (*h*). The
633] *father died within three months after the sale. Four years later the son sued to have the whole transaction set aside, but failed in the House of Lords after succeeding in the Court of Appeal in Ireland. The majority of the Lords (*i*) held that the burden of proof was indeed on the buyer, but that he had satisfied it. In some cases unconscionable bargains of this kind are complicated with champerty. Where this is so the transaction cannot, of course, be upheld (*k*).

(*f*) *Wilton & Co.* v. *Osborn* [1901] 2 K. B. 110, 70 L. J. K. B. 507. The utility of the Act seems doubtful.

(*g*) (1877) 2 App. Ca. 814. Cp. *Fry* v. *Lane* (1888) 40 Ch. D. 312, 58 L. J. Ch. 113, where the seller was poor and ignorant, and the same solicitor purported to act for both parties.

(*h*) Lord Blackburn, 2 App. Ca. at p. 837.

(*i*) Lord Blackburn, Lord O'Hagan, and Lord Gordon, *diss.* Lord Hatherley.

(*k*) *Rees* v. *De Bernardy* [1896] 2 Ch. 437, 65 L. J. Ch. 656.

"Surprise" and "improvidence." Another alleged ground of equitable relief against contracts founded on the notion of an inequality between the contracting parties, has been "surprise," or "surprise and improvidence." But this seems to be only a way of describing evidence of fraud or of a relation of dependence between the parties.

Evans v. Llewellin. The case of *Evans* v. *Llewellin* (*l*) may be taken as the typical instance. The plaintiff was a person of inferior station and education who acquired by descent a title in fee simple to a share in land in which the defendant had a limited interest. His title was first communicated to him by the defendant, who represented to him (as the fact appears to have been) that the circumstances of the family created a moral obligation in the plaintiff not to insist on his strict rights, and offered to purchase his interest for a substantial though not adequate consideration. The defendant suggested to the plaintiff to consult his friends in the matter, which however he did not do. Three days intervened between the first interview and the conclusion of the business by the acceptance of the defendant's offer. It was considered that the plaintiff was under the circumstances not a free agent and not equal to protecting himself, and was taken by surprise, and the sale was set aside (*m*). The case seems somewhat anomalous, but it has *been suggested by very [634 high authority that it would still be followed in setting aside a contract as "improvident and hastily carried into execution" (*n*), and it has been distinctly approved in the Court of Appeal in Chancery (*o*).

Whether "surprise," &c. is any substantive cause for avoiding contracts. It is submitted, however, that there is no intelligible reason for treating *surprise* or *improvidence* as a substantive cause for setting aside contracts, much less for attempting to give these words a technical signification. Both terms are in fact merely negative and relative. *Surprise* is nothing else than the want of mature deliberation: *improvidence* is nothing else than the want of that degree of vigilance

(*l*) See following note.

(*m*) (1787) 2 Bro. C. C. 150, 1 Cox, 333 (1 R. R. 49), a fuller report, which is here followed; the other if correct would reduce it to a plain case of fraud or at all events misrepresentation. In *Haygarth* v. *Wearing* (1871) L. R. 12 Eq. 320, 40 L. J. Ch. 577, which to some extent resembled this, the ground of the decision was a positive misrepresentation as to the value of the property.

(*n*) Lord St. Leonards in *Curzon* v. *Belworthy* (1852) 3 H. L. C. 742; there the appellant relied on express charges of fraud, which were not made out: but Lord St. Leonards thought he might possibly have succeeded if he had rested his case on the ground suggested.

(*o*) Per Turner L.J. in *Baker* v. *Monk* (1864) 4 D. J. & S. at p. 392.

which a man of ordinary prudence may be expected to use in guarding his own interest. Now one man's deliberation and prudence are not the same as another man's, nor is the same man equally deliberate or prudent at all times. A man may enter into a contract with less deliberation than the average wisdom of mankind would counsel, or than he himself commonly uses, in affairs of the like nature, and yet the contract may be perfectly valid.

But circumstances of this kind may be material for proving the existence of distinct grounds for avoiding the contract, as fundamental error or fraud. But if it be disputed whether there was or not any real consent, or whether consent was or not freely given, then circumstances of what is called *surprise* or *improvidence* may be very material as evidence bearing on those issues. Unusual haste or folly in entering into an engagement is a circumstance to be accounted for: and the best way of accounting for it may in all the circumstances of a particular case be to suppose that the party did not know what he was about, or that he was wrought upon by conduct of the other party of such a kind 635] as to make the *contract voidable on the ground of fraud. *Surprise* and *improvidence*, therefore, are matters from which it may be inferred, as a fact in particular cases, that there was no true consent, or that the consent was not free. But it is not to be affirmed as a general proposition of law that haste or imprudence can of itself be a sufficient cause for setting aside a contract, nor even that there is any particular degree of haste or imprudence from which fundamental error, fraud, or undue influence, will be invariably presumed. "The Court will not measure the degrees of understanding" (*p*). It seems to follow that what is recorded in such a case as *Evans* v. *Llewellin* (*q*) is not an enunciation of law, but an inference of fact. Such an inference may be useful in the way of analogy when similar circumstances recur, but is not binding as an authority.

Opinions of judges in Earl of Bath and Mountague's case. The view here taken may be supported by the observations of the judges in the *Earl of Bath and Mountague's case* (A.D. 1693) (*r*). In that case Baron Powel said (3 Ch. Ca. at p. 56):

"It is said, This is a Deed that was obtained by Surprize and Circumvention. Now I perceive this word Surprize is of a very large and general Extent. . . I hardly know any Surprize that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved." [*i.e.* the verdict in favour of the deed precludes the party

(*p*) *Bridgman* v. *Green* (1755) Wilmot, 58, 61.

(*q*) (1787) 1 Cox, 333, 1 R. R. 49.

(*r*) 3 Ch. Ca. 55. Cp. Story, Eq. Jurisp. § 251.

from asserting in equity that he did not know what he was about: for he should have set up that case at law on the plea of *non est factum*.] "It must be admitted that there was Deliberation, and Consideration and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it": per L. C. J. Treby, *ib.* at p. 74.

The judgment of the Lord Keeper Somers is even more decided, and points out clearly the difference between an instrument which is void both at law and in equity, and one which is voidable in equity (p. 108):—

"It is true, it is charged in the Bill that this Deed was obtained by *Fraud and Surprize . . But whosoever reads over the Depositions will [636 see that the End they aimed at was to attack the Deeds themselves as false Deeds and not truly executed; but that being Tried at Law, and the Will and Deeds verified by a Verdict, the Counsel have attempted to make use of the same Evidence, and read it all, or at least the greatest Part of it, as Evidence of Surprize and Circumvention. . . . . .

"Now, for this word (Surprize) it is a Word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surpriz'd in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case mean such Surprize as is attended and accompanied with Fraud and Circumvention; such a Surprize indeed may be a good ground to set aside a Deed so obtain'd in Equity and hath been so in all times: but any other Surprize never was, and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for."

Analogy to doctrine as to inadequacy of consideration. Moreover the doctrine thus stated is exactly analogous to the undoubted law concerning inadequacy of consideration. The value of the subject-matter of a contract, and therefore the adequacy of the consideration, which depends on it, is in most cases easier to measure than the degree of deliberation or prudence with which the contract was entered into. "Surprise" or "improvidence" represents nothing but an opinion of the general character of a transaction, founded on a precarious estimate of average human conduct, and cannot well have a greater legal effect than inadequacy of consideration, which generally admits of being determined by reference to the market value of the object at the date of the contract.

5. Limits of the right of rescission.

The right of rescission is like that in cases of fraud, &c. and governed by same rules. The right of setting aside a contract or transfer of property voidable on the ground of undue influence is analogous to the right of rescinding a transaction voidable on any other ground, and follows the same rules with some slight modifications in detail.

What is said in the last chapter of rescinding contracts for fraud

637] or misrepresentation may be taken as generally *applicable here. We proceed to give some examples of the special application of the principles.

Examples. The right to set aside a gift or beneficial contract voidable for undue influence may be exercised by the donor's representatives or successors in title (*s*)[60] as well as by himself, and against not only the donee but persons claiming through him (*t*)[61] otherwise than as purchasers for value without notice (*u*).[62] But the jurisdiction is not exercised at the suit of third persons.[63] The Court will not refuse, for example, to pay a fund, at the request of a petitioner entitled thereto, to the trustees of a deed of gift previously executed by the petitioner, because third parties suggest that the gift was not freely made (*x*).

Jurisdiction not confined to influence of actual party to the contract. On the other hand it is not necessary to the support of a claim to set aside a contract on the ground of undue influence to show that the influence was directly employed by another contracting party. It is enough to show that it was employed by some one who expected to derive benefit from the transaction, and with the knowledge of the other party or under circumstances sufficient to give him notice of it. The most frequent case is that of an ancestor or other person *in loco*

(*s*) *E.g.* Executor: *Hunter* v. *Atkins* (1832–4) 3 M. & K. 113, 41 R. R. 30; *Coutts* v. *Acworth* (1869) L. R. 8 Eq. 558. Assignee in bankruptcy: *Ford* v. *Olden* (1867) L. R. 3 Eq. 461, 36 L. J. Ch. 651. Devisee: *Gresley* v. *Mousley* (1861) 4 De G. & J. 78. Heir: *Holman* v. *Loynes* (1854) 4 D. M. & G. 270, 23 L. J. Ch. 529.

(*t*) *Huguenin* v. *Baseley* (1807) 14 Ves. 273, 289, 9 R. R. 276, 286. Cp. *Molony* v. *Kernan* (1842) 2 Dr. & W. 31, 40.

(*u*) *Cobbett* v. *Brock* (1855) 20 Beav. 524, 528.

(*x*) *Metcalfe's trust* (1864) 2 D. J. & S. 122, 33 L. J. Ch. 308.

60 Yard *v.* Yard, 27 N. J. Eq. 114; Boyd *v.* De La Montagnie, 73 N. Y. 498; Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241. Trustee in bankruptcy: see Chattanooga Bank *v.* Rome Iron Co., 102 Fed. Rep. 755 (C. C. A.); Duplan Silk Co. *v.* Speneer, 115 Fed. Rep. 689 (C. C. A.). Devisee: Lee *v.* Pearce, 68 N. C. 76. Heir: Allore *v.* Jewell, 94 U. S. 506; Churchill *v.* Scott, 65 Mich. 485; Cadwallader *v.* West, 48 Mo. 483; Ford *v.* Hennessy, 70 Mo. 580; Sears *v.* Shafer, 6 N. Y. 268; Darlington's Appeal, 86 Pa. 512; Martin *v.* Martin, 1 Heisk. 644.

61 Barron *v.* Willis, [1900] 2 Ch. 121, 133; Adams *v.* Cowen, 177 U. S. 471; Poillon *v.* Martin, 1 Sandf. Ch. 569; Darlington's Appeal, 86 Pa. 512. A conveyance procured by undue influence will be set aside against all who take a gratuitous benefit under it, though they themselves took no part in procuring it. Ranken *v.* Patton, 65 Mo. 378; Miller *v.* Simonds, 72 Mo. 669, 687; Whelan *v.* Whelan, 3 Cow. 537, 577; Bergen *v.* Udall, 31 Barb. 9, 21; Lee *v.* Pearce, 68 N. C. 76.

62 Valentine *v.* Lunt, 115 N. Y. 496.

63 Andrews *v.* Jones, 10 Ala. 400, 419; Davidson *v.* Little, 22 Pa. 245.

parentis inducing a descendant, etc., to give security for a debt of the ancestor. But if the other party does all he reasonably can to guard against undue influence being exerted (as by insisting on the person in a dependent position having independent professional advice), and the precautions he demands are satisfied in a manner he cannot object to at the time, the contract cannot as against him be impeached (*y*).

*It appears to be at least doubtful whether a contract can be [638 set aside on the ground of influence exerted on one of the parties by a stranger to the contract who did not expect to derive any benefit from it (*z*):[64] except where the contract is an arrangement between cestuis que trust claiming under the same disposition, and the trustee puts pressure on one of the parties to make concessions; the ground in this case being the breach of a trustee's special duty to act impartially (*a*).

Confirmation and acquiescence. The right to set aside a contract or gift originally voidable on the ground of undue influence may be lost by express confirmation (*b*)[65] or by delay amounting to proof of acquiescence (*c*).[66] But any subsequent confirmation will be inoperative if made in the same absence of independent advice and assistance which vitiated the transaction in the beginning (*d*). This has been strongly stated in the judgment of the Lords Justices in *Moxon* v.

(*y*) Compare *Cobbett* v. *Brock* (1855) 20 Beav. 524, with *Berdoe* v. *Dawson* (1865) 34 Beav. 603. As to what amounts to notice, *Maitland* v. *Backhouse* (1847) 16 Sim. 58; *Tottenham* v. *Green* (1863) 32 L. J. Ch. 201.

(*z*) *Bentley* v. *Mackay* (1869) 31 Beav. 143, 151. On principle the answer should clearly be in the negative.

(*a*) *Ellis* v. *Barker* (1871) L. R. 7 Ch. 104, 41 L. J. Ch. 64.

(*b*) *Stump* v. *Gaby* (1852) 2 D. M. & G. 623, 22 L. J. Ch. 352; *Morse* v. *Royal* (1806) 12 Ves. 355, 8 R. R. 338.

(*c*) *Wright* v. *Vanderplank* (1855) 8 D. M. & G. 133, 147, 25 L. J. Ch. 753; *Turner* v. *Collins* (1871) L. R. 7 Ch. 320, 41 L. J. Ch. 558; *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, see especially per Lindley L.J. at p. 187. Cp. *Nutt* v. *Easton* [1899] 1 Ch. 873, 68 L. J. Ch. 367, affd. [1900] 1 Ch. 29, 69 L. J. Ch. 46, where the plaintiff's case also failed on other grounds.

(*d*) *Savery* v. *King* (1856) 5 H. L. C. at p. 664, 25 L. J. Ch. 482.

64 Such a contract or conveyance should never be set aside as against a party who has given value without notice of the undue influence. Dent *v.* Long, 90 Ala. 172; Walker *v.* Nicrosi, 135 Ala. 353, 357; but a deed of gift should be set aside though the donee had no knowledge of the undue influence. Ross *v.* Conway, 92 Cal. 632; Kraft *v.* Koenig, 3 S. W. Rep. 803 (Ky.); Ranken *v.* Patton, 65 Mo. 378; Miller *v.* Simonds, 72 Mo. 669, 687; at least unless the donee has acted on the faith of the gift to such an extent as to make it inequitable to set the deed aside.

65 Rogers *v.* Higgins, 57 Ill. 244, 250.

66 Jenkins *v.* Pye, 12 Pet. 241; Wells *v.* Wood, 28 Kan. 400; Price's Appeal, 54 Pa. 472.

Payne (*e*): "Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's
639] *length, on equal terms, with equal knowledge, and with sufficient advice and protection." And delay which can be accounted for as not unreasonable in all the circumstances is no bar to relief (*f*).[67] In short, an act "the effect of which is to ratify that which in justice ought never to have taken place" ought to stand only upon the clearest evidence (*g*).[68] The effect of delay on the part of the person seeking relief is also subject to a special limitation. In a case between solicitor and client, or parties standing in any other confidential relation, less weight is given to the lapse of time than is due to it when no such relation subsists (*h*),[69] and it is of special importance that the confirming party should not only be fully acquainted with his or her rights but have independent advice (*i*).

In the case of a deliberate confirmation after the relation of influence has ceased to exist, it need not be shown that the donor knew the gift to be voidable (*k*): otherwise where the alleged confirmation

(*e*) (1873) L. R. 8 Ch. 881, 885, 43 L. J. Ch. 240. And a confirmation will not be helped by the presence of an independent adviser of the party confirming, if, in consequence of the continuing influence of the other party, his advice is in fact disregarded: *ib.*

(*f*) *Kempson* v. *Ashbee* (1874) L. R. 10 Ch. 15, 44 L. J. Ch. 195.

(*g*) *Morse* v. *Royal* (1806) 12 Ves. at p. 374, 8 R. R. at p. 341.

(*h*) *Gresley* v. *Mousley* (1861) 4 De G. & J. 78, 96. But even in a case between solicitor and client a delay of eighteen years has been held fatal: *Champion* v. *Rigby* (1830) 1 Russ. & M. 539, 31 R. R. 107.

(*i*) *Barron* v. *Willis* [1900] 2 Ch. 121, 137, 69 L. J. Ch. 532, C. A.

(*k*) *Mitchell* v. *Homfray* (1881) 8 Q. B. Div. 587, 50 L. J. Q. B. 460. In *Tomson* v. *Judge* (1855) 3 Drew. 306, there was not independent advice, and there was an attempt to conceal the real character of the transaction. But the considered opinion of Kindersley V.-C. on the general principle is doubtless a weighty one.

67 Thompson *v.* Lee, 31 Ala. 292, 304; McCormick *v.* Malin, 5 Blackf. 509, 532; Rau *v.* Von Zedlitz, 132 Mass. 164; McClure *v.* Lewis, 72 Mo. 314; Boyd *v.* Hawkins, 2 Dev. Eq. 195, 215; Butler *v.* Haskell, 4 Dess. 651, 708; Wade *v.* Pulsifer, 54 Vt. 45.

68 In Montgomery *v.* Perkins, 116 Mass. 227, A. by fraud obtained a bond for a deed of land from B., who afterwards, with full knowledge of the facts, and after taking legal advice, executed and delivered the deed; it was held that the deed did not operate as a confirmation of the previous transaction, not having been given with that intent.

69 See Tyars *v.* Alsop, 61 L. T. 8.

is connected with the original transaction and takes place under similar circumstances (*f*).[70]

An adoption of the instrument impeached for a particular purpose (as by the exercise of a power contained in it) may operate as an absolute confirmation of the whole (*l*).

There seems no presumption of undue influence where the gain is trifling. It seems that the presumption of influence arising from confidential relations is not to be extended to cases where *a merely trifling [640 benefit is conferred (*m*). This is more than a simple application of the maxim *De minimis non curat lex,* for the transaction brought in question might be in itself of great magnitude and importance, though the advantage gained by one party over the other were not large. Indeed the case to which this principle seems most likely to be applicable is that of a transaction not of a commercial nature, and on such a scale that the parties, dealing fairly and deliberately, might choose not to be curious in weighing a comparatively small balance of profit or loss.

(*f*) *Kempson* v. *Ashbee* (1874) L. R. 10 Ch. 15, 44 L. J. Ch. 195.

(*l*) *Jarratt* v. *Aldam* (1870) L. R. 9 Eq. 463, 39 L. J. Ch. 349.

(*m*) Per Turner L.J. *Rhodes* v. *Bate* (1866) L. R. 1 Ch. at p. 258, and Lindley L.J. *Allcard* v. *Skinner,* 36 Ch. Div. at p. 185.

[70] See cases cited *supra,* n. 67.

641] *CHAPTER XIII.

AGREEMENTS OF IMPERFECT OBLIGATION.

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Nature of imperfect obligations. Under this head we propose to deal with topics of a miscellaneous kind as regards their subject-matter, and forming anomalies in the general law of contract, but presenting in those anomalies some remarkable uniformities and analogies of their own.

Between contracts which can be actively enforced by the persons entitled to the benefit of them, and agreements or promises which are not recognized as having any legal effect at all there is another class of agreements which though they confer no right of action are recog-

nized by the law for other purposes. These may be called agreements of imperfect obligation. Some writers (as Pothier) speak of imperfect obligations in the sense of purely moral duties which are wholly without the scope of law: and what we here call Imperfect Obligations are in the civil law called Natural Obligations. But this term, the use of which in Roman law is intimately connected with the distinction between *ius civile* and *ius gentium* (*a*), would be inappropriate in English (*b*).

How produced. Where there is a perfect obligation, there is a right coupled with a remedy, *i.e.*, an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right.

*Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an exception whenever it occurs to the general law expressed in the maxim *Ubi ius ibi remedium.* And it can be produced only by the operation of some special rule of positive law. Such rules may operate in the following ways to produce an imperfect obligation: [642

1. By way of condition subsequent, taking away a remedy which once existed.

2. By imposing special conditions as precedent to the existence of the remedy.

3. By excluding any remedy altogether.

We shall now endeavour to show what are the effects of an imperfect obligation in these three classes of cases.

1. **Remedy lost — Statutes of Limitation.** Under the first head we have to notice the operation of the statutes of limitation, so far as it illustrates the present subject (*c*). The Statute of Limitation of James I. (21 Jac. 1, c. 16, s. 3) enacts that the actions therein enumerated—which, with an exception since repealed, comprise all actions on simple

(*a*) Savigny, Obl. 1. 22, sqq. For a summary statement of the effects of a natural obligation in Roman law see Muirhead's note on Gai. 3. 119, *a*.

(*b*) The term "covenant en ley de nature" was applied by Bishop Stillington, C., to a parol agreement not to sue: 9 Ed. 4, 41, pl. 26.

(*c*) Debts contracted by an infant are often compared to debts barred by the statutes of limitation; and the comparison is just to this extent, that at common law they might be rendered enforceable in much the same manner, and practically the authorities are interchangeable on this point. But an infant's contract is in its inception not of imperfect obligation, but simply voidable.

contracts (*d*)[1]—"shall be commenced and sued" within six years after the cause of action, and not after. By the modern statute 3 & 4 Will. 4, c. 42, s. 3 (*e*), following the presumption of satisfaction after the lapse of twenty years which already obtained in practice (*f*), **643]** it is enacted that (*inter alia*) all *actions of covenant or debt upon any bond or other speciality "shall be commenced and sued" within twenty years of the cause of action. We need not stop to consider the exceptions for disability, or the rules as to the time from which the statutes begin to run; for the object throughout this chapter will not be to define to what cases and under what conditions the laws under consideration apply, when that is abundantly done in other treatises, but to observe the general results which follow when they do apply.

The right not gone. Now there is nothing in these statutes to extinguish an obligation once created. The party who neglects to enforce his right by action cannot insist upon so enforcing it after a certain time. But the right itself is not gone. It is not correct even to say without qualification that there is no right to sue, for the protection given by the statutes is of no avail to a defendant unless he expressly claims it. Serjeant Williams, after noticing the earlier conflicts of opinion on this point, and some unsatisfactory reasons given at different times for the rule which has prevailed, concludes the true reason to be that "the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy" (*g*).[2] This alone shows that an imperfect obliga-

(*d*) As to the extent to which the statute applies to proceedings in equity see *Knox* v. *Gye* (1871–2) L. R. 5 H. L. 656, 42 L. J. Ch. 234.

(*e*) This section is not affected by the Real Property Limitation Act, 1874, except that proceedings to recover rent or money charged on land now have to be taken within 12 years: 37 & 38 Viet. c. 57, ss. 1, 8.

(*f*) *Roddam* v. *Morley* (1856–7) 1 De G. & J. 17, 26 L. J. Ch. 438.

(*g*) 2 Wms. Saund. 163: cp. *Scarpellini* v. *Atcheson* (1845) 7 Q. B. at p. 878, 14 L. J. Q. B. at p. 338, on the technical effect of a plea of the statute. The rule continues under the Judicature Acts, Order XIX. r. 15 [No. 211].

[1] As to the extent to which the statute applies to proceedings in equity, see Knox *v.* Gye, L. R. 5 H. L. 656; Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 448; Alsop *v.* Riker, 155 U. S. 448; Kelley *v.* Boettcher, 85 Fed. Rep. 55, 62; McGaughey *v.* Brown, 46 Ark. 25; Moore *v.* Moore, 103 Ga. 517; Hancock *v.* Harper, 86 Ill. 445; Wilhelm *v.* Caylor, 32 Md. 151; Story Eq. Jur., § 1520.

[2] Campbell *v.* Holt, 115 U. S. 620; Booth *v.* Hoskins, 75 Cal. 271; Shaw *v.* Silloway, 145 Mass. 503; Johnson *v.* Railroad Co., 54 N. Y. 416; Campbell *v.* Maple's Adm., 105 Pa. 304; Jordan *v.* Jordan, 85 Tenn. 561; Criss *v.* Criss, 28 W. Va. 388, 396. But in Wisconsin the statute extinguishes the right. Carpenter *v.* State, 41 Wis. 36; Pierce *v.* Seymour, 52 Wis. 272. See also McCracken Co. *v.* Mercantile Trust Co., 84 Ky. 344, 349.

tion subsists between the parties after the time of limitation has run out. In the case of unliquidated demands that obligation is practically inoperative, since an unliquidated demand cannot be rendered certain except by action or an express agreement founded on the relinquishment of an existing remedy. But in the case of a liquidated debt the continued existence of the debt after the loss of the remedy by action may have other important effects.

Results — Incidental rights of creditor preserved. Although the creditor cannot enforce payment by direct process of *law, he is not the [644 less entitled to use any other means of obtaining it which he might lawfully have used before. Thus if he has a lien on goods of the debtor for a general account, he may hold the goods for a debt barred by the statute (*h*). And any lien or express security he may have for the particular debt remains valid (*i*).[3] If the debtor pays money to him without directing appropriation of it to any particular debt, he

(*h*) *Spears* v. *Hartly* (1800) 3 Esp. 81, 6 R. R. 814.

(*i*) *Higgins* v. *Scott* (1831) 2 B. & Ad. 413, 36 R. R. 607; *Seager* v. *Aston* (1857) 26 L. J. Ch. 800 (on the statute of 3 & 4 Will. 4).

[3] Jones *v.* Bank, 6 Rob. (N. Y.) 162; Davis *v.* Wrigley, 1 Tex. App. 399. A vendor of land may enforce his equitable lien for the unpaid purchase money, although an action for the debt is barred by the Statute of Limitations. Hardin *v.* Boyd, 113 U. S. 756, 765; Clay *v.* Freeman, 118 U. S. 97; Buckner *v.* Street, 15 Fed. Rep. 365; Gage *v.* Riverside Trust Co., 86 Fed. Rep. 984; Ware *v.* Curry, 67 Ala. 274; Hood *v.* Hammond, 128 Ala. 569; Coldcleugh *v.* Johnson, 34 Ark. 312; Magruder *v.* Peter, 11 G. & J. 217; Railroad Co. *v.* Trimble, 51 Md. 99, 109–112; Hopkins *v.* Cockerell, 2 Gratt. 88; Paxton *v.* Rich, 85 Va. 378. And see Whitmore *v.* San Francisco Sav. Union, 50 Cal. 145. *Contra*, Ilett *v.* Collins, 103 Ill. 74; Vandiver *v.* Hodge, 4 Bush, 538; Tate *v.* Hawkins, 81 Ky. 577; Trotter *v.* Erwin, 27 Miss. 772; Littlejohn *v.* Gordon, 32 Miss. 235; Borst *v.* Corey, 15 N. Y. 505. Where a note is secured by mortgage on real or personal property, the fact that the remedy on the note becomes barred by the statute will not take away the remedy of foreclosure of the mortgage. Cheney *v.* Stone, 29 Fed. Rep. 885; Bailey *v.* Butler, 138 Ala. 153; Birnie *v.* Main, 29 Ark. 591; Belknap *v.* Gleason, 11 Conn. 160; Jordan *v.* Sayre, 24 Fla. 1; Harding *v.* Durand, 138 Ill. 515; Kittredge *v.* Nicholes, 162 Ill. 410; Jenks *v.* Shaw, 99 Ia. 604; Joy *v.* Adams, 26 Me. 330; Townsend *v.* Tyndale, 165 Mass. 293; Wilkinson *v.* Flowers, 37 Miss. 579; Everman *v.* Piron, 151 Mo. 107; Omaha Bank *v.* Simerall, 61 Neb. 741, 743; Shoecraft *v.* Beard, 20 Nev. 182; Hulbert *v.* Clark, 128 N. Y. 295; Taylor *v.* Hunt, 118 N. C. 168; Kerr *v.* Lydecker, 51 Ohio St. 240, 254; Campbell *v.* Maple, 105 Pa. 304, 307; Ballou *v.* Taylor, 14 R. I. 277; McGowan *v.* Reid, 28 S. C. 74; Richmond *v.* Aiken, 25 Vt. 324; Smith's Exrx. *v.* Railroad Co., 33 Gratt. 617; Potter *v.* Stransky, 48 Wis. 243. But in some States it is held that when the remedy on the debt is barred, the remedy on the mortgage given to secure it is gone. Whipple *v.* Johnson, 66 Ark. 204; Jackson *v.* Longwell, 63 Kan. 93; First Bank *v.* Thomas, 3 S. W. Rep. 12 (Ky.). So in California and New Mexico by statute. And see Jones on Mortgages, § 1207. One who becomes surety by a deed for the performance of an unsealed contract remains liable to an action after the remedy on the principal contract is barred by the statute. Wagoner *v.* Watts, 44 N. J. L. 126.

may appropriate it to satisfy a debt of this kind (*k*):[4] much more is he entitled to keep the money if the debtor pays it on account of the particular debt, but not knowing, whether by ignorance of fact or of law, that the creditor has lost his remedy. So an executor may retain out of a legacy a barred debt owing from the legatee to the testator (*l*).[5] He may also retain out of the estate such a debt due from the testator to himself: and he may pay the testator's barred debts to other persons (*m*),[6] though not any particular debt which has been judicially declared to be not recoverable from the estate (*n*): and this even if the personal estate is insufficient (*o*).[7] But though a creditor may retain a barred debt if he can, he may not resist another claim of the debtor against him by a set-off of the barred debt: for the right of set-off is statutory, and introduced merely to prevent cross actions, so that a claim pleaded by way of set-off is subject to be defeated in any way in which it could be defeated if made by action (*p*).[8] This reason

(*k*) *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455, 50 R. R. 750; *Nash* v. *Hodgson* (1855) 6 D. M. & G. 474, 25 L. J. Ch. 186.

(*l*) *Courtenay* v. *Williams* (1844) 3 Ha. 539, 13 L. J. Ch. 461; cp. *Rose* v. *Gould* (1852) 15 Beav. 189.

(*m*) *Hill* v. *Walker* (1858) 4 K. & J. 166; *Stahlschmidt* v. *Lett* (1853) 1 Sm. & G. 415.

(*n*) *Midgley* v. *Midgley* [1893] 3 Ch. 282, 62 L. J. Ch. 905, C. A.

(*o*) *Lowis* v. *Rumney* (1867) L. R. 4 Eq. 451. This is a peculiar rule. It is otherwise as to claims not enforceable by reason of the Statute of Frauds: *Re Rownson* (1885) 29 Ch. Div. 358, 54 L. J. Ch. 950.

(*p*) The defence of set-off must be specially met by replying the statute of limitation, see 1 Wms. Saund. 431.

[4] Armistead *v.* Brooke, 18 Ark. 521; Brown *v.* Burns, 67 Me. 535; Ramsay *v.* Warner, 97 Mass. 8, 13.

[5] *Re* Akerman, [1891] 3 Ch. 212; Garrett *v.* Pierson, 29 Ia. 304; Cummings *v.* Bramhall, 120 Mass. 552; *Re* Bogart, 28 Hun, 466. But see *contra*, Harrod *v.* Carder's Adm., 3 Ohio C. C. 479; Reed *v.* Marshall, 90 Pa. 345; Milne's Appeal, 99 Pa. 483.

[6] *Re* Huger, 100 Fed. Rep. 805; Distributees of Knight *v.* Godbolt, 7 Ala. 304; Payne *v.* Pusey, 8 Bush, 564. But see Fairfax *v.* Fairfax's Exr., 2 Cr. C. C. 25; Pollard *v.* Scears, 28 Ala. 484; Richmond, Admr., Petitioner, 2 Pick. 567; Hodgdon *v.* White, 11 N. H. 208, 213; Rogers *v.* Rogers, 3 Wend. 503; Hoch's Appeal, 21 Pa. 280; Seig *v.* Acord's Exr., 21 Gratt. 365, 371; Batson *v.* Murrell, 10 Humph. 301. Cp. Ritter's Appeal, 23 Pa. 95. And see Woods *v.* Elliott, 49 Miss. 168; Byrd *v.* Wells, 40 Miss. 711; Oates *v.* Lilly, 84 N. C. 643.

[7] To a petition by an administrator or executor to sell real estate of the decedent for the payment of debts, the heir or devisee may plead that the debts are barred by the Statute of Limitations. Heirs of Bond *v.* Smith, 2 Ala. 660; Pollard *v.* Scears, 28 Ala. 484; Lee *v.* Downey, 68 Ala. 98; Riser *v.* Snoddy, 7 Ind. 442; Payne *v.* Pusey, 8 Bush, 564; McKinlay *v.* Gaddy, 26 S. C. 573. And see cases in last note, *ad fin.* *Contra*, Hodgdon *v.* White, 11 N. H. 208.

[8] Harwell *v.* Steele, 17 Ala. 372; Gilchrist *v.* Williams, 3 A. K. Marsh. 235; Nolin *v.* Blackwell, 31 N. J. L. 170; Hinkley *v.* Walters, 8 Watts, 260; Taylor *v.* Gould, 57 Pa. 152; Verrier *v.* Guillou, 97 Pa. 63; Turnbull *v.* Strohecker, 4 McCord, 210; Trimyer *v.* Pollard, 5 Gratt. 460.

applies equally to all other cases of imperfect obligations. Herein *our law differs from the Roman, in which *compensatio* did not [645 depend on any positive enactment, but was an equitable right derived from the *ius gentium*.

Acknowledgment by debtor. Again, the creditor's lost remedy may be revived by the act of the debtor. The decisions on the statute of James I. have established that a renewed promise to pay, or an acknowledgment from which a promise can be inferred, excludes the operation of the statute. It was formerly held that the statute rested wholly on a presumption of payment, and therefore that any acknowledgment of the debt being unpaid, even though coupled with a refusal to pay, was sufficient. But this opinion has long since been overruled (*q*). Again, it has been said that although the original remedy is gone, the original consideration remains as a sufficient foundation for a subsequent promise. But this explanation is not satisfying, since the consideration for the new promise is wholly past, and therefore insufficient according to modern doctrine (*r*). The only theory tenable on principle seems to be that the statute is a law merely of procedure, giving the debtor a defence which he may waive if he think fit. Nevertheless it is held that the acknowledgment operates as evidence of a new promise, and therefore it is not effectual unless made before action brought (*s*).[9]

What is sufficient acknowledgment. The modern law has been concisely stated by Mellish L.J. "There must be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed" (*t*).[10] The prom-

(*q*) 2 Wms. Saund. 183, 184.

(*r*) See p. *182, above.

(*s*) *Bateman* v. *Pinder* (1842) 3 Q. B. 574, 11 L. J. Q. B. 281.

(*t*) *Mitchell's claim* (1871) L. R. 6 Ch. at p. 828. And see *Wilby* v. *Elgee* (1875) L. R. 10 C. P. 497, 44 L. J. C. P. 254; *Chasemore* v. *Turner* (1874) (Ex. Ch.) L. R. 10 Q. B. 500, 506, 510, 520, 45 L. J. Q. B. 66, and the later case of *Meyerhoff* v. *Fröhlich* (1878) 3 C. P. D. 333, in C. A., 4 C. P. Div. 63, 48 L. J. C. P. 43, which also show how much difficulty there may be in determining in a particular case whether there has been an unconditional promise: *Quincey* v. *Sharpe* (1876) 1 Ex. D. 72, 45 L. J. Ex. 347; *Skeet* v. *Lindsay* (1877) 2 Ex. D. 314, 46 L. J. Ex. 249.

9 Martin *v.* Jennings, 52 S. C. 371. *Contra*, Soper *v.* Baum, 6 Mackey (D. C.), 29: Love *v.* Hackett, 6 Ga. 486; Danforth *v.* Culver, 11 Johns. 146; Stevens *v.* Hewitt, 30 Vt. 262.

10 This is an accurate summary of the American law in most jurisdictions. See Bell *v.* Morrison, 1 Pet. 351, 362; Shepherd *v.* Thompson, 122

646] ise must be to pay the debt as **ex debito iustitiae;* a promise to pay *as a debt of honour* is insufficient, as it excludes the admission of legal liability (*u*). When the promise is implied, it must be as an inference of fact, not of law; the payment of interest under compulsion of law does not imply any promise to pay the principal (*x*).[11]

The acknowledgment or promise, if express, must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 13). But an acknowledgment may still be implied from the pay-

(*u*) *Maccord* v. *Osborne* (1876) 1 C. P. D. 568, 45 L. J. C. P. 727 (on Lord Tenterden's Act).

(*x*) *Morgan* v. *Rowlands* (1872) L. R. 7 Q. B. 493, 498, 41 L. J. Q. B. 187.

U. S. 231; Bullion Bank *v.* Hegler, 93 Fed. Rep. 890; *Re* Lorillard, 107 Fed. Rep. 677 (C. C. A.); Chapman *v.* Barnes, 93 Ala. 433; Thomas *v.* Casey, 26 Col. 485; Carroll *v.* Forsyth, 69 Ill. 127; Johnston *v.* Hussey, 92 Me. 92; Wald *v.* Arnold, 168 Mass. 134; Wells *v.* Hargrave, 117 Mo. 563; Engel *v.* Brown, 69 N. H. 183; Miller *v.* Teeter, 53 N. J. Eq. 262; Manchester *v.* Braedner, 107 N. Y. 346; Patterson *v.* Neuer, 165 Pa. 66; Ward *v.* Jack, 172 Pa. 416; Wiley *v.* Brown, 18 R. I. 615; Suber *v.* Richard, 61 S. C. 393; Liberman *v.* Gurensky, 27 Wash. 410; Stiles *v.* Laurel Fork Co., 47 W. Va. 838. See further, 19 Am. & Eng. Encyc. of Law (2d ed.), 288 *et seq.*

In a few States, however, the law has followed the earlier English doctrine that an admission of indebtedness is sufficient though no promise can fairly be implied from the admission. Southern Pac. Co. *v.* Prosser, 122 Cal. 413; Ia. Code (1897), § 3456; Stewart *v.* McFarland, 84 Ia. 55; First Bank *v.* Woodman, 93 Ia. 668; Beeler *v.* Clarke, 90 Md. 221; N. Mex. Comp. L. (1897), § 2926; Reymond *v.* Newcomb, 10 N. Mex. 151; Hunter *v.* Starkes, 8 Humph. 658.

11 "No payment can fall within this principle which was enforced by a mere proceeding *in rem* without any act upon the part of the debtor." Thomas *v.* Brewer, 55 Ia. 227, 229. And see Taylor *v.* Hollard, [1902] 1 K. B. 676; Campbell *v.* Baldwin, 130 Mass. 199; Brown *v.* Latham, 58 N. H. 30; Anderson *v.* Baxter, 4 Oreg. 105, 113; Goodwin *v.* Buzzell, 35 Vt. 9. Cp. Whipple *v.* Blackington, 97 Mass. 476; Porter *v.* Blood, 5 Pick. 54; Sornberger *v.* Lee, 14 Neb. 193.

The payment of a dividend by an assignee of an insolvent debtor is not such a part payment as will take the residue of the debt out of the statutory limitation as against such debtor. Stoddard *v.* Doane, 7 Gray, 387; Richardson *v.* Thomas, 13 Gray, 381; Parsons *v.* Clark, 59 Mich. 414; Chambers *v.* Whitney, 17 Neb. 70; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Pickett *v.* Leonard, 34 N. Y. 175; Marienthal *v.* Mosler, 16 Ohio St. 566; Read *v.* Johnson, 1 R. I. 81; Benton *v.* Holland, 58 Vt. 533. And see Christy *v.* Flemington, 10 Pa. 129; Black *v.* White, 13 S. C. 37. *Contra*, Letson *v.* Kenyon, 31 Kan. 301. And see Lilley *v.* Ford, [1899] 2 Ch. 107.

From an acknowledgment drawn out from the debtor when testifying as a witness no promise can be implied. Bloodgood *v.* Bruen, 8 N. Y. 362.

Nor from an admission in answer in equity. Holberg *v.* Jaffray, 64 Miss. 646. But may be from a decree entered by consent of the debtor. Bissell *v.* Jaudon, 16 Ohio St. 498.

A clause in a conveyance to the effect that the lands conveyed are charged with the payment of a debt of the grantor, which the grantee assumes and agrees to pay, is such an acknowledgment as interrupts the running of the statute. De Freest *v.* Warner, 98 N. Y. 217.

A new promise made under the mistaken belief that the creditor's remedy is not yet barred will take the case out of the statute. Langston *v.* Aderhold, 60 Ga. 376.

ment of interest or of part of the principal on account of the whole, without any admission in writing (*y*).[12]

Statutory provision for acknowledgment of specialty debts. The more recent statute which limits the time for suing on contracts by specialty contains an express proviso as to acknowledgment and part payment (3 & 4 Will. 4, c. 42, s. 5) (*z*). The cases as to acknowledgment, &c. under the statute of James, and Lord Tenterden's Act, are not applicable to this proviso. Here the operation of the acknowledgment is independent of any new promise to pay, and the action in which the acknowledgment is to be operative must be founded on the original obligation alone (*a*).

Statute of limitation as to real property: right as well as remedy taken away. The Act for the Limitation of Actions and Suits relating to Real Property (3 & 4 Will. 4, c. 27, s. 34) does not only bar the remedy, but extinguishes the right at the end of the period of limitation. It is therefore unconnected with out present subject.

***English statutes of limitation and analogous foreign laws affecting the remedy only, treated as part of lex fori.** [647 We have seen that by the operation of the statutes of limitation applicable to contracts the right itself is not destroyed, but only the conditions of enforcing it are affected. The law of limitation is a law relating not to the substance of the cause of action, but to procedure. Hence follows a consequence which is important in private international law, namely, that

(*y*) 2 Wms. Saund. 181, 187, see also the notes to *Whitcomb* v. *Whiting* (1781) 1 Sm. L. C.

(*z*) See *Pears* v. *Laing* (1871) L. R. 12 Eq. 41, 40 L. J. Ch. 225.

(*a*) *Roddam* v. *Morley* (1856–7) 1 De G. & J. 1, 26 L. J. Ch. 438, opinion of Williams and Crowder JJ. at p. 15.

12 This statute has been generally copied in this country. See 19 Am. & Eng. Encyc. of Law (2d ed.), 320.

In Pennsylvania, however, a writing is not necessary. Patterson *v.* Neuer, 165 Pa. 66; Simrell *v.* Miller, 169 Pa. 326. So in Delaware. Morrow *v.* Turner, 2 Marv. 332.

The debt intended by a written promise may be identified by oral evidence. McConaughy *v.* Wilsey, 115 Ia. 589; McGinty *v.* Henderson, 41 La. Ann. 382; Russell *v.* Davis, 51 Minn. 482.

In Shapley *v.* Abbott, 42 N. Y. 443, it was held that where a creditor was induced to forbear collecting his claim by an oral promise on the part of the debtor not to take advantage of the statute, this promise was no answer to the defense of the statute. See also Andreae *v.* Redfield, 98 U. S. 225. But in other cases it is held that under such circumstances the debtor is estopped to plead the statute. Bridges *v.* Stevens, 132 Mo. 524; Cecil *v.* Henderson, 121 N. C. 244.

The numerous cases on part payment are collected in 19 Am. & Eng. Encyc. of Law (2d ed.), 323 *et seq.*

these enactments belong to the *lex fori,* not to the *lex contractus,* and are binding on all persons who seek their remedy in the courts of this country. A suitor in an English court must sue within the time limited by the English statute, though the cause of action may have arisen in a country where a longer time is allowed (*b*).[13] Conversely, an action brought in an English court within the English period of limitation is maintainable although a shorter period limited by the law of the place where the contract was made has elapsed,[14] even if a competent court of that place has given judgment in favour of the defendant on the ground of that period having expired (*c*).[15] And for this purpose a document under seal has been treated by an English

(*b*) *British Linen Co.* v. *Drummond* (1830) 10 B. & C. 903, 34 R. R. 595.

(*c*) *Huber* v. *Steiner* (1835) 2 Bing. N. C. 202, 42 R. R. 598 (debt barred by French law): *Harris* v. *Quine* (1869) L. R. 4 Q. B. 653, 38 L. J. Q. B. 331 (debt barred by Manx law): in the latter case Cockburn C.J. expressed some doubt as to the principle, admitting however that the rule was settled by authority: [And see Leroy *v.* Crowninshield, 2 Mason, 151, 175, per Story, J. "A state statute which enacts that 'no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit has been brought therein,' is unconstitutional and void, as destroying the right of a party to enforce a judgment regularly obtained in another state, and conflicting therefore with the provision of the Constitution (art. iv. § 1) which ordains that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;'" Christmas *v.* Russell, 5 Wall. 290.] Savigny too (Syst. 8. 273) is for applying that law which governs the substance of the contract.

[13] McElmoyle *v.* Cohen, 13 Pet. 312; Nicolls *ads.* Rogers, 2 Paine, 437; Brunswick Terminal Co. *v.* National Bank, 88 Fed. Rep. 607; Underwood *v.* Patrick, 94 Fed. Rep. 468 (C. C. A.); McArthur *v.* Goddin, 12 Bush, 274; Home Ins. Co. *v.* Elwell, 111 Mich. 689; Robinson *v.* Peyton, 4 Tex. 276. But see Shillito Co. *v.* Richardson, 19 Ky. L. Rep. 1020.

[14] Townsend *v.* Jemison, 9 How. 407; Dexter *v.* Edmands, 89 Fed. Rep. 467; Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503; Jones *v.* Jones, 18 Ala. 248; Medbury *v.* Hopkins, 3 Conn. 472; Fanton *v.* Middlebrook, 50 Conn. 44; O'Bear *v.* First Bank, 97 Ga. 587; Hendricks *v.* Comstock, 12 Ind. 238; Graves *v.* Graves' Exrs., 2 Bibb, 207; Thibodeau *v.* Levasseur, 36 Me. 362; Thompson *v.* Reed, 75 Me. 404; Bulger *v.* Roche, 11 Pick. 36; Putnam *v.* Dike, 13 Gray, 535; Home Ins. Co. *v.* Elwell, 111 Mich. 689; McMerty *v.* Morrison, 62 Mo. 140; Paine *v.* Drew, 44 N. H. 306; Lincoln *v.* Battelle, 6 Wend. 475; Miller *v.* Brenham, 68 N. Y. 83; Crocker *v.* Arey, 3 R. I. 178; Sawyer *v.* Macaulay, 18 S. C. 543; Jones *v.* Hook, 2 Rand. 303.

But where a statute creates a new right of action with a provision requiring it to be asserted within a limited time, the provision is not a part of the law of the remedy, but a condition attached to the right itself and hence operative in any jurisdiction wherein the plaintiff may sue. Walsh *v.* Mayer, 111 U. S. 31, 37; Stern *v.* La Compagnie Generale, 110 Fed. Rep. 996; Railroad *v.* Hine, 25 Ohio St. 629.

[15] But see Sweet *v.* Brackley, 53 Me. 346.

court as creating a specialty debt, though made in a country where our distinction between simple contract and specialty debts does not exist, and more than six years before action brought (*d*).[16]

The House of Lords, as a Scots court of appeal, has had to decide a similar question as between the law of Scotland and the law of France. It was held that the Scottish law of prescription applied to an action brought *in Scotland on a bill of exchange drawn and [648 accepted in France, the right of action on which in France had been saved by judicial proceedings there (*e*). In the case where the shorter of the two periods of limitation is that allowed by the foreign law governing the substance of the contract, and that period has elapsed, it is of course necessary to ascertain that the foreign law is analogous to our own in its operation, and merely takes away the remedy without making the contract void at the end of the time of prescription. But it is considered that an actual destruction of the right would be so inconvenient and unreasonable that it may almost be presumed that such is not the operation of the law of any civilized state; and the English courts would not put such a construction on the foreign law unless compelled so to do by very strong evidence (*f*).[17]

We shall presently see that analogous questions concerning the *lex fori* may arise in other cases of imperfect obligations.

(*d*) *Alliance Bank of Simla* v. *Carey* (1880) 5 C. P. D. 429, 49 L. J. C. P. 781 (a bond executed in British India). Possibly the use by British subjects of an English form, unmeaning at the place of execution, may justify the inference that they at the time intended the document to operate as an English deed. Otherwise the decision seems not easy to support.

(*e*) *Don* v. *Lippmann* (1837) 5 Cl. & F. 1, 47 R. R. 1. See also 2 Wms. Saund. 399.

(*f*) *Huber* v. *Steiner* (1835) 2 Bing. N. C. 202, 42 R. R. 598, where it was in vain attempted to show that by the French law of prescription the right was absolutely extinguished.

16 See Bank *v.* Donally, 8 Pet. 361; Kerper *v.* Wood, 48 Ohio St. 613.

17 See Campbell *v.* Holt, 115 U. S. 620; Hendricks *v.* Comstock, 12 Ind. 238; Chapin *v.* Freeland, 142 Mass. 383; Perkins *v.* Guy, 55 Miss. 153; McMerty *v.* Morrison, 62 Mo. 140; Lincoln *v.* Battelle, 6 Wend. 475; Kempe *v.* Bader, 86 Tenn. 189. For instances, however, where the right was held to have been extinguished, see Baker *v.* Stonebraker's Admrs., 36 Mo. 338; Brown *v.* Parker, 28 Wis. 21. And see per Matthews, J., in Pritchard *v.* Norton, 106 U. S. 124, 131.

In Shelby *v.* Guy, 11 Wheat. 361, it was held, that as five years' *bona fide* possession of a slave constitutes a title, by the laws of Virginia, upon which the possessor may recover in detinue, this title may be set up by the vendee of such possessor in the courts of Tennessee. *Acc.* Howell *v.* Hair, 15 Ala. 194; Newcombe *v.* Leavitt, 22 Ala. 631; McDuffie *v.* Sinnott, 119 Ill. 449; Fears *v.* Sykes, 35 Miss. 633; Eingartner *v.* Illinois Steel Co., 103 Wis. 373. See *e converso*, Goodwin *v.* Morris, 9 Oreg. 322.

2. **Conditions precedent to remedy.** Under the second head fall the cases of particular classes of contracts where the law requires particular acts to be done by the parties or one of them (in respect of the form of the contract or otherwise) as conditions precedent to the contract being recognized as enforceable.

A. **Statute of Frauds, s. 4.** The most important of the enactments thus imposing special conditions on contract is the fourth section of the Statute of Frauds (29 Car. 2, c. 3).

The fourth section enacts that after the date there mentioned

"no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for 649] the debt, default, or miscarriage of another person; or to charge any *person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The terms of the 17th section (now superseded in England by s. 4 of the Sale of Goods Act, 1893) were different, and raised a question whether they did not wholly avoid agreements not satisfying its conditions; yet the better opinion was that the 17th section, like the 4th, was only a law of procedure (*g*);[18] and the Sale of Goods Act has so settled it for the future by using the words "shall

(*g*) Lord Blackburn in *Maddison* v. *Alderson* (1883) 8 App. Ca. at p. 488; Brett L.J. in *Britain* v. *Rossiter* (1879) 11 Q. B. D. at p. 127, 48 L. J. Ex. 362.

[18] In Houghtaling *v.* Ball, 20 Mo. 563, it was expressly decided that a sale of goods made in Illinois and valid there should be enforced in Missouri, although if made in the latter State, it would have been void under what corresponds to the seventeenth section of the statute. *Acc.* Allen *v.* Schuchardt, Fed. Cas. No. 236 (affd., without, however, any reference to this question, in 1 Wall. 359). But see Miller *v.* Wilson, 146 Ill. 523; Cochran *v.* Ward, 5 Ind. App. 89. In Townsend *v.* Hargraves, 118 Mass. 325, it is held that both sections affect only the remedy, and not the validity of the contract. See also Merchant *v.* O'Rourke, 111 Ia. 351; Head *v.* Goodwin, 37 Me. 181; Bird *v.* Munroe, 66 Me. 337; Denny *v.* Williams, 5 Allen, 1; Emery *v.* Burbank, 165 Mass. 326, 327; Alderton *v.* Buchoz, 3 Mich. 322; Daniel *v.* Frazer, 40 Miss. 507.

That the operation of section 17 is not confined to actions on the contract itself, but affects rights of property as against third persons, see Taylor *v.* Great Eastern Ry. Co., [1901] 1 K. B. 774; Coombs *v.* Railway Co., 3 H. & N. 510; Mahan *v.* United States, 16 Wall. 143; Hicks *v.* Cleveland, 48 N. Y. 84; O'Neil *v.* Railroad Co., 60 N. Y. 138; Ely *v.* Ormsby, 12 Barb. 570; Browne on Stat. of Frauds, § 138 f. sqq.

not be enforceable by action." And it seems that the statute does not prevent property from passing on an informal sale (*h*). The cases of part acceptance of the goods or part payment of the price are expressly provided for, either of these having the same effect as a duly made memorandum in writing.

Effect of section 4 for some time not settled. We now return to the fourth section. For the sake of brevity we shall use the term "informal agreement" to signify any agreement which comes within this section and does not comply with its requirements.

For some time it was not fully settled what was the effect of this enactment on informal agreements. There was some authority for saying it made them void. It was never held necessary in the courts of law for a defendant sued on an informal agreement to plead the statute specially, as in the case of the statutes of limitation: and it has been held (before the C. L. P. Act) that a special plea was not only unnecessary but bad as an "argumentative denial" of the contract declared upon (*i*). Moreover an *action cannot be [650 maintained when, although it is not brought to enforce any right *ex contractu,* the right which is the foundation of the plaintiff's claim depends on an informal agreement. In *Carrington* v. *Roots* (*k*) the plaintiff sued in trespass for seizing his horse and cart: the defendant pleaded that they were incumbering and doing damage on his ground: the plaintiff replied a verbal agreement that the defendant should sell the crop and grass growing there to the plaintiff, and that the plaintiff might enter with his horse and cart to take them. It was held that this agreement was for the sale of an interest in land within s. 4, and that the plaintiff could not set it up, though it might have been available as a *licence* only, in answer to an action for trespass (*l*).[19] Both here and in the later case of *Reade* v. *Lamb* above cited the judges said distinctly enough that informal agree-

(*h*) *Taylor* v. *G. E. Ry. Co.* [1901] 1 K. B. 774, 70 L. J. K. B. 499.

(*i*) *Reade* v. *Lamb* (1851) 6 Ex. 130, 20 L. J. Ex. 161. Since the Judicature Acts the defence of the statute must always be distinctly raised on the pleadings. Order XIX. r. 15, cp. r. 20. The defendant need not specify on which section he relies, but if he does, he cannot alter it by amendment: *James* v. *Smith* [1891] 1 Ch. 384, 63 L. T. 524, affd. (on other grounds) 65 L. T. 544. As to the former practice in equity, see *Johnasson* v. *Bonhote* (1876) 2 Ch. Div. 298, 45 L. J. Ch. 651. Once properly raised the defence is available without further repetition at any subsequent stage of the proceedings: *ib.*

(*k*) (1837) 2 M. & W. 248, 46 R. R. 583.

(*l*) Cp. *Crosby* v. *Wadsworth* (1805) 6 East 602, 8 R. R. 566.

19 Owens *v.* Lewis, 46 Ind. 488. An oral sale of growing timber, though unenforceable under the Statute of Frauds, is valid as a license to enter upon

ments were not only not enforceable but void. And so Sir W. Grant appears to have thought in *Randall* v. *Morgan* (*m*). These dicta are not consistent with the decisions to be presently mentioned in which the existence of an imperfect obligation is implied. And there had also been judicial expressions of opinion the other way.

Decision in Leroux v. Brown: agreement not void, but only not enforceable. But it is not necessary to notice these, for the point was expressly decided by the Court of Common Pleas in *Leroux* v. *Brown* (*n*),[20] where the earlier dicta are also considered. The action was on a contract not to be performed within one year, and made in France, **651]** where by the French law the plaintiff *might have sued on it. For the plaintiff it was argued that s. 4 of the Statute of Frauds applied to the substance of the contract, and therefore, on general principles of private international law, did not affect contracts which were made out of England, and which as to their substance were to be governed by the law of the place where they were made. But for the defendant it was answered that this enactment, like the Statute of Limitation, only affected the remedy, and was therefore a law of the procedure of the English courts, and as such binding on all suitors who might seek to enforce their rights in those courts: the agreement might be good enough for any other purpose, but the plaintiff could not sue on it in England. And this view was adopted by the Court. Jervis C. J. said: "The statute in this part of it does not say that unless those requisites are complied with *the contract shall be void,* but merely that *no action shall be brought* upon it. . . . The fourth section relates only to the procedure and not to the right and validity of the contract itself." It will be observed that the plaintiff was here in the curious position of contending, in order to support his right to recover on a contract made in France, that it would have been absolutely void if made in England (*o*). If

(*m*) (1805) 12 Ves. at p. 73, 8 R. R. at p. 293.

(*n*) (1852) 12 C. B. 801, 22 L. J. C. P. 1; and see per Lord Blackburn in *Maddison* v. *Alderson*, note (*g*), last page.

(*o*) *Leroux* v. *Brown*, last note, was doubted by Willes J. in *Williams* app. *Wheeler* resp. (1860) 8 C. B. N. S. 299, 316. Savigny, Syst. 8. 270, also takes the opposite view. The case also took (*obiter*) a distinction between s. 4 and s. 17, which was not generally accepted.

the land and cut the trees, and if the timber is cut before revocation of the license title to it passes. Owens *v.* Lewis, 46 Ind. 488; Erskine *v.* Plummer, 7 Me. 447; Spalding *v.* Archibald, 52 Mich. 365; Williams *v.* Flood, 63 Mich. 487; Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491; Pierrepont *v.* Barnard, 6 N. Y. 279; Buck *v.* Pickwell, 27 Vt. 157.

[20] *Acc.* Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, 207; Buhl *v.* Stephens, 84 Fed. Rep. 922; Kleeman *v.* Collins, 9 Bush, 460; Heaton *v.* Eldridge. But see Miller *v.* Wilson, 146 Ill. 527; Cochran *v.* Ward, 5 Ind. App. 89.

this decision and the reasons given for it are correct, it would seem to follow that a foreign or colonial court ought to enforce an English agreement, notwithstanding that it was informal under s. 4 of the Statute of Frauds, if it had the general requisites of a valid contract in English law, and was not informal according to the local law of procedure.

It has even been argued that the words "no action shall be brought" confine the operation of the statute to civil process, so that an informal agreement for service not to be performed within a year might be enforced by criminal *process under the Master and [652 Servant Act, 1867. But the Court held that such a construction would be too unreasonable, and the statute must mean that informal agreements are not to be enforced in any way (*p*).

Results of imperfect obligation under section 4 of Statute of Frauds. It being established that the informal agreements we are considering are not void, it follows that they give rise to imperfect obligations. We will now indicate the results. We have seen that neither the obligation itself, nor any right immediately founded on it, can be directly enforced. But it is recognized for the purpose of explaining anything actually done in pursuance of it, and anything so done may in many cases be a good consideration for a new obligation on a subsequent and distinct contract, or a sufficient foundation for a new obligation *quasi ex contractu*.[21]

A. **As to money paid.** Money paid under an informal agreement cannot be recovered back merely on the ground of the agreement not being enforceable.[22] Thus if a responsibility has been assumed and executed under a verbal guaranty, the guarantor cannot recover

(*p*) *Banks* v. *Crossland* (1874) L. R. 10 Q. B. 97, 44 L. J. M. C. 8. The Act is now repealed by the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90). *Qu.* whether the decision be applicable to the malicious breaches of contract in particular cases which are made substantive offences by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).

21 Consult Browne on the Stat. of Frauds, Ch. VIII. Consenting to the rescission of a contract unenforceable because within the statute is a good consideration for a promise. Merchant *v.* O'Rourke, 111 Ia. 351; Stout *v.* Ennis, 28 Kan. 706.

22 Mueller *v.* Wiebracht, 47 Mo. 468. "The Statute of Frauds does not affect the common law right of retainer by an administrator." Berry *v.* Graddy, 1 Met. (Ky.) 553.

So a creditor receiving a payment from his debtor, without any direction as to its application, may apply it to payment of a debt on which the statute does not permit an action to be maintained. Murphy *v.* Webber, 61 Me. 478; Haynes *v.* Nice, 100 Mass. 327. Cp. *supra*, p. 775.

back the money paid by him (*q*).[23] So a purchaser cannot recover a deposit paid on an informal agreement for the sale of land, the vendor remaining ready and willing to complete (*r*).[24] And not

(*q*) *Shaw* v. *Woodcock* (1827) 7 B. & C. 73. 83, 84, 31 R. R. 158. Cp. *Sweet* v. *Lee* (1841) 3 M. & Gr. 452.

(*r*) *Thomas* v. *Brown* (1876) 1 Q. B. D. 714, 45 L. J. Q. B. 811.

[23] "One who has verbally guaranteed the debt of another, at his request, may pay the same and recover the amount so paid in an action against the original debtor." Beal *v.* Brown, 13 Allen, 114; Simpson *v.* Hall, 47 Conn. 417; Madden *v.* Floyd, 69 Ala. 221.

"Where one summoned as trustee made answer that a debt was due from him to the defendant, but that he had verbally promised and he considered himself bound to pay a debt to a greater amount due from the defendant to a third person, it was held that he was not obliged to set up the Statute of Frauds to avoid this promise, and that if he chose not to avail himself of it he was not chargeable as trustee." Cahill *v.* Bigelow, 18 Pick. 369. *Acc.* Browning *v.* Parker, 17 R. I. 183.

A party who has entered into an agreement which he cannot be compelled to perform, because it is within the Statute of Frauds and not in writing, is not obliged, in behalf of a third person not interested in the contract, to take that objection, nor can such third person take advantage of the statute on that account, to avoid a collateral liability to him. Tibbetts *v.* Flanders, 18 N. H. 284. And see Moore *v.* Crawford, 130 U. S. 122; Kemp *v.* National Bank, 109 Fed. Rep. 48 (C. C. A.); Lavender *v.* Hall, 60 Ala. 214; Cooper *v.* Hornsby, 71 Ala. 62; Brown *v.* Rawlings, 72 Ind. 505; Dixon *v.* Duke, 85 Ind. 434; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; King *v.* Bushnell, 121 Ill. 650; A. R. Beck Co. *v.* Rupp, 188 Ill. 562; Bohannon *v.* Pace, 6 Dana, 194; Ames *v.* Jackson, 115 Mass. 507, 512; Bullard *v.* Smith, 139 Mass. 492; Rickards *v.* Cunningham, 10 Neb. 417; Cresswell *v.* McCaig, 11 Neb. 222; Livermore *v.* Northrup, 44 N. Y. 107; Stowell *v.* Hazlett, 57 N. Y. 637; Rice *v.* Manly, 66 N. Y. 82; Davis *v.* Inscoe, 84 N. C. 396; Lefferson *v.* Dallas, 20 Ohio St. 68; Houser *v.* Lamont, 55 Pa. 311; Bank *v.* Bertschy, 52 Wis. 438.

The same is true of a claim unenforceable because barred by the Statute of Limitations. Allen *v.* Smith, 129 U. S. 465; Mathesius *v.* Railroad Co., 96 Fed. Rep. 792; Hanchett *v.* Blair, 100 Fed. Rep. 817; Wright *v.* Wright, 103 Fed. Rep. 580; Vansickle *v.* Wells, Fargo & Co., 105 Fed. Rep. 16; Brookfield Bank *v.* Kimble, 76 Ind. 195; Jackson *v.* Stanfield, 137 Ind. 592; City Bank *v.* Wright, 68 Ia. 132; Ullman *v.* Thomas, 126 Mich. 61; Frost *v.* Steele, 46 Minn. 1; Dayton Co. *v.* Sloan, 49 Neb. 622; Manchester *v.* Tibbetts, 121 N. Y. 219; McConnell *v.* Barber, 86 Hun, 360; McAfee *v.* McAfee, 28 S. C. 188.

But an exception has been made as to the Statute of Limitations. Where a court of equity or bankruptcy has taken possession of an estate for distribution among creditors, any creditor can set up the bar of the statute against the claim of another. Shewen *v.* Vanderhorst, 1 Russ. & M. 347; *Re* Lafferty, 122 Fed. Rep. 558; Grattan *v.* Wiggins, 23 Cal. 25; Sawyer *v.* Sawyer, 74 Me. 579; Dunn *v.* Beaman, 126 N. C. 766; Cartney *v.* Tyrer, 94 Va. 198, 202; Calloway's Admr. *v.* Saunders, 99 Va. 350; Werdenbaugh *v.* Reed, 20 W. Va. 588.

[24] See Nelson *v.* Shelby Mfg. Co., 96 Ala. 515; Venable *v.* Brown, 31 Ark. 564; Laffey *v.* Kaufman, 134 Cal. 391; Day *v.* Wilson, 83 Ind. 463; Whitnell *v.* Bigham, 5 T. B. Mon. 191; Gray *v.* Gray, 2 J. J. Marsh. 21; Plummer *v.* Bucknam, 55 Me. 105; Coughlin *v.* Knowles, 7 Met. 57; Clark *v.* Shehan, 27 Minn. 328; McKinney *v.* Harvie, 38 Minn. 18; Sims *v.* Hutchins, 8 S. & M. 328; Galway *v.* Shields, 66 Mo. 313; Abbott *v.* Draper, 4 Denio, 51; Green *v.* Railroad Co., 77 N. C. 95; Cobb *v.* Hall, 29 Vt. 510; Hoskins *v.* Mitcheson, 14 U. C. Q. B. 551.

only can the one party keep money actually paid to him by the other, but if money is paid by A. to B. in order to be paid over to C. in pursuance of an informal agreement between A. and C. which C. has executed, then C. can recover it as money received to his use.[25] In *Griffith* v. *Young* (*s*) the plaintiff was the defendant's landlord. The defendant wished to assign to one P., which he could not *do without the plaintiff's consent. It was verbally agreed that [653 P. should pay the defendant 100*l.* for goodwill, out of which the defendant was to pay 40*l.* to the plaintiff for his consent to the assignment. P. knowing of this agreement paid the 100*l.* to the defendant: it was held that the defendant was liable to the plaintiff for 40*l.* in an action for money received to his use. Lord Ellenborough said: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other."

On the same principle, if on the faith of an informal agreement money has been paid in advance to a party who afterwards refuses or fails to perform his part of it, or has been expended on his account, it is conceived that proof of the agreement may be admitted to show what was in fact the consideration which has failed (*t*).[26]

But an executor may not pay or retain a debt which by reason of the Statute of Frauds the creditor cannot enforce (*u*).

B. **As to agreement executed.** The execution of an informal agreement may be shown as a fact, and the party who has had some benefit

(*s*) (1810) 12 East 513, 11 R. R. 478.

(*t*) See *Pulbrook* v. *Lawes* (1876) 1 Q. B. D. 284, 45 L. J. Q. B. 178.

(*u*) *Re Rownson* (1885) 29 Ch. Div. 358, 54 L. J. Ch. 950.

25 Garrett's Admrs. *v.* Garrett, 27 Ala. 687.

26 "The principle seems to be perfectly well settled, and is sustained by very numerous authorities, that where a party to an agreement void by the Statute of Frauds fails to execute it, the price advanced, or the value of the article delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back." Smith *v.* Admrs. of Smith, 28 N. J. L. 208, 217; Barickman *v.* Kuykendall, 6 Blackf. 21; Jarboe *v.* Severin, 85 Ind. 496; Bogard *v.* Turner, 23 Ky. L. Rep. 625; Jellison *v.* Jordan, 68 Me. 373; Segars *v.* Segars, 71 Me. 530; Kidder *v.* Hunt, 1 Pick. 328; Cook *v.* Doggett, 2 Allen, 439; White *v.* Wheland, 109 Mass. 291; Parker *v.* Tainter, 123 Mass. 185; Sovereign *v.* Ortman, 47 Mich. 181; Herrick *v.* Newell, 49 Minn. 198; Hairston *v.* Jaudon, 42 Miss. 380; Dickerson *v.* Mays, 60 Miss. 388; Lucy *v.* Bundy, 9 N. H. 298; Moody *v.* Smith, 70 N. Y. 598; Wilkie *v.* Womble, 90 N. C. 254; Hawley *v.* Moody, 24 Vt. 603; Gifford *v.* Willard, 55 Vt. 36; Clark *v.* Davidson, 53 Wis. 317.

from such execution, so as in fact to get what he bargained for, cannot treat the bargain as a nullity. Thus the delivery of possession under an informal agreement for the sale of land is a good consideration for a promissory note for the balance of the purchase-money (*x*).[27] It was held in the case cited that the bargain was for a future conveyance, and that the defendant, who did not deny the
654] plain*tiffs' allegation that they were willing to convey, had got all he bargained for.

The same holds of an account stated. In *Cocking* v. *Ward* (*y*) there was an oral agreement by an incoming tenant from year to year to pay 100*l.* to the outgoing tenant: it was held that the agreement was within s. 4 of the statute, and the outgoing tenant could not recover the 100*l.* on the agreement itself, but that on an account stated he could.

Again, money due simply under an informal agreement from the plaintiff to the defendant cannot of course be set off; but the performance of an informal agreement by the defendant may be good as an accord and satisfaction. In *Lavery* v. *Turley* (*z*)[28] the plaintiff sued for goods sold, &c.: the defendant pleaded an equitable plea showing that in pursuance of an agreement between the parties (which turned out to be verbal) the defendant had given up to the plaintiff possession of a house and premises in satisfaction of the causes of action sued upon. The plea was held good, and it seems it was good enough at law (per Bramwell and Channell BB.). Pollock C.B. said: "It is pleaded as a fact that the defendant performed the agreement and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The fourth section of the Statute of Frauds does not ex-

(*x*) *Jones* v. *Jones* (1840) 6 M. & W. 84.

(*y*) (1845) 1 C. B. 858, 15 L. J. C. P. 245.

(*z*) (1860) 6 H. & N. 239, 30 L. J. Ex. 49.

[27] Gillespie *v.* Battle, 15 Ala. 276; Eidelin *v.* Clarkson's Exrs., 3 B. Mon. 31; Ott *v.* Garland, 7 Mo. 28. An oral promise to convey land is a sufficient consideration for a promissory note, and if the vendor shows himself able and willing to perform, he can recover upon the note. Schierman *v.* Beckett, 88 Ind. 52; McGowen *v.* West, 7 Mo. 569; Crutchfield *v.* Donathon, 49 Tex. 691.

In an action for use and occupation of land, the existence of a parol agreement may be proved to show that the defendant entered by permission of the plaintiff. Whitney *v.* Cochran, 1 Scam. 209; Little *v.* Martin, 3 Wend. 219.

[28] *Acc.* Bechtel *v.* Cone, 52 Md. 698.

clude unwritten proof in the case of executed contracts" (*a*). This of course does not mean that the agreement itself can in any case be sued upon (*a*).[29]

It is admitted that if A. agrees informally with X. to sell land to him, and afterwards agrees in writing to sell the same land to Z., and then conveys to X. in pursuance *of the first agreement, [655 Z. has no equity as against X. (*b*).

(*a*) Cp. *Souch* v. *Strawbridge* (1846) 2 C. B. 808, 814, 15 L. J. C. P. 170, and remarks on the dictum there in *Sanderson* v. *Graves* (1875) L. R. 10 Ex. 234, 238, 241, 44 L. J. Ex. 210.

(*b*) *Dawson* v. *Ellis* (1820) 1 J. & W. 524, 21 R. R. 227.

[29] "The Statute of Frauds has no application to a contract which has been fully performed on both sides." Stone *v.* Dennison, 13 Pick. 1. See *post*, p. 823. In the case at least of contracts not to be performed within a year the weight of authority is to the effect that if the contract is executed on one side the statute does not apply. Donellan *v.* Read, 3 B. & A. 899; Cherry *v.* Heming, 4 Ex. 631; Fernald *v.* Gilman, 123 Fed. Rep. 797; Rake's Admr. *v.* Pope, 7 Ala. 161; Manning *v.* Pippen, 95 Ala. 537, 541; Johnson *v.* Watson, 1 Ga. 348; Fraser *v.* Gates, 118 Ill. 99, 112; Haugh *v.* Blythe, 20 Ind. 24; Piper *v.* Fosher, 121 Ind. 407; Smalley *v.* Greene, 52 Ia. 241; Dant *v.* Head, 90 Ky. 255; Jones *v.* Comer, 25 Ky. L. Rep. 773; Blanton *v.* Knox, 3 Mo. 342; Bless *v.* Jenkins, 129 Mo. 647; Marks *v.* Davis, 72 Mo. App. 557; Blanding *v.* Sargent, 33 N. H. 239; Little *v.* Little, 36 N. H. 224; Perkins *v.* Clay, 54 N. H. 518; Durfee *v.* O'Brien, 16 R. I. 213; Gee *v.* Hicks, 1 Rich. Eq. 5; Reed *v.* Gold, 102 Va. 37; McClellan *v.* Sanford, 26 Wis. 595; Washburn *v.* Dosch, 68 Wis. 436. See also Sheehy *v.* Adarene, 41 Vt. 541. *Contra*, Berry *v.* Graddy, 1 Met. (Ky.) 553; Marcy *v.* Marcy, 9 Allen, 8; Kelley *v.* Thompson, 175 Mass. 427; Buckley *v.* Buckley, 9 Nev. 373; Bartlett *v.* Wheeler, 44 Barb. 162; Broadwell *v.* Getman, 2 Denio, 87; Parks *v.* Francis, 50 Vt. 626. And see also Reinheimer *v.* Carter, 31 Ohio St. 579, 587. When an agreement within the statute has been fully performed by one of the parties, and the benefit thereof has inured to the other, so that in the absence of an express promise of compensation one would have been implied (see Diddle *v.* Needham, 39 Mich. 147), an action lies in favor of the party who has performed. Walsh *v.* Colclough, 56 Fed. Rep. 778; Butler *v.* Lee, 11 Ala. 885; Worden *v.* Sharp, 56 Ill. 104; McDonald *v.* Crosby, 192 Ill. 283; Curran *v.* Curran, 40 Ind. 473; Stephenson *v.* Arnold, 89 Ind. 426; Wallace *v.* Long, 105 Ind. 522; Schoonover *v.* Voochow, 121 Ind. 3; Atchison, etc., R. Co. *v.* English, 38 Kan. 110; Wonsettler *v.* Lee, 40 Kan. 367; Dant *v.* Head, 90 Ky. 255; Lally *v.* Crookston Co., 85 Minn. 256; Galley *v.* Galley, 14 Neb. 174; Griffith *v.* Thompson, 50 Neb. 424; McElroy *v.* Ludlum, 32 N. J. Eq. 828; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Towsley *v.* Moore, 30 Ohio St. 184; King *v.* Brown, 2 Hill, 485; Brown *v.* Bell, 20 Johns. 338; Durfee *v.* O'Brien, 16 R. I. 213; King *v.* Smith, 33 Vt. 22, 25; Carter *v.* Brown, 3 S. C. 298; Grace *v.* Lynch, 80 Wis. 166.

In the case of an agreement of hiring and service not to be performed within a year, if, after part performance thereof, the employer refuses to go on the employee may recover upon a *quantum meruit*. W. B. Steel Works *v.* Atkinson, 68 Ill. 421; Wallace *v.* Long, 105 Ind. 522; Murphy *v.* De Haahn, 116 Ia. 61; Hambell *v.* Hamilton, 3 Dana, 591; Hamilton *v.* Thirston, 93 Md. 213; Williams *v.* Bemis, 108 Mass. 91; Spinney *v.* Hill, 81 Minn. 316; Updike *v.* Ten Broeck, 32 N. J. L. 105, 116. But not if the plaintiff himself has refused to go on, the defendant having been willing to perform the agreement. Swanzey *v.* Moore, 22 Ill. 63; Kriger *v.* Leppel, 42 Minn. 5; Galvin *v.* Prentice, 45 N. Y. 162; Abbott *v.* Inskip, 29 Ohio St. 59; Mack *v.* Bragg, 30 Vt. 571. *Contra*, Comes *v.* Lamson, 16 Conn. 246 (cp. Clark *v.*

c. **Part performance in equity.** It is a well-known doctrine of equity[30] that one who has partly performed an informal agreement for the purchase or hiring of land (*c*) is entitled to and can sue for a specific performance at the hands of the other party, if the acts of part performance have been done on the faith of an existing agreement, and have been of such a kind that the parties cannot be restored to their original position, and if the existence of an agreement is reasonably to be inferred from the acts themselves, or they are "unequivocally referable to the contract" (*d*).[31] This seems to be the real meaning of the distinctions as to what is or is not a sufficient part performance. Payment of money is in itself an equivocal act, and therefore the part payment of purchase-money is not a sufficient part performance (*e*).[32] But payment of increased rent by a yearly tenant holding over has been held a sufficient part performance of an agreement for a lease (*f*).[33] Here the part performance consists not in the payment itself, but in a possession which, though continuous in time with the old possession of the plaintiff as yearly tenant, is shown to be in fact referable to some new agreement (*g*). This doctrine of

(*c*) The doctrine is not extended to other transactions, *Britain* v. *Rossiter* (1879) 11 Q. B. Div. 123, 131, 48 L. J. Ex. 362. See, however, per Kay J. *McManus* v. *Cooke* (1887) 35 Ch. D. 681, 697, 56 L. J. Ch. 662.

(*d*) *Maddison* v. *Alderson* (1883) 8 App. Ca. at p. 476; Bell's Principles, 479, cited by Lord Selborne, *ib.* at p. 477.

(*e*) Lord Selborne, 8 App. Ca. at p. 479.

(*f*) *Nunn* v. *Fabian* (1865) L. R. 1 Ch. 35, 35 L. J. Ch. 140. See explanation of that case by Baggallay L.J. in *Humphreys* v. *Green* (1882) 10 Q. B. Div. at p. 156, 52 L. J. Q. B. 140; *diss.* Brett L.J. 10 Q. B. Div. p. 160; and per Byrne J. *Miller & Aldworth* v. *Sharp* [1899] 1 Ch. 622, 624.

(*g*) On the general theory of possession as constituting part performance see per Jessel M.R. *Ungley* v. *Ungley* (1877) 5 Ch. Div. at p. 890: "The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to

Terry, 25 Conn. 395); Tague *v.* Hayward, 25 Ind. 427; King *v.* Welcome, 5 Gray, 41; Freeman *v.* Foss, 145 Mass. 361. And see Bernier *v.* Cabot Mfg. Co., 71 Me. 506; Fuller *v.* Rice, 52 Mich. 435; Draheim *v.* Evison, 112 Wis. 27.

30 This doctrine is confined to courts of equity. See Ames' Cas. Eq. Jur. 314, n. 3; Kling *v.* Bordner, 65 Ohio St. 86.

31 See also Hodson *v.* Heuland, [1896] 2 Ch. 428; Riggles *v.* Erney, 154 U. S. 224; Harman *v.* Harman, 70 Fed. Rep. 894; Cooley *v.* Lobdell, 153 N. Y. 596; Shahan *v.* Swan, 48 Ohio St. 25, 38; Scott *v.* Lewis, 40 Oreg. 37.

32 See Pomeroy on Spec. Perf., §§ 112–114; Townsend *v.* Vanderwerker, 160 U. S. 171; Cooley *v.* Lobdell, 153 N. Y. 596.

Services rendered were held insufficient in Edward *v.* Estelle, 48 Cal. 194, 196; Crabill *v.* Marsh, 38 Ohio St. 331; Kling *v.* Bordner, 65 Ohio St. 86. See also Maddison *v.* Alderson, 8 A. C. 467. But see *contra*, Sharkey *v.* McDermott, 91 Mo. 647 (see also Kinney *v.* Murray, 170 Mo. 674); Davison *v.* Davison, 13 N. J. Eq. 246; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Lothrop *v.* Marble, 12 S. Dak. 511.

33 See Franke *v.* Riggs, 93 Ala. 252; Spear *v.* Orendorf, 26 Md. 37; Simmons *v.* Headlee, 94 Mo. 482; Gallagher *v.* Gallagher, 31 W. Va. 9; Conner *v.* Fitzgerald, 11 L. R. Ir. 106.

part performance is not in *direct contradiction of the Statute [656
of Frauds. It would be erroneous to say that a court of equity accepts proof of an oral agreement and part performance of a substitute for the evidence required by the statute. The plaintiff's right in the first instance rests not on contract but on a principle akin to estoppel; the defendant's conduct being equivalent to a continuing statement to some such effect as this: It is true that our agreement is not binding in law, but you are safe as far as I am concerned in acting as if it were. A man cannot be allowed to set up the legal invalidity of an agreement on the faith of which he has induced or allowed the other party to alter his position (*h*).[34] In the law of Scotland such facts are said to "raise a personal exception" (*i*). The same principle of equity is carried out in cases of representation independent of contract (see pp. *659, *660, below) and even of mere acquiescence. In equity an owner may be estopped by acquiescence from asserting his rights, although there has not been any agreement at all (*k*).[35] This also explains why the plaintiff must show part per-

admit evidence of the terms of the contract in order that justice may be done between the parties"; to same effect Cotton L.J. in *Britain* v. *Rossiter* (1879) 11 Q. B. Div. at p. 131. This holds even where the possession was taken before the agreement was concluded: *Hodson* v. *Heuland* [1896] 2 Ch. 428, 65 L. J. Ch. 754.

(*h*) *Caton* v. *Caton* (1865) L. R. 1 Ch. at p. 148, 35 L. J. Ch. 292; *Morphett* v. *Jones* (1818) 1 Swanst. at p. 181, 18 R. R. p. 54; *Dale* v. *Hamilton* (1846) 5 Ha. at p. 381; accordingly the cases on estoppel at law are compared by Lord Cranworth in *Jorden* v. *Money* (1854) 5 H. L. C. 185, 213, 23 L. J. Ch. 865; and by Lord Campbell in *Piggott* v. *Stratton* (1859) 1 D. F. & J. 33, 49, 29 L. J. Ch. 1. It must be admitted, however, that the recent authorities do not exhibit a very definite or settled theory.

(*i*) Bell, cited by Lord Selborne, 8 App. Ca. 476.

(*k*) See *Ramsden* v. *Dyson* (1865) L. R. 1 H. L. 129, 140, 168; *Powell* v. *Thomas* (1848) 6 Ha. 300; and the remarks of Fry J. in *Willmott* v. *Barber* (1881) 15 Ch. D. 96, 105.

[34] Williams *v.* Morris, 95 U. S. 444, 457; Tate *r.* Jones, 16 Fla. 216, 242; Temple *v.* Johnson, 71 Ill. 13; Morrison *r.* Herrick, 130 Ill. 631; Edwards *v.* Fry, 9 Kan. 417; Green *v.* Jones, 76 Me. 563; Woodbury *v.* Gardner, 77 Me. 68; Bennett *r.* Dyer, 89 Me. 17; Semmes *r.* Worthington, 38 Md. 298, 327; Glass *v.* Hulbert, 102 Mass. 24; Potter *r.* Jacobs, 111 Mass. 32, 37; Jorgensen *v.* Jorgensen, 81 Minn. 428; Brown *r.* Brown, 33 N. J. Eq. 650; Nibert *r.* Baghurst, 47 N. J. Eq. 201; Freeman *v.* Freeman, 43 N. Y. 34; Beardsley *v.* Duntley, 69 N. Y. 577; Armstrong *v.* Kattenhorn, 11 Ohio, 265, 271; Wright *r.* Puckett, 22 Gratt. 370.

[35] Foster *r.* Bear Valley Co., 65 Fed. Rep. 836; Blake *v.* Cornwell, 65 Mich. 467; Slingerland *v.* Slingerland, 39 Minn. 197; Railroad Co. *r.* Ragsdale, 54 Miss. 200; Dellett *v.* Kemble, 23 N. J. Eq. 58; Sumner *v.* Seaton, 44 N. J. Eq. 103; Brown *r.* Bowen, 30 N. Y. 519, 541, 544; Burkard *v.* Crouch, 169 N. Y. 399; Brooks *v.* Curtis, 4 Lans. 283; Quinlan *r.* Myers, 29 Ohio St. 500; Curtis *v.* La Grande Water Works, 20 Oreg. 34; Marines *v.* Goblet, 31 S. C. 153; Wampol *v.* Kountz, 14 S. Dak. 334; Stone *v.* Tyree, 30 W. Va. 687. See also Peek *v.* Peek, 77 Cal. 107.

formance on his own side, and part performance by the defendant would be immaterial (*l*).[36] When the Court is satisfied that the plaintiff has altered his position on the faith of an agreement, and that the defendant cannot be heard to deny the existence of that agreement, it proceeds to ascertain by the ordinary means what the terms of the agreement were. The proof of this is strictly collateral **657]** to *the main issue, though the practical result is that the agreement is enforced.

D. Ante-nuptial agreements. The case of an agreement in consideration of marriage presents special difficulties, and has to be treated in an exceptional manner. This subject is fully discussed in the late Mr. Davidson's volume on settlements (Dav. Conv. vol. 3, part 1, appendix No. 1, to which place the reader is referred for details). It is thoroughly settled that the marriage itself does not constitute such a part performance as to make the agreement binding in equity in the manner just mentioned, though other acts may have that effect (*m*).[37]

Effect of confirmation by post-nuptial writing. The next question is, what is the effect of a post-nuptial "note or memorandum" satisfying the requisites of the statute on ante-nuptial informal agreement?

The authorities are not very clear on this point. It is submitted however that if attention be given to the actual decisions rather than to the language used on various occasions, little or no real conflict will be found. It is not the Statute of Frauds alone that has to be considered in these cases, but also the statute of 13 Eliz. c. 5, and the extensive application of it by judicial construction to voluntary dispositions of property. Two distinct questions are in fact raised: namely whether an informal ante-nuptial agreement can after the marriage be rendered valid *as against the promisor,* and whether a post-nuptial settlement can be made to relate back to such an agreement so as to be deemed a settlement made for valuable consideration and thus be rendered valid *as against creditors.*

(*l*) *Caton* v. *Caton,* note (*h*).

(*m*) See *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551, 571; *Surcome* v. *Pinniger* (1853) 3 D. M. & G. 571, 575, 22 L. J. Ch. 419.

[36] Glass *v.* Hulbert, 102 Mass. 24, 31; Luckett *v.* Williamson, 37 Mo. 388.

[37] See Peek *v.* Peek, 77 Cal. 107; Moore *v.* Allen, 26 Col. 197; Bradley *v.* Sadler, 54 Ga. 681; White *v.* Bigelow, 154 Mass. 593; Nowack *v.* Berger, 133 Mo. 24; Manning *v.* Riley, 52 N. J. Eq. 39; Russell *v.* Russell, 60 N. J. Eq. 282; Finch *v.* Finch, 10 Ohio St. 501; Henry *v.* Henry, 27 Ohio St. 121; Adams *v.* Adams, 17 Oreg. 248; Flory *v.* Hauck, 186 Pa. 263.

Good as against promisor: Barkworth v. Young. The first question is answered in the affirmative by the decision in *Barkworth* v. *Young* (*n*).[38] The case was decided on demurrer, and the facts assumed by the Court on the case made by the plaintiff's bill were to this effect. The testator against whose estate the suit was brought had *orally [658 promised his daughter's husband before and in consideration of the marriage that at his death she should have an equal share of his property with his other children. After the marriage the testator made an affidavit in the course of a litigation unconnected with this agreement, in which he incidentally admitted it. It was held that the affidavit was a sufficient note or memorandum of the agreement within the Statute of Frauds, and that as such, although subsequent to the marriage, it rendered the agreement binding on the testator.

Bad as against settlor's creditors: Warden v. Jones. The second question is answered in the negative by the almost contemporaneous decision in *Warden* v. *Jones* (*o*). That was a creditor's suit to set aside a post-nuptial settlement. It was attempted to support the settlement as having been made pursuant to an oral ante-nuptial agreement. This agreement was not referred to in the settlement by any recital or otherwise. It was held both by Romilly M.R., and by Lord Cranworth C. on appeal, that the settlement could not be supported: and Lord Cranworth inclined to think (*p*) that if the settlement had expressly referred to the agreement it would have made no difference. It has now been held, following this decision, that a post-nuptial settlement reciting a parol ante-nuptial agreement is void against the husband's trustee in bankruptcy (*q*).

The result appears to be that even if the imperfect obligation arising from an informal ante-nuptial agreement can be made perfect and binding as between the parties by a post-nuptial note or memorandum, the marriage consideration cannot in this way be imported into a post-nuptial settlement made in pursuance of the agreement so as to protect it from being treated as a voluntary settlement and *subject to the consequent danger of being set aside at the [659

(*n*) (1856) 4 Drew. 1, 26 L. J. Ch. 153.

(*o*) (1867) 23 Beav. 487, 9 De G. & J. 76, 27 L. J. Ch. 190.

(*p*) Notwithstanding *Dundas* v. *Dutens* (1790) 1 Ves. jun. 196, 1 R. R. 112.

(*q*) *Re Holland* [1901] 2 Ch. 145, 70 L. J. Ch. 625. The judgment suggests that *Barkworth* v. *Young* must be treated as entirely overruled, but this, it is submitted, is no part of the decision.

38 *Acc.* Moore *v.* Harrison, 26 Ind. App. 408; Brinkley *v.* Brinkley, 128 N. C. 503. But see McAnnulty *v.* McAnnulty, 120 Ill. 26.

suit of the settlor's creditors. There seems to be no ground in either case for drawing any distinction between promises made by one of the persons to be married and promises made by a third person to either of them. These doctrines appear to be both reasonable in themselves and not inconsistent with one another. There is nothing unexampled in a transaction being valid as regards the parties to it and invalid as regards the rights of other persons. It is difficult to see why a writing satisfying the requisites of the statute should in this case be deprived of its effect as against the party to be charged merely by reason of the marriage having taken place between the dates of the original promise and of the writing. On the other hand the rights of creditors would be in serious danger if a mere reference to the ante-nuptial agreement, of which there was no evidence beyond the memory of the persons who for this purpose would have a common interest in upholding its existence, were to be admitted to make a post-nuptial settlement unimpeachable (*r*).[39]

E. **Informal agreement as defence.** It is doubtful how far an informal agreement varying a perfect one can be relied on as a defence to an action brought on the original agreement. On principle it would seem that an agreement which will not support an action ought not to support a defence (*s*), and there is good authority to that effect (*t*) : but a different practice appears to have gained ground of late years (*u*).

(*r*) Cp. the remarks of Sir T. Plumer M.R. in *Battersbee* v. *Farrington* (1818) 1 Swanst. 106, 113, 18 R. R. 32, doubting whether a recital in a post-nuptial settlement of ante-nuptial written articles would of itself as against creditors be sufficient evidence of the existence of such articles. And see May on Voluntary and Fraudulent Alienations of Property, ch. 5, p. 346 *sqq.*

(*s*) Cp. *Chapin* v. *Freeland* (1886) 142 Mass. 383.

(*t*) *Noble* v. *Ward* (1867) L. R. 2 Ex. 135, Ex. Ch.

(*u*) Mr. Ernest C. C. Firth, in L. Q. R. ix. 366—372.

[39] "It seems very idle, not to say frivolous, to attempt any distinction between the case where the settlement recites the parol agreement, and where it is made in fulfillment of such contract, but without reciting it." Story Eq. Jur., § 987*a*; Satterthwaite *v.* Emley, 3 Green's Ch. 489; Reade *v.* Livingston, 3 Johns. Ch. 481.

A post-nuptial settlement, made in pursuance of an oral ante-nuptial agreement, is, so far as creditors are concerned, a voluntary conveyance. Keady *v.* White, 168 Ill. 76; Elwell *v.* Walker, 52 Ia. 256; White *v.* O'Bannon, 86 Ky. 93; Asher *v.* Brock, 95 Ky. 270; Winn *v.* Albert, 5 Md. 66; Deshon *v.* Wood, 148 Mass. 132; Manning *v.* Riley, 52 N. J. Eq. 39; Reade *v.* Livingston, 3 Johns. Ch. 481; Borst *v.* Corey, 15 N. Y. 505; Flory *v.* Hauck, 186 Pa. 263; Barnes *v.* Black, 193 Pa. 447; Izard *v.* Izard, Bailey's Eq. 228; Smith *v.* Green, 3 Humph. 118.

But in Clark *v.* McMahon, 170 Mass. 91, such a conveyance was upheld against creditors, though it made the grantor insolvent on the ground that it did not appear that there was actual fraudulent intent.

Cases of equitable estoppel distinguished. There is yet another class of cases, not resting on contract or agreement at all, in which courts of equity have *compelled persons to make good the representa- [660
tions concerning existing facts (*x*) on the faith of which they have induced others to act.[40] The distinction is pointed out by Romilly M.R. in *Warden* v. *Jones* (*y*): and the extension of the doctrine to married women shows very forcibly that it has nothing to do with contract or capacity for contracting: for a married woman's interest in property, though not settled to her separate use, has repeatedly been held to be bound by this kind of equitable estoppel (*z*).[41]

B. **"Slip" in marine insurance — Acts requiring stamped policy.** Another curious and important instance of an imperfect obligation arising out of special conditions imposed on the formation of a complete contract is to be found in the case of marine insurance. In practice the agreement is concluded between the parties by a memorandum called a slip, containing the terms of the proposed insurance and initialed by the underwriters (*a*). It is the practice of some insurers always to date the policy as of the date of the slip (*b*). At common law the slip would constitute a binding contract. This however is not allowed by the revenue laws. By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93 (*c*), "A contract for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862 (*d*)) [*i.e.* *against the [661
owner's liability for accidents of the kinds mentioned in s. 54 of that

(*x*) Per Lord Selborne, *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L. R. 6 H. L. 352, 360, 43 L. J. Ch. 269; and *Maddison* v. *Alderson* (1883) 8 App. Ca. at p. 473.

(*y*) (1857) 23 Beav. at p. 493; cp. *Yeomans* v. *Williams* (1865) L. R. 1 Eq. 184, 186, 35 L. J. Ch. 283; and see Dav. Conv. 3, 640—646.

(*z*) *Sharpe* v. *Foy* (1868) L. R. 4 Ch. 35; *Lush's trusts* (1869) *ib.* 591.

(*a*) For the form of this, see L. R. 8 Q. B. 471, 9 Q. B. 420. In the case of fire insurance, there being no statutory requirement, there is nothing to prevent a slip from forming a complete contract of insurance; the burden of proof is on the underwriter to show a contrary intention; and there is not any implied condition that a policy shall be put forward for signature within a reasonable time: *Thompson* v. *Adams* (1889) 23 Q. B. D. 361.

(*b*) See L. R. 8 Ex. 199.

(*c*) As to stamping and production in evidence (which does not affect our present subject), see ss. 95—97: there is a special penalty of 100*l.* instead of the usual 10*l.* for stamping in Court.

(*d*) Now Merchant Shipping Act, 1894, s. 506.

40 See Pomeroy Eq. Jur., § 1294; Ames' Cas. Eq. Jur. 306–309; Scott *v.* Lane, 66 Pac. Rep. 299 (Oreg.).

41 As to estoppel against married women, see *supra*, p. 88, n. 34; against infants, *supra*, p. 82, n. 27.

Act] shall be void unless the same is expressed in a policy of sea insurance."

Earlier statutes on the matter now before us were differently worded, and made every contract of insurance "null and void to all intents and purposes" which was not written on duly stamped paper or did not contain the prescribed particulars. (35 Geo. 3, c. 63, ss. 11, 14; 54 Geo. 3, c. 144, s. 3: the latter statute was expressly pointed, as appears by the preamble, against the practice "of using unstamped slips of paper for contracts or memorandums of insurance, previously to the insurance being made by regular stamped policies.") It was settled on these statutes that the preliminary slip could not be regarded as having any effect beyond that of a mere proposal (*e*): and it was even held that the slip could not be looked at by a court of justice for any purpose whatever (*f*). The change in the language of the modern statute law, which dates from 1867 (*g*), has given the Courts the opportunity of adopting a more liberal construction without actually overruling any former authorities.

Modern recognition of the slip. It has now for many years been judicially recognized that the slip is in practice and according to the understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on without a breach of faith. Accordingly, though the contract expressed in the slip is not valid, that is, not enforceable, it may be given in evidence wherever it is, though
662] not valid, material (*h*). In the case referred *to the slip was admitted to show whether the intention of the parties was to insure goods by a particular named ship only, or by that in which they might be actually shipped, whatever her name might be. A still more important application of the same principle was made in *Cory* v. *Patton* (*i*), where it was held that the time when the contract is concluded and the risk accepted is the date of the slip, at which time the underwriter becomes bound in honour, though not in law, to execute a formal policy; that the Court, when a duly stamped policy

(*e*) See per Willes J. in *Xenos* v. *Wickham* (1866) L. R. 2 H. L. 296, 314, 36 L. J. C. P. 313; *Smith's case* (1869) L. R. 4 Ch. 611, 38 L. J. Ch. 681.

(*f*) See per Blackburn J. in *Fisher* v. *Liverpool Marine Insurance Co.* (1873) L. R. 8 Q. B. 469, 474, 43 L. J. Q. B. 114.

(*g*) 30 & 31 Vict. c. 23, repealed, except two sections not here relevant, and on this point substantially re-enacted, by the Stamp Act, 1891.

(*h*) Per Cur. *Ionides* v. *Pacific Insurance Co.* (1871) L. R. 6 Q. B. 674, 685, affd. in Ex. Ch. 7 Q. B. 517, 41 L. J. Q. B. 33, 190.

(*i*) (1872) L. R. 7 Q. B. 304, see further s. c. 9 Q. B. 577, 43 L. J. Q. B. 181.

is once before it, may look to the slip to ascertain the real date of the contract; and therefore that if a material fact comes to the knowledge of the assured after the date of the slip and before the execution of the policy, it is not his duty either in honour or in law to disclose it, and the non-disclosure of it does not vitiate the policy. This holds though after the completion of the contract by the slip a new term be added for the benefit of the underwriters (*k*).

Collateral bearings of the doctrine. The same doctrine has been considered, and allowed, though not directly applied, in other cases. In *Fisher* v. *Liverpool Marine Insurance Co.* (*l*) the slip had been initialed but the insurance company had executed no policy. In the case of an insurance with private underwriters it is the duty of the broker of the assured to prepare a properly stamped policy and present it for execution. But in the case of a company the policy is prepared by the company, executed in the company's office, and handed over to the assured or his agent on application. It was held that there was no undertaking by the company, distinguishable from the contract of insurance itself, to do that which it would be the duty of a broker to do in the case of private underwriters; that the only agreement with the company *with the assured was one en- [663
tire agreement made by the initialing of the slip, and that as this was an agreement for sea insurance, the statute applied and made it impossible to maintain any action for a breach of duty with regard to the preparation and execution of a policy. In *Morrison* v. *Universal Marine Insurance Co.* (*m*), the question arose of the effect of delivering without protest a stamped policy pursuant to the slip after the insurers had discovered that at the date of the slip a material fact had been concealed. It was held in the Exchequer Chamber, reversing the judgment of the Court below, that the delivery of the policy did not preclude the insurers from relying on the concealment, but that it was a question properly left to the jury whether they had or had not elected to abide by the contract. This implies not only that the rights of the parties are determined at the date of the slip, but that the execution of the stamped policy afterwards has little or no other significance than that of a necessary formality (*n*).

(*k*) *Lishman* v. *Northern Maritime Insurance Co.* (1875) L. R. 8 C. P. 216, affirmed in Ex. Ch. 10 C. P. 179, 44 L. J. C. P. 185.

(*l*) (1874) L. R. 8 Q. B. 469 (Blackburn J. *diss.*) affd. in Ex. Ch. 9 Q. B. 418, 43 L. J. Q. B. 114.

(*m*) (1873) L. R. 8 Ex. 40, in Ex. Ch. *ib.* 197, 42 L. J. Ex. 115.

(*n*) See the judgment of Cleasby B. in the Court below, L. R. 8 Ex. at p. 60.

Application in winding up insurance companies. In the case of a mutual marine insurance association, a letter by which the assured undertook to become members of the association was admitted as part of one agreement with the stamped policy, to show that the assured were contributories in the winding-up of the association (*o*). In the winding-up of another such association a member has been admitted as a creditor for the amount due on his policy, though unstamped, when the liability was admitted by entries in the minute books of the association, which seem to have been considered equivalent to an account stated (*p*).

Stamp duties in general. It has already been observed that the general revenue laws as to stamp duties are on a different footing.[42] However their effects may in one or two cases resemble to some ex-
664] tent those which under the present head we have *attempted to exhibit. Thus, if an unstamped document combines two characters (as, for instance, if it purports to show both an account stated and a receipt), and if in one of those characters it requires a stamp, and in the other not, it may be given in evidence in the second character for any purpose unconnected with the first (*q*).

Variation by subsequent unstamped agreement. In a case where the parties to an agreement in writing had afterwards varied its terms by a memorandum in writing, and the memorandum was not stamped, the plaintiff joined in his action a count on the agreement in its

(*o*) *Blyth & Co.'s case* (1872) L. R. 13 Eq. 529.

(*p*) *Martin's claim* (1872) L. R. 14 Eq. 148, 41 L. J. Ch. 679.

(*q*) *Matheson* v. *Ross* (1849) 2 H. L. C. 286.

42 The act of Congress, in force during and shortly after the Civil War, providing that no instrument or document not duly stamped as required by the internal revenue laws of the United States should be admitted or used as evidence in any court, was generally held by the State courts inapplicable to or not binding upon them. Duffy *v.* Hobson, 40 Cal. 240; Bumps *v.* Taggart, 26 Ark. 398; Griffin *v.* Ranney, 35 Conn. 239; Forchheimer *v.* Holly, 14 Fla. 239; Latham *v.* Smith, 45 Ill. 29; Craig *v.* Dimock, 47 Ill. 308; Hunter *v.* Cobb, 1 Bush, 239; Wallace *v.* Cravens, 34 Ind. 534; Carpenter *v.* Snelling, 97 Mass. 452; Green *v.* Holway, 101 Mass. 243; Moore *v.* Quirk, 105 Mass. 49; Davis *v.* Richardson, 45 Miss. 499; Sammons *v.* Halloway, 21 Mich. 162; Woodward *v.* Roberts, 58 N. H. 503; People *v.* Gates, 43 N. Y. 40; Moore *v.* Moore, 47 N. Y. 467; Stewart *v.* Hopkins, 30 Ohio St. 502, 525; Sporrer *v.* Eifler, 1 Heisk. 633; Dailey *v.* Cohen, 33 Tex. 815; Talley *v.* Robinson's Assignee, 22 Gratt. 888. *Contra*, Turnpike Co. *v.* McNamara, 72 Pa. 278.

The decisions were similar under the act passed in 1898. Hooper *v.* Whitaker, 130 Ala. 324; Slocumb *v.* Small, 112 Ga. 279; Steeley's Creditors *v.* Steeley, 23 Ky. L. Rep. 996; Knox *v.* Rossi, 25 Nev. 96; People *v.* Fromme, 35 N. Y. App. Div. 459; Cassidy *v.* St. Germain, 22 R. I. 53; Plunkett *v.* Hanseka, 14 S. Dak. 454.

original form and another on the agreement as varied: and when it appeared by his own evidence that the memorandum did materially alter the first agreement, but was unavailable for want of a stamp, it was held that he could not fall back on the agreement as it originally stood (*r*). Neither this decision, nor the earlier authorities on which it rested, were referred to in *Noble* v. *Ward* (*s*). In that case there was a substituted agreement which was unenforceable under sect. 17 of the Statute of Frauds (*t*): and it was held that as the parties had no intention of simply rescinding the former agreement, that former agreement remained in force. The two cases, if they can stand together, must do so by reason of the distinction between a contract the record of which is unavailable for want of a stamp, and an agreement which cannot be sued on at all if the defendant pleads the statute.

Attempt to use unstamped document in a different character. In a much litigated case of *Evans* v. *Prothero* (*u*), the question arose whether a document purporting to be a *receipt for purchase-money on [665 a sale of land, but insufficiently stamped for that purpose, can be admitted as evidence to prove the existence of an agreement for sale. In a series of motions for new trials, Lord Cottenham and Lord St. Leonards took different views. The judges before whom the applications came in the Court of Chancery in the first instance, and those before whom the issues were tried at Cardiff Assizes, were also divided in opinion. The opinion of Lord St. Leonards, who held the document admissible, has now been recognized as authorative (*x*).

C. **Statutory conditions affecting professions, &c.** There are also many statutes which impose special conditions on the exercise of particular professions and occupations and the sale of particular kinds of goods. Most of these, however, are so framed, or have been so construed, as

(*r*) *Reed* v. *Deere* (1827) 7 B. & C. 261, 31 R. R. 190.

(*s*) (1867) L. R. 1 Ex. 117, in Ex. Ch. 2 Ex. 135: but otherwise where the substituted agreement has been executed in part; for this shows that the old one is gone: *Sanderson* v. *Graves* (1875) L. R. 10 Ex. 234, 44 L. J. Ex. 210. There has been a tendency in some recent cases (not regularly reported) to depart from *Noble* v. *Ward*. Whether correct or not in law, such a doctrine has nothing to recommend it in point of substantial justice. See Mr. Ernest C. C. Firth's article in L. Q. R. ix. 366.

(*t*) Now repealed and substantially re-enacted by the Sale of Goods Act, 1893, s. 4.

(*u*) (1852) 2 Mac. & G. 319, 1 D. M. & G. 572, 21 L. J. Ch. 772.

(*x*) *Ashling* v. *Boon* [1891] 1 Ch. 568, 60 L. J. Ch. 306, where it was held that an insufficiently stamped promissory note could not be admitted as a receipt for the consideration money, this being "of the very essence of the promissory note itself."

to have an absolutely prohibitory effect, that is, not merely to take away or suspend the remedy by action, but to render any transaction in which their provisions are disregarded illegal and void. The principles applicable to such cases have been considered under the head of Unlawful Agreements. In a few cases, however, there is not anything to prevent a right from being acquired, or to extinguish it when acquired, but only a condition on which the remedy depends.[43] Of this kind are the provisions of the Act 6 & 7 Vict. c. 73, with respect to attorneys and solicitors, and of the Medical Act, 1858 (21 & 22 Vict. c. 90), with respect to medical practitioners.

Attorneys and solicitors — Costs of uncertificated solicitor, how far allowed. By the 6 & 7 Vict. c. 73, s. 26, extended by 37 & 38 Vict. c. 68, it is enacted in substance that an attorney or solicitor practising in any court without having a stamped certificate then in force (as pro-
666] vided for by ss. 22–25, and now 23 & *24 Vict. c. 127, ss. 18–23) shall not be capable of recovering his fees for any business so done by him while uncertificated. This, however, does not make it unlawful for the client to pay such fees if he thinks fit, nor for the solicitor to take and keep them. It has been held that a defeated party in an action who has to pay his adversary's costs is bound by any such payment which has been actually made, and cannot claim to have it disallowed after taxation (*y*). But, since the Act of 1874 at all events, a successful party whose solicitor was uncertificated cannot recover costs if the objection is made on taxation (*z*). This appears to leave untouched an earlier case (*a*) where it was decided that items for business done by a solicitor while uncertificated must be allowed as against the client in a taxation on the client's own application; for the client submits to pay what shall be found due, not only what the solicitor might have sued for, and the debt is not destroyed. Proceedings taken by a solicitor who has not renewed his certificate cannot be on that account set aside as irregular (*b*). It is said that an attorney can have no lien for business done by him while uncertificated (*c*). But the case cited for this (*d*) was on the earlier Attorneys Act, 37 Geo. 3, c. 90, by which

(*y*) *Fullalove* v. *Parker* (1862) 12 C. B. N. S. 246, 31 L. J. C. P. 239, 240.

(*z*) *Fowler* v. *Monmouthshire Canal Co.* (1879) 4 Q. B. D. 334, 48 L. J. Q. B. 457.

(*a*) *Re Jones* (1869) L. R. 9 Eq. 63, 39 L. J. Ch. 83.

(*b*) *Sparling* v. *Brereton* (1866) L. R. 2 Eq. 64, 35 L. J. Ch. 461.

(*c*) Chitty's Archbold's Pr. 69, ed. 1866.

(*d*) *Wilton* v. *Chambers* (1837) 7 A. & E. 524.

[43] See *supra*, pp. *296–*298, n. 54–57.

the admission of an attorney neglecting to obtain his certificate as thereby directed was in express terms made void (s. 31): it was held that under the special circumstances of the case (which it is unnecessary to mention), there had been a neglect within the meaning of the statute so that the attorney's admission was void, and that he must be regarded as having been off the roll of attorneys. He was therefore, as a necessary consequence, incapable of acquiring any right whatever as an attorney *while thus disqualified. It is sub- [667
mitted that under the modern Act there is no reason for depriving an uncertificated solicitor of his lien, at any rate in the absence of any wrong motive or personal default in the omission to take out the certificate.

As to time of suing for costs. Apart from this, a solicitor cannot in any case sue for costs till a month after the bill has been delivered (6 & 7 Vict. c. 73, s. 37), unless authorised by a judge to sue sooner on one of certain grounds now much enlarged by the Legal Practitioners Act, 1875 (38 & 39 Vict. c. 79) (*e*).

Medical practitioners. The rights of medical practitioners now depend on the Medical Acts, 1858 and 1886, and (in England only) the Apothecaries Act, 55 Geo. 3, c. 194 (*f*).

Common law as to physicians. Before the Medical Act the state of the law, so far as concerned physicians (but not surgeons or apothecaries) was this: It was presumed, in accordance with the general usage and understanding, that the services of a physician were honorary, and were not intended to create any legal obligation: hence no contract to pay for them could be implied from his rendering them at the request either of the patient or of a third person. But this was a presumption only, and there was nothing contrary to law in an express contract to pay a physician for his services, which contract would effectually exclude the presumption (*g*).[44]

(*e*) As to special agreements between solicitor and client, see p. *672, below.

(*f*) This is still in force subject to certain amendments made in 1874, 37 & 38 Vict. c. 34, see *Davies* v. *Makuna* (1885) 29 Ch. Div. 596, 54 L. J. Ch. 1148.

(*g*) *Veitch* v. *Russell* (1842) 3 Q. B. 928, 12 L. J. Q. B. 13. No such presumption exists in the United States; and *qu.* how far, if at all, it exists in English colonies.

[44] That there is no presumption in this country that the services of a physician are honorary or gratuitous, and that he may, therefore, recover reasonable compensation for his services rendered on request, see Todd *v.* Myers, 40 Cal. 355; Judah *v.* M'Namee, 3 Blackf. 269; Shelton *v.* Johnson, 40 Ia. 84; Succession of Dickey, 41 La. Ann. 1010; McClallen *v.* Adams, 19

Provisions of Medical Act, 1886. The Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6, enables every registered medical practitioner to recover his expenses, charges, and fees, unless restrained by a prohibitory by-law of a college of physicians of which he is a fellow (*h*). **668]** Accordingly there is no longer any presump*tion of honorary employment (*i*). It remains competent however for a medical man to attend a patient on the understanding that his attendance shall be gratuitous, and whether such an understanding exists or not in a disputed case is a question of fact for a jury (*k*).

Apothecaries Act, 55 Geo. 3. By the Act 55 Geo. 3, c. 194, s. 21, an apothecary cannot recover his charges without having a certificate from the Apothecaries' Society: and this is not repealed by the Medical Acts (*l*).

It seems that a practitioner must have been registered at the time of rendering the services sued for, not merely at the time of suing (*m*), decisively and at all events as to apothecaries; for an unrepealed section of the Apothecaries Act (55 Geo. 3, c. 194, s. 20) expressly forbids unqualified persons to practise: and in the clear opinion of the Court on the construction and intention of the Medical Act also.[45]

(*h*) Such by-laws have been made by the Royal College of Physicians in London, and (though apparently without compulsory force under the Act) the Royal College of Surgeons of England.

(*i*) *Gibbon* v. *Budd* (1863) 2 H. & C. 92, 32 L. J. Ex. 182 (on the similar provision of the Act of 1858, which is repealed by the Act of 1886). See judgment of Martin B.

(*k*) *Gibbon* v. *Budd*, last note.

(*l*) See decisions on this Act collected, 1 Wms. Saund. 513–4. S. 31 of the Medical Act of 1858 enabled a practitioner to sue only "according to his qualification," and a qualification in one capacity did not entitle him to sue for services rendered in another: *Leman* v. *Fletcher* (1873) L. R. 8 Q. B. 319, 42 L. J. Q. B. 214. But these words do not occur in the Act of 1886, which on the other hand requires all practitioners to be generally qualified.

(*m*) *Leman* v. *Houseley* (1874) L. R. 10 Q. B. 66, 44 L. J. Q. B. 22 (notwithstanding *Turner* v. *Reynall* (1863) 14 C. B. N. S. 328, 32 L. J. C. P. 164).

Pick. 333; Adams *v.* Stevens, 26 Wend. 451, 455; Prince *v.* McRae, 84 N. C. 674; Vilas *v.* Downer, 21 Vt. 419; Garrey *v.* Stadler, 67 Wis. 512.

[45] It was held that a compensation for physician's services, rendered in violation of a statute requiring a license, could not be recovered in Mayfield *v.* Nale, 26 Ind. App. 240; Bohn *v.* Lowry, 77 Miss. 424; Peterson *v.* Seagraves, 94 Tex. 390.

In Hewitt *v.* Wilcox, 1 Met. 154, it was held that an unlicensed physician could, after the repeal of an act depriving unlicensed physicians "of the benefit of law for the recovery of any debt or fee accruing for professional services," recover for services rendered while the act was in force. *Contra*, Bailey *v.* Mogg, 4 Den. 60; *aliter*, where the repealed act made the contract not simply unenforceable, but absolutely void. Nichols *v.* Poulson, 6 Ohio, 305; Warren *v.* Saxby, 12 Vt. 146.

A qualified practitioner cannot recover for services rendered by an unqualified assistant who in fact acted without his specific direction or advice (*n*).

Similarly an agreement by a qualified practitioner to assist an unqualified one is bad, though perhaps an unqualified person might lawfully carry on medical business through qualified assistants if he did not act as a practitioner himself (*o*).

*3. **No remedy allowed.** We now come to the cases in which [669 some positive rule of law or statutory enactment takes away the remedy altogether.

The only cases known to the writer in which there is a rule of law to this effect independent of any statute are those of the remuneration of barristers engaged as advocates in litigation, and (to a limited extent) of arbitrators.

Arbitrators. With regard to arbitrators the better opinion appears to be that they are in the same condition as physicians were at common law. It is said that an arbitrator cannot recover on any implied contract for his remuneration, but this is by no means certain. There is no doubt that he can sue on an express contract (*p*).[46]

Barristers. The position of a barrister is different.

It was formerly a current opinion that in the case of counsel, as in that of a physician, there was a presumption of purely honorary employment, derived from the custom of the profession, but that this presumption would be excluded by proof of an express contract (*q*).

(*n*) *Alvarez de la Rosa* v. *Prieto* (1864) 16 C. B. N. S. 578, 33 L. J. C. P. 262; *Howarth* v. *Brearley* (1887) 19 Q. B. D. 303, 56 L. J. Q. B. 543.

(*o*) *Davies* v. *Makuna* (1885) 29 Ch. Div. 596, 54 L. J. Ch. 1148.

(*p*) *Hoggins* v. *Gordon* (1842) 3 Q. B. 466, 11 L. J. Q. B. 286; *Veitch* v. *Russell* (1842) 3 Q. B. 928, 12 L. J. Q. B. 13. In *Crampton* v. *Ridley* (1887) 20 Q. B. D. 48, 52, A. L. Smith J. thought that in mercantile arbitrations a promise to pay for the arbitrator's services might well be implied. When a case is referred by the Court, the referee's or arbitrator's remuneration is determinable by the Court: Arbitration Act, 1889, s. 15.

(*q*) So Lord Denman seems to have been inclined to think in *Veitch* v. *Russell* (1842) 3 Q. B. 928, 12 L. J. Q. B. 13; and a modern Irish case of *Hobart* v. *Butler* (1859) 9 Ir. C. L. 157, though it did not decide the point, proceeded to some extent on the same assumption.

46 In this country an arbitrator may recover compensation for his services in the absence of an express promise to pay for them. Holcomb *v.* Tiffany, 38 Conn. 271; Goodall *v.* Cooley, 29 N. H. 48, 55; Hinman *v.* Hapgood, 1 Den. 188.

No remedy against client in respect of litigious business. But the decision of the Court of Common Pleas in *Kennedy* v. *Broun* (*r*) has established the unqualified doctrine that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel, "create neither an obligation
670] nor an inception of obligation, nor *any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

Distinction when barrister acts as arbitrator, &c. On the other hand there is apparently no reason to doubt the validity of an express contract to remunerate a barrister for services which, though to some extent of a professional kind, and involving the exercise of professional knowledge, do not involve any relation of counsel and client between the contracting parties: as when a barrister acts as arbitrator or returning officer (*s*). The want of attending to this distinction has led to such cases being cited as authorities for the general proposition that a barrister can recover fees on an express contract.

Express contract with client as to non-litigious business. Moreover, it has been argued that an express contract even between counsel and client may still be good as to non-litigious business. A claim of this sort made against an estate under administration was disposed of by Giffard L.J. on the ground, which was sufficient for the particular decision, that at all events a solicitor has no general authority to bind his client by such a contract: but he also observed that such applications had never been successful, and expressed a hope that they never would be (*t*). And it must be remembered that although the rule laid down in *Kennedy* v. *Broun* is in its terms confined to litigation, and the word *advocate*, not *counsel*, is studiously used throughout the judgment, yet the rule is founded not on any tech-

(*r*) (1863) 13 C. B. N. S. 677, 32 L. J. C. P. 137.

(*s*) *Hoggins* v. *Gordon* (1842) 3 Q. B. 466, 11 L. J. Q. B. 286; *Egan* v. *Guardians of Kensington Union* (1841) 3 Q. B. 935, *n.*

(*t*) *Mostyn* v. *Mostyn* (1870) L. R. 5 Ch. 457, 459, 39 L. J. Ch. 780. The cases there referred to in argument in favour of the counsel's claim seem, with the sole exception of *Hobart* v. *Butler* (1859) 9 Ir. C. L. 157, irrelevant. For instance, *Doe* d. *Bennett* v. *Hale* (1850) 15 Q. B. 71, 18 L. J. Q. B. 353, shows only that there is no absolute rule of law that in a civil cause a barrister may not be instructed directly by the client, and throws no light whatever on any question of a right to recover fees. *Hobart* v. *Butler* was itself really a decision against a similar claim and on an almost identical point.

nical distinction between one sort of business and another, nor on any mere presumption, but on a principle of general convenience supported by unbroken custom. No doubt it may be said that some of the reasons given *for the policy of the law do not apply in their [671 full extent to non-litigious business (*u*); and it is doubtful whether they apply even to those English colonies where the common law is in force (*x*). But there is no reason to suppose that English courts of justice are likely to narrow the scope of a decision called by the late Lord Justice Giffard "a landmark of the law on this subject" (*y*).

Rights of barrister as against solicitor. There is no express authority to show whether a barrister can or cannot contract with his client's solicitor for payment of his fees any more effectually than with the client himself. It is apprehended that, inasmuch as counsel's services are given not to the solicitor but to the client, there would be no consideration to support such a contract unless the solicitor had actually received the fees from the client. In that case it is difficult to see on what ground of principle or policy the barrister should not be legally entitled to them as money received by the solicitor for his use. A barrister has in fact been admitted to prove in bankruptcy against the estate of a firm of solicitors for fees (apparently for conveyancing, not litigious business) which had been actually paid by clients to the bankrupts before the bankruptcy (*z*). If this be right, it is also difficult to see why an express promise by the solicitor to pay such fees, or an account stated between the solicitor and the counsel in respect of them, should not be binding. On the other hand the Court of Common Pleas has refused to exercise a summary jurisdiction, on the motion of the client, to compel an attorney to pay to counsel fees alleged *to have been paid by the client, or else [672 to return them to the client (*a*). The case, however, was a peculiar

(*u*) In addition to *Kennedy* v. *Broun*, see *Morris* v. *Hunt* (1819) 1 Chitty, 544, 550, 554, where the rule is put on the ground that the remuneration of the counsel ought to be independent of the result of the cause, and therefore counsel should rely on prepayment alone. This reason would however be equally inapplicable to an express and unconditional contract to pay fees for advocacy, if made before the commencement of the litigation.

(*x*) *Reg.* v. *Doutre* (1884) 9 App. Ca. at p. 751, where it was held that the case at bar was governed by the law of the Province of Quebec: in that law there is nothing to prevent an advocate from suing for professional services.

(*y*) *Mostyn* v. *Mostyn*, note (*t*), last page.

(*z*) *Re Hall* (1856) 2 Jur. N. S. 1076.

(*a*) *Re Angell* (1861) 29 L. J. C. P. 227. And see *Re Le Brasseur and Oakley* [1896] 2 Ch. 487, 493, 495: "I doubt whether anything short of a bond would enable counsel to sue a solicitor for his fees," Lindley L.J. at p. 492.

one and goes but a very little way towards answering the general question.

Recognition of counsel's fees in taxation of costs. It is hardly necessary to add that although counsel's fees cannot be recovered in any way by action, except possibly in some of the cases which have been mentioned as still doubtful, the propriety of paying such fees is judicially recognized by the constant practice of the courts in the taxation of costs: and the solicitor needs no authority from the client beyond his general retainer to enable him to retain aud pay counsel and charge the fees to his client (*b*). The payment of counsel's fees may in this manner be indirectly enforced either against the client himself or against an unsuccessful adversary who is liable for the taxed costs. Notwithstanding the strong expressions used by the Court in *Kennedy* v. *Broun* (*c*), the judicial notice thus taken of the obligation of a client to pay his counsel seems to show that it is in the nature of a legal duty, though not a perfect one, and is on a different footing from a mere moral obligation.

Solicitors' Remuneration Act, 1881. The Solicitor's Remuneration Act, 1881 (*d*), establishes complete freedom of contract between solicitor and client as to conveyancing and other non-contentious business, and to that extent expressly supersedes the earlier Act of 1870.

Special agreements between solicitor and client under Act of 1870. By the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), special agreements for remuneration between solicitor and client were made lawful (s. 4) and in a qualified manner enforceable. Agreements under this Act cannot be sued upon as ordinary contracts, but the procedure is by motion or petition, when the Court may enforce
673] the *agreement if it appears to be in all respects fair and reasonable, or otherwise set it aside. In the last case the Court may direct the costs of the business included in the agreement to be taxed in the regular way (ss. 8, 9). Where there is an agreement to employ a solicitor on certain terms at a future time, this does not prevent the solicitor from suing the client in a court of law if the client refuses to let him transact the business at all. The Act applies only to that part of an agreement which fixes the mode of payment for work done (*e*).

(*b*) See *Morris* v. *Hunt* (1819) 1 Chitty, 544.

(*c*) (1863) 13 C. B. N. S. 677, 32 L. J. C. P. 137.

(*d*) 44 & 45 Vict. c. 44.

(*e*) *Rees* v. *Williams* (1875) L. R. 10 Ex. 200, 44 L. J. Ex. 116. By the terms of the Act the agreement must be in writing, and it seems it must be signed by both parties: *Ex parte Munro* (1876) 1 Q. B. D. 724, 45 L. J. Q. B. 816.

Voidable contracts of infants affirmed at full age. Since the Infants Relief Act, 1874, any contract of an infant voidable at common law and affirmed by him on attaining his majority must be reckoned as an imperfect obligation of this class, *viz.* on which there has not been and cannot be any remedy. The special features of this subject have been already considered (*f*), and there is nothing to add except that the general principles set forth in the present chapter seem to be applicable to these, so far as they still exist, as well as to other agreements of imperfect obligation.

Other cases where contract not illegal, but remedy taken away by statute. There are sundry other cases of a less important kind in which the remedy naturally attached to a contract is taken away by statute, without the contract itself being forbidden or avoided.

Small debts for spirits by Tippling Act, 24 Geo. 2; for beer, &c., by County Courts Act, 1888. By the Act 24 Geo. 2, c. 40, s. 12, commonly known as the Tippling Act, no debt can be recovered for spirituous liquors supplied in quantities of less than twenty shillings' worth at one time (*g*). The County Courts Act, 1888, s. 182 (*h*), similarly enacts that no action shall be brought *in *any* court for the price of [674 beer or other specified liquors *ejusdem generis* consumed on the premises. The Act of Geo. 2 applies whether the person to whom the liquor is supplied be the consumer or not (*i*). As these enactments do not make the sale illegal, money which has been paid for spirits supplied in small quantities cannot be recovered back (*k*) A debt for such supplies was once held to be an illegal consideration for a bill of exchange (*l*): but this decision seems dictated by an excess of zeal to carry out the policy of the Act, and is possibly questionable. In a later case at Nisi Prius (*m*) Lord Tenterden held that where an account consisted partly of items for spirituous liquors within the Tippling Act, and partly of other items, and payments had been made generally in reduction of the account, the vendor was at liberty to appropriate these payments to the items for liquor, so as to leave a good cause of action for the balance; thus

(*f*) In Chap. II., above.

(*g*) By 25 & 26 Vict. c. 38, an exception is made in favour of sales of spirituous liquor not to be consumed on the premises, and delivered at the purchaser's residence in quantities of not less than a reputed quart.

(*h*) Superseding a similar enactment in the County Courts Act, 1867.

(*i*) *Hughes* v. *Done* or *Doane* (1841) 1 Q. B. 294, 10 L. J. Q. B. 65.

(*k*) *Philpott* v. *Jones* (1834) 2 A. & E. 41, 41 R. R. 371.

(*l*) *Scott* v. *Gillmore* (1810) 3 Taunt. 226, 12 R. R. 641.

(*m*) *Crookshank* v. *Rose* (1831) 5 C. & P. 19, 38 R. R. 788.

treating these debts, like debts barred by the Statute of Limitation of James I., as existing though not recoverable.

The writer is not aware of any decision on the modern enactment as to beer, &c., in the County Courts Act.

Trade union agreements under Trade Union Act, 1871. By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, certain agreements therein enumerated and relating to the management and operations of trade unions cannot be sued upon, but it is expressly provided that they are not on that account to be deemed unlawful. In this enumeration are included agreements to pay subscriptions. It has also been decided that a member of a trade union who complains of having been wrongfully expelled cannot be reinstated by the Court, though this may be done in the case of a club or other voluntary association holding property for purposes lawful at common law, on the ground of the expelled member being deprived of a right of **675]** pro*perty (*n*). Practically trade union subscriptions are thus placed on the same footing as subscriptions to any club which is not proprietary (*o*). Not that, so far as we are aware, there is anything in principle against the payment of subscriptions to a club being legally enforced: the practical difficulty lies in ascertaining who are the proper persons to sue. The same difficulty exists in the case of any numerous unincorporated association. But this belongs to another division of our subject (*p*).

Cases of analogy to imperfect obligations — Effect of repeal of usury laws as to advances made before. The present place seems on the whole the most appropriate one for mentioning a singular case which may be regarded as the converse of those we have been dealing with. A valuable consideration is given in the course of a transaction which as the law stands at the time is wholly illegal and confers no right of action on either party. Afterwards the law which made the transaction illegal is repealed. Is the consideration so received a good foundation for a new express promise on the part of the receiver? The question came before the Court of Exchequer in 1863, some years after the repeal of the usury laws. The plaintiff sued on bills of exchange drawn and accepted after that repeal, but in renewal of other bills given before the repeal in respect of advances made on

(*n*) *Rigby* v. *Connol* (1880) 14 Ch. D. 482, 49 L. J. Ch. 328; cp. *Wolfe* v. *Matthews* (1882) 21 Ch. D. 194, 51 L. J. Ch. 833.

(*o*) In the case of a proprietary club the proprietor can sue; see *Raggett* v. *Bishop* (1826) 2 C. & P. 343, 31 R. R. 668; *Raggett* v. *Musgrave* (1827) 2 C. & P. 556. The practical sanction is the power of excluding a member in default.

(*p*) See pp. *216, *234, *supra*.

terms which under the old law were usurious. The former bills were unquestionably void: but it was held by the majority of the Court that the original advance was a good consideration for the new bills. The question was thus stated in the judgment of the majority:—"Whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so." And the answer was given *thus:—"The consideration which would have been [676 sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated. . . . A man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt" (*q*).[47] The debt, therefore, which was originally void by the usury laws, seems to have been put in the same position by their repeal as if it had been a debt once enforceable but barred by the Statute of Limitation. But the decision seems wrong, for the consideration was wholly past at the time of the promise. The consideration for accepting a renewed bill of exchange is not the value received which was the consideration of the original bill, but the abandonment of the right of action thereon.

Treatment of equitable obligations at common law. There is one other analogy to which it is worth while to advert, although it was never of much practical importance, and what little it had has in England been taken away by the Judicature Acts. Purely equitable liabilities have to a certain extent been treated by common law courts as imperfect obligations. The mere existence of a liquidated claim on a trust against the trustee confers no legal remedy. But the trustee may make himself legally liable in respect of such a claim by an account stated (*r*), or by a simple admission that he holds as trustee

(*q*) *Flight* v. *Reed* (1863) 1 H. & C. 703, 715, 716, 32 L. J. Ex. 265, 269. Prof. Langdell (Summary § 76) supports the case on the ground that the bills sued on were an actual payment of the usurious loan. *Quod nimium subtiliter dictum videtur.*

(*r*) *Topham* v. *Morecraft* (1858) 8 E. & B. 972, 983; *Howard* v. *Brownhill* (1853) 23 L. J. Q. B. 23.

47 *Acc.* Garvin *v.* Linton, 62 Ark. 370; Kilbourn *v.* Bradley, 3 Day, 356; Phillips *v.* Columbus Assoc., 53 Ia. 719; Vermeule *v.* Vermeule, 95 Me. 138; Early *v.* Mahon, 19 Johns. 147; Hammond *v.* Hopping, 13 Wend. 505; Sheldon *v.* Haxtun, 91 N. Y. 124; Marstin *v.* Hall, 9 Gratt. 8. See also Tucker *v.* West, 29 Ark. 386; Gwinn *v.* Simes, 61 Mo. 335; Melchoir *v.* McCarty, 31 Wis. 252. Cp. Holden *v.* Cosgrove, 12 Gray, 216; Ludlow *v.* Hardy, 38 Mich. 690; Fulton *v.* Day, 63 Wis. 112.

a certain sum due to the cestui que trust (*s*). A court of law has also held that a payment made by a debtor without appropriation may be appropriated by the creditor to an equitable debt (*t*).

677] *Summary of results. It may be useful to sum up in a more general form the results which have been obtained in this chapter.

An imperfect obligation is an existing obligation which is not directly enforceable.

This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent.

When an agreement of imperfect obligation is executory a right of possession immediately founded on the obligation can be no more enforced than the obligation itself.

Acts done in fulfilment of an imperfect obligation are valid, and may be the foundation of new rights and liabilities, by way of consideration for a new contract or otherwise.

A party who has a liquidated and unconditional claim under an imperfect obligation may obtain satisfaction thereof by any means other than direct process of law which he might have lawfully employed to obtain it if the obligation had not been imperfect.

The laws which give rise to imperfect obligations by imposing special conditions on the enforcement of rights are generally treated as part of the law of procedure of the forum where they prevail (*u*), and as part of the *lex fori* they are applicable to a contract sued upon in that forum without regard to the law governing the substance of the contract (*x*); but on the other hand they are not regarded in any other forum.

(*s*) *Roper* v. *Holland* (1835) 3 A. & E. 99.

(*t*) *Bosanquet* v. *Wray* (1816) 6 Taunt. 597, 16 R. R. 677.

(*u*) *Contra* Savigny, Syst. 8. 270, 273.

(*x*) This (it is conceived) does not apply to revenue laws, and enactments which are merely ancillary to revenue laws, such as the provisions relating to marine insurances (p. *660, above).

CHAPTER XIV.

Discharge of Contracts.

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Methods of discharge. A contract may be discharged in the following ways:

1. Performance according to its terms.

2. A breach of such a nature as to justify the innocent party in treating the contract as rescinded or as giving rise to a right of action for breach of the entire contract.

3. Rescission of a voidable contract, at the will of one party, as for fraud, mistake, duress.

4. Release.
5. Rescission by parol agreement.
6. Accord and satisfaction.
7. Cancellation and surrender.
8. Alteration.
9. Merger.
10. Arbitration and award.
11. Impossibility.
12. Bankruptcy.
13. Statutes of Limitation, though in general barring the remedy only, may be added.

A right of action upon a contract may be discharged in any of these ways except the second and the eleventh.

Treatment of these methods. The first three and the last three methods here specified have been treated with more or less fulness in earlier parts of this volume. It remains to consider the other methods. A distinction may be taken between the discharge of a contract and the discharge of a right of action that has arisen for breach of a contract, but as the principles applicable to the two cases are in general the same, it has been thought simpler to treat the questions together. Where the requirements of law differ according as the contract has or has not been broken, attention is called to the difference.

Release.

Nature and effect of release. A release is a discharge under seal of an existing obligation or right of action. Any contract either before or after breach may be discharged by release. Like other sealed instruments it needs no consideration.[1]

Early law. In very early times it may be that a release did not operate as a legal discharge of a specialty,[2] since payment[3] or a judgment[4] did not. Even at the present day a negotiable instrument before maturity cannot be effectually discharged by release.[5] Nothing but cancellation, destruction, or surrender of the instrument itself

1 Tiger *v.* Lincoln, 1 Col. 394; Union Bank *v.* Call, 5 Fla. 409; Ingersoll *v.* Martin, 58 Md. 67; Tyson *v.* Dorr, 6 Whart. 256; Benson *v.* Mole, 9 Phila. 66; Sheer *v.* Austin, 2 Rich. L. 330. See also Mills *v.* Larrance, 186 Ill. 635; Saunders *v.* Blythe, 112 Mo. 1; Winter *v.* Kansas City Ry. Co., 160 Mo. 159.

2 See Fowell *v.* Forrest, 2 Wms. Saund. 47 *ff.*

3 Ames, Specialty Contracts and Equitable Defenses, 9 Harv. L. Rev. 54.

4 See *infra*, p. 875.

5 Dod *v.* Edwards, 2 C. & P. 602; Schoen *v.* Houghton, 50 Cal. 528.

can fully discharge a negotiable instrument before maturity. But this is now the only exception to the efficacy of a release.

Effect of statutes in regard to seals. The legislation in many states[6] in this country, depriving a seal of the efficacy which it had at common law, has been unfortunate in depriving the law of a simple and easy means for the voluntary discharge of liabilities. For a voluntary parol agreement to discharge a debtor from liability was not efficacious at common law,[7] and in states where a seal is at most presumptive evidence of consideration, a release with or without a seal must be on the footing of a parol agreement.[8] In a few jurisdictions[9] statutes have qualified this result by giving an unsealed release in writing the effect which the common law gave to sealed writings only. The courts of a few other states by judicial legislation have given the effect of a sealed release to a written discharge or acknowledgment of receipt in full.[10]

Covenant to forbear. A release properly is a present discharge, and a release of a right to be acquired in the future is, therefore, anomalous;[11] but a covenant of perpetual forbearance has been from early times, in order to avoid circuity of action, a bar at law to an action,[12]

6 See *supra*, p. 217, n. 25.

7 See *infra*, p. 816.

8 A sealed release made in Michigan was disregarded on this ground in Wabash Ry. *v.* Brow, 65 Fed. Rep. 941 (C. C. A.). So in Missouri, Winter *v.* Kansas City Ry. Co., 160 Mo. 159.

It should be noticed that in New York (and perhaps other states) the statute depriving a seal of its common-law effect applies only to executory contracts. Hence a voluntary release is good. Homans *v.* Tyng, 56 N. Y. App. Div. 383, 387; Finch *v.* Simon, 61 N. Y. App. Div. 139.

9 Cal. Civ. Code, § 1541; Ind. Code Civ. Pro., § 450; Mont. Civ. Code, § 2080; N. Dak. Rev. Stat., § 3892; S. Dak. Annot. Stat., § 4538; Shannon's Tenn. Code, § 5570. An informal waiver or agreement does not come within these statutes. The instrument must purport to be a release. Wheelock *v.* Pacific Gas Co., 51 Cal. 223; Upper San Joaquin Co. *v.* Roach, 78 Cal. 552. See also Miller v. Fox, 76 S. W. Rep. 893 (Tenn.).

10 Green *v.* Langdon, 28 Mich. 221; Holmes *v.* Holmes, 129 Mich. 412; Gray *v.* Barton, 55 N. Y. 68; Ferry *v.* Stephens, 66 N. Y. 321; Carpenter *v.* Soule, 88 N. Y. 251. See *contra*, Reynolds *v.* Reynolds, 55 Ark. 369; Warren *v.* Skinner, 20 Conn. 559; Stamper *v.* Hayes, 25 Ga. 546; Bingham *v.* Browning, 197 Ill. 122; Dennett *v.* Lamson, 30 Me. 223; First Bank *v.* Marshall, 73 Me. 79; Sigourney *v.* Sibley, 21 Pick. 101; Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 206.

11 Hoe *v.* Marshall, Cro. Eliz. 579; Hoe's Case, 5 Rep. 70*b*, 71; Neal *v.* Sheffield, Brownl. 110; S. C., Yelv. 192; 18 Vin. Abr. *327.

12 Hodges *v.* Smith, Cro. Eliz. 623; Smith *v.* Mapleback, 1 T. R. 441, 446; Ford *v.* Beech, 11 Q. B. 852.

A covenant of permanent forbearance is, therefore, as effective as a release. Flinn *v.* Carter, 59 Ala. 364; Jones *v.* Quinnipiack Bank, 29 Conn. 25; Guard *v.* Whiteside, 13 Ill. 7; Peddicord *v.* Hill, 4 T. B. Mon. 370; Foster *v.* Purdy, 5 Met. 442; Stebbins *v.* Niles, 25 Miss. 267; Line *v.* Nelson, 38 N. J. L. 358; Phelps *v.* Johnson, 8 Johns. 54; Thurston *v.* James, 6 R. I. 103.

So a bond to indemnify against a debt will bar an action by the obligor on the debt. Richards *v.* Fisher, 2 Allen, 527; Clark *v.* Bush, 3 Cow. 151.

and as an attempted release of a future right must be construed as amounting at least to a covenant not to enforce the right whenever it arises, such a release is fully effectual.[13]

Conditional releases. A release may be subject to the happening of a condition precedent,[14] and it has been held that it may also be subject to a condition subsequent.[15] There seems difficulty in this result, however. It was a settled doctrine of the common law that a cause of action once discharged was gone forever. If such a release can be successfully pleaded to the action before the condition subsequent happens, a court of law must give judgment for the defendant, and if after the condition subsequent has happened an action is again brought on the same cause of action, the plea of *res judicata* seems unanswerable.[16] The intention of the parties can be effectuated in great measure, however, by construing the so-called condition subsequent as a promise to pay the released claim in a given event. The creditor's right of action on the happening of that event would then be on the new promise contained in the release, not on the original cause of action. But consideration would be essential.

Construction. Most of the cases on releases involve questions of construction only, and some technical rules of construction have been established, but these, like most rules of construction, would be held subordinate to the broad rule that the intention which the words of the instrument express in the light of the circumstances existing at the time shall prevail.[17] Thus "by a release of all actions, suits, and quarrels, a covenant before the breach of it is not released, because there is not any cause of action, nor any certain duty before the breach of it, but the breach of it ought to precede the action, and the cause of the duty. . . But . . . by release of covenants, the covenant is discharged before the breach of it." [18]

"If a man release to another all manner of demands, this is the best release to him to whom the release is made, that he can have, and shall enure most to his advantage. For by such release of all

[13] Pierce *v.* Parker, 4 Metc. 80; Reed *v.* Tarbell, 4 Metc. 93. See also Crum *v.* Sawyer, 132 Ill. 443; Curtis *v.* Curtis, 40 Me. 24; Power's Appeal, 63 Pa. 443.

[14] Gibbons *v.* Vouillon, 8 C. B. 483; Corner *v.* Sweet, L. R. 1 C. P. 456.

[15] Slater *v.* Jones, L. R. 8 Ex. 186; Newington *v.* Levy, L. R. 5 C. P. 607, L. R. 6 C. P. 180.

[16] See Ford *v.* Beech, 11 Q. B. 852.

Therefore, in Tyson *v.* Dorr, 6 Whart. 256, the condition subsequent was held void and the release absolute.

[17] See Rowe *v.* Rand, 111 Ind. 206.

[18] Hoe's Case, 5 Coke, 70*b*, 71*a*.

manner of demands all manner of actions reals, personals and actions of appeals are taken away and extinct, and all manner of executions are taken away and extinct." [19]

The most important rule of construction relating to releases was thus expressed in a recent case by Lindley, M.R. "General words of release are always controlled by recitals and context which show that unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them." [20]

Rescission by Parol Agreement.

Elements of such agreement. The discharge of a contract by the parol agreement of the parties would seem on principle to require the same elements of mutual consent and consideration that are necessary for the formation of simple contracts; and certainly this is the general rule.

Bilateral contracts. If the parties to a bilateral contract agree to rescind it there is no difficulty in regard to consideration, whether the agreement to rescind is made before or after the breach of the original contract, so long as neither party has completely performed or been discharged from his obligation. The promise of one party to forego his rights under the contract is sufficient consideration for the promise of the other party to forego his rights.[21]

[19] Litt., § 508; Co. Litt., 291*a*. See Suit *v.* Suit, 97 Md. 539.

The nicety of construction which the early law sanctioned may be illustrated by some other sections of Littleton. Thus, section 498, "If I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may by the law take my goods out of his possession, because no right of the goods is released to him but only the action."

Again, section 504, "If a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet he may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias;* for execution upon such a writ cannot be said an action."

[20] *Re* Perkins, [1898] 2 Ch. 182, 190. To the same effect are Payler *v.* Homersham, 4 M. & S. 423; Lindo *v.* Lindo, 1 Beav. 496; London, &c. Ry. Co. *v.* Blackmore, L. R. 4 H. L. 610; Turner *v.* Turner, 14 Ch. D. 829; Tryon *v.* Hart, 2 Conn. 120; Seymour *v.* Butler, 8 Ia. 304; Rich *v.* Lord, 18 Pick. 322; Wiggin *v.* Tudor, 23 Pick. 434; Hoes *v.* Van Hoesen, 1 Barb. Ch. 379; Matlack's Appeal, 7 Watts & S. 79. See also Danby *v.* Coutts, 29 Ch. D. 500.

[21] King *v.* Gillett, 7 M. & W. 55; Farrar *v.* Toliver, 88 Ill. 408; Rollins *v.* Marsh, 128 Mass. 116; Brigham *v.* Herrick, 173 Mass. 460, 467; Blagborne *v.* Hunger, 101 Mich. 375; Spier *v.* Hyde, 78 N. Y. App. Div. 151, 158; Dreifus *v.* Columbian Salvage Co., 194 Pa. 475, 486; Blood *v.* Enos, 12 Vt. 625; Montgomery *v.* American Central Ins. Co., 108 Wis. 146, 159.

Agreement may be inferred from facts. The agreement to rescind need not be express. Mutual assent to abandon a contract may be inferred from circumstances[22] and sometimes from circumstances of a negative character, such as the failure to take any steps looking towards the enforcement or performance of the contract.[23] Also "a subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, substitutes, and is substituted for the earlier contract and becomes the only agreement of the parties on the subject." [24]

Unilateral contracts. If the original contract was unilateral or has since its formation become unilateral by the discharge of one party to the contract, either by his own performance or otherwise, a mutual agreement to rescind without more has no consideration. As one party only was entitled to anything under the original contract at the time of the attempted rescission, he alone promises to give up anything by agreeing to rescind.

Two special classes of cases. These principles are clearly recognized by the decisions[25] except in two classes of cases:

1. Agreements made before breach of a unilateral contract to discharge the promisor.

[22] Green *v.* Wells, 2 Cal. 584; Heinlin *v.* Fish, 8 Minn. 70; Fine *v.* Rogers, 15 Mo. 315; Chouteau *v.* Jupiter Iron Works, 94 Mo. 388; Wheeden *v.* Fiske, 50 N. H. 125. See also cases cited in the following two notes.

[23] Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109; Mowry *v.* Kirk, 19 Ohio St. 375.

[24] Housekeeper Pub. Co. *v.* Swift, 97 Fed. Rep. 290 (C. C. A.). See in accord, Patmore *v.* Colburn, 1 C. M. & R. 65, 71; Stow *v.* Russell, 36 Ill. 18, 30; Harrison *v.* Polar Star Lodge, 116 Ill. 279, 287; Holbrook *v.* Electric Appliance Co., 90 Ill. App. 86; Western Ry. Equipment Co. *v.* Missouri Iron Co., 91 Ill. App. 28, 37; Thompson *v.* Elliott, 28 Ind. 55; Paul *v.* Meservey, 58 Me. 419; Howard *v.* Wilmington, &c. R. Co., 1 Gill, 311, 340; Smith *v.* Kelly, 115 Mich. 411; Chresman *v.* Hodges, 75 Mo. 413, 415; Tuggles *v.* Callison, 143 Mo. 527, 536; McClurg *v.* Whitney, 82 Mo. App. 625; Renard *v.* Sampson, 12 N. Y. 561, 568. Compare Rhoades *v.* Chesapeake, &c. R. Co., 49 W. Va. 494.

[25] Foster *v.* Dawber, 6 Ex. 851; Edwards *v.* Walters, 2 Ch. 157, 168; Westmoreland *v.* Porter, 75 Ala. 452; Florence Cotton Co. *v.* Field, 104 Ala. 471; Mobile, &c. R. R. Co. *v.* Owen, 121 Ala. 505; Swan *v.* Benson, 31 Ark. 728; Mendall *v.* Davis, 46 Ark. 420; Davidson *v.* Burke, 143 Ill. 139; Metcalf *v.* Kent, 104 Ia. 487; Averill *v.* Wood, 78 Mich. 342, 354; Young *v.* Power, 41 Miss. 197; Northwestern Nat. Bank *v.* Great Falls Opera House, 23 Mont. 1; Landon *v.* Hutton, 50 N. J. Eq. 500; Crawford *v.* Millspaugh, 13 Johns. 87; Whitehill *v.* Wilson, 3 Pen. & Watts, 405, 413; Kidder *v.* Kidder, 33 Pa. 268; Collyer *v.* Moulton, 9 R. I. 90.

2. Agreements to discharge a party to a negotiable instrument, whether the agreement be made before or after maturity of the instrument.

Agreements Made Before Breach of a Unilateral Simple Contract to Discharge the Promisor.

Early cases. In several short cases decided about the year 1600, it was decided or said that such an agreement was effectual.[26] The appropriate words for alleging such an agreement were that the plaintiff exonerated or discharged the defendant. The point seems not to have been again discussed until the nineteenth century, when several cases were decided which touch upon it.

King v. Gillett. In *King* v. *Gillett*,[27] the plea to an action for breach of promise of marriage was that before any breach the plaintiff "absolved, exonerated, and discharged the defendant." On special demurrer it was urged that the plea should have alleged rescission by mutual assent. But the plea was held good on the strength of the early decisions. The court, however, said the question was merely as to a matter of form, for though the plea was good, "yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a rescinding of the contract previously made." It is apparently thought by some writers[28] that the decision in some way discredits the early authorities, but this seems a mistake. The court simply said that mutual assent was necessary to make out the defence, but this is not saying that consideration was unnecessary. In later decisions the English courts have never considered *King* v. *Gillett*. As the contract in that case was bilateral, there was, undoubtedly, consideration if there was an agreement to rescind. The question was merely whether mutual assent was alleged with sufficient certainty.

Dobson v. Espie. *Dobson* v. *Espie*,[29] was an action for the breach of an independent obligation to pay a deposit to an auctioneer as security for future performance of a contract for the sale of property, and the defendant pleaded leave and license. On demurrer the court

[26] Coniers and Holland's Case, 2 Leon. 214; Langden *v.* Stokes, Cro. Car. 383; Edwards *v.* Weeks, 2 Mod. 259. See also Treswaller *v.* Keyne, Cro. Jac. 620; May *v.* King, 12 Mod. 537; Weston *v.* Mowlin, 2 Burr. 969, 978.

[27] 7 M. & W. 55.

[28] Anson on Contracts (10th ed.), 292; Clark on Contracts, 609.

[29] 2 H. & N. 79.

held the plea bad as not equivalent to "exonerated and discharged," but the implication is clear that a plea in the latter form would have been held good, and one member of the court, Bramwell, B., not only said so, but expressed the opinion that even in its actual form the plea was good, saying:

"In an action on a simple contract, a plea of exoneration before breach is good. The law is thus laid down in Byles on Bills, p. 168 (7th ed.):[30] 'It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge except by deed or upon sufficient consideration.' Assuming, then, that a plea of exoneration before breach would have been good in this case, I thought that the present plea might be so read; and, therefore, if sitting alone, I should have been disposed to hold it good."

There is a dictum to the same effect by Lindley, L. J., in the recent case of *Edwards* v. *Walters*.[31]

Foster v. Dawber. It is true that Parke, B., in *Foster* v. *Dawber*,[32] said *obiter* "an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." It is to be noticed, however, that Parke is not speaking of the situation before breach and though his remark is applicable both to broken and unbroken contracts, cases arise far more commonly in regard to the former. In any event, Parke was speaking without having the authorities before him and with his mind addressed to another matter. In view of the later case of *Dobson* v. *Espie*,[33] the English law seems still to be that exoneration before breach is good without consideration.

American decisions. In the United States there are a few dicta[34] to the same effect, and there is a decision in Wisconsin[35] involving the point, which held exoneration good. But there are authorities of contrary effect,[36] and in view of this as well as the opinion of American text writers,[37] and the absence of any underlying principle to sup-

[30] So in 16th ed., p. 311; 1 Smith's Leading Cases (11th Eng. ed.), 350; (9th Am. ed.) 614.

[31] [1896] 2 Ch. 157, 168.

[32] 6 Ex. 851.

[33] 2 H. & N. 79.

[34] Robinson *v.* McFaul, 19 Mo. 549; Seymour *v.* Minturn, 17 Johns. 169, 175; Kelly *v.* Bliss, 54 Wis. 187, 191.

[35] Hathaway *v.* Lynn, 75 Wis. 551.

[36] Hale *v.* Dressen, 76 Minn. 183; Collyer *v.* Moulton, 9 R. I. 90; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 164. See also Bowman *v.* Wright, 65 Neb. 661; Purdy *v.* Rome, etc., R. Co., 125 N. Y. 209.

[37] Clark on Contracts, 608; Harriman on Contracts (2d ed.), § 505; 24 Am. & Eng. Encyc. of Law (2d ed.), 287.

port the English doctrine, it seems probable that consideration will, in most states, be held essential. Cases may be suggested, however, where the promisor should clearly be held discharged. Suppose the promisee informs the promisor that performance will not be required, and relying on this the promisor is not ready to perform at the day, or has so altered his position that he cannot perform at all. Though estoppel is not ordinarily a substitute for consideration justice demands that in the cases supposed the promisee should not be allowed to hold the promisor liable for his non-performance.

It may well be that a recognition of this possibility of injustice here suggested led the early judges to hold exoneration good without consideration. At the present day it would seem better to apply the doctrines of estoppel *in pais* when necessary, but in general to require consideration.

Agreement to Discharge a Party to a Negotiable Instrument.

Foster v. Dawber. The following extract from the opinion of Parke, B., in *Foster* v. *Dawber*,[38] the leading case on the subject sufficiently expresses the English law prior to the enactment of the Bills of Exchange Act in 1882.

"Mr. Willes disputed the existence of any rule of law by which an obligation on a bill of exchange by the law merchant can be discharged by parol, and he questioned the decisions, and contended that the authorities merely went to show that such an obligation might be discharged as to remote but not as between immediate parties. The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule. In the passage referred to in the work of my brother Byles, the words 'it is said' are used, but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are mediate or immediate parties the liability turns on the law merchant, for no person is liable on a bill of exchange except through the law merchant; and, probably, the law merchant being introduced into this country, and differing very much from the simplicity of the common law, at the same time was introduced that rule quoted from Pailliet[39] as prevailing in foreign countries, viz., that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or by any solemn instrument. Such appears to be the law of France, and probably it was for the reason above stated that it has been adopted here with respect to bills of exchange. But Mr. Willes further contended, that though the rule might be true with respect to bills of exchange, it did not apply to promissory notes, inasmuch as they are not put upon the same footing as bills of exchange by the statute law. The negotiability of promissory notes was created by the statute 3 & 4 Anne, c. 9, which recites that 'notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum of money therein mentioned are not assignable or indorsable over, within the custom

[38] 6 Ex. 839, 851.
[39] Manuel de Droit Civil, Code Civ., liv. 3, tit. 3, s. 3.

of merchants to any other person' (that is one of the properties promissory notes are recited not to have); 'and that such persons to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same.' That appears to apply to cases of the original liability on a note, as well as to those cases where the liability has been created by the assignment of that instrument. Now bills of exchange and promissory notes differ from other contracts at common law in two important particulars: first, they are assignable, whereas choses in action at common law are not; and secondly, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars promissory notes are put on the same footing as bills of exchange by the statute of Anne, and, therefore, we think the same law applies to both instruments. This court was of this opinion in a case of Mayhew *v.* Cooze,[40] in which there was a plea similar to the present, although the expression of that opinion was not necessary for the decision of that case." [41]

Bills of Exchange Act. The Bills of Exchange Act now provides:[42]

"62 (1) When the holder of a bill[43] at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

The requirement of a writing effected a change in the English law. It was adopted from the Scotch law.[44]

American decisions. The doctrine of *Foster* v. *Dawber* was never adopted by the American courts and it was uniformly held that consideration was necessary to make effectual an agreement to discharge a party to a negotiable instrument.[45] The draftsman of the Ameri-

[40] 23d November, 1849, not reported.

[41] In White *v.* Bluett, 23 L. J. Ex. (N. S.) 36, the defendant, when sued upon a promissory note, pleaded an agreement by the payee to discharge it in consideration of an agreement by the defendant to forbear to make certain complaints. The court held the alleged consideration insufficient and gave judgment for the plaintiff, but as the forbearance asked for was in fact given and as there was nothing illegal in the bargain, it is difficult to see why the doctrine of Foster *v.* Dawber, to which Parke, B., alluded, should not have been applied.

[42] 45 & 46 Vict., ch. 61.

[43] The provisions of this section are made applicable to promissory notes by section 89.

[44] Chalmers' Bills of Exchange (5th ed.), 212.

[45] Maness *v.* Henry, 96 Ala. 454; Scharf *v.* Moore, 102 Ala. 468; Upper San Joaquin Co. *v.* Roach, 78 Cal. 552; Rogers *v.* Kimball, 121 Cal. 247; Heckman *v.* Manning, 4 Col. 543; Adamson *v.* Lamb, 3 Blackf. 446; Denman *v.* McMahin, 37 Ind. 241; Carter *v.* Zenblin, 68 Ind. 437; Hanlon *v.* Doherty, 109 Ind. 39; Franklin Bank *v.* Severin, 124 Ind. 317; Shaw *v.* Pratt, 22 Pick.

can Negotiable Instruments Law,[46] however, copied the provision of the English act, and in States where this law has been enacted,[47] therefore, a written renunciation or discharge is good without consideration.

Written Contracts.

May be varied by subsequent agreement. "By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."[48]

After breach. It is also true that if the agreement to discharge or vary a contract is made after its breach, it is immaterial whether the original bargain was or was not in writing. The later agreement is an accord, and if the parties so intend will operate at once without performance to discharge the liability for breach of the original contract.[49]

305; Smith *v.* Bartholomew, 1 Met. 276; Bragg *v.* Danielson, 141 Mass. 195; Hale *v.* Dressen, 76 Minn. 183; Henderson *v.* Henderson, 21 Mo. 379; Irwin *v.* Johnson, 36 N. J. Eq. 347; Crawford *v.* Millspaugh, 13 Johns. 87; Seymour *v.* Minturn, 17 Johns. 169; Campbell's Est., 7 Pa. 100, 101; McGuire *v.* Adams, 8 Pa. 286; Kidder *v.* Kidder, 33 Pa. 268; Horner's App., 2 Pennypacker, 289; Corbett *v.* Lucas, 4 McCord L. 323. See, however, Nolan *v.* Bank of New York, 67 Barb. 24, 34.

[46] Crawford Nego. Inst. Law, § 203.

[47] New York Laws of 1897, ch. 612; New York Laws of 1898, ch. 336; Connecticut Laws of 1897, ch. 74; Colorado Laws of 1897, ch. 64; Florida Laws of 1897, ch. 4524; Massachusetts Laws of 1898, ch. 533; Massachusetts Laws of 1899, ch. 130; Maryland Laws of 1898, ch. 119; Virginia Laws of 1897–8, ch. 866; Rhode Island Laws of 1899, ch. 674; Tennessee Laws of 1899, ch. 94; North Carolina Laws of 1899, ch. 733; Wisconsin Laws of 1899, ch. 356; North Dakota Laws of 1899, ch. 113; Utah Laws of 1899, ch. 149; Oregon Laws of 1899, Sen. Bill 27; Washington Laws of 1899, ch. 149; District of Columbia Laws of 1899; U. S. Stats. Arizona R. S. 1901, tit. XLIX, §§ 3304–3491; Pennsylvania Laws of 1901, ch. 162; Ohio Laws of 1902, Sen. Bill 10; Iowa Laws of 1902, ch. 130; New Jersey Laws of 1902, ch. 184; Montana Laws of 1903, ch. 121; Idaho Laws of 1903, Sen. Bill 86; Kentucky Laws of 1904; Louisiana Laws of 1904.

[48] Goss *v.* Lord Nugent, 5 B. & Ad. 58, 64. See in accord Pioneer Savings Co. *v.* Nonnemacher, 30 So. Rep. 79 (Ala.); Swain *v.* Seamens, 9 Wall. 254, 271; Calliope Min. Co. *v.* Herzinger, 21 Col. 482; Ward *v.* Walton, 4 Ind. 75; Walter *v.* Victor G. Bloede Co., 94 Md. 80, 85; Cummings *v.* Arnold, 3 Metc. 486, 489; Barton *v.* Gray, 57 Mich. 622; Van Santvoord *v.* Smith, 79 Minn. 316; Chouteau *v.* Jupiter Iron Works, 94 Mo. 388; Warren *v.* Mayer Mfg. Co., 161 Mo. 112, 121; Bryan *v.* Hunt, 4 Sneed, 543; Montgomery *v.* American Ins. Co., 108 Wis. 146, 159.

[49] See *infra*, p. 834.

Contracts within the Statute of Frauds — Rescission. If an executory contract is within the Statute of Frauds and is in writing or a proper written memorandum has at some time been made, a subsequent oral agreement to rescind the contract is effectual if the oral agreement fulfills the requisites of a contract at common law. The Statute of Frauds does not mention contracts of rescission or discharge and such contracts are therefore not affected by its terms.[50] An exception to this rule should, perhaps, be made in the case of contracts relating to land. As such contracts create immediately an equitable interest in the land,[51] the contract to rescind necessarily involves the surrender of an interest in land. This has been so held[52] and the reasoning seems unanswerable, but there is contrary authority,[53] which takes no distinction between contracts for an interest in land and other contracts within the statute. If the agreement to rescind was paid for, or anything was done in accordance with the agreement which could operate as an accord and satisfaction, the original agreement is doubtless effectually discharged.[54] On the other hand it should be noticed that if a contract has been partly executed by the transfer of either real or personal property, an agreement of rescission which contemplates not simply a discharge of unexecuted obligations but a re-transfer of the property must certainly be within the section of the statute relating to sales of land or that relating to sales of goods.

Variation. More difficult questions are presented when the subsequent oral agreement does not purport totally to rescind but only to vary some of the terms of an original bargain, which was within the Statute of Frauds but of which a memorandum had been made. It seems clear on principle that no right of action can lie for breach of the second agreement or of the first and second combined. To allow such a right would be to enforce a contract within the statute when

50 Goss *v.* Lord Nugent, 5 B. & Ad. 58, 66.

51 Equitable interests are within the statutes. Toppin *v.* Lomas, 16 C. B. 145; Smith *v.* Burnham, 3 Sumn. 435; Dougherty *v.* Catlett, 129 Ill. 431; Browne on the Statute of Frauds, § 229.

52 Catlett *v.* Dougherty, 21 Ill. App. 116 (see Dougherty *v.* Catlett, 129 Ill. 431); Dial *v.* Crain, 10 Tex. 444, 454 (see also Huffman *v.* Mulkey, 78 Tex. 556).

53 Goss *v.* Lord Nugent, 5 B. & Ad. 58, 66 (see, however, Harvey *v.* Grabham, 5 A. & E. 61, 73); Buel *v.* Miller, 4 N. H. 196; Boyce *v.* McCulloch, 3 W. & S. 429; Brownfield's Ex. *v.* Brownfield, 151 Pa. 565. See also Browne on the Statute of Frauds, § 431 *et seq.*

54 Burns *v.* Fidelity Real Estate Co., 52 Minn. 31, 36; Warren *v.* Mayer Mfg. Co., 161 Mo. 112, 122; Long *v.* Hartwell, 36 N. J. L. 116; Miller *v.* Pierce, 104 N. C. 389; Jones *v.* Booth, 38 Ohio St. 405; Phelps *v.* Seely, 22 Gratt. 573; Jordan *v.* Katz, 89 Va. 628, 630.

some terms at least of the contract were oral.[55] On the other hand, if the terms of the oral contract have been performed, such performance operates as a satisfaction of the liability on the original contract. The Statute of Frauds does not apply to executed contracts, so that when the oral agreement is performed its performance has the effect which the parties agreed it should have.[56] If the terms of the oral agreement have not been performed, the original contract still remains in force. Though an oral agreement to rescind without more would be effectual, where the rescission is to be effected only by the necessary implication contained in the agreement to substitute a new contract differing in some of its terms from the old one, there can be no rescission if the agreement for substitution is invalid.[57] Even if one party offers to perform his promise under the new agreement, the other party may, according to the better view, still insist on the original contract, and refuse to accept the substituted performance to which he had orally agreed.[58] In an early case,[59] however, the Supreme Court of Massachusetts adopted a distinction that was suggested by Lord Ellenborough in *Cuff* v. *Penn*,[60] between the contract and its performance. "The statute," Wilde, J., says, "requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance." The court then proceeds to argue that as a substituted performance would operate as a satisfaction of the original contract, and tender is equivalent to performance, the plaintiff could sue on the original contract and prove in support of it an offer to perform with the alterations

[55] Stead *v.* Dawber, 10 A. & E. 57 (overruling Cuff *v.* Penn, 1 M. & S. 21); Marshall *v.* Lynn, 6 M. & W. 116; Noble *v.* Ward, L. R. 1 Ex. 117; Carpenter *v.* Galloway, 73 Ind. 418; Bradley *v.* Harter, 156 Ind. 499; Cummings *v.* Arnold, 3 Metc. 486, 491; King *v.* Faist, 161 Mass. 449, 456; Heisley *v.* Swanstrom, 40 Minn. 199; Burns *v.* Fidelity Real Est. Co., 52 Minn. 31; Thompson *v.* Thompson, 78 Minn. 379; Rucker *v.* Harrington, 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co., 161 Mo. 112; Dana *v.* Hancock, 30 Vt. 616.

[56] Moore *v.* Campbell, 10 Ex. 323; Leather Cloth Co. *v.* Hieronymus, L. R. 10 Q. B. 140; Swain *v.* Seamens, 9 Wall. 254; Long *v.* Hartwell, 34 N. J. L. 116, 127; Jackson *v.* Litch, 62 Pa. 451; Ladd *v.* King, 1 R. I. 224, 231. Cp. Dana *v.* Hancock, 30 Vt. 616.

[57] Noble *v.* Ward, L. R. 2 Ex. 135; Hasbrouck *v.* Tappen, 15 Johns. 200; Barton *v.* Gray, 57 Mich. 622, 632.

[58] Stowell *v.* Robinson, 3 Bing. N. C. 937; Noble *v.* Ward, L. R. 2 Ex. 135; Plevins *v.* Downing, 1 C. P. D. 220; Swain *v.* Seamens, 9 Wall. 254, 271; Lawyer *v.* Post, 109 Fed. Rep. 512; Bradley *v.* Harter, 156 Ind. 499; Walter *v.* Victor G. Bloede Co., 94 Md. 80; Rucker *v.* Harrington, 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co., 161 Mo. 112; Clark *v.* Fey, 121 N. Y. 470. See also Dana *v.* Hancock, 30 Vt. 616.

[59] Cummings *v.* Arnold, 3 Metc. 486.

[60] 1 M. & S. 21. The suggestion was repudiated in Stead *v.* Dawber, 10 A. & E. 57, and Marshall *v.* Lynn, 6 M. & W. 109, and is wholly discredited in England.

later agreed upon. But the prevailing view is that even in the case of a binding contract of accord, tender is not equivalent to performance, and there is no satisfaction even if the tender is wrongfully refused.[61] However this may be, a tender where there is no obligation to accept it cannot possibly have the effect of performance. The learned author of the leading text book on the subject[62] gives his approval to the decision, but the current of authority seems strongly against it.

Amount of variation. No distinction is taken in the cases between large changes from the original agreement and slight ones, such as the extension for a brief period of the time for performance. The validity of such a distinction has been explicitly denied.[63] "Every part of the contract in regard to which the parties are stipulating must be taken to be material."[64]

Part performance of varied agreement. Though an attempted oral modification of a contract within the statute is wholly ineffectual to accomplish the intent of the parties, yet the actual forbearance by one party at the request of the other to enforce a contract at the time when performance was due may produce important legal consequences. In *Ogle* v. *Vane*,[65] it was held that the plaintiff who had contracted to buy iron from the defendant in July, and who, after waiting at the defendant's request till the following February, then bought in the market, could charge the defendant for damages based on the price in February, though the price was higher then than in July. The court relied to some extent on the fact that though there was forbearance at the defendant's request there was no agreement to forbear, but it seems an agreement would have made no difference, for the agreement would neither have rescinded the original contract nor have had any effect itself except in so far as it was performed.[66]

Hickman v. Haynes. In *Hickman* v. *Haynes*,[67] the plaintiff had agreed to sell and the defendant to buy iron in the future. The

[61] *Infra*, p. 832.

[62] Browne on the Statute of Frauds, § 424. See also Smith *v.* Loomis, 74 Me. 503; Lee *v.* Hawks, 68 Miss. 669. Cp. Wiessner *v.* Ayer, 176 Mass. 425.

[63] Goss *v.* Lord Nugent, 5 B. & Ad. 67; Harvey *v.* Grabham, 5 A. & E. 74; Marshall *v.* Lynn, 6 M. & W. 116.

[64] Per Parke, B., Marshall *v.* Lynn, 6 M. & W. 116, 117.

[65] L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

[66] Smiley *v.* Barker, 83 Fed. Rep. 684 (C. C. A.); Barton *v.* Gray, 57 Mich. 622, 636. See Hasbrouck *v.* Tappen, 15 Johns. 200. Cp. Sanderson *v.* Graves, L. R. 10 Ex. 234.

[67] L. R. 10 C. P. 598.

defendant had requested, before the time for performance, an enlargement of the time for taking delivery. This was granted, but the defendant ultimately refused altogether to take the iron. In an action on the contract the defendant set up that the plaintiff was not himself ready and willing to perform the contract at the time when performance was due according to the written memorandum. The court held that though before that time "either party could have changed his mind and required the other to perform the contract according to its original terms," [68] yet after having induced the plaintiff to withhold delivery the defendant could not thereafter insist that prompt delivery was a condition precedent to a right of action. In this case, as in the preceding, the court said there was no agreement to forbear, but merely a voluntary forbearance, but here also it is hard to see that a mutual agreement, which was unenforceable, would have altered the decision.[69]

Performance of part of contract within the statute. If so much of a contract as is within the Statute of Frauds is fully performed, other obligations or liabilities on the contract may obviously be discharged or modified in any way that contracts not within the statute may be. Thus in *Negley* v. *Jeffers*,[70] there was a contract for the sale of land and the land was actually conveyed. After the conveyance an agreement was made by the vendee for valuable consideration to waive certain conditions precedent to his obligation to pay the price. It was held this agreement though oral was binding.

Contracts under Seal.

Common law rule. If the original contract was under seal the same questions are presented with the additional difficulty, which at common law was insuperable, that an obligation by deed could not be discharged or varied by anything of inferior nature.[71]

When applicable. This rule was applicable to any discharge attempted either before breach of the deed or after the breach of the deed if the obligation created by the deed was to pay a fixed sum of money. If, however, a covenant was for the performance of anything

[68] *Quære* if the change of mind was so near the time for performance as to make performance extremely difficult for the other party. See Tyers *v.* Rosedale Co., L. R. 8 Ex. 305, L. R. 10 Ex. 195.

[69] Smiley *v.* Barker, 83 Fed. Rep. 684 (C. C. A.); Barton *v.* Gray, 57 Mich. 622, 636. But see Sanderson *v.* Graves, L. R. 10 Ex. 234.

[70] 28 Ohio St. 90.

[71] See cases *infra, passim.*

other than the payment of a fixed sum of money, breach of the covenant gave rise merely to a right of action for unliquidated damages, and such a right of action was subject to the same rules as to discharge that are applicable to simple contracts.[72]

Modern relaxation. Accordingly, if an obligation under seal created reciprocal rights, a mutual agreement before breach of the obligation to surrender such rights or to substitute others for them did not discharge or alter the effect of the deed.[73] The suggested mutual agreement by parol evidently contains all the requisite elements of a contract, but there seems no recognition of its validity as a contract in any decision before the beginning of the nineteenth century, and it is hard to distinguish it from an unexecuted accord which was held not valid as a contract.[74] In *Nash* v. *Armstrong*,[75] however (which was decided after the passage of the Common Law Procedure Act of 1854[76] had permitted the use of equitable pleas at law), it was not only held that such a parol agreement was in itself a binding contract, but it was also said that the performance of the contract would "be ground for an unconditional perpetual injunction against proceeding upon the deed," and consequently would be the basis of a good equitable plea in an action at law. At the present day this doctrine would be generally accepted. Indeed, many modern authorities go farther than this. Even though the parol agreement has not been performed, if it was intended in substitution of the earlier sealed contract, this intention is frequently given full effect. In jurisdictions where by statute the effect of a seal has been abolished or seriously diminished, this result is based on clear principle, for if a contract under seal is reduced to the level of a mere written contract in other respects, there is no reason why it should not be discharged or varied by subsequent written or oral bargains.[77] But in leading jurisdictions, where seals still have in most respects their old value, the rule for-

[72] Blake's Case, 6 Rep. 342.

[73] Rogers *v.* Payne, 2 Wils. 376; Braddick *v.* Thompson, 8 East, 344; West *v.* Blakeway, 2 Man. & G. 729; Ellen *v.* Topp, 6 Ex. 424; Herzog *v.* Sawyer, 61 Md. 344, 352. See also *infra*, p. 835.

[74] Allen *v.* Harris, 1 Ld. Raym. 122; Lynn *v.* Bruce, 2 H. Bl. 317; Reeves *v.* Hearne, 1 M. & W. 323.

[75] 10 C. B. N. S. 259. In Braddick *v.* Thompson, 8 East, 344, 346, the court said *obiter*, in denying that a parol agreement could discharge a bond: "His only remedy was by bringing a cross-action upon the agreement against the plaintiff, for suing upon the bond in breach of such agreement."

[76] Section 83.

[77] So held in Barton *v.* Gray, 57 Mich. 634; Blagborne *v.* Hunger, 101 Mich. 375; Bowman *v.* Wright, 65 Neb. 661; McIntosh *v.* Miner, 37 N. Y. App. Div. 483.

bidding discharge or variation by parol has been done away with.[78] In some jurisdictions, however, this rule still persists,[79] and as it has the support of the whole early law, English and American, the matter cannot be considered settled in any jurisdiction unless the court of that jurisdiction has either abrogated the rule, in which case it is not likely to recede, or has expressly considered it in a recent case. In Illinois the court takes a middle ground. Thus in *Starin* v. *Kraft*,[80] the Supreme Court of that state held that a sealed executory option to sell a tract of land "estimated to contain forty-five acres . . the precise quantity . . . to be ascertained by a correct survey," could not be changed so as to make good a tender of a sum based on the estimated quantity, by proof of a parol agreement between the parties to treat this quantity as correct. The court said:

"It cannot be maintained . . . that the parol agreement to substitute the fixed amount of forty-five acres for the actual amount to be ascertained by survey was an executed parol agreement. The entire agreement which is set up by defendant in error as to the basis of his suit is partly under seal and partly by parol, and altogether executory; and that it has never been executed, either as to the provisions under seal or the provision by parol, is determined by the fact that a tender of performance, in accordance with the parol provision on the one side, and a refusal to so perform on the other, constitute the grounds of the suit. But it is contended by counsel for appellee . . . that where, by parol, a condition of a sealed instrument is waived, and the parties act or fail to act, because of such waiver, the doctrine of estoppel will preclude a denial of the effect of the parol agreement, and in support of this contention they cite White *v.* Walker, 31 Ill. 422; Vroman *v.* Darrow, 40 *Id.* 171; Fisher *v.* Smith, 48 *Id.* 184; Defenbaugh *v.* Weaver, 87 *Id.* 132; Worrell *v.* Forsyth, 141 *Id.* 22; Moses *v.* Loomis, 156 *Id.* 392.[81] In Worrell *v.* Forsyth, the parol agreement had been fully executed. In each of the other cases it will be found, upon examination, that the facts constituted a waiver of the terms or conditions in question, which waiver was in the nature of a release, surrender, or discharge, and hence would come under the rule here obtaining, that a contract under seal may be released, surrendered, or discharged by matters *in pais*. . . . There is not here the mere subtraction of an element or condition of the sealed contract without changing its import, but, on the contrary, there is the attempted substitution of new matter which is essential to sustain the right of action. . . . Nor can we concede that the

78 Steeds *v.* Steeds, 22 Q. B. D. 537; Canal Co. *v.* Ray, 101 U. S. 522; Hastings *v.* Lovejoy, 140 Mass. 261; Tuson *v.* Crosby, 172 Mass. 478; Stees *v.* Leonard, 20 Minn. 494; McGrann *v.* North Lebanon R. Co., 29 Pa. 82; Hamilton *v.* Hart, 109 Pa. 629; Hydeville Co. *v.* Eagle R. R. Co., 44 Vt. 395. See also Phelps *v.* Seely, 22 Gratt. 573.

79 Miller *v.* Hemphill, 9 Ark. 488; Levy *v.* Very, 12 Ark. 148; Smith *v.* Lewis, 24 Conn. 624; Tischler *v.* Kurtz, 35 Fla. 323; Sinard *v.* Patterson, 3 Blackf. 353; McMurphy *v.* Garland, 47 N. H. 316; Armijo *v.* Abeytia, 5 N. Mex. 533; Delacroix *v.* Bulkley, 13 Wend. 71; Eddy *v.* Graves, 23 Wend. 82; Coe *v.* Hobby, 72 N. Y. 141; Smith *v.* Kerr, 108 N. Y. 31; McKenzie *v.* Harrison, 120 N. Y. 260, 263 (but see McCreery *v.* Day, 119 N. Y. 1; McIntosh *v.* Miner, 37 N. Y. App. Div. 483); Bond *v.* Jackson, Cooke, 500; Sherwin *v.* Rutland, &c. R. Co., 24 Vt. 347. Some of these decisions would not perhaps now be followed in their own jurisdictions.

80 174 Ill. 120.

81 To these cases may be added Palmer *v.* Meriden Britannia Co., 188 Ill. 508.

doctrine of equitable estoppel may be applied at law to enforce such a change by parol in a sealed executory contract. We regard the parol agreement sought to be made a part of this executory contract under seal as insufficient, if established, to support his suit for breach of it."

Accords and similar agreements. If an agreement for the discharge of a sealed obligation contemplates not an immediate mutual surrender of rights but the performance of something other than the duty imposed by the deed in satisfaction of that duty, and further contemplates that until such performance the deed shall remain in force, the agreement is one of accord if made after a right of action on the deed has arisen; if made before a right of action has arisen the agreement is not properly called an accord but such agreements are more conveniently considered in connection with accords.

Doctrine of exoneration inapplicable. The doctrine of exoneration or discharge of a contract before breach without consideration never applied to sealed instruments.[82]

Accord and Satisfaction.

Definition. "From time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer." [83] As this doctrine arose long before the validity of simple contracts was recognized, it is obvious that it was not by virtue of any preliminary agreement or accord between the parties, but only by virtue of the ultimate acceptance of the satisfaction that the discharge was effected. The only importance of the accord was as evidence to prove that the performance relied upon by the defendant as satisfaction was actually received by the plaintiff as such. This would be proved as well by the plaintiff's offer to receive the thing as satisfaction as by a bilateral agreement between the parties by which the plaintiff promised to receive the thing as satisfaction and the defendant promised to give it. There was, therefore, no occasion to distinguish between a mere offer on the part of the plaintiff and a bilateral contract. The distinction is now, however, of great importance. If there is a mere offer or promise by the creditor to accept something as satisfaction and the debtor makes no promise

[82] Irwin *v.* Johnson, 36 N. J. Eq. 347; Traphagen *v.* Voorhees, 44 N. J. Eq. 21; Tulane *v.* Clifton, 47 N. J. Eq. 351; Jackson *v.* Stackhouse, 1 Cow. 122; Albert's Ex. *v.* Ziegler's Ex., 29 Pa. 50; Horner's App., 2 Pennypacker, 289; Ewing *v.* Ewing, 2 Leigh, 337.

[83] 9 Harv. L. Rev. 55, by Professor Ames, citing Y. B. 21 & 22 Edw. I. 586 (Rolls series); Y. B. Hen. VI. 25–13; Y. B. 34 Hen. VI. 43, 44; Andrew *v.* Boughey, Dyer, 75 pl. 23.

to give it, the offer of the creditor is revocable at his pleasure and the rights of the parties are unchanged until the agreed satisfaction is actually given and received. This distinction is not always observed in the cases.[84] The word "accord," to avoid confusion, should be used only to designate a bilateral contract, by which the defendant promises to give the proposed satisfaction, and the plaintiff promises to accept it.[85]

Accord held not a valid contract — Peyto's Case. It might well be supposed that such an accord would have been recognized as a valid contract as soon as the validity of other bilateral contracts was recognized, but such was not the case. The courts were doubtless led astray by the assumption that if the contract of accord was valid, it necessarily would be a defence to the original cause of action. Even burdened with this assumption, the Court of King's Bench said, in 1681,[86] that "though in *Peyto's case,* and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 b, 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given."

Allen v. Harris. But this *dictum* being urged in the Common Pleas twenty years later in the case of *Allen* v. *Harris*[87] as a reason for holding an accord unexecuted a defence to an action, the court gave judgment for the plaintiff, saying: "If arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous that an accord ought to be executed that it is now

84 Cases in which there seems to have been merely an offer by the creditor are: Wray *v.* Milestone, 5 M. & W. 21; Francis *v.* Deming, 59 Conn. 108; Harbor *v.* Morgan, 4 Ind. 158; Burgess *v.* Denison Mfg. Co., 79 Me. 266; Cannon Rivers Assoc. *v.* Rogers, 46 Minn. 376; Hawley *v.* Foote, 19 Wend. 516; Keen *v.* Vaughan's Exrs., 48 Pa. 477.

85 Langdell, Summ. Cont., § 87.

86 Case *v.* Barber, T. Ray. 450.

87 Allen *v.* Harris, 1 Ld. Ray. 122.

impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration."

Lynn v. Bruce. Accordingly in *Lynn* v. *Bruce*[88] breach of a bilateral agreement to give and receive a specified sum of money as satisfaction for a previous cause of action was held to give the plaintiff no right. Eyre, C. J., quoted from the case of *Allen* v. *Harris*, and gave his approval of the result for a reason not mentioned in the earlier cases. "*Interest reipublicae ut sit finis litium.* Accord executed is satisfaction, accord executory is only substituting one cause of action in the room of another, which might go on to any extent."

Reeves v. Hearne. The decision of *Lynn* v. *Bruce* was correct upon its facts, since the accord was in that case merely an agreement to pay part of an admitted debt in satisfaction of the whole,[89] but no such explanation is possible in the case of *Reeves* v. *Hearne*.[90] Though the declaration in that case set forth mutual promises, each to do something of detriment to the promisor, and a breach of the defendant's promise, the court held on demurrer that no cause of action was stated. These cases have never been in terms overruled, and the fourth edition of Leake on Contracts[91] on their authority says: "The accord is in the nature of a mere offer which either party may refuse or withdraw; and upon which no action will lie."

Inconsistent decisions. Nevertheless it is hardly credible that *Reeves* v. *Hearne* would now be followed even in England. The case of *Crowther* v. *Farrer*,[92] though not purporting to overrule it, is in fact inconsistent with it, and allowed recovery of damages for breach of a contract to settle an existing liability by an agreed payment. Other decisions show clearly enough that if an agreement by way of accord is broken, an action may be maintained on the ordinary principles of contract.[93]

Effect of accord on previous cause of action — Intention of parties. The more difficult question is, what effect does the unexecuted accord have upon the previous cause of action? So far as it is possible for the law to reach this result, the effect should be that which the parties

88 2 H. Bl. 317.
89 See, however, 13 Harv. L. Rev. 38, by Professor Ames.
90 1 M. & W. 323. To the same effect is Elliott *v.* Dazey, 3 T. B. Mon. 268.
91 P. 623.
92 15 Q. B. 677.
93 Nash *v.* Armstrong, 10 C. B. N. S. 259; Very *v.* Levy, 13 How. 345, 349; White *v.* Gray, 68 Me. 579, 580; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144; Hunt *v.* Brown, 146 Mass. 253; Palmer *v.* Bosley, 62 S. W. Rep. 195 (Tenn. Ch.).

intend. Generally no intention is definitely expressed, and it is necessary to resort to inference. When a creditor agrees to accept from his debtor something in satisfaction of the debt in consideration of the debtor's promise to give the satisfaction, it can hardly be supposed that the parties intended that the creditor should immediately have the right to proceed on his original claim, without giving the debtor a chance to give the agreed satisfaction. Temporary forbearance at least must have been contemplated, though not expressly promised. So that if no time is fixed by the parties for the performance of the accord, it is a natural inference that the parties intended that the creditor should forbear for a reasonable time; if a date is fixed by the parties for the performance of the accord, the inference is that the parties intended forbearance upon the original claim to last until that date. In some cases the circumstances show that the parties intended more than a temporary forbearance. They may and sometimes do, in effect, agree that the original liability shall be immediately extinguished and the accord substituted in its place. But this is exceptional.

Accord no defence at common law. After the true construction of the accord is determined, its legal effect must be considered. Let it be supposed, first, that the accord was not intended immediately to satisfy and destroy the original cause of action, and further that the creditor, in violation of his agreement, brings action on the original cause before the time has arrived for the debtor to give the agreed satisfaction. If the debtor pleads the accord, the defence cannot be sustained.[94] To sustain it would lead to the result that even though the debtor subsequently failed to perform the accord, the creditor's claim would be barred, for judgment having once been given for the defendant on that very cause of action the matter has become *res judicata*. Of course, the creditor could sue upon the accord, but to limit his rights to this would in effect put him in the same position that he would have occupied if he had agreed to accept the accord and not its performance as the satisfaction of the debt. The rule of the common law, therefore, that an unexecuted accord is no defence is based on sound principles.

94 Many decisions to this effect are collected in 1 Am. & Eng. Encyc. of Law (2d ed.), 422. A few recent cases are Crow *v.* Kimball Lumber Co., 69 Fed. Rep. 61 (C. C. A.); Crass *v.* Scruggs, 115 Ala. 258; Martin-Alexander Co. *v.* Johnson, 70 Ark. 215; Goble *v.* American Nat. Bank, 46 Neb. 891; Gowing *v.* Thomas, 67 N. H. 399; Arnett *v.* Smith, 11 N. Dak. 55, 64. The decisions cited in the first paragraph of the next note are *a fortiori* in point to the same effect.

Even though performance tendered. The case may be carried a step further. Suppose the debtor within the time agreed or within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his claim, and brings suit on the original cause of action. Here, too, the unexecuted accord is no defence.[95] The creditor's claim is not satisfied. Tender is not the same as performance. To assert such a doctrine is to say that the debtor after making his tender has satisfied his debt, though he is still the owner of the thing which was agreed upon as the satisfaction. Even in the rare case where the tender is not only made, but kept good by setting aside as the creditor's the proposed satisfaction, to give relief involves an extension of the powers of a court of law. If the court holds that the debt was satisfied and that the tendered property became the property of the creditor by setting it aside for him, the court is doing more than merely ordering specific performance. It is holding that the debtor himself by his own action in appropriating the property to the creditor, in spite of the latter's express refusal to receive it, has himself specifically enforced the bargain transferring title to the creditor and extinguishing the original obligation. Doubtless the law of sales furnishes a certain analogy with such a result. In many jurisdictions a seller may, if the buyer in breach of his contract refuses to receive the goods agreed upon, set them aside for him and sue him for the full price, instead of damages for loss of the bargain,[96] but unless there is no way to work out a just result without such violation of fundamental legal distinctions the analogy should not be followed.

[95] Shepherd *v.* Lewis, T. Jones, 6; Lynn *v.* Bruce, 2 H. Bl. 317; Carter *v.* Wormald, 1 Ex. 81; Gabriel *v.* Dresser, 15 C. B. 622; Humphreys *v.* Third Nat. Bank, 75 Fed. Rep. 852, 859; Long *v.* Scanlan, 105 Ga. 424; Woodruff *v.* Dobbins, 7 Blackf. 582; Deweese *v.* Cheek, 35 Ind. 514; Young *v.* Jones, 64 Me. 563; White *v.* Gray, 68 Me. 579; Clifton *v.* Litchfield, 106 Mass. 34; Hayes *v.* Allen, 160 Mass. 34; Prest *v.* Cole, 183 Mass. 283; Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 549; Clarke *v.* Dinsmore, 5 N. H. 136; Rochester *v.* Whitehouse, 15 N. H. 468; Kidder *v.* Kidder, 53 N. H. 561; Gowing *v.* Thomas, 67 N. H. 399; Russell *v.* Lytle, 6 Wend. 390; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; Tilton *v.* Alcott, 16 Barb. 598; Kromer *v.* Heim, 75 N. Y. 574; Hearn *v.* Kiehl, 38 Pa. 147; Blackburn *v.* Ormsby, 41 Pa. 97; Hosler *v.* Hursh, 151 Pa. 415; Clarke *v.* Hawkins, 5 R. I. 219; Carpenter *v.* Chicago, etc., Ry. Co., 7 S. Dak. 594; Gleason *v.* Allen, 27 Vt. 364.

But see *contra*, Bradley *v.* Gregory, 2 Camp. 383; Very *v.* Levy, 13 How. 345; Latapee *v.* Pecholier, 2 Wash. C. C. 180; Whitsett *v.* Clayton, 5 Col. 476; Jenness *v.* Lane, 26 Me. 475; Heirn *v.* Carron, 19 Miss. 361; Coit *v.* Houston, 3 Johns. Cas. 243 (overruled); Bradshaw *v.* Davis, 12 Tex. 336; Johnson *v.* Portwood, 89 Tex. 235, 239.

[96] Mechem on Sales, § 1694. In many jurisdictions, however, the seller cannot recover the full price unless the title to the goods had passed. Ibid.

Equitable relief. It is clear that the debtor has just reason to complain if the law allows the creditor to proceed at once with his original cause of action without giving the debtor an opportunity to satisfy it as the parties agreed in the accord. Recognized principles, however, suffice to protect the debtor. His grievance is that the creditor has broken the promise of temporary forbearance necessarily implied from the accord, and he should be entitled to the same redress that is allowed for breach of contracts for temporary forbearance where there is no agreement of accord. A covenant or other contract for temporary forbearance is not a good plea at law to an action brought in violation of the contract.[97] To allow such a plea and give judgment for the defendant would involve the consequence that the plaintiff could never sue, though he had agreed to temporary forbearance only, and would be repugnant to the rule of the common law that if a cause of action is once suspended, it is gone forever; nor is there better ground for an equitable plea to the action, since equity would not grant a permanent injunction against the creditor's action, for the same difficulty that forbids upholding the plea as a legal defence is equally insuperable to an equitable defence. The defendant is entitled to delay, not to a defense on the merits. The debtor must, therefore, apply to a court of equity powers for a temporary injunction against the prosecution of the action, and such an injunction should be granted.[98] In the case of an accord there is a further difficulty. It will not greatly help the debtor to get a temporary injunction on the express or implied promise of the creditor to forbear if the creditor is permitted ultimately to refuse to accept the agreed satisfaction, and may then enforce his original cause of action. In order to give effectual relief, therefore, equity must specifically enforce the performance of the accord. As a court of law cannot give adequate relief, and as the promise of temporary forbearance necessarily included in the accord gives equity jurisdiction of the matter, there seems good reason for equity to deal with the whole matter by granting specific performance. Though there is strangely little authority upon the matter, and though in the few cases on the

97 Ford *v.* Beech, 11 Q. B. 852; Ray *v.* Jones, 19 C. B. N. S. 416; Dow *v.* Tuttle, 4 Mass. 414; Perkins *r.* Gilman, 8 Pick. 229; Winans *r.* Huston, 6 Wend. 471. See, however, Walker *v.* Nevill, 34 L. J. Ex. 73; Slater *r.* Jones, L. R. 8 Ex. 186; Newington *v.* Levy, L. R. 5 C. P. 607, 6 C. P. 180.

98 Compleat Attorney (1st ed.), 325; Blake *r.* White, 1 Y. & C. Ex. 420, 424, 426; Greely *v.* Dow, 2 Met. 176, 178. See also Billington *v.* Wagoner, 33 N. Y. 31; Bomeisler *v.* Forster, 154 N. Y. 229. But see Hall *r.* First Bank, 173 Mass. 16.

point the reasoning is not very full or satisfactory, the result here advocated seems to be justified by the decisions.[99]

Accord may itself be taken as satisfaction and is then a bar. Though an executory promise to give something in satisfaction of a cause of action cannot be while unperformed a legal bar to an action upon the original cause, the parties may, as has already been said, agree that an executory promise shall itself be the satisfaction of the old right; and if the claimant accepts a promise with that agreement, his original claim is at once and finally extinguished. Thereafter he must find his only remedy upon the new promise. This doctrine is modern,[1] and it may well be doubted whether early courts would have admitted the possibility, under any circumstances, of an executory simple contract extinguishing an existing cause of action;[2] but the principle seems logically correct, and is now well-settled law.[3]

Presumption that accord is not intended as satisfaction. It is often extremely difficult to determine as matter of fact whether the parties agreed that the new promise should be itself the satisfaction of the original cause of action, or whether they contemplated the performance of the accord as the satisfaction. Unless there is clear evidence that the former was intended, the latter kind of agreement must be presumed, for it is not a probable inference that a creditor intends merely an exchange of his present cause of action for another. It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was

[99] Very *v.* Levy, 13 How. 345, 349; Apperson *v.* Gogin, 3 Ill. App. 48; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144. See *Re* Hatton, L. R. 7 Ch. 723.

[1] Good *v.* Cheesman, 2 B. & Ad. 328, is regarded as the leading case on the point, but the doctrine was not clearly stated until after that decision.

[2] The reason given by Eyre, C. J., in Lynn *v.* Bruce, 2 H. Bl. 317, against the validity of unexecuted accords generally, that they are merely "substituting one cause of action in the room of another," is obviously as applicable to an agreement which is itself to be satisfaction of a cause of action as to an agreement where the performance is to be the satisfaction.

[3] Evans *v.* Powis, 1 Ex. 601; Buttigieg *v.* Booker, 9 C. B. 689; Edwards *v.* Hancher, 1 C. P. D. 111, 119; Acker *v.* Bender, 33 Ala. 230; Smith *v.* Elrod, 122 Ala. 269; Heath *v.* Vaughn, 11 Col. App. 384; Warren *v.* Skinner, 20 Conn. 356; Goodrich *v.* Stanley, 24 Conn. 613; Brunswick, etc., Ry. Co. *v.* Clem, 80 Ga. 534; Simmons *v.* Clark, 56 Ill. 96; Hall *v.* Smith, 10 Ia. 45, 15 Ia. 584; Whitney *v.* Cook, 53 Miss. 551; Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385; Worden *v.* Houston, 92 Mo. App. 371; Gerhart Realty Co. *v.* Northern Assur. Co., 94 Mo. App. 356; Frick *v.* Joseph, 2 N. Mex. 138; Perdew *v.* Tillma, 62 Neb. 865; Morehouse *v.* Second Nat. Bank, 98 N. Y. 503; Nassoiy *v.* Tomlinson, 148 N. Y. 326; Spier *v.* Hyde, 78 N. Y. App. Div. 151; Babcock *v.* Hawkins, 23 Vt. 561. See also Hunt *v.* Brown, 146 Mass. 253. Cp. Campbell *v.* Hurd, 74 Hun, 235; Wentz *v.* Meyersohn, 59 N. Y. App. Div. 130; Hosler *v.* Hursh, 151 Pa. 415.

performed. The earliest decision in which it was held that the accord itself might operate as an extinguishment of the creditor's claim was on an agreement of composition;[4] and it is in such instruments perhaps that it is most frequently and naturally inferred that the intention of the parties was to substitute at once the right to the agreed composition for the old claims.

Consequence of non-performance of accord. If such is the construction of the agreement, it must follow that even though the accord is never performed the creditor's right to sue on the old claim is lost.[5] If, however, it is the performance of the accord which is to be the satisfaction of the claim, the creditor may, on default in performance of the accord by the debtor, sue either on the accord or on the original cause of action;[6] and similarly, if the creditor, contrary to his agreement, sues on the original claim without giving opportunity for the performance of the accord, the debtor need make no attempt to use the accord as a ground for injunction, even though the local law permits him to do so, but may suffer judgment to go against him and resort to a separate action on the accord.[7]

Sealed contracts. A contract under seal presented some peculiar difficulties. The maxim "*Nihil tam conveniens est naturali aequitate, ut unumquodque dissolvi eo ligamine quo ligatum est,*" seemed to forbid discharge by accord and satisfaction as completely as by mere parol agreement. *Blake's case,*[8] however, decided that a right of action for unliquidated damages for breach of covenant could be discharged in this way. The Court distinguished the case from that of a covenant to pay a sum of money. "For there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti,* as by covenant, bill, or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing;[9] and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty, but when no certain duty accrues by the deed, but a wrong or default

4 Good *v.* Cheesman, 2 B. & Ad. 328.
5 Sioux City Stock Yards Co. *v.* Sioux City Packing Co., 110 Ia. 396.
6 Babcock *v.* Hawkins, 23 Vt. 561.
7 Hunt *v.* Brown, 146 Mass. 253.
8 6 Coke, 43 *b.*
9 In further illustration of the theory of our early law, that an obligation to pay money was an immediate conveyance or grant, rather than merely an executory promise to do something in the future, see Langdell, Sum. Cont., § 100; Pollock & Maitland, Hist. of Eng. Law (2d ed.), ii., 205; 8 Harv. L. Rev. 252; 14 id. 429.

subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea.[10]

Before breach of a covenant, not only was a parol agreement ineffectual to discharge it, but even though property were accepted in satisfaction the covenant was not discharged, whether the covenant was for the payment of money[11] or for the performance of some duty, breach of which would sound in damages.[12] Doubtless equity would, if necessary, enjoin the enforcement of any kind of bond[13] where satisfaction had been given either before or after maturity. The acceptance of property in satisfaction necessarily imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect to as a defence, even by courts of law. The reason sometimes given is that such a covenant amounts to a release.[14] The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided.[15] This latter reason is as applicable to the case of a parol contract never to sue as to the case of a covenant not to sue, so that it would seem that even a court of law might well have held satisfaction before breach a defence. There can now be no doubt that wherever equitable defences are allowed at law, there would be a good defence to an action at law on the covenant, and probably few courts would hesitate to accept such a defence, even though no statute had authorized the general use of equitable pleas.[16]

Debts of record. A debt of record presented a difficulty similar to that of a debt by specialty. Accordingly it could not be discharged at common law even by payment. By Statute of 4 Anne, c. 16, § 12,

[10] See to the same effect, Herzog *v.* Sawyer, 61 Md. 344, 352; Cabe *v.* Jameson, 10 Ired. L. 193; Smith *v.* Brown, 3 Hawks, 580.

[11] Spence *v.* Healey, 8 Ex. 668.

[12] Kaye *v.* Waghorne, 1 Taunt. 428; Berwick *v.* Oswald, 1 E. & B. 295; Harper *v.* Hampton, 1 H. & J. 622, 673; Smith *v.* Brown, 3 Hawks, 580.

[13] Steeds *v.* Steeds, 22 Q. B. D. 537; Nash *v.* Armstrong, 10 C. B. N. S. 259; Hurlbut *v.* Phelps, 30 Conn. 42; McCreery *v.* Day, 119 N. Y. 1.

[14] Deux *v.* Jefferies, Cro. Eliz. 352.

[15] Hodges *v.* Smith, Cro. Eliz. 623; Lacy *v.* Kynaston, 2 Salk. 575; S. C., 1 Ld. Ray. 690; 12 Mod. 551; Ford *v.* Beech, 11 Q. B. 852, 871. See also Smith *v.* Mapleback, 1 T. R. 441, 446; Ledger *v.* Stanton, Johns. & H. 687.

[16] Green *v.* Wells, 2 Cal. 584; McDonald *v.* Mountain Lake Co., 4 Cal. 335; Worrell *v.* Forsyth, 141 Ill. 22 (see also Starin *v.* Kraft, 174 Ill. 120; Jones *v.* Chamberlain, 97 Ill. App. 328); Munroe *v.* Perkins, 9 Pick. 298; Savage *v.* Blanchard, 148 Mass. 348; Siebert *v.* Leonard, 17 Minn. 433, 436; Armijo *v.* Abeytia, 5 N. Mex. 533, 545; Reichel *v.* Jeffrey, 9 Wash. 250.

Cases where a parol agreement to rescind or discharge a sealed contract is held effectual, also *a fortiori* imply that accord and satisfaction would be good.

this was changed in England. The English statute may be regarded as part of the American common law inheritance, but it did not cover the case of accord and satisfaction, and that has been held within comparatively recent times to constitute no defence to an action on the judgment.[17] It may be doubted, however, whether these decisions would now be followed anywhere. The Supreme Court of the United States, though it holds itself obliged to preserve the distinctions between law and equity as they existed a century ago, has held the defence good,[18] and other decisions are to the same effect.[19]

Requisites of satisfaction like those of consideration. Though the defence of accord and satisfaction was recognized long before the doctrine of consideration was developed, the requirements for a legally effective satisfaction became confused and regarded as identical with the requirements for the consideration of a promise. As an accord and satisfaction is an executed transaction, and as the validity of the satisfaction as a discharge of the previous cause of action cannot have rested on any view that the satisfaction was rather the consideration of a promise of perpetual forbearance than a technical extinction of the old cause of action, the essentials of consideration and of satisfaction might well have varied. But it was not unnatural that what had been regarded as inadequate to work a satisfaction of a cause of action should also have been regarded as insufficient consideration, and later that whatever was insufficient consideration should be inadequate also for the satisfaction of a cause of action. Brian, C. J., said in 1455 of an attempted satisfaction by part payment: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand."[20] This soon became settled law as to satisfaction, but the doctrine of consideration was expressly distinguished by Coke at least,

17 Riley *v.* Riley, 20 N. J. L. (Spencer) 114; Mitchell *v.* Hawley, 4 Denio, 414; Garvey *v.* Jarvis, 54 Barb. 179.

18 Boffinger *v.* Tuyes, 120 U. S. 198, 205.

19 *Re* Freeman, 117 Fed. Rep. 680, 684; Jones *v.* Ransom, 3 Ind. 327; McCullough *v.* Franklin Coal Co., 21 Md. 256; Savage *v.* Blanchard, 148 Mass. 348; Weston *v.* Clark, 37 Mo. 568, 572; Fowler *v.* Smith, 153 Pa. 639; Reid *v.* Hibbard, 6 Wis. 175. Accord and satisfaction was held a good plea to an action on a foreign judgment in Hardwick *v.* King, 1 Stew. (Ala.) 312.

20 Y. B. 33 Hen. VI. 48 A. pl. 32; 12 Harv. L. Rev. 521.

who held that though part payment of a debt could not in the nature of things be a satisfaction of the debt, it might be consideration for a promise.[21] Lord Ellenborough, however, made no such distinction, and regarded, apparently, consideration as a test both for satisfaction and for executory contracts. "There must be some consideration for the relinquishment of the residue; something collateral to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." [22]

Reasonableness of satisfaction. In *Cumber* v. *Wane*,[23] Pratt, C. J., said: "It must appear to the Court to be a reasonable satisfaction; or at least the contrary must not appear." But in modern cases no such test is applied. The same rule that governs the formation of contracts—that the adequacy of the consideration is for the parties—governs the satisfaction of causes of action. Thus in *Cooper* v. *Parker*,[24] Parke, B., said: "The Court cannot enter into a consideration of the value of the satisfaction, which upon the face of it is uncertain." So in *Curlewis* v. *Clark*, an incomplete bill of exchange was held a good satisfaction; Alderson, B., saying: "We cannot value the signature of the Earl of Mexborough; possibly it may be worth something as an autograph." [25]

Cases where satisfaction ineffectual. Though the common case where an agreed satisfaction is held ineffectual for lack of consideration arises when part of a liquidated and undisputed debt has been paid,[26] doubtless decisions on other facts would turn on similar principles.[27] Thus where performance of a duty other than a debt is held insufficient consideration to support a promise, such performance would also be held insufficient to satisfy any cause of action. The legal requirements in this respect for a valid satisfaction should, therefore, be sought under the heading of consideration.

Check sent in payment of disputed claim. It seems obvious that nothing can operate as a satisfaction, unless both debtor and creditor agree that it shall, but there is one commonly recurring state of facts where this principle seems to be lost sight of by many courts. The

21 Bagge *v.* Slade, 3 Bulst. 162.
22 Fitch *v.* Sutton, 5 East, 230, 232. The early cases are stated and discussed by Professor Ames in 12 Harv. L. Rev. 524.
23 1 Stra. 426.
24 15 C. B. 822, 828.
25 3 Ex. 375, 379. See also Reed *v.* Bartlett, 19 Pick. 273.
26 See these cases collected and distinctions discussed in 12 Harv. L. Rev. 525 *et seq.*; 1 Am. & Eng. Encyc. 413 *et seq.*
27 Leake on Contracts (4th ed.), 622.

case is this: A debtor sends to a creditor whose claim is unliquidated or disputed a check with a letter stating that the check is sent in full satisfaction of the claim, and that if the creditor is unwilling to accept it as such he must return it. The creditor takes the check, but immediately writes a letter stating that he refuses to accept the check as full satisfaction, but will apply it in reduction of the indebtedness. Upon these facts the English Court of Appeal held that there was no satisfaction of the cause of action,[28] and a few jurisdictions in the United States have made the same ruling.[29] But the great weight of authority in the United States is to the contrary.[30] It is said that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered.

Principles governing the question. If the parties are dealing orally with one another and the debtor offer the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms. If the creditor refuses to receive the check in full satisfaction and yet takes it, either he must have assented to the terms, or the debtor must have assented to the creditor's refusal, for the voluntary giving of the check by one, and the taking it by the other, if neither misunderstood the words that were spoken, necessarily indicate assent,[31] and it becomes a question of

28 Day *v.* McLea, 22 Q. B. D. 610.

29 Louisville, etc., Ry. Co. *v.* Helm, 22 Ky. L. Rep. 964; Rosenfield *v.* Fortier, 94 Mich. 29. See also Kistler *v.* Indianapolis R. Co., 88 Ind. 460; Mortlock *v.* Williams, 76 Mich. 568; Mitterwallner *v.* Supreme Lodge, 86 N. Y. Supp. 786; Krauser *v.* McCurdy, 174 Pa. 174; Rapp *v.* Giddings, 4 S. Dak. 492.

30 Potter *v.* Douglass, 44 Conn. 541; Hamilton *v.* Stewart, 108 Ga. 472; Ostrander *v.* Scott, 161 Ill. 339; Lapp *v.* Smith, 183 Ill. 179; Bingham *v.* Browning, 197 Ill. 122; Michigan Leather Co. *v.* Foyer, 104 Ill. App. 268; Talbott *v.* English, 156 Ind. 299, 313; Neely *v.* Thompson, 75 Pac. Rep. 117 (Kan.); Anderson *v.* Standard Granite Co., 92 Me. 429, 432; Fremont Foundry Co. *v.* Norton, 92 N. W. Rep. 1058, 1060 (Neb.); Nassoiy *v.* Tomlinson, 148 N. Y. 326; Logan *v.* Davidson, 162 N. Y. 624; Lewinson *v.* Montauk Theatre Co., 60 N. Y. App. Div. 572; Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489; De Lovenzo *v.* Hughes, 84 N. Y. Supp. 857; Petit *v.* Woodlief, 115 N. C. 120; Hull *v.* Johnson, 22 R. I. 66; McDaniels *v.* Rutland, 29 Vt. 230; Connecticut River Lumber Co. *v.* Brown, 68 Vt. 239. See also Bull *v.* Bull, 43 Conn. 455; Cooper *v.* Yazoo, etc., R. Co., 35 So. Rep. 162 (Miss.); Pollman Coal Co. *v.* St. Louis, 145 Mo. 651; McCormick *v.* St. Louis, 166 Mo. 315, 335; Perkins *v.* Hadley, 49 Mo. App. 556. As to the necessity of an explicit statement that the check sent is intended as full payment, cp. Hillestad *v.* Lee, 91 Minn. 335; Fremont Foundry Co. *v.* Norton, 92 N. W. Rep. 1058 (Neb.); Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489; Amer *v.* Folk, 28 N. Y. Misc. Rep. 598; Boston Rubber Co. *v.* Peerless Wringer Co., 58 Vt. 551; Van Dyke *v.* Wilder, 66 Vt. 583.

31 Potter *v.* Douglass, 44 Conn. 541; Cooper *v.* Yazoo, etc., Ry. Co., 35 So. Rep. 162 (Miss.); McCormick *v.* St. Louis, 166 Mo. 315. See also McKeen *v.* Morse, 49 Fed. Rep. 253; Porter *v.* Cook, 114 Wis. 60.

fact, what the bargain was to which they assented. But if the debtor laid down the check and departed, saying, if this is taken it is full satisfaction, it is hard to see why the creditor may not steal or convert the check. Doubtless, if he take the check, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent,[32] and even if he indicate by some act or word at the time that he takes the check that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is an expression of assent unless informed to the contrary.[33] But if as soon as the check is taken notice is promptly given to the debtor that it is not taken as satisfaction, it seems impossible to find the elements of a bargain. The most forcible argument upon the other side is that the creditor should not be allowed to assert his tortious conversion of the check, though the effect of such a ruling is to fix upon the creditor a bargain which he never made. The case of sending the check by mail is essentially the same as that just discussed, in that the creditor is given the power in fact to take the check without making an agreement with the debtor, though forbidden to exercise such power.

Accord and satisfaction with a third person — English cases. The question whether accord and satisfaction entered into by the creditor with a person other than the debtor discharges the debt has been much disputed. Even though the third person pays in money the exact amount of the debt there can in strictness be at most an accord and satisfaction, for, as payment by A. is a different thing from payment by B., the obligation has not been performed according to its tenor. In the early case of *Grymes* v. *Blofield*[34] the defendant pleaded to an action of debt satisfaction given by a third person, but it was held no plea. This is inconsistent with a still earlier case thus stated by Fitzherbert:[35] "If a stranger doth trespass to me and one of his

[32] Creighton *v.* Gregory, 142 Cal. 34; Keck *v.* Hotel Owners' F. I. Co., 89 Ia. 200; Le Page *v.* Lalance Mfg. Co., 90 N. Y. Supp. 676.

[33] Hull *v.* Johnson, 22 R. I. 66. In this case the debtor wrote on the check: "Good only . . . if endorsed in full of all demands." The creditor struck this out and cashed the check. The court said: "The erasure on the check was not made in the presence of the defendants, and could not have been known to them until the check had reached their bank and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money."

[34] Cro. Eliz. 541. This case is elaborately considered in Jones *v.* Broadhurst, 9 C. B. 173, 195 *et seq.*, and the result of an examination of the original rolls is stated.

[35] Tit. "Barre," pl. 166.

relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" *Grymes* v. *Blofield* was followed in *Edgcombe* v. *Rodd*,[36] and though its correctness seems to have been doubted in *Jones* v. *Broadhurst*,[37] where Cresswell, J., considered the question elaborately, the English law was settled soon after by several cases thus summarized by Baron Parke in *Simpson* v. *Eggington*.[38]

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones* v. *Broadhurst*, 9 C. B. 193; *Belshaw* v. *Bush*, 11 C. B. 191, and *James* v. *Isaacs*, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw* v. *Bush*, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case of *James* v. *Isaacs*, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad." [39]

In *Simpson* v. *Eggington*[40] it was held that ratification might be made at the trial of such an action.

American cases. In the United States the weight of authority sustains the validity of the defence,[41] though wherever there is any evidence that the payment or satisfaction was made on behalf of

[36] 5 East, 294. See also Thurman *v.* Wild, 11 A. & E. 453.

[37] 9 C. B. 173, 193.

[38] 10 Ex. 844.

[39] See in accord with James *v.* Isaacs, Kemp *v.* Balls, 10 Ex. 607; Lucas *v.* Wilkinson, 1 H. & N. 420.

[40] 10 Ex. 844. See also Neely *v.* Jones, 16 W. Va. 625.

[41] Harrison *v.* Hicks, 1 Port. (Ala.) 423; Underwood *v.* Lovelace, 61 Ala. 155; Martin *v.* Quinn, 37 Cal. 55; White *v.* Cannon, 125 Ill. 412; Poole *v.* Kelsey, 95 Ill. App. 233, 240; Ritenour *v.* Mathews, 42 Ind. 7; Binford *v.* Adams, 104 Ind. 41; Thompson *v.* Conn. Mut. L. I. Co., 139 Ind. 325, 345; Harvey *v.* Tama County, 53 Ia. 228; Porter *v.* Chicago, etc., Ry. Co., 99 Ia. 351, 359; Marshall *v.* Bullard, 114 Ia. 462; Oliver *v.* Bragg, 15 La. Ann. 402; Leavitt *v.* Morrow, 6 Ohio St. 71; Royalton *v.* Cushing, 53 Vt. 321, 326; Crumlish's Admr. *v.* Central Imp. Co., 38 W. Va. 390; Gray *v.* Herman, 75 Wis. 453.

the debtor and was ratified by him, these facts are relied upon.[42] In New York, however, the strictness of the early English law was long maintained,[43] and a similar result has been reached in Kentucky[44] and Missouri.[45]

Ratification by the debtor. The difference in the authorities is of less importance than it might seem on first consideration. The courts which require the satisfaction to be made on behalf of the debtor and ratified by him are disposed to find these facts upon rather slight evidence. The difficulty is generally that the third person did not purport to act on behalf of the debtor. If the payment was so made as to be capable of ratification, there can be no difficulty so far as the debtor himself is concerned in making out such ratification. The mere assertion by the debtor that the debt has been satisfied though made by plea or at the trial after action has been brought on the debt is sufficient. If the question whether the debt has been paid comes in issue between the creditor and third persons, then indeed trouble may arise over the question of ratification.

Equitable defence. Even though satisfaction from a third person does not legally discharge the obligation, there may be ground for an equitable defence. There must be implied from the creditor's acceptance of the satisfaction a promise to forbear perpetually to sue the original debtor. Whether the original debtor can enforce this promise in any jurisdiction should depend upon the doctrines there held in regard to the enforcement by third persons of contracts for their benefit or for the discharge of obligations due to them.[46] If the promise is enforceable by the original debtor, either a permanent injunction or an equitable plea at law is an appropriate remedy.

Rescission of arrangement. It has been held in England that before ratification by the debtor, it is competent for the creditor and the third person to rescind their arrangement, and the original debtor

[42] See the careful opinions in Snyder *v.* Pharo, 25 Fed. Rep. 398, and Jackson *v.* Pennsylvania R. Co., 66 N. J. L. 632.

[43] Clow *v.* Borst, 6 Johns. 37; Daniels *v.* Hallenbeck, 19 Wend. 408; Bleakley *v.* White, 4 Paige, 654; Muller *v.* Eno, 14 N. Y. 597, 605; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Dusenbury *v.* Callaghan, 8 Hun, 541, 544. Cp. Hun *v.* Van Dyck, 26 Hun, 567; affirmed, without opinion, 92 N. Y. 660. See also Wellington *v.* Kelly, 84 N. Y. 543; Knapp *v.* Roche, 92 N. Y. 329, 334. But in Danziger *v.* Hoyt, 120 N. Y. 190, 194, the court say: "But if ratification of the latter (*i. e.*) the debtor may be deemed essential, it appears by the fact of her asserting payment and seeking to avail herself of the benefit of the receipt as a defense."

[44] Stark's Admr. *v.* Thompson's Exrs., 3 T. B. Mon. 296, 302.

[45] Armstrong *v.* School District, 28 Mo. App. 169. See also Carter *v.* Black, 4 Dev. & Bat. 425, 427.

[46] See *supra*, p. 242 *et seq.*; Armstrong *v.* School District, 28 Mo. App. 169.

will then still continue liable.[47] In this case, too, if it be granted that satisfaction by a third person is not a legal discharge, the correctness of the result depends on the doctrine held as to the right of parties to a contract in which a third person is interested, to rescind it.[48]

Cancellation and Surrender.

Normal method of discharging specialty. At common law the normal method of discharging a contract under seal was by the cancellation of the document. As such a contract was not merely evidence of the intent of the parties, but was itself regarded as the obligation, even more fully than a railroad or government bond is to-day, when the physical identity of the document was destroyed, the obligation ceased to exist.[49] Though the destruction of the document was accidental, the legal obligation was destroyed, and equitable relief was necessary to save the obligee's rights.[50]

Surrender insufficient in early law. In order to give a contract under seal validity, delivery by the obligor was essential. What constitutes delivery is a question which to-day depends largely on intention, but originally the physical act of delivery was undoubtedly the essential thing. Surrender might have been regarded as the converse of delivery and for that reason as undoing the effect of delivery. This, however, was not the doctrine of our early law, which held that "even though the specialty was upon payment surrendered to the obligor, the latter was still not safe unless he cancelled or destroyed the specialty, for, if the obligee should afterwards get possession of the instrument, even by a trespass, the obligor, notwithstanding the payment, the surrender, and the trespass, would have no defence to an action at law by the obligee." [51]

Equitable relief. Equity, however, early gave relief in such cases and at the present day there can be no doubt that even a voluntary

47 Walter *v.* James, L. R. 6 Ex. 124. In this case the creditor when he received payment thought that it was authorized by the debtor, and the fact that he accepted the payment under this mistake had weight with the court.

48 See *supra*, p. 273, *et seq.*

49 9 Harv. L. Rev. 49, by Professor Ames. This is illustrated by the doctrine in regard to alteration. See *infra*, p. 845 *et seq.*

50 9 Harv. L. Rev. 49.

51 9 Harv. L. Rev. 49, 54, by Professor Ames, citing "Y. B. 5 Hen. IV. 2–6; Y. B. 22 Hen. VI. 522–4; Y. B. 37 Hen. VI. 14–3; Y. B. 5 Ed. IV. 4–10; Y. B. 1 Hen. VII. 14–2; Waberley *v.* Cockerell, Dy. 51, pl. 12; Cross *v.* Powell, Cro. El. 483; Atkins *v.* Farr, 2 Eq. Ab. 247; Licey *v.* Licey, 7 Barr, 251, 253. In the last case Gibson, C. J., said: 'Even if a bond thus delivered [to the obligor] but not canceled come again to the hands of the obligee, though it be valid at law, the obligor will be relieved in equity.'"

surrender of a bond, if made with intent to extinguish it, would be effectual between the parties.[52]

Bills and notes — Insurance policies. Cancellation and surrender being appropriate means of discharge for sealed contracts are similarly appropriate to discharge other formal obligations as bills and notes[53] or policies of insurance, and in jurisdictions where written contracts are by statute presumptively founded on good consideration[54] it may be that all written contracts are thereby given a formal character.

Simple contracts. The effect of cancellation or surrender upon written contracts which are not formal contracts must depend somewhat upon the particular circumstances of the case. Surrender or cancellation frequently forms part of and is evidence of a parol agreement to discharge the contract. The validity of such an agreement depends upon rules previously considered.[55] Even though it is impossible to make out a binding parol contract of discharge, the rules of evidence may save the original promisor from liability upon his contract; for the voluntary cancellation of the writing by the promisee may have deprived him of his only legal evidence.[56] If the writing is still in existence the mere fact that it has been surrendered would not, however, it seems, prevent its use in evidence, or prevent the admis-

[52] Hurst *v.* Beach, 5 Madd. 351; Beach *v.* Endress, 51 Barb. 570; Picot *v.* Sanderson, 1 Dev. 309; Wentz *v.* Dehaven, 1 S. & R. 317; Licey *v.* Licey, 7 Pa. 251; Albert's Exrs. *v.* Ziegler's Exrs., 29 Pa. 50; Piercy's Heirs *v.* Piercy's Exrs., 5 W. Va. 199.

[53] Voluntary destruction of a note operates as a discharge of the maker. Gilbert *v.* Wetherell, 2 Sim. & St. 358; **Darland *v.*** Taylor, 52 Ia. 503; McDonald *v.* Jackson, 56 Ia. 643; Fisher *v.* Mershon, 3 Bibb. 527; Vanauken *v.* Hornbeck, 2 Green, 178; Blade *v.* Noland, 12 Wend. 173. So of a bond. Gardner *v.* Gardner, 22 Wend. 526; Bond *v.* Bunting, 78 Pa. 210, 218; Rees *v.* Rees, 11 Rich. Eq. 86.

Surrender of a note to the maker with intent to extinguish it has that effect. Sherman *v.* Sherman, 3 Ind. 337; Gibson *v.* Gibson, 15 Ill. App. 328; Denman *v.* McMahin, 37 Ind. 241, 246; Peabody *v.* Peabody, 59 Ind. 556; Slade *v.* Mutrie, 156 Mass. 19; Stewart *v.* Hidden, 13 Minn. 43; Marston *v.* Marston, 64 N. H. 146; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265; Larkin *v.* Hardenbrook, 90 N. Y. 333; Jaffray *v.* Davis, 124 N. Y. 164, 170; Kent *v.* Reynolds, 8 Hun, 559; Bridgers *v.* Hutchins, 11 Ired. 68; Melvin *v.* Bullard, 82 N. C. 33; Dittoe's Admr. *v.* Cluney's Exrs., 22 Ohio St. 436; Ellsworth *v.* Fogg, 35 Vt. 355; Lee's Exrs. *v.* Boak, 11 Gratt. 182.

If the surrender was after maturity it is immaterial whether surrender is still to be regarded as an equitable defense or has become a legal extinction of the obligation. If, however, surrender was before maturity, and the document was wrongfully obtained and put in circulation also before maturity by a party to whom it was made payable or indorsed, the question would be vital. Where the Negotiable Instruments Law is in force (see *supra*, p. 821, n. 47), it would seem that the maker would be liable again to a holder in due course. Crawford's Neg. Inst. L., § 35.

[54] See *supra*, p. 217, n. 25.

[55] See *supra*, p. 815 *et seq.*

[56] See *infra*, p. 847.

sion of secondary evidence of its contents if the holder of it refused to produce it.

Alteration.

Common-law rule — Pigot's case. It was an early doctrine of the common law that alteration avoided a deed. The leading case is *Pigot's case*,[57] and the doctrine is stated therein by Lord Coke, as follows:

"These points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

"Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed.

. . . . .

"If a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto*, avoids the whole deed, as it is held in 14 H. 8, 25, 26. For although they are several covenants, yet it is but one deed, 3 H. 7, fol. 5, a. If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both. *Vide* the case of Matthewson, Mich. 39 & 40 Eliz. in the Fifth Part of my Reports, fol. 23 a."

Distinction between Conveyances and Covenants.

Conveyance though altered vests title, but covenant must be valid when enforcement sought. A distinction should be observed between a deed of conveyance and a bond or covenant obliging the maker to some future performance. If a conveyance is valid when delivered, the title to the property vests in the grantee, and no subsequent alteration[58] or loss[59] of the deed can affect the title of the grantee, though

57 11 Coke, 26*b*.

58 Argoll *v.* Cheney, Palmer, 402; Doe *v.* Hirst, 3 Stark. 60; Agricultural Cattle Ins. Co. *v.* Fitzgerald, 16 Q. B. 432; West *v.* Steward, 14 M. & W. 47; United States *v.* West, 22 How. 315; Mallory *v.* Stodder, 6 Ala. 401; Sharpe *v.* Orme, 61 Ala. 263; Ransier *v.* Vanorsdol, 50 Ia. 130; Hollingsworth *v.* Holbrook, 80 Ia. 151; Slattery *v.* Slattery, 120 Ia. 717; Barrett *v.* Thorndike, 1 Me. 73; Goodwin *v.* Norton, 92 Me. 532; Hatch *v.* Hatch, 9 Mass. 307; Chessman *v.* Whittemore, 23 Pick. 231, 233; Alexander *v.* Hickox, 34 Mo. 496; Woods *v.* Hilderbrand, 46 Mo. 284; Donaldson *v.* Williams, 50 Mo. 407; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556; Chesley *v.* Frost, 1 N. H. 145; Jackson *v.* Gould, 7 Wend. 364; Herrick *v.* Malin, 22 Wend. 388; Waring *v.* Smyth, 2 Barb. Ch. 119; Rifener *v.* Bowman, 53 Pa. 318; Booker *v.* Stivender, 13 Rich. L. 85, 90; Morgan *v.* Elam, 4 Yerg. 375; Stanley *v.* Epperson, 45 Tex. 645; North *v.* Henneberry, 44 Wis. 306.

In Argoll *v.* Cheney, Palmer, 402, a little boy had torn the seals off a deed to guide the uses of a recovery, but the effect of the deed was held not destroyed.

59 Bolton *v.* Bishop of Carlisle, 2 H. Bl. 259, 263, per Eyre, C. J.. "God forbid that a man should lose his estate by losing his title deeds." Donaldson *v.* Williams, 50 Mo. 407.

for want of evidence he may find difficulty in enforcing his title. A bond or covenant for future performance, however, must be valid when the obligee seeks to enforce it, and the rules in *Pigot's case* are applicable.[60]

Conveyances of corporeal and incorporeal hereditaments. This distinction between conveyances and obligations, while clear on principle, was not that which the early English law adopted. As to conveyances of corporeal hereditaments where there was a transfer of possession, it was early held that a subsequent alteration could not divest a title which had passed by the deed,[61] for it was said that the property lay in livery and the deed was but evidence of the transfer. But in the case of incorporeal hereditaments, which lie in grant, it was otherwise; the title was regarded as continuously dependent on the deed, and a subsequent alteration divested a title previously passing by the deed.[62]

[60] Compare with Argoll *v.* Cheney, n. 58, *supra;* Bayly *v.* Garford, March, 125, where the seal of two obligors had been eaten by mice and rats, and this was thought to discharge a third person jointly bound with them, though his seal was uninjured. See also Michaell's Case, Owen, 8; Nichols *v.* Haywood, Dyer, 59*a;* Seaton *v.* Henson, 2 Lev. 220; S. C., 2 Show. 28. The numerous modern decisions are cited *passim infra.*

[61] Bro. Ab. "Lease," pl. 16; Moore *r.* Waldron, 1 Rolle, 188; Argoll *v.* Cheney, Palm. 402; Miller *v.* Manwaring, Cro. Car. 397, 399; Woodward *v.* Aston, 1 Vent. 296; Nelthorp *v.* Dorrington, 2 Lev. 113; Lady Hudson's Case, cited in 2 Vern. 476, and Ch. Prec. 235; Doe *v.* Hirst, 3 Stark. 60.

[62] Miller *v.* Manwaring, Cro. Car. 397, 399; Moor *v.* Salter, 3 Bulstr. 79. In Miller *v.* Manwaring, the report reads: "And Jones and Berkley, Justices, . . took a difference when an estate loseth his essence by a deed, *viz.*, where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent-charge, or such like, if the deed be rased after delivery, it determines the estate and makes it void, but when the estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the estate although it destroys the deed." The court, therefore, held rasure in a lease did not avoid the lessee's estate. Croke's opinion was, however, that the rasure destroyed the deed and also the estate of the lessee, as by a surrender.

So in Gilbert on Evidence (1st ed., p. 84, 6th ed., p. 75), "There is a difference to be taken between things that lie in livery, and things that lie in grant, for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed must be shown." See also *ibid.* 1st ed., p. 109, 6th ed., p. 95.

In Woodward *r.* Aston, 1 Vent. 296, 297 (1677), "The Court said in this case that a rent or other grant was not lost by the destruction of the deed, as a bond or *chose en action* was. (*Quære*, if the party himself cancel it.)"

The Statute of Frauds introduced a new element into the case, since it made impossible the transfer or surrender (except by operation of law) of an estate without a writing. Consequently even voluntary cancellation of a lease granting an estate within the statute could not operate as a surrender. Magennis *r.* McCulloch, Gilb. Eq. 236; Leech *r.* Leech, 2 Ch. Rep. 100; Roe *v.* York, 6 East, 86.

Distinction not now essential. By the present English law, however, a title once vested whether to corporeal or incorporeal property cannot be divested,[63] and probably the distinction of the earlier law would not now be followed in this country.[64]

Substantive law and evidence — Equitable relief. The question of substantive law is complicated with the question of evidence. The original reason that a deed was discharged by alteration applied equally to the loss or accidental destruction of such an instrument. The deed was itself the obligation, not merely evidence of it, and if the deed ceased to exist in its original form the obligation necessarily ceased. But an obvious consequence of alteration, loss, or destruction was a difficulty of proving that a deed of a particular character had been made. In case of accidental loss[65] or destruction[66] courts of equity early gave relief, and later courts of law made equitable relief unnecessary by accepting secondary evidence of the deed and enforcing its provisions.[67] But alteration was regarded as due, if not to wrongdoing, at least to laches of the obligee or grantee, and equity gave him no relief.[68] If a court of law also would not receive in evidence

63 The old distinction was criticised by Eyre, C. J., in Bolton *v.* The Bishop of Carlisle, 2 H. Bl. 259, 263: "I hold clearly that the cancelling a deed will not divest property, which has once vested by transmutation of possession, and I would go farther and say that the law is the same with respect to things which lie in grant. In pleading a grant, the allegation is that the party at such time '*did grant*,' but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted. The question in that case is, Whether the party *did* grant? To prove this the best evidence must be produced, which is the deed: but if that be destroyed, other evidence may be received to shew that the thing was once granted."

64 It was stated as law, however, in Lewis *v.* Payn, 8 Cow. 71.

65 Griffin *v.* Boynton, 2 Nelson, 82; Collet *v.* Jaques, 1 Eq. Cas. Ab. 32, pl. 2; Lightbone *v.* Weeden, 1 Eq. Cas. Ab. 24; pl. 7; so in the case of a lost bill of exchange. Tercese *v.* Geray, Finch, 301.

66 Brown *v.* Savage, Finch, 184; Bennett *v.* Ingoldsby, Finch, 262; Brookbank *v.* Brookbank, 1 Eq. Cas. Ab. 168, pl. 7; Wilcox *v.* Stuart, 1 Vern. 78; Sanson *v.* Rumsey, 2 Vern. 561, and note.

67 See 1 Greenleaf, Ev. § 563, *b.*; Leake, Cont. (4th ed.), 580. In the case of a negotiable instrument the aid of a court of equity remained necessary, for the plaintiff in such a case could not fairly be given relief except upon the terms of giving a bond to indemnify the defendant from possible subsequent liability on the instrument if it were found. See 2 Ames Cas. B. & N. 38, 42, n. But this was not applied to non-negotiable instruments. Wain *v.* Bailey, 10 A. & E. 616. And in the case of negotiable instruments, reformed procedure or statutes have made resort to equity unnecessary in many jurisdictions. 2 Ames Cas. B. & N. 19, n.

68 Sel. C. Chanc. *temp.* King, 24. In Arrison *v.* Harmstead, 2 Barr, 191, 193, counsel argued that equity would reform an altered deed in favor of a purchaser, but Gibson, C. J., interrupted, "The deed is dead and equity cannot put life into it." This was cited with approval in Wallace *v.* Harmsted, 44 Pa. 492, 494. See also Marcy *v.* Dunlap, 5 Lans. 365.

the altered deed or secondary proof of its contents, the consequence would be to deprive any grantee or obligee of all legal rights in any case where such rights could be shown only by proof of the deed. Even if the deed vested an estate in the grantee prior to the alteration, no one would be bound to respect the title if the only legal evidence of it were destroyed. The case is analogous to that of the voluntary destruction of a conveyance by the grantee. Though this is not a reconveyance of the estate, the effect is similar if the grantee cannot prove his title nor show that the grantor's title has been divested. The rule of evidence is often broadly enough stated to lead to these results. In the last edition of Greenleaf on Evidence it is said that if a writing has been destroyed by the party wishing to prove its contents no secondary evidence will be received, unless the party can show that the destruction was not for the purpose of suppressing evidence or any fraudulent purpose.[69] No English cases, however, are cited which support so severe a rule. On the contrary, the English courts have held that not only in the case of alteration by a stranger may the altered deed be given in evidence as proof that a title passed,[70] but that this may be done even where the alteration was chargeable to the party offering the deed,[71] and similarly that the cancellation of a conveyance does not prevent proof by one consenting to the cancellation that such a conveyance was made.[72] The Supreme Court of Alabama has followed the English decisions.[73]

Rule in the United States. In this country alteration by a stranger does not generally avoid a deed, so that such a deed can of course be given in evidence, but it has been held generally, in accordance with the rule of evidence stated above, that if a material alteration is fraudulently made the altered deed cannot thereafter be given in evidence.[74] Whether this in effect transfers the title back to the

[69] 1 Greenleaf, Ev. (16th ed.), § 563, *b*, citing numerous decisions.

[70] Doe *v.* Hirst, 3 Stark. 60; Hutchins *v.* Scott, 2 M. & W. 809; West *v.* Steward, 14 M. & W. 47. See also Woods *v.* Hilderbrand, 46 Mo. 284; Jackson *v.* Gould, 7 Wend. 364.

[71] Agricultural Ins. Co. *v.* Fitzgerald, 16 Q. B. 432.

[72] Ward *v.* Lumley, 5 H. & N. 656. See also S. C., 5 H. & N. 87; Harris *v.* Owen, West Ch. 527; S. C., *sub nom.* Harrison *v.* Owen, 1 Atk. 520.

[73] Alabama Land Co. *v.* Thompson, 104 Ala. 570; Burgess *v.* Blake, 128 Ala. 105; Harper *v.* Reaves, 132 Ala. 625. See also Woods *v.* Hilderbrand, 46 Mo. 284; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556.

[74] Chesley *v.* Frost, 1 N. H. 145; Babb *v.* Clemson, 10 S. & R. 419; Withers *v.* Atkinson, 1 Watts, 236; Bliss *v.* McIntyre, 18 Vt. 466; Newell *v.* Mayberry, 3 Leigh, 250; Batchelder *v.* White, 80 Va. 103.

So of a written contract. Hayes *v.* Wagner, 89 Ill. App. 390.

The numerous decisions holding that a writing with an apparent alteration cannot be received in evidence unless the alteration is explained necessarily involve the same point. Decisions which allow such documents to be

grantor depends on whether the rule is aimed solely against the party guilty of the fraudulent alteration and his heirs or donees, or whether even a *bona fide* purchaser from him would acquire no better title. It may be urged that if a purchaser is protected the fraudulent person is in effect given the benefit of his title by being allowed to sell it, though he cannot directly enforce it. Accordingly the Pennsylvania Supreme Court has held that a *bona fide* purchaser can no more assert a title than his wrongdoing grantor.[75] This conclusion is supported by the rule in regard to executory contracts avoided by alteration. Even though the contract is negotiable an innocent purchaser acquires no rights.[76]

Rights of creditors. The rights of creditors are also frequently involved. If the owner of property is so deeply indebted that he could not legally make a voluntary conveyance of it, he cannot be allowed to produce the same effect by destroying the evidence of his title by alteration or cancellation of the conveyance. His creditors may levy on the property. If, however, the debtor cancelled a deed for adequate consideration, or if he had other property sufficient to satisfy his debts, the creditors should have no greater rights than their debtor had, except so far as recording acts or other statutes may provide.[77]

Voluntary destruction of conveyance. The voluntary destruction or cancellation by the grantee of a conveyance is not ordinarily done for any fraudulent purpose, but it is an intentional destruction of the appropriate evidence of his title, and it would seem that a court might as well decline to allow a grantee who has done this for the very purpose of depriving himself of his rights to prove his title by secondary evidence, as to deny that privilege to one who has been guilty of some fraudulent purpose. Many cases accordingly hold that neither the grantee nor any one claiming under him can assert his title after such cancellation.[78] These decisions have not met

received in evidence on proof of the signature, leaving the question of alteration to be decided as an issue in the case, perhaps have a contrary implication. These decisions are hereafter referred to.

75 Arrison *v.* Harmstead, 2 Barr, 191, 197; Wallace *v.* Harmstad, 15 Pa. 462; Wallace *v.* Harmstad, 44 Pa. 492. See also Marr *v.* Hobson, 22 Me. 321. But see Chesley *v.* Frost, 1 N. H. 145.

76 See *infra*, p. 866.

77 See Steeley's Creditors *v.* Steeley, 23 Ky. L. Rep. 996.

78 Thompson *v.* Thompson, 9 Ind. 323; Patterson *v.* Yeaton, 47 Me. 308, 314; Trull *v.* Skinner, 17 Pick. 213, 215; Howe *v.* Wilder, 11 Gray, 267 (but see Chessman *v.* Whittemore, 23 Pick. 231); McAllister *v.* Mitchner, 68 Miss. 672, 679; Potter *v.* Adams, 125 Mo. 118; Farrar *v.* Farrar, 4 N. H. 191; Bank *v.* Eastman, 44 N. H. 431; Sawyer *v.* Peters, 50 N. H. 143; Dukes *v.* Spangler,

uniform approval in this country,[79] but there are not many cases to the contrary. Cases are not in point where primary evidence of the destroyed deed was obtainable, or where the party seeking to use secondary evidence was not bound by the default or estoppel binding the original grantee. Thus the doctrine is applicable only to unrecorded deeds,[80] for when a deed has been recorded and subsequently fraudulently altered or dstroyed, there is no difficulty of proof if the statute makes a copy from the records primary evidence. If, however, a deed is altered before it is recorded, the record can afford no help.[81] If a writing is not necessary to the transfer of property, as is the case with chattel property, alteration of a bill of sale or other writing conveying such property will not prevent proof of the transfer.[82]

Alteration of separable part of a deed. A deed to which there are several parties will not be avoided as to one party by the alteration of a provision which relates wholly to other parties.[83] Also a deed may

35 Ohio St. 119 (see Spangler *v.* Dukes, 39 Ohio St. 642); Wiley *v.* Christ, 4 Watts, 196, 199; Howard *v.* Huffman, 3 Head, 562; Bliss *v.* McIntyre, 18 Vt. 466 (lease); Parker *v.* Kane, 4 Wis. 1, 22 How. 1 (but see Rogers *v.* Rogers, 53 Wis. 36; Slaughter *v.* Bernards, 97 Wis. 184, 190).

So where the name of the grantee in a deed was changed with the concurrence of the grantee first named, it was held he could not afterwards claim title in himself. Abbott *v.* Abbott, 189 Ill. 488.

[79] Cunningham *v.* Williams, 42 Ark. 170; Diver *v.* Friedheim, 43 Ark. 203; Cranmer *v.* Porter, 41 Cal. 462; Weygant *v.* Bartlett, 102 Cal. 224; Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 Conn. 262; Furguson *v.* Bond, 39 W. Va. 561. See further 2 Devlin on Deeds, § 300 *et seq.*; 2 Jones on Real Property, § 1258.

[80] See cases cited in note 78, *supra*; Wheeler *v.* Single, 62 Wis. 380. See also Van Riswick *v.* Goodhue, 50 Md. 57.

[81] Marr *v.* Hobson, 22 Me. 321. See also Moelle *v.* Sherwood, 148 U. S. 21; Respass *v.* Jones, 102 N. C. 5. Cp. Chessman *v.* Whittemore, 23 Pick. 231.

[82] Ransier *v.* Vanorsdol, 50 Ia. 130; Babb *v.* Clemson, 10 S. & R. 419.

[83] Doe *v.* Bingham, 4 B. & Ald. 672; Agricultural Cattle Ins. Co. *v.* Fitzgerald, 16 Q. B. 432, 440; Robinson *v.* Phœnix Ins. Co., 25 Ia. 430; Shelton *v.* Deering, 10 B. Mon. 405; Bird *v.* Bird, 40 Me. 394; Kendall *v.* Kendall, 12 Allen, 92; Herrick *v.* Baldwin, 17 Minn. 209; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556; Wright *v.* Kelley, 4 Lans. 57, 63; Arrison *v.* Harmstead, 2 Barr, 191, 194. But see Pigot's Case, 11 Coke, 26*b*.

In Woods *v.* Hilderbrand, 46 Mo. 284, and Burnett *v.* McCluey, 78 Mo. 676, it was held that an alteration in the description of one tract in a deed, whatever its effect on the conveyance of this tract, would not affect the validity of the deed as to another tract. But see Powell *v.* Pearlstine, 43 S. C. 403; Bowser *v.* Cole, 74 Tex. 222, where it was held that the insertion of an additional tract avoided a mortgage as to the tract originally included.

And similarly the addition in a mortgage of other notes than that which it was actually given to secure avoids the mortgage as to all the notes. Johnson *v.* Moore, 33 Kan. 90; Russell *v.* Reed, 36 Minn. 376.

In Parke Co. *v.* White River Lumber Co., 110 Cal. 658, it was held that alteration of a contract secured by a mortgage discharged the mortgage as far as the contract was concerned, but not so far as a separate note also secured by the same mortgage was concerned.

operate both as a conveyance and as an obligation. Indeed most conveyances contain covenants. In such a case a material wrongful alteration will discharge the obligation, though it may not divest the title conveyed,[84] except in so far as the grantee's lack of legal evidence to prove his title by record or otherwise may in effect revest the grantor with the property. Accordingly, when a mortgage is materially and wrongfully altered by the mortgagee, any executory right which the mortgage deed gives is thereby discharged,[85] as for instance a right to enter on the mortgagor's premises and take mortgaged chattels.[86] But the mortgaged estate is still in the mortgagee, where the common law theory of the effect of a mortgage prevails.[87] Where a mortgage is held to give the mortgagee only a lien, however, such alteration discharges the lien.[88] Alteration of the mortgage in such a way as to invalidate it does not, however, discharge a note given with the mortgage for the mortgage debt.[89] When alteration of the note will not only avoid the note, but altogether discharge the debt, will be discussed hereafter.[90]

Kinds of Contract to which the Rule is Applicable.

Originally applicable to specialties. The rule denying recovery where a writing has been altered might, so far as relates to the fundamental reason of the rule, have been confined to specialities, which by our law are more than mere evidence of obligations,[91] but this reason was early obscured, and the rule was largely rested on principles of evidence and policy that were equally applicable to any written contract. It is true that the rule was first extended from deeds to bills

84 Ward *v.* Lumley, 5 H. & N. 87, 656; Withers *v.* Atkinson, 1 Watts, 236; Arrison *v.* Harmstead, 2 Barr, 191, 194; North *v.* Henneberry, 44 Wis. 306.

85 Harris *v.* Owen, West Ch. 527; S. C., *sub. nom.* Harrison *v.* Owen, 1 Atk. 520; Cutler *v.* Rose, 35 Ia. 456; Hollingsworth *v.* Holbrook, 80 Ia. 151; Johnson *v.* Moore, 33 Kan. 90; Coles *v.* Yorks, 28 Minn. 464; Pereau *v.* Frederick, 17 Neb. 117; Kime *v.* Jesse, 52 Neb. 606; Waring *v.* Smyth, 2 Barb. Ch. 119; Marcy *v.* Dunlap, 5 Lans. 365; McIntyre *v.* Velte, 153 Pa. 350; Powell *v.* Pearlstine, 43 S. C. 403, 409.

86 Hollingsworth *v.* Holbrook, 80 Ia. 151; Bacon *v.* Hooker, 177 Mass. 335.

87 Harris *v.* Owen, West Ch. 527; S. C., *sub. nom.* Harrison *v.* Owen, 1 Atk. 520; Kendall *v.* Kendall, 12 Allen, 92 (see also Bacon *v.* Hooker, 177 Mass. 335); Cheek *v.* Nall, 112 N. C. 370; Heath *v.* Blake, 28 S. C. 406. See also Williams *v.* Van Tuyl, 2 Ohio St. 336.

88 Johnson *v.* Moore, 33 Kan. 90; Russell *v.* Reed, 36 Minn. 376; Powell *v.* Banks, 146 Mo. 620; Kime *v.* Jesse, 52 Neb. 606; Waring *v.* Smyth, 2 Barb. Ch. 119; McIntyre *v.* Velte, 153 Pa. 350.

89 Kime *v.* Jesse, 52 Neb. 606. See also Powell *v.* Pearlstine, 43 S. C. 403.

90 In the January number of the Review.

91 "The alteration was a cancellation of the deed, having the same effect that tearing off the seals would have had. This rule comes down to us from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the

of exchange,[92] which are in truth mercantile specialities,[93] being themselves obligations, not merely evidence; and the same may perhaps be said of policies or insurance[94] to which the rule was soon extended,[95] but the grounds on which these extensions were actually made were those of lack of legal evidence and requirements of policy.

Now applicable to all written contracts. It is not surprising therefore to find in this century the rule against alteration applied not only to all written contracts,[96] but even to writings like memoranda to satisfy the Statute of Frauds,[97] which are written evidence, but cannot properly be regarded as written contracts.

Excusable Alteration.

Alteration by a stranger. The original reason for the rule against alteration was obviously applicable as well when the alteration was made by a stranger, or when it was made by the obligee without fraudulent intent to correct a real or supposed mistake, as when made by the obligee with fraudulent purpose; but after relief was given by equity and by the allowance of secondary evidence in cases of accidental loss or destruction, it would seem as if similar relief should have been given in case of alteration, where the obligee was innocent of any fraudulent intent, certainly where he had no part whatever in the alteration. But the English law did not take this step. Altera-

body when the latter was destroyed or lost its identity for any cause." Per Holmes, C. J., in Bacon *v.* Hooker, 117 Mass. 335, 337.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions." Per Holmes, J., in Blackstone *v.* Miller, 188 U. S. 189, 206.

92 Master *v.* Miller, 4 T. R. 320, 2 H. Bl. 141.

The doctrine has been more frequently applied to bills and notes than to any other instruments. See numerous cases collected in 1 Ames Cas. B. & N. 447–449; Daniel, Neg. Inst.

93 See 2 Ames Cas. B. & N. 872; Langdell, Summ. Cont., § 49 *et seq.*

94 *Ibid.*

95 Campbell *v.* Christie, 2 Stark. 64; Forshaw *v.* Chabert, 3 Brod. & B. 158.

96 Powell *v.* Divett, 15 East, 29; Forshaw *v.* Chabert, 3 Brod. & B. 158; United States Glass Co. *v.* West Va. Bottle Co., 81 Fed. Rep. 993; Baxter *v.* Camp, 71 Conn. 245; Johnson *v.* Brown, 51 Ga. 498; Kline *v.* Raymond, 70 Ind. 271; Andrews *v.* Burdick, 62 Ia. 714, 720; Davis *v.* Campbell, 93 Ia. 524; Lee *v.* Alexander, 9 B. Mon. 25; Phœnix Ins. Co. *v.* McKernan, 100 Ky. 97; Osgood *v.* Stevenson, 143 Mass. 399; Fletcher *v.* Minneapolis Ins. Co., 80 Minn. 152; Burton *v.* American Ins. Co., 88 Mo. App. 392; Consaul *v.* Sheldon, 35 Neb. 247; Meyer *v.* Huneke, 55 N. Y. 412; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Cline *v.* Goodale, 23 Oreg. 406; American Pub. Co. *v.* Fisher, 10 Utah, 147; Consumers' Ice Co. *v.* Jennings, 100 Va. 719; Schwalm *v.* McIntyre, 17 Wis. 232.

97 Nichols *v.* Johnson, 10 Conn. 192; A. A. Cooper Wagon Co. *v.* Wooldridge, 98 Mo. App. 648; Schmidt *v.* Quinzel, 55 N. J. Eq. 792. So where several writings are essential to prove the agreement of the parties, fraudulent alteration of one invalidates all. Meyer *v.* Huneke, 55 N. Y. 412.

tion by a stranger still operates as a discharge of a contract, provided the instrument was at the time in the custody of the obligee, for it is said that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state." [98] Why he should be bound to more care to prevent alteration by a stranger than to prevent the total loss or destruction of the instrument, is difficult to see. An alteration made under a mistake of fact has been held not fatal;[99] but otherwise if the alteration was intentionally made and the mistake was only as to the legal effect of the contract.[1] In this country the more equitable rule prevails that alteration by a stranger or spoliation, as it is often called, will not discharge the obligation.[2] The rule is the same for alteration by the obligee's agent or attorney if the obligee himself did not authorize it;[3] or by

98 Davidson *v.* Cooper, 13 M. & W. 343, 352.

99 Raper *v.* Birkbeck, 15 East, 17; Wilkinson *v.* Johnson, 3 B. & C. 428; Prince *v.* Oriental Bank, 3 App. Cas. 325. These were cases where the cancellation under a mistake of fact of the name of a party to an obligation was held not to discharge the party.

1 Bank of Hindustan *v.* Smith, 36 L. J. (N. S.) C. P. 241. The distinction between this case and those in the preceding note seems trivial. The court may well have been influenced by the fact that there were in this case equitable grounds for holding the defendant not liable, aside from any question of alteration.

2 United States *v.* Hatch, 1 Paine, 336; Davis *v.* Carlisle, 6 Ala. 707; Nichols *v.* Johnson, 10 Conn. 192; Orlando *v.* Gooding, 34 Fla. 244; Condict *v.* Flower, 106 Ill. 105; Paterson *v.* Higgins, 58 Ill. App. 268; State *v.* Berg, 50 Ind. 496; Eckert *v.* Louis, 84 Ind. 99; Lee *v.* Alexander, 9 B. Mon. 25; Blakey *v.* Johnson, 13 Bush, 197; Chessman *v.* Whittemore, 23 Pick. 231; Drum *v.* Drum, 133 Mass. 566; Church *v.* Fowle, 142 Mass. 12; Croft *v.* White, 36 Miss. 455; Medlin *v.* Platte Co., 8 Mo. 235; Moore *v.* Ivers, 83 Mo. 29; Fisherdick *v.* Hutton, 44 Neb. 122, 127; Perkins Windmill Co. *v.* Tillman, 55 Neb. 652; Schlageck *v.* Widhalm, 59 Neb. 541; Goodfellow *v.* Inslee, 1 Beas. 355; Rees *v.* Overbaugh, 6 Cow. 746; Lewis *v.* Payn, 8 Cow. 71; Dinsmore *v.* Duncan, 57 N. Y. 573; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Evans *v.* Williamson, 79 N. C. 86; Whitlock *v.* Manciet, 10 Oreg. 166; Neff *v.* Horner, 63 Pa. 327; Robertson *v.* Hay, 91 Pa. 242; Pope *v.* Chafee, 14 Rich. Eq. 69; Harrison *v.* Turbeville, 2 Humph. 242; Boyd *v.* McConnell, 10 Humph. 68; Murray *v.* Peterson, 6 Wash. 418; Union Nat. Bank *v.* Roberts, 45 Wis. 373. See also cases cited in the following note. So in Ireland, Swiney *v.* Barry, 1 Jones, 109. *Contra*, Den *v.* Wright, 2 Halst. 175, 177.

3 Forbes *v.* Taylor, 139 Ala. 286; Langenberger *v.* Kroeger, 48 Cal. 147; Brooks *v.* Allen, 62 Ind. 401; Mathias *v.* Leathers, 99 Ia. 18, 21; Nickerson *v.* Swett, 135 Mass. 514; White Co. *v.* Dakin, 86 Mich. 581; Christian County Bank *v.* Goode, 44 Mo. App. 129; Hays *v.* Odom, 79 Mo. App. 425; Hunt *v.* Gray, 35 N. J. L. 227; Rees *v.* Overbaugh, 6 Cow. 746; Casoni *v.* Jerome, 58 N. Y. 321; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Gleason *v.* Hamilton, 64 Hun, 96, 138 N. Y. 353; Waldorf *v.* Simpson, 15 N. Y. App. Div. 297; Fullerton *v.* Sturges, 4 Ohio St. 529; Acme Harvester Co. *v.* Butterfield, 12 S. Dak. 91; Port Huron Co. *v.* Sherman, 14 S. Dak. 461; Deering Harvester Co. *v.* White, 72 S. W. Rep. 962 (Tenn.); Bigelow *v.* Stilphen, 35 Vt. 521; Yeager *v.* Musgrave, 28 W. Va. 90; Jesup *v.* City Bank, 14 Wis. 331. But see *contra*, White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; Hollingsworth *v.* Holbrook, 80 Ia. 151 (cp. Mathias *v.* Leathers, 89 Ia. 18); Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. 564. See also Pew *v.* Laughlin, 3 Fed. Rep. 39; Bowser *v.* Cole, 74 Tex. 222. If the principal

a trustee.[4] So far as negotiable instruments are concerned, however, a reversion to the English doctrine in regard to alteration by a stranger has been brought about in states which have enacted the Negotiable Instruments Law. The draftsman of that law copied the section on the subject from the English Bills of Exchange Act.[5]

Alteration by the obligor. An unauthorized alteration by the obligor is, of course, not allowed to affect the rights of the obligee.[6]

Innocent alteration by the obligee. The propriety of relieving a party who has altered a written contract by allowing secondary evidence of the contract depends on his freedom from fraudulent or wrongful intent in making the alteration. Therefore, if the alteration was made to express more clearly the intent of the parties or to correct a real or supposed mistake, the contract is in this country generally held not avoided.[7] Similarly, a cancellation by mistake is not fatal.[8]

seeks to take the benefit of the agent's alteration, the effect is the same as if the principal had himself made the alteration. Nichols *v.* Rosenfeld, 181 Mass. 525; Sherwood *v.* Merritt, 83 Wis. 232.

[4] Flinn *v.* Brown, 6 Rich. L. 209. But see *contra*, as to an administrator, McMurtrey *v.* Sparks, 71 Mo. 126.

[5] Neg. Inst. Act., § 205, following Bills of Exch. Act, § 64. See 16 Harv. L. Rev. 260; Hoffman *v.* Planters' Bank, 99 Va. 480. But see Jeffrey *v.* Rosenfeld, 179 Mass. 506.

[6] Cutts *v.* United States, 1 Gall. 69; United States *v.* Spalding, 2 Mason 478; Lane *v.* Pacific, etc., Ry. Co., 67 Pac. Rep. 656 (Idaho); Osborn *v.* Andrees, 37 Kan. 301; Hughes *v.* Littlefield, 18 Me. 400; Natchez *v.* Minor, 17 Miss. 544; Fritz *v.* Commissioners, 17 Pa. 130.

[7] Brutt *v.* Picard, Ryan & M. 37; Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. Rep. 542; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Webb *v.* Mullins, 78 Ala. 111; Turner *v.* Billagram, 2 Cal. 520; Sill *v.* Reese, 47 Cal. 294; Sullivan *v.* California Realty Co., 75 Pac. Rep. 767 (Cal.); Hotel Lanier Co. *v.* Johnson, 103 Ga. 604; Burch *v.* Pope, 114 Ga. 334; Miller *v.* Slade, 116 Ga. 772; Shirley *v.* Swafford, 45 S. E. Rep. 722 (Ga.); Day *v.* Fort Scott Co., 53 Ill. App. 165; Osborn *v.* Hall, 160 Ind. 153; Busjahn *v.* McLean, 3 Ind. App. 281; Andrews *v.* Burdick, 62 Ia. 714; Barlow *v.* Buckingham, 68 Ia. 169; Duker *v.* Franz, 7 Bush, 273; Thornton *v.* Appleton, 29 Me. 298; Croswell *v.* Labree, 81 Me. 44; Outoun *v.* Dulin, 72 Md. 536; Ames *v.* Colburn, 11 Gray, 390; Produce Exchange Trust Co. *v.* Bieberbach, 176 Mass. 577; James *v.* Tilton, 183 Mass. 275; McRaven *v.* Crisler, 53 Miss. 542; Foote *v.* Hambrick, 70 Miss. 157; Cole *v.* Hills, 44 N. H. 227; Seymour *v.* Mickey, 15 Ohio St. 515; Wallace *v.* Jewell, 21 Ohio St. 163; Cline *v.* Goodale, 23 Oreg. 406; Wallace *v.* Tice, 32 Oreg. 283 (*cp.* Savage *v.* Savage, 36 Oreg. 268); Express Pub. Co. *v.* Aldine Press, 126 Pa. 347; Gunter *v.* Addy, 58 S. C. 178; McClure *v.* Little, 15 Utah, 379; Wolferman *v.* Bell, 6 Wash. 84; Young *v.* Wright, 4 Wis. 144; Gordon *v.* Robertson, 48 Wis. 493. But see *contra*, Warpole *v.* Ellison, 4 Houst. 322; Kelly *v.* Trumble, 74 Ill. 428; Soaps *v.* Eichberg, 42 Ill. App. 375, 381; Hamilton *v.* Wood, 70 Ind. 306; Letcher *v.* Bates, 6 J. J. Marsh. 524; Phœnix Ins. Co. *v.* McKernan, 100 Ky. 97, 103; Evans *v.* Foreman, 60 Mo. 449; Bowers *v.* Jewell, 2 N. H. 543; Lewis *v.* Schenck, 3 C. E. Green, 459; Wegner *v.* State, 28 Tex. App. 419. And see also Green *v.* Sneed, 101 Ala. 205; White Sewing Machine Co. *v.* Saxon, 121 Ala. 369; Heath *v.* Blake, 28 S. C. 406; Capital Bank *v.* Armstrong, 62 Mo. 59; Otto *v.* Halff, 89 Tex. 384.

[8] Lowremore *v.* Berry, 19 Ala. 130; Brett *v.* Marston, 45 Me. 401; Russell *v.* Longmoor, 29 Neb. 209. See also Chamberlin *v.* White, 79 Ill. 549.

Authorized alteration — Sealed instruments. As to alterations authorized by the obligor, the common law made a distinction between an alteration affecting a sealed contract and one affecting other writings. As the common law required that the authority of an agent to execute a sealed instrument should be itself under seal,[9] parol authorization could not make the deed in its altered form the deed of the obligor.[10] Nor could the deed be valid according to its original terms for the deed in that form was destroyed by the mere fact that it possessed no longer physical identity with the original obligation.[11] It is plain, however, that if this be granted the obligee should be relieved from the consequences of such a destruction of the obligation, and in modern times wherever the instrument is unenforceable at law in its altered form, secondary evidence would be allowed to prove the original terms of the obligation, and if valid in that form it would be enforced,[12] or if the Statute of Frauds did not prevent, equity should reform the deed to conform to the agreement of parties or should treat it as if reformed.[13]

Contracts within the Statute of Frauds. Similar reasoning is applicable if the law requires a contract of the kind which has been altered to be in writing signed by the promisor.[14]

[9] Mechem on Agency, § 93.

[10] Hibblewhite *v.* McMorine, 6 M. & W. 200; United States *v.* Nelson, 2 Brock. 64; Cross *v.* State Bank, 5 Ark. 525; Upton *v.* Archer, 41 Cal. 85; People *v.* Organ, 27 Ill. 27; Simms *v.* Hervey, 19 Ia. 273; Ayres *v.* Probasco, 14 Kan. 175; Burns *v.* Lynde, 6 Allen, 305; Basford *v.* Pearson, 9 Allen, 387; Lindsley *v.* Lamb, 34 Mich. 509; Williams *v.* Crutcher, 6 Miss. 71; Blacknall *v.* Parish, 6 Jones Eq. 70; Graham *v.* Holt, 3 Ired. 300; Barden *v.* Southerland, 70 N. C. 528; Martin *v.* Buffaloe, 121 N. C. 34, 36; Gilbert *v.* Anthony, 1 Yerg. 69; Mosby *v.* State, 4 Sneed, 324; Walla Walla Co. *v.* Ping, 1 Wash. T. 339.

If the alteration is made before delivery by an agent of the grantor authorized to deliver, the grantor is held bound by the alteration, if not broadly on the ground that parol authority is good, then on principles of estoppel. Allen *v.* Withrow, 110 U. S. 119; Swartz *v.* Ballou, 47 Ia. 188; State *v.* Tripp, 113 Ia. 698, 704; Dolbeer *v.* Livingston, 100 Cal. 617; Phelps *v.* Sullivan, 140 Mass. 36; Field *v.* Stagg, 52 Mo. 534; Thummel *v.* Holden, 149 Mo. 677, 684; Cribben *v.* Deal, 21 Oreg. 211; Van Etta *v.* Evenson, 28 Wis. 33. Cp. Vaca Valley R. R. *v.* Mansfield, 84 Cal. 560. If a new delivery of the deed is made after the alteration, the deed is, of course, binding in its altered form. De Malarin *v.* United States, 1 Wall. 282; Prettyman *v.* Goodrich, 23 Ill. 330; but held otherwise if the new delivery was made without knowledge of the alterations. Nesbitt *v.* Turner, 155 Pa. 429.

[11] In McNab *v.* Young, 81 Ill. 11, it was held that the objection that an authorized insertion was made after execution could not be taken by one not claiming in the right of the grantor.

[12] Gunter *v.* Addy, 58 S. C. 178.

[13] Burnside *v.* Wayman, 49 Mo. 356; McQuie *v.* Peay, 58 Mo. 56; Bryant *v.* Bank, 107 Tenn. 560. See also Mohlis *v.* Trauffler, 91 Ia. 751.

[14] Upton *v.* Archer, 41 Cal. 85; Ingram *v.* Little, 14 Ga. 173 (overruled by Brown *v.* Colquitt, 73 Ga. 59; Smith *v.* Farmers' Mut. Ins. Assoc., 111 Ga. 737). But see Bluck *v.* Gompertz, 7 Ex. 862; Winslow *v.* Jones, 88 Ala. 496.

Unsealed contracts — Ratification. If the writing was unsealed, an authorized alteration is binding upon both parties, and the altered form of the contract, not the original form, will be enforced.[15] In jurisdictions where the peculiar doctrines applicable to sealed contracts are no longer in force, the same result is necessarily reached as to such contracts,[16] and even in other states, for practical reasons, the same result is often reached.[17] Ratification, subsequent to the alteration, has as full effect as authority originally granted;[18] and ratification may be shown by any conduct from which assent can fairly be implied.[19]

Ratification of alteration of sealed instrument. Indeed ratification may be more effectual in the case of a sealed instrument than prior authority could have been. A sealed instrument takes its validity from de-

[15] Gardiner *v.* Harback, 21 Ill. 129; Grimsted *v.* Briggs, 4 Ia. 559; Stewart *v.* First Nat. Bank, 40 Mich. 348; Wilson *v.* Henderson, 17 Miss. 375; Humphreys *v.* Guillow, 13 N. H. 385; Taddiken *v.* Cantrell, 69 N. Y. 597; Schmelz *v.* Rix, 95 Va. 509. See also cases in the following notes.

[16] Dolbeer *v.* Livingston, 100 Cal. 617; Gardiner *v.* Harback, 21 Ill. 129; Swartz *v.* Ballou, 47 Ia. 188; State *v.* Tripp, 113 Ia. 698, 704.

[17] Speake *v.* United States, 9 Cranch, 28; Drury *v.* Foster, 2 Wall. 24, 33; Woodbury *v.* Allegheny, etc., Co., 72 Fed. Rep. 371; Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 274; Inhabitants *v.* Huntress, 53 Me. 89; State *v.* Young, 23 Minn. 551; Field *v.* Stagg, 52 Mo. 534; Otis *v.* Browning, 59 Mo. App. 326; Cribben *v.* Deal, 21 Oreg. 211; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64; Bank *v.* Hammond, 1 Rich. L. 281; Lamar *v.* Simpson, 1 Rich. Eq. 71; Schintz *v.* McManamy, 33 Wis. 301.

[18] Speake *v.* United States, 9 Cranch, 28; Goodspeed *v.* Cutler, 75 Ill. 534; Scott *v.* Bibo, 48 Ill. App. 657; Emerson *v.* Opp, 9 Ind. App. 581; Pelton *v.* Prescott, 13 Ia. 567; Browning *v.* Gosnell, 91 Ia. 448; Fletcher *v.* Minneapolis Ins. Co., 80 Minn. 152; Workman *v.* Campbell, 57 Mo. 53; Humphreys *v.* Guillow, 13 N. H. 385; Conable *v.* Smith, 61 Hun, 185; Wester *v.* Bailey, 118 N. C. 193; Matlock *v.* Wheeler, 29 Oreg. 64; Jacobs *v.* Gilreath, 45 S. C. 46; Ratcliff *v.* Planters' Bank, 2 Sneed, 425; Chezum *v.* McBride, 21 Wash. 558. But held otherwise as to a surety. Mulkey *v.* Long, 5 Idaho, 213; Warren *v.* Fant, 79 Ky. 1 (*contra*, Bell *v.* Mahin, 69 Ia. 408. See also Knoebel *v.* Kincher, 33 Ill. 308). Where the original alteration amounted to a forgery, it was held that ratification was not possible. Wilson *v.* Hayes, 40 Minn. 531 (*contra*, Marks *v.* Schram, 109 Wis. 452. See also Ofenstein *v.* Bryan, 20 App. D. C. 1). See also *supra*, p. 443.

[19] Barnsdall *v.* Boley, 119 Fed. Rep. 191; Montgomery *v.* Crossthwait, 90 Ala. 553; Dickson *v.* Bamberger, 107 Ala. 293; Payne *v.* Long, 121 Ala. 385, 131 Ala. 438; Jackson *v.* Johnson, 67 Ga. 167; Yocum *v.* Smith, 63 Ill. 321; Oswego *v.* Kellogg, 99 Ill. 590; Linington *v.* Strong, 107 Ill. 295; Canon *v.* Grisby, 116 Ill. 151; Bell *v.* Mahin, 69 Ia. 408; Dover *v.* Robinson, 64 Me. 183; Ward *v.* Allen, 2 Met. 53; Prouty *v.* Wilson, 123 Mass. 297; Stewart *v.* First Nat. Bank, 40 Mich. 348; Janney *v.* Goehringer, 52 Minn. 428; Board *v.* Gray, 61 Minn. 242; Evans *v.* Foreman, 60 Mo. 449; Reed *v.* Morton, 24 Neb. 760; Perkins Windmill Co. *v.* Tillman, 55 Neb. 652; Wright *v.* Buck, 62 N. H. 656; Conable *v.* Keeney, 61 Hun, 624; Jacobs *v.* Gilreath, 45 S. C. 46. Cp. State *v.* Churchill, 48 Ark. 426; Benedict *v.* Miner, 58 Ill. 19; Fraker *v.* Cullum, 21 Kan. 555; Fraker *v.* Little, 24 Kan. 598; German Bank *v.* Dunn, 62 Mo. 79; Kennedy *v.* Lancaster Bank, 18 Pa. 347; McDaniel *v.* Whitsett, 96 Tenn. 10.

livery, and the maker may adopt a signature or seal previously made and make them his own by delivering them as his. A redelivery therefore of a sealed instrument by the obligor after it has been altered will make it binding in its altered form. A prior consent to an alteration can hardly amount to a redelivery after the alteration, but if the maker himself assists or takes part in the alteration it would generally be easy to find a new delivery, and courts which, like those of England, hold that there is always a delivery when the maker of a deed indicates his assent to be bound by it as a completed instrument have no difficulty in finding delivery when the maker after an alteration has been made ratifies it.[20] But if acknowledgment[21] or witnesses[22] are necessary to the validity of the deed, the assent of the parties, even though amounting to a redelivery, would be insufficient to make the alterations part of the deed.

Several obligors. If there are several obligors bound by an obligation, a material alteration of the obligation made with the assent of one or more parties will be binding upon those who assent,[23] but will totally avoid the obligation of any who do not assent.[24]

[20] Hudson *v.* Revett, 4 Bing. 368; Winslow *v.* Jones, 88 Ala. 496; Stiles *v.* Probst, 69 Ill. 382; Abbott *v.* Abbott, 189 Ill. 488, 497; Bassett *v.* Bassett, 55 Me. 127; Vidvard *v.* Cushman, 35 Hun, 18; Wester *v.* Bailey, 118 N. C. 193.

[21] Booker *v.* Stivender, 13 Rich. L. 85.

[22] Drury *v.* Foster, 2 Wall. 24; Bryant *v.* Bank, 107 Tenn. 560, 567. See also Keene Mach. Co. *v.* Barratt, 100 Fed. Rep. 590 (C. C. A.). But the deed may be good as between the parties. Walkley *v.* Clarke, 107 Ia. 451; Bryant *v.* Bank, 107 Tenn. 560.

[23] Hochmark *v.* Richler, 16 Col. 263; Browning *v.* Gosnell, 91 Ia. 448; Rhoades *v.* Leach, 93 Ia. 337; Brownell *v.* Winnie, 29 N. Y. 400, 409.

[24] Gardner *v.* Walsh, 5 E. & B. 83; Martin *v.* Thomas, 24 How. 315; Mundy *v.* Stevens, 61 Fed. Rep. 77; State *v.* Churchill, 48 Ark. 426; State *v.* Smith, 9 Houst. 143; Gardiner *v.* Harback, 21 Ill. 129; State *v.* Van Pelt, 1 Ind. 304; Zimmerman *v.* Judah, 13 Ind. 286, 22 Ind. 388; Horn *v.* Newton Bank, 32 Kan. 518; Warring *v.* Williams, 8 Pick. 322; Greenfield Bank *v.* Stowell, 123 Mass. 196; Board *v.* Gray, 61 Minn. 242; Love *v.* Shoape, 1 Miss. 508; Morrison *v.* Garth, 78 Mo. 434; State *v.* Findley, 101 Mo. 368; McMillan *v.* Hefferlin, 18 Mont. 385; Davis *v.* Bauer, 41 Ohio St. 257; Wills *v.* Wilson, 3 Oreg. 308; Rittenhouse *v.* Levering, 6 Watts & S. 190; Broughton *v.* Fuller, 9 Vt. 373; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392.

See also Reese *v.* United States, 9 Wall. 13; United States *v.* Freel, 186 U. S. 309; People *v.* Kneeland, 31 Cal. 288; Cotten *v.* Williams, 1 Fla. 42; Thompson *v.* Williams, 1 Fla. 64; Ames Cas. Suretyship 246, n.

The court will not restore such an obligation to its original form, so as to make sureties liable again on the obligation which they assumed. Ruby *v.* Talbott, 5 N. Mex. 251; Fulmer *v.* Seitz, 68 Pa. 237. Cp. Davis *v.* Shafer, 50 Fed. Rep. 764; Nickerson *v.* Swett, 135 Mass. 514.

Of course, if there are entirely distinct obligations created by the same instrument, an alteration of one obligation only does not invalidate the others. But the fact that an obligation is several at law is not conclusive. Collins *v.* Prosser, 1 B. & C. 682, which held that tearing off the seal of one obligor on a several bond thereby discharging him did not destroy the

Signature made in ignorance of alteration. If an obligor signs an obligation after it has been signed by others, in ignorance of the fact that the obligation has been altered or by his signature is altered and that thereby the other obligors are discharged, the obligor signing last is also discharged if the obligee is cognizant of the facts before accepting the obligation. The signature of the last obligor does not bind him, because given under a mistake, induced by what is equivalent to misrepresentation.[25] If, however, the obligee was not notified of the alteration either constructively by the appearance of the document or actually, his legal right to enforce the obligation cannot be defeated by the unknown equity of the deceived obligor.[26]

Restoration. If a contract has been avoided by alteration, the subsequent restoration of the writing to its original form without the assent of the obligor will not restore the legal obligation.[27] But if the alteration, because made by mistake or without wrongful intent, was not such as to avoid the obligation, and the document has been restored to its original form, it will be received in evidence and enforced.[28]

obligors, is clearly erroneous. The court admit that the right of contribution in equity was affected, and this is surely material.

In Brownell *v.* Winnie, 29 N. Y. 400, the name of an obligor was added as maker to a note, and the court, in holding the alteration immaterial, relied on the fact that the obligation created was several rather than joint and several. This alone would not support the decision, but as the added signer was in fact a surety the conclusion is sound, since the original maker's liability in law and equity remained unchanged.

[25] Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75; People *v.* Kneeland, 31 Cal. 288; State *v.* Craig, 58 Ia. 238; Howe *v.* Peabody, 2 Gray, 556; State *v.* McGonigle, 101 Mo. 353. Cp. Evans *v.* Partin, 22 Ky. L. Rep. 20.

[26] Crandall *v.* Auburn Bank, 61 Ind. 349; Rhoades *v.* Leach, 93 Ia. 337; Ward *v.* Hackett, 30 Minn. 150. And see numerous cases cited in Ames Cas. Suretyship 305, n. to the effect that in general fraud or misrepresentation inducing the surety to enter into an obligation is no defense against a creditor innocent and ignorant of the facts. This principal was lost sight of by the court in the contrary decision of Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75.

[27] Wood *v.* Steele, 6 Wall. 80; Warpole *v.* Ellison, 4 Houst. 322; Hayes *v.* Wagner, 89 Ill. 390, 401; Robinson *v.* Reed, 46 Ia. 219; Shepard *v.* Whetstone, 51 Ia. 457; Cotton *v.* Edwards, 2 Dana, 106; Locknane *v.* Emmerson, 11 Bush, 69; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; McMurtrey *v.* Sparks, 71 Mo. App. 126; McDaniel *v.* Whitsett, 96 Tenn. 10; Newell *v.* Mayberry, 3 Leigh, 250.

[28] Rogers *v.* Shaw, 59 Cal. 260; Kountz *v.* Kennedy, 63 Pa. 187 (see remarks on this case in Citizens' Bank *v.* Williams, 174 Pa. 66).

Material and Immaterial Alterations.

Effect of immaterial alterations. It was laid down in *Pigot's case*[29] that even an immaterial alteration if made by the obligee avoids a deed. But in *Sanderson* v. *Symonds*,[30] the English court refused to apply the rule to a policy of insurance, and in *Aldous* v. *Cornwell*[31] this resolution in *Pigot's case* was dissented from. It has been followed in some cases in this country,[32] but most of them were decided a number of years ago, and no such severe rule is generally in force. As has been shown, even material alterations by the obligee, when innocently made, do not bar the obligee's rights.[33] This must be true *a fortiori* of immaterial alterations. And the prevailing doctrine is that no immaterial alteration will affect rights and liabilities under a writing, irrespective of the person by whom the alteration was made or his purpose in making it.[34]

What alterations are material. The following alterations have been held material: erasing the obligee's name and substituting the name of another as obligee;[35] changing the name of the obligor in a deed,

[29] *Supra*, p. 845.

[30] 1 Brod. & Bing. 426.

[31] L. R. 3 Q. B. 573.

[32] Herdman *v.* Bratten, 2 Har. (Del.) 396; Johnson *v.* Bank, 2 B. Mon. 310, 311; Wickes *v.* Caulk, 5 Har. & J. 36; Haskell *v.* Champion, 30 Mo. 136; First Bank *v.* Fricke, 75 Mo. 178; Hord *v.* Taubman, 79 Mo. 101; Kelly *v.* Thuey, 143 Mo. 422; Bailey *v.* Gilman Bank, 99 Mo. App. 571; Vanauken *v.* Hornback, 2 Green (N. J.), 178; Wright *v.* Wright, 2 Halst. 175; Jones *v.* Crowley, 57 N. J. L. 222; Jackson *v.* Malin, 15 Johns. 293; Nunnery *v.* Cotton, 1 Hawks, 222; Morris *v.* Vanderen, 1 Dall. 64; Crockett *v.* Thomason, 5 Sneed, 342, 344.

[33] *Supra*, p. 853.

[34] First Bank *v.* Weidenbeck, 97 Fed. Rep. 896, 897 (C. C. A.); Prim *v.* Hammel, 134 Ala. 652; Nichols *v.* Johnson, 10 Conn. 192; Reed *v.* Kemp, 16 Ill. 445; Ryan *v.* First Bank, 148 Ill. 349; Lisle *v.* Rogers, 18 B. Mon. 528; Tranter *v.* Hibbard, 108 Ky. 265; Cushing *v.* Field, 70 Me. 50; Moye *v.* Herndon, 30 Miss. 110; Burnham *v.* Ayer, 35 N. H. 351; Robertson *v.* Hay, 91 Pa. 242; Note Holders *v.* Funding Board, 16 Lea, 46.

[35] Sneed *v.* Sabinal Co., 71 Fed. Rep. 493, 73 Fed. Rep. 925 (C. C. A.); Horst *v.* Wagner, 43 Ia. 373; Bell *v.* Mahin, 69 Ia. 408; Horn *v.* Newton Bank, 32 Kan. 518; Dolbier *v.* Norton, 17 Me. 307; Stoddard *v.* Penniman, 108 Mass. 366; Aldrich *v.* Smith, 37 Mich. 438; German Bank *v.* Dunn, 62 Mo. 79; Robinson *v.* Berryman, 22 Mo. App. 509; Erickson *v.* First Bank, 44 Neb. 622; Cumberland Bank *v.* Penniman, 1 Halst. 215; Gillette *v.* Smith, 18 Hun, 10; Davis *v.* Bauer, 41 Ohio St. 257; Hoffman *v.* Planters' Bank, 99 Va. 480. See also Park *v.* Glover, 23 Tex. 469; Broughton *v.* Fuller, 9 Vt. 373. *Contra*, Latshaw *v.* Hiltebeitel, 2 Penny. 257.

Changing the name of a special indorsee in a note is therefore material (Grimes *v.* Piersol, 25 Ind. 246), or adding a name of another person on a railroad mileage-book as one entitled to ride. Holden *v.* Rutland R. Co., 73 Vt. 317. But changing the name of the insured in a policy from the name of the agent of mortgagors to the name of a trustee for them, the loss being made

who in fact signed as agent but did not so indicate on the deed, to the name of the principal;[36] or changing the signature of an obligor so as to make the obligation purport to be that of a corporation[37] or firm[38] instead of an individual, or that of an individual instead of a corporation,[39] or that of a surety instead of a principal.[40]

Erasing the name of a joint or prior obligor,[41] and changing the amount, time of payment, place of payment, or rate of interest are obviously material, as are the addition of words of negotiability,[42] or of a cause requiring payment in gold;[43] a waiver of demand and notice written over a blank indorsement;[44] the insertion of words of

payable, both before and after the alteration, to the mortgagee, was held immaterial since it effected no material change in the ultimate rights under the policy. Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498.

The addition of the word "junior" to the name of the grantee in a deed was held immaterial, as the only effect was to designate more clearly the grantee actually intended. Coit *v.* Starkweather, 8 Conn. 289. So the addition of "with the will annexed," after the word "administrator." Casoni *v.* Jerome, 58 N. Y. 315.

But otherwise of an addition of a designation, which makes the payee in effect different. Hodge *v.* Farmers' Bank, 7 Ind. App. 94 (cashier); First Bank *v.* Fricke, 75 Mo. 178 (president); York *v.* Janes, 43 N. J. L. 332 (collector).

[36] North *v.* Henneberry, 44 Wis. 306. But erasure of an initial of the grantor's name in a deed is immaterial, where no change in the person is thereby intended or indicated. Banks *v.* Lee, 73 Ga. 25. See also Chadwick *v.* Eastman, 53 Me. 12.

[37] Sheridan *v.* Carpenter, 61 Me. 83.

[38] Montgomery *v.* Crossthwait, 90 Ala. 553 (though the alteration was made by one having no power to bind the firm); Haskell *v.* Champion, 30 Mo. 136.

[39] Texas Printing Co. *v.* Smith, 14 S. W. Rep. 1074 (Tex. App.).

[40] Lamb *v.* Paine, 46 Ia. 550.

[41] Smith *v.* United States, 2 Wall. 219; Gillett *v.* Sweat, 6 Ill. 475; State *v.* Griswold, 32 Ind. 313; State *v.* Craig, 58 Ia. 238; Bracken Co. *v.* Daum, 80 Ky. 388; State *v.* Findley, 101 Mo. 217; Blanton *v.* Commonwealth, 91 Va. 1.

But not if the obligor whose name was erased was an infant and had repudiated his contract. Young *v.* Currier, 63 N. H. 419.

[42] Many authorities as to such changes in negotiable paper are collected in 1 Ames Cas. Bills and Notes 447, 448; 2 Century Digest, 241 *seq.*

In Tranter *v.* Hibbard, 108 Ky. 265, a note was altered by writing the word "fixed" after the date of payment, which is equivalent to "without grace." By the law of Kentucky such negotiable paper only as is discounted at a bank is entitled to grace. The note in question never was so discounted, and the court therefore held the alteration immaterial, though admitting the note might have been discounted. The case seems wrong. The alteration purported to give the payee an added right to discount the note without entitling the maker to grace. The fact that the payee did not exercise this right cannot make any difference.

Similarly changing the penal sum in a bond. Howe *v.* Peabody, 2 Gray, 556; Board *v.* Gray, 61 Minn. 242.

[43] Hanson *v.* Crawley, 41 Ga. 303; Bridges *v.* Winters, 42 Miss. 135; Foxworthy *v.* Colby, 64 Neb. 216; Church *v.* Howard, 17 Hun, 5; Darwin *v.* Ripley, 63 N. C. 318; Wills *v.* Wilson, 3 Oreg. 308; Bogarth *v.* Breedlove, 39 Tex. 561.

[44] Andrews *v.* Simms, 33 Ark. 771; Davis *v.* Eppler, 38 Kan. 629; Farmer *v.* Rand, 16 Me. 453; Schwartz *v.* Wilmer, 90 Md. 136; Harnett *v.* Holdrege, 97 N. W. Rep. 443 (Neb.).

guaranty over such an indorsement,[45] unless the indorser's intention was in fact to be liable as a guarantor;[46] the addition of other property to that described in a deed or mortgage;[47] the insertion in a mortgage of a statement that it was given to secure other debts besides that for which it was in fact given;[48] the insertion in a bond for title of a provision that the vendee shall have immediate possession;[49] the insertion or alteration of the date if that results in altering the legal effect of the instrument, as by changing the day of maturity;[50] the addition[51] or cancellation[52] of a seal after the signature of an obligor, unless a seal would in no way alter the legal effect of the document.[53]

Alterations advantageous to the obligor. An alteration is none the less material because the change in the contract is advantageous to the obligor. Thus where a later day of payment is substituted the obligation is avoided.[54] So where a smaller amount is substituted in an obligation,[55] or where the specified rate of interest is altered to a lower rate,[56] or where the name of a joint obligor or co-surety is

But otherwise, if the indorser is also the maker, and hence in no event entitled to demand or notice. Gordon *v.* Third Bank, 144 U. S. 97.

In Schwartz *v.* Wilmer, 90 Md. 136, the words inserted were "protest waived." The court assumed that this was equivalent to a waiver of demand and notice, and that "it converted the contingent liability of the indorser into an absolute liability." This seems wrong. Waiver of protest does not mean waiver of demand and notice. It did not even appear that the note was a foreign note, and as such entitled to protest.

[45] Robinson *v.* Reed, 46 Ia. 219; Belden *v.* Ham, 61 Ia. 42; Clawson *v.* Gustin, 2 South. 947; Orrick *v.* Colston, 7 Gratt. 189.

[46] Iowa Valley Bank *v.* Sigstad, 96 Ia. 491; Levi *v.* Mendell, 1 Duv. 77.

[47] Powell *v.* Pearlstine, 43 S. C. 403; Bowser *v.* Cole, 74 Tex. 222. See also Moelle *v.* Sherwood, 148 U. S. 21. Cp. Burnett *v.* McCluey, 78 Mo. 676.

[48] Carlisle *v.* People's Bank, 122 Ala. 446; Johnson *v.* Moore, 33 Kan. 90.

[49] Kelly *v.* Trumble, 74 Ill. 428.

[50] Hirschman *v.* Budd, L. R. 8 Ex. 171; Inglish *v.* Breneman, 5 Ark. 377; Wyman *v.* Yoemans, 84 Ill. 403; Hamilton *v.* Wood, 70 Ind. 306; McCormick Co. *v.* Lauber, 7 Kan. App. 730; Lisle *v.* Rogers, 18 B. Mon. 528; Britton *v.* Dierker, 46 Mo. 591; McMurtrey *v.* Sparks, 71 Mo. App. 126; Bowers *v.* Jewell, 2 N. H. 543; Crawford *v.* West Side Bank, 100 N. Y. 50; Miller *v.* Gilleland, 19 Pa. 119; Taylor *v.* Taylor, 12 Lea, 714.

[51] State *v.* Smith, 9 Houst. 143; Morrison *v.* Welty, 18 Md. 169; Rawson *v.* Davidson, 49 Mich. 607; Fred Heim Co. *v.* Hazen, 55 Mo. App. 277; Biery *v.* Haines, 5 Whart. 563; Vaughan *v.* Fowler, 14 S. C. 355.

[52] Porter *v.* Doby, 2 Rich. Eq. 49; Organ *v.* Allison, 9 Baxt. 459; Piercy *v.* Piercy, 5 W. Va. 199.

[53] Truett *v.* Wainwright, 9 Ill. 411.

[54] Wood *v.* Steele, 6 Wall. 80; Wyman *v.* Yoemans, 84 Ill. 403; Post *v.* Losey, 111 Ind. 74; McCormick Co. *v.* Lauber, 7 Kan. App. 730; First Bank *v.* Payne, 19 Ky. L. Rep. 839. But see *contra*, Union Bank *v.* Cook, 2 Cranch C. C. 218.

[55] Prim *v.* Hammel, 134 Ala. 652; Johnston *v.* May, 76 Ind. 293. See also Doane *v.* Eldridge, 16 Gray. 254.

[56] Post *v.* Losey, 111 Ind. 74; Board *v.* Greenleaf, 80 Minn. 242; Whitmer *v.* Frye, 10 Mo. 348. But see *contra*, Burkholder *v.* Lapp's Ex., 31 Pa. 322.

added,[57] or of a prior obligor.[58] The addition of a collateral guaranty does not, however, discharge the principal debtor,[59] for the addition neither increases nor diminishes his immediate liability or his ultimate equitable liability. The same is true of the erasure of the name of a collateral guarantor.[60]

Materiality of the addition of a surety's name. If, however, a surety's name is added in such a way that he incurs or purports to incur at law a joint obligation with others previously bound by the instrument, the alteration seems technically a material one, though his equitable liability was one of suretyship, for the alteration if effective would create a new and different obligation at law on the part of the previous obligors. They could be sued jointly with the surety. The answer adopted in one decision[61] to this reasoning is that the surety having signed after delivery of the note was not in fact a joint maker, and that as the original maker could effectively object to the joinder of the new signer the former's obligation remained unaltered. But this is unsound. An alteration to which he has not consented never binds an obligor. He is discharged not because an alteration is in legal effect wrought upon his obligation, but because it purports to be; and in the case in question the obligation of the defendant was on the face of the instrument changed to a joint obligation. Nevertheless, on account of the hardship of the case the addition has in

[57] Gardner *v.* Walsh, 5 E. & B. 83; Taylor *v.* Johnson, 17 Ga. 521; Henry *v.* Coats, 17 Ind. 161; Bowers *v.* Briggs, 20 Ind. 139; Houck *v.* Graham, 106 Ind. 195; Hall's Adm. *v.* McHenry, 19 Ia. 521; Hamilton *v.* Hooper, 46 Ia. 515; Berryman *v.* Manker, 56 Ia. 150; Sullivan *v.* Rudisill, 63 Ia. 158; Shipp *v.* Suggett, 9 B. Mon. 5; Singleton *v.* McQuerry, 85 Ky. 41; Lunt *v.* Silver, 5 Mo. App. 186; Wallace *v.* Jewell, 21 Ohio St. 163; Harper *v.* Stroud, 41 Tex. 367. But see *contra*, Produce Exchange Trust Co. *v.* Bieberbach, 176 Mass. 577, 590; Gano *v.* Heath, 36 Mich. 441; Union Banking Co. *v.* Martin's Estate, 113 Mich. 521; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62, 65.

The alteration is none the less material if the added signature is forged. Farmers' Bank *v.* Myers, 50 Mo. App. 157; Harper *v.* Stroud, 41 Tex. 367.

If the addition is without the knowledge of the obligee, it is an alteration by a stranger and hence in this country would generally have no effect. Anderson *v.* Bellenger, 87 Ala. 334; Ward *v.* Hackett, 30 Minn. 150; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62.

[58] Haskell *v.* Champion, 30 Mo. 136.

[59] *Ex parte* Yates, 2 De G. & J. 191; First Bank *v.* Weidenbeck, 97 Fed. Rep. 896 (C. C. A.); Burnham *v.* Gosnell, 47 Mo. App. 637; Wallace *v.* Jewell, 21 Ohio St. 163, 172; Hutches *v.* J. I. Case Co., 35 S. W. Rep. 60 (Tex. Civ. App.). See *a fortiori* cases in note 62, *infra*. Cp. Oneale *v.* Long, 4 Cranch, 60.

[60] First Bank *v.* Weidenbeck, 97 Fed. Rep. 896 (C. C. A.); Broughton *v.* West, 8 Ga. 248; People *v.* Call, 1 Denio, 120; Huntington *v.* Finch, 3 Ohio St. 445.

[61] McCaughey *v.* Smith, 27 N. Y. 39. See also *Ex parte* Yates, 2 De G. & J. 191; Bowser *v.* Rendell, 31 Ind. 128.

such a case frequently been held immaterial.[62] But there are many cases enforcing the strict rule.[63]

Criticism of decisions. In two cases[64] where the name added created or purported to create a several liability on the part of the new signer the previous signer was held not discharged because no joint liability was created. The terms of the legal obligation of the previous signer are certainly not affected by such an addition, but if the consequence of carrying out the obligation assumed by the new signer is that equitably the latter must pay equally with the previous signer, the contract is certainly altered by the added signature. Such is the situation where the new signer is a co-surety. If, however, the only previous signer is the principal debtor, the contract is not altered, for he remains liable immediately at law and ultimately in equity for the whole.

What alterations are immaterial. The following changes have been held immaterial: the alteration of the name of the grantee[65] or grantor[66] or other party[67] by correcting a mistake in spelling or initials, where no change in the person designated is intended or apparently indicated; the insertion of a more specific description of the mortgaged property in a chattel mortgage;[68] the addition in a

[62] *Ex parte* Yates, 2 De G. & J. 191; Mersman *v.* Werges, 112 U. S. 139; Montgomery Railroad *v.* Hurst, 9 Ala. 513; Rudulph *v.* Brewer, 96 Ala. 189 (overruled); Bowser *v.* Rendell, 31 Ind. 128; Taylor *v.* Acom, 1 Ind. Ty. 436; Stone *v.* White, 8 Gray, 589; Miller *v.* Finley, 26 Mich. 249; Barnes *v.* Van Keuren, 31 Neb. 165; Royse *v.* State Bank, 50 Neb. 16; McCaughey *v.* Smith, 27 N. Y. 39; Hecker *v.* Mahler, 64 Ohio St. 398. See also Ryan *v.* First Bank, 148 Ill. 349; Heath *v.* Blake, 28 S. C. 406.

[63] Gardner *v.* Walsh, 5 E. & B. 83; First Bank *v.* Weidenbeck, 81 Fed. Rep. 271 (reversed, 97 Fed. Rep. 896); Brown *v.* Johnson, 126 Ala. 93 (overruling Montgomery R. Co. *v.* Hurst, 9 Ala. 513, and, it seems, Rudulph *v.* Brewer, 96 Ala. 189); Soaps *v.* Eichberg, 42 Ill. App. 375; Bowers *v.* Briggs, 20 Ind. 139; Nicholson *v.* Combs, 90 Ind. 515; Dickerman *v.* Miner, 43 Ia. 508; Hamilton *v.* Hooper, 46 Ia. 515; Sullivan *v.* Rudisill, 63 Ia. 158; Browning *v.* Gosnell, 91 Ia. 448; Rhoades *v.* Leach, 93 Ia. 337; Shipp *v.* Suggett, 9 B. Mon. 5; Singleton *v.* McQuerry, 85 Ky. 41; Lunt *v.* Silver, 5 Mo. App. 186; Farmers' Bank *v.* Myers, 50 Mo. App. 157; Allen *v.* Dorman, 57 Mo. App. 288; Wright *v.* Kelley, 4 Lans. 57; Harper *v.* Stroud, 41 Tex. 367; Ford *v.* Cameron Bank, 34 S. W. Rep. 684 (Tex. Civ. App.).

[64] Collins *v.* Prosser, 1 B. & C. 682; Brownell *v.* Winnie, 29 N. Y. 400.

[65] State *v.* Dean, 40 Mo. 464; Cole *v.* Hills, 44 N. H. 227; Derby *v.* Thrall, 44 Vt. 413.

[66] Banks *v.* Lee, 73 Ga. 25.

[67] *Re* Howgate & Osborn's Contract, [1902] 1 Ch. 451.

[68] Starr *v.* Blatner, 76 Ia. 356; Chicago Trust Co. *v.* O'Marr, 18 Mont. 568. See also Heman *v.* Gilliam, 171 Mo. 258; Gunter *v.* Addy, 58 S. C. 178. But see *contra*, McKinney *v.* Cobell, 24 Ind. App. 676, which went on the ground that the more specific description would charge third persons with notice. See further S. C., 31 Ind. App. 548.

bond to pay a judgment of a provision for payment of legal costs, since that was the effect of the bond originally;[69] the insertion or alteration of the date when that does not alter the legal effect of the instrument by changing the day of maturity or otherwise;[70] the insertion of the name of the obligor in the body of a bond, after the execution of the bond,[71] since the obligor would be liable though his name had not been inserted; the alteration of the courses named in a deed where the alteration was required by the context and was in accordance with the facts;[72] the insertion of a recital of unessential circumstances;[73] the addition[74] or cancellation[75] of words of description, or the addition of a place of residence,[76] after the signature of an obligor; the erasure of the name of a surety, so far as the principal debtor is concerned;[77] the addition of a memorandum, which does not purport to form part of the document itself.[78] Under this last rule the addition or alteration of the figures indicating the amount of a bill or note is immaterial, if the body of the writing clearly states the amount,[79] for the figures are rather a memorandum

[69] Kleeb *v.* Bard, 12 Wash. 140.

[70] Parry *v.* Nicholson, 13 M. & W. 778; Gill *v.* Hopkins, 19 Ill. App. 74; Lee *v.* Lee, 83 Ia. 565; Prather *v.* Zulauf, 38 Ind. 155; Terry *v.* Hazlewood, 1 Duv. 104; State *v.* Miller, 3 Gill, 335; Hepler *v.* Mt. Carmel Bank, 97 Pa. 420; Whiting *v.* Daniel, 1 Hen. & M. 391; Bashaw's Adm. *v.* Wallace's Adm., 45 S. E. Rep. 290 (Va.). But see Bills of Ex. Act, § 64 (2); Crawford, Neg. Inst. L., § 206.

[71] Smith *v.* Crooker, 5 Mass. 538.

[72] Burnham *v.* Ayer, 35 N. H. 351.

[73] Rudesill *v.* County Court, 85 Ill. 446.

[74] Manufacturers' Bank *v.* Follett, 11 R. I. 92 (agent).

[75] Burlingame *v.* Brewster, 79 Ill. 515; Marx *v.* Luling Assoc., 17 Tex. Civ. App. 408.

[76] Struthers *v.* Kendall, 41 Pa. 214. Cp. Commercial Bank *v.* Patterson, 2 Cranch C. C. 346.

[77] Lynch *v.* Hicks, 80 Ga. 200; Loque *v.* Smith, Wright (Ohio), 10; Tutt *v.* Thornton, 57 Tex. 35.

[78] Manning *v.* Maroney, 87 Ala. 563; Maness *v.* Henry, 96 Ala. 454; Mente *v.* Townsend, 68 Ark. 391; Carr *v.* Welch, 46 Ill. 88; Huff *v.* Cole, 45 Ind. 300; Toner *v.* Wagner, 158 Ind. 447; Light *v.* Killinger, 16 Ind. App. 102; Reed *v.* Culp, 63 Kan. 595; Nugent *v.* Delhomme, 2 Mart. (O. S.) 308; Littlefield *v.* Coombs, 71 Me. 110; Cole's Lessee *v.* Pennington, 33 Md. 476; Cambridge Bank *v.* Hyde, 131 Mass. 77; Boutelle *v.* Carpenter, 182 Mass. 417; American Bank *v.* Bangs, 42 Mo. 450; Moore *v.* Maeon Bank, 22 Mo. App. 684; Johnson *v.* Parker, 86 Mo. App. 660; Palmer *v.* Largent, 5 Neb. 223; Edward Thompson Co. *v.* Baldwin, 62 Neb. 530; Kinard *v.* Glenn, 29 S. C. 590; Yost *v.* Watertown Steam Engine Co., 24 S. W. Rep. 657 (Tex. Civ. App.); Tremper *v.* Hemphill, 8 Leigh, 623. See also Sawyer *v.* Campbell, 107 Ia. 397; Steeley's Credr's *v.* Steeley, 23 Ky. L. Rep. 996. Cp. Warrington *v.* Early, 2 E. & B. 763; Woodworth *v.* Bank of America, 19 Johns. 391.

[79] Horton *v.* Horton's Est., 71 Ia. 448; Woolfolk *v.* Bank of Americe, 10 Bush, 504; Fisk *v.* McNeal, 23 Neb. 726; Smith *v.* Smith, 1 R. I. 398.

In Sehryver *v.* Hawkes, 22 Ohio St. 308, a *bona fide* purchaser was allowed to recover on a note where the figures had been raised, though the amount was left blank in the body of the note and the figures had been written by the

than an integral part of the obligation. But if a memorandum collateral in form is in fact a part of the contract, the erasure of the memorandum is a material alteration.[80]

Further illustrations — Test of materiality. Alteration by adding or changing a statement of the consideration does not ordinarily change the legal effect of an obligation, and if that is the correct test, as is generally held, in the American decisions,[81] such an alteration is immaterial.[82] But a statement of consideration may be important as evidence of the terms of a transaction, and if added or erased fraudulently should make the writing inadmissible as evidence upon that question at least.[83] If the writing was the sole legal evidence by

defendant in order to limit the amount for which the blank space for the amount could be filled in.

[80] Cochran *v.* Nebeker, 48 Ind. 459; Scofield *v.* Ford, 56 Ia. 370; Johnson *v.* Heagan, 23 Me. 329; Wheelock *v.* Freeman, 13 Pick. 165; Wait *v.* Pomeroy, 20 Mich. 425; Bay *v.* Shrader, 50 Miss. 326; Davis *v.* Henry, 13 Neb. 497; Gerrish *v.* Glines, 56 N. H. 9; Price *v.* Tallman, Coxe (N. J.), 447; Benedict *v.* Cowden, 49 N. Y. 396; Stephens *v.* Davis, 85 Tenn. 271. See also Law *v.* Crawford, 67 Mo. App. 150. Cp. Thepold *v.* Deike, 76 Minn. 121; Law *v.* Blomberg, 91 N. W. Rep. 206 (Neb.); Hubbard *v.* Williamson, 5 Ired. 397. But if a condition qualifying the liability of the maker of a note is written with a pencil and the condition is afterwards erased, the maker has been held liable, because of his negligence, to a *bona fide* purchaser without notice on the note in its altered form. Harvey *v.* Smith, 55 Ill. 224; Seibel *v.* Vaughan, 69 Ill. 257. This principle has been carried so far in some cases as to hold the maker liable when a condition written below the note has been cut off. Noll *v.* Smith, 64 Ind. 511; Phelan *v.* Moss, 67 Pa. 59; Zimmerman *v.* Rote, 75 Pa. 188. These decisions are on their facts opposed to several of the cases cited above. Cp. Brown *v.* Reed, 79 Pa. 370.

[81] See the American cases here cited on materiality and immateriality. So in Caldwell *v.* Parker, Ir. Rep. 3 Eq. 519. This decision was dissented from in Suffell *v.* Bank of England, 9 Q. B. D. 555.

[82] Riggs *v.* St. Clair, 1 Cranch C. C. 606; Murray *v.* Klinzing, 64 Conn. 78; Gardiner *v.* Harback, 21 Ill. 129; Magers *v.* Dunlap, 39 Ill. App. 618; Cheek *v.* Nall, 112 N. C. 370. But see Knill *v.* Williams, 10 East, 431; Wright *v.* Inshaw, 1 Dowl. N. S. 802; Suffell *v.* Bank of England, 9 Q. B. D. 555, 571; Benjamin *v.* McConnel, 9 Ill. 536; Low *v.* Argrove, 30 Ga. 129. Cp. Richardson *v.* Fellner, 9 Okl. 513.

[83] See *infra*, p. 848. In Suffell *v.* Bank of England, 9 Q. B. D. 555, the Court of Appeal held an alteration of the number of a bank note material, though admitting the change did not alter the legal effect of the contract. In Craighead *v.* McLoney, 99 Pa. 211, it was said, "Any alteration which changes the evidence or mode of proof is material," and in Brady *v.* Berwind-White Co., 94 Fed. Rep. 28, 106 Fed. Rep. 824 (E. D., Pa.); an addition was held material which did not change the meaning of the writing, because it would render inadmissible parol evidence of facts contradicting the inserted words. This is in accordance with earlier Pennsylvania cases holding the addition of an attesting witness material. Foust *v.* Renno, 8 Pa. 378; Henning *v.* Werkheiser, 8 Pa. 518. See also White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; International Bank *v.* Parker, 88 Mo. App. 117. If this principle were logically applied it would overthrow many of the cases of immaterial alteration collected here. With the English and Pennsylvania decisions may be compared Rowe *v.* Bowman, 183 Mass. 488. In that case it was argued that the unauthorized addition of a United States revenue stamp was a material

which the debt could be proved, the alteration would then be fatal to any recovery by the plaintiff; otherwise not.[84] The same may be said in regard to an alteration of the number of a bond or bank note;[85] or of adding[86] or erasing[87] the name of an attesting witness, where the legal effect of the instrument is not affected by attestation, but only the mode of proof.

Materiality is a question of law. Whether an alteration is material is a question of law, to be decided by the court.[88]

Assignment of Altered Contracts.

Assignment of altered contract generally gives no validity — Contract with blanks. If a contract has been made void by alteration, no subsequent assignment, even if the contract is a negotiable bill or note, can give it validity. The assignee or indorsee, though an innocent purchaser for value, has no greater rights than the previous holder.[89]

alteration. The lack of a stamp, though it would not have made the note inadmissible in evidence in the Massachusetts courts, would have made it inadmissible in the Federal courts. The addition therefore purported to enlarge the rights of the holder by affording evidence legal in the Federal courts. The plaintiff nevertheless recovered.

[84] See *infra*, pp. 848, 873.

[85] Such a change was held material in Suffell *v.* Bank of England, 9 Q. B. D. 555; but immaterial in Wylie *v.* Missouri Pac. Ry. Co., 41 Fed. Rep. 623; State *v.* Cobb, 64 Ala. 127, 157; Comm. *v.* Emigrant Bank, 98 Mass. 12; Elizabeth *v.* Force, 29 N. J. Eq. 587; Birdsall *v.* Russell, 29 N. Y. 239; Note Holders *v.* Funding Board, 16 Lea, 46; Fisk's Claim, 11 Op. Atty. Gen. 258. Sometimes the number of a bond may affect the contract, as where bonds are paid as their numbers are drawn. See Suffell *v.* Bank of England, 9 Q. B. D. 555, 563.

[86] Held immaterial in Hall *v.* Weaver, 34 Fed. Rep. 104; Ford *v.* Ford, 17 Pick. 418; State *v.* Gherkin, 7 Jred. L. 206; Beary *v.* Haines, 4 Whart. 17; Fuller *v.* Green, 64 Wis. 159. But see *contra*, White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; Adams *v.* Frye, 3 Met. 107; Girdner *v.* Gibbons, 91 Mo. App. 412; Foust *v.* Renno, 8 Pa. 378; Henning *v.* Werkheiser, 8 Pa. 518. It is material if the legal effect of the instrument would be changed thereby, as by extending the Statute of Limitations. Milberry *v.* Stover, 75 Me. 69; Homer *v.* Wallis, 11 Mass. 309. See also Richardson *v.* Mather, 178 Ill. 449.

[87] Wickes *v.* Caulk, 5 H. & J. 36. Cp. Nunnery *v.* Cotton, 1 Hawks, 222.

[88] Steele *v.* Spencer, 1 Pet. 552; Payne *v.* Long, 121 Ala. 385; Overton *v.* Matthews, 35 Ark. 146; Ofenstein *v.* Bryan, 20 App. D. C. 1; Milliken *v.* Marlin, 66 Ill. 13; Cochran *v.* Nebeker, 48 Ind. 459; Heard *v.* Tappan, 116 Ga. 930; Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Fisherdick *v.* Hutton, 44 Neb. 122; Burnham *v.* Ayer, 35 N. H. 351; Stephens *v.* Graham, 7 S. & R. 505; Kinard *v.* Glenn, 29 S. C. 590.

[89] Master *v.* Miller, 4 T. R. 320; Vance *v.* Lowther, 1 Ex. D. 176; Suffell *v.* Bank of England, 9 Q. B. D. 555; Overton *v.* Matthews, 35 Ark. 146; Burwell *v.* Orr, 84 Ill. 465; Merritt *v.* Boyden, 191 Ill. 136; McCoy *v.* Lockwood, 71 Ind. 319; Eckert *v.* Louis, 84 Ind. 99, 104; Horn *v.* Newton Bank, 32 Kan. 518; Farmer *v.* Rand, 14 Me. 225; Schwartz *v.* Wilmer, 90 Md. 136; Belknap *v.* National Bank, 100 Mass. 376; Cape Ann Bank *v.* Burns, 129 Mass. 596; Hunter *v.* Parsons, 22 Mich. 96; Coles *v.* Yorks, 28 Minn. 464 (mortgage); Trigg *v.* Taylor, 27 Mo. 245; Hurlbut *v.* Hall, 39 Neb. 889; Erickson *v.* First Bank, 44 Neb. 622; Haines *v.* Dennett, 11 N. H. 180; Gettysburg Bank *v.*

How far this rule is subject to an exception if the alteration consisted in filling in a blank left by the obligor is a disputed question. If the instrument was incomplete and a blank in it was later filled in accordance with express or implied authority, the case is covered by what has been said of alterations made by consent.[90] If the instrument was incomplete and the obligee or another authorized to fill the blank in a certain way fills it in a different way, the case is one of an agent exceeding his actual but not his apparent authority. In such a case his principal should be liable on the instrument in its altered form to an innocent purchaser buying without notice, actual or constructive, of the excess of authority.[91] Where, however,

Chisholm, 169 Pa. 564. See also Burwell *v.* Orr, 84 Ill. 465; Pereau *v.* Frederic, 17 Neb. 117; Walla Walla Co. *v.* Ping, 1 Wash. Ty. 339.

The English Bills of Exchange Act, § 64 (1), qualified this rule by the following proviso: "Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." And the substance of this proviso has been adopted in the Negotiable Instruments Law in this country. Crawford, Neg. Inst. L., § 205; Schwartz *v.* Wilmer, 90 Md. 136, 143.

[90] Such cases are State *v.* Dean, 40 Mo. 464; Kinney *v.* Schmitt, 12 Hun, 521; Stahl *v.* Berger, 10 S. & R. 170; Walla Walla Co. *v.* Ping, 1 Wash. Ty. 339. See further, *supra*, p. 855 *et seq.*

Issuing a negotiable instrument with blanks gives any *bona fide* holder authority to fill them with appropriate words. Michigan Bank *v.* Eldred, 9 Wall. 544; Huntington *v.* Bank, 3 Ala. 186; Visher *v.* Webster, 8 Cal. 109; Norwich Bank *v.* Hyde, 13 Conn. 279; Riddle *v.* Stevens, 32 Conn. 378, 390; Young *v.* Ward, 21 Ill. 223; Spitler *v.* James, 32 Ind. 202; Gillaspie *v.* Kelley, 41 Ind. 158; Lowden *v.* Schoharie Bank, 38 Kan. 533; Bank *v.* Curry, 2 Dana, 142; Cason *v.* Grant County Bank, 97 Ky. 487; Ives *v.* Farmers' Bank, 2 Allen, 236; Russell *v.* Langstaffe, Doug. 514; Scotland Bank *v.* O'Connel, 23 Mo. App. 165; Mitchell *v.* Culver, 7 Cow. 336; Redlich *v.* Doll, 54 N. Y. 234; Waggoner *v.* Millington, 8 Hun, 142; Porter *v.* Hardy, 10 N. Dak. 551; Fullerton *v.* Sturges, 4 Ohio St. 529; Cox *v.* Alexander, 30 Oreg. 438; Wessell *v.* Glenn, 108 Pa. 104; Douglass *v.* Scott, 8 Leigh, 43. But see *contra*, Inglish *v.* Breneman, 9 Ark. 122; Holmes *v.* Trumper, 22 Mich. 427; Morehead *v.* Parkersburg Bank, 5 W. Va. 74 (overruled in First Bank *v.* Johns, 22 W. Va. 520). See also Young *v.* Baker, 29 Ind. App. 130; Greenfield Bank *v.* Stowell, 123 Mass. 196.

This principle was applied to other contracts in Roe *v.* Town Ins. Co., 78 Mo. App. 452; Kinney *v.* Schmitt, 12 Hun, 521. Cp. Solon *v.* Williamsburgh Bank, 114 N. Y. 122.

[91] Hatch *v.* Searles, 2 Sm. & G. 147; Garrard *v.* Lewis, 10 Q. B. D. 30; Michigan Bank *v.* Eldred, 9 Wall. 544; Prim *v.* Hammel, 134 Ala. 652; Overton *v.* Matthews, 35 Ark. 146; Elliott *v.* Levings, 54 Ill. 214; Spitler *v.* James, 32 Ind. 202; De Pauw *v.* Bank, 126 Ind. 551, 557; Geddes *v.* Blackmore, 132 Ind. 551 (cp. Pope *v.* Branch County Bank, 23 Ind. App. 210); Woolfolk *v.* Bank of America, 10 Bush, 517; Breckenridge *v.* Lewis, 84 Me. 349; Weidman *v.* Symes, 120 Mich. 657; Simmons *v.* Atkinson, 69 Miss. 862; 865; Redlich *v.* Doll, 54 N. Y. 234; Ross *v.* Doland, 29 Ohio St. 473; Cox *v.* Alexander, 30 Oreg. 438; Wessell *v.* Glenn, 108 Pa. 104; Orrick *v.* Colston, 33 Gratt. 377. But see Riddle *v.* Stevens, 32 Conn. 378; Holmes *v.* Trumper, 22 Mich. 427; Solon *v.* Williamsburgh Bank, 114 N. Y. 122; Porter *v.* Hardy, 10 N. Dak. 551.

the instrument was complete when issued but contained spaces which could be filled in without exciting suspicion, there is no agency. If the obligor is liable, it must be because he was so negligent in leaving spaces which invited alteration that he cannot be allowed to assert the defense of alteration against an innocent holder. In the leading case of *Young* v. *Grote*[92] the maker was held liable where he had carelessly left an unfilled space after the amount of a check. The case seems sound in principle and has been followed in this country.[93] It has, however, been practically overruled in England.[94] Of course, it is only when spaces are left in such a way that the obligor must be regarded as careless in view of existing mercantile usage that the doctrine of *Young* v. *Grote* is applicable.[95] It is not applicable to instruments other than negotiable paper.[96]

When a Debt Survives, though the Writing is Destroyed.

Formerly debt died with the writing — Reason for the rule. While the doctrine of alteration was applied only to obligations under seal, there was no question that if the validity of the document was destroyed by alteration, the debt represented by the document was equally destroyed, and in no form of action could the holder get relief. But with the extension of the doctrine of alteration to writings which are only evidence, and perhaps not the sole evidence, of the obligation, the technical reason for regarding the obligation as totally destroyed does not hold good, for the existence of a simple contract obligation

So where a note apparently complete is delivered on the condition that another maker's name shall be obtained, the condition is invalid against an innocent purchaser. Ward *v.* Hackett, 30 Minn. 150. And see many decisions in accord in Ames Cas. Suretyship, 305, n.

92 4 Bing. 254.

93 Young *v.* Lehman, 63 Ala. 519; Winter *v.* Pool, 104 Ala. 580; Yocum *v.* Smith, 63 Ill. 321; Lowden *v.* National Bank, 38 Kan. 533; Blakey *v.* Johnson, 13 Bush, 204; Cason *v.* Grant County Bank, 97 Ky. 487; Isnard *v.* Torres, 10 La. Ann. 103; First Bank *v.* Webster, 121 Mich. 149; Scotland County Bank *v.* O'Connel, 23 Mo. App. 166; Garrard *v.* Haddan, 67 Pa. 82; Zimmerman *v.* Rote, 75 Pa. 188; Johnson Harvester Co. *v.* McLean, 57 Wis. 258. But see Fordyce *v.* Kosminski, 49 Ark. 40; Walsh *v.* Hun, 120 Cal. 46; Cronkhite *v.* Nebeker, 81 Ind. 319; De Pauw *v.* Bank of Salem, 126 Ind. 553; Knoxville Bank *v.* Clarke, 51 Ia. 264; First Bank *v.* Zeims, 93 Ia. 140; Burrows *v.* Klunk, 70 Md. 451; Greenfield Bank *v.* Stowell, 123 Mass. 196; Burson *v.* Huntington, 21 Mich. 415; Simmons *v.* Atkinson, 69 Miss. 862; Goodman *v.* Eastman, 4 N. H. 455; Worrall *v.* Gheen, 39 Pa. 388.

94 Scholfield *v.* Earl of Londesborough, [1895] 1 Q. B. 536, [1896] A. C. 514.

95 See cases in note 93, *supra*, also Harvey *v.* Smith, 55 Ill. 224; Derr *v.* Keaough, 96 Ia. 397; Bank of Billings *v.* Wade, 73 Mo. App. 558; Leas *v.* Walls, 101 Pa. 57.

96 Lehman *v.* Central Co., 12 Fed. Rep. 595; Cronkhite *v.* Nebeker, 81 Ind. 319; Smith *v.* Holzhauer, 67 N. J. L. 202. See also Solon *v.* Williamsburgh Bank, 114 N. Y. 122, 136.

is not in theory dependent on the evidence by which it is proved. If, therefore, in such a case the obligee is held to lose all rights, even though it would be possible to prove the obligation by legal evidence, it is because the policy requiring that the purity of written evidence shall be maintained demands the imposition of a severe penalty on those who tamper with such evidence.[97]

Recovery on original debt allowed in this country where alteration not fraudulent. In most of the cases upon the point the altered writing was a bill of exchange or promissory note, and it has been held in England that as between the original parties the alteration does not extinguish the liability on account of which the instrument was given.[98] In this country the distinction has been taken between an alteration made fraudulently and an alteration not made fraudulently. In the latter case, as has been seen, the alteration in many jurisdictions will not bar recovery on the instrument itself;[99] but where such recovery is barred, relief is granted by allowing recovery on the original debt or consideration for which the instrument was given.[1]

97 Whether the rule against alteration is wider in its effect than a rule of evidence, forbidding the use of writings materially and wrongfully altered, is well illustrated by the case of a contract executed in duplicate, one part of which is thereafter fraudulently and materially altered. If the requirement of the law is merely that the altered writing shall not be given in evidence, the fraudulent party may still prove his right by the unaltered part, for each part is an original. 1 Greenl. Ev. (16th ed.), § 563. But if the fact that he has fraudulently altered a writing which embodies the contract is, as matter of substantive law, a defense there can be no recovery. The former view is supported by two decisions in regard to duplicate leases. Lewis *v.* Payn, 8 Cow. 71; Jones *v.* Hoard, 59 Ark. 42. Since a lease is primarily a conveyance, these cases may perhaps be distinguished from the case supposed. Certainly the conclusion, if applied to executory contracts, cannot be regarded as free from doubt. An affirmative plea alleging alteration of the contract would, it seems, set up a good defense and would be supported by proof of the facts. Chitty, Pleading (16th Am. ed.), 299; *infra*, p. 872.

98 Atkinson *v.* Hawdon, 2 A. & E. 628; Sloman *v.* Cox, 1 C. M. & R. 471. See also Hall *v.* Fuller, 5 B. & C. 750.

But there could be no recovery against a party secondarily liable on the instrument, for the consideration received by him, since the alteration has deprived him of any right to recover over against prior parties to the instrument. Alderson *v.* Langdale, 3 B. & Ad. 663.

99 See *supra*, p. 853.

1 Little *v.* Fowler, 1 Root, 94; Warren *v.* Layton, 3 Harring. (Del.) 404; Vogle *v.* Ripper, 34 Ill. 100; Elliott *v.* Blair, 47 Ill. 342; Hayes *v.* Wagner, 89 Ill. 390; Wallace *v.* Wallace, 8 Ill. App. 69; First Bank *v.* Ryan, 31 Ill. App. 271, 38 Ill. App. 268; affd., 148 Ill. 349; Hampton *v.* Mayes, 3 Ind. Ty. 65; Krause *v.* Meyer, 32 Ia. 566; Morrison *v.* Huggins, 53 Ia. 76; Eckert *v.* Pickel, 59 Ia. 545; Maguire *v.* Eichmeier, 109 Ia. 301, 304; Hervey *v.* Hervey, 15 Me. 357; Morrison *v.* Welty, 18 Md. 169; Owen *v.* Hall, 70 Md. 97; State Bank *v.* Shaffer, 9 Neb. 1; Lewis *v.* Schenck, 18 N. J. Eq. 459; Hunt *v.* Gray, 35 N. J. L. 227; Merrick *v.* Boury, 4 Ohio St. 60; Savage *v.* Savage, 36 Oreg. 268; Keene *v.* Weeks, 19 R. I. 309; Wyckoff *v.* Johnson, 2 S. D. 91; Otto *v.* Halff, 89 Tex. 384; Matteson *v.* Ellsworth, 33 Wis. 488. See also

Where the instrument was given in conditional payment of an antecedent debt, there is no difficulty in reaching this result. The instrument has not been paid at maturity, and the old debt therefore still exists. But the same result would probably be reached in this country, though no debt had ever existed before the transaction of which the delivery of the instrument was a part, though a recovery of the consideration or its value must in such a case be supported on principles of quasi-contract. If a material alteration is made fraudulently, however, no recovery can be had in any form of action either on the instrument or the original debt or consideration.[2]

Application of doctrine to mortgages. The application of these principles seems clear in the case of alteration of a mortgage note or bond. If the effect of the alteration is to discharge not simply the note or bond, but the debt itself, the mortgage, being an incident of the debt, must also fall.[3] If, however, the alteration was not due to fraud of the holder, the debt is not discharged, whether the altered obligation is or not; and if the debt is not discharged the mortgage will survive.[4] If a mortgage is given to secure several separate obligations, such an alteration of one of them as avoids the debt represented thereby, avoids also the lien of the mortgage as to that obligation, but not as to the other obligations.[5]

Craig *v.* Lowe, 36 Ga. 117. *Contra* are White *v.* Hass, 32 Ala. 430; Toomer *v.* Rutland, 57 Ala. 379.

As the note, though void because of alteration, may be injurious to the defendant if it remains outstanding, the plaintiff is required to surrender the note in order to recover on the consideration. Morrison *v.* Welty, 18 Md. 169; Smith *v.* Mace, 44 N. H. 553, 560; Booth *v.* Powers, 56 N. Y. 22, 31. Cp. Eckert *v.* Pickel, 59 Ia. 545.

[2] Elliott *v.* Blair, 47 Ill. 342; Ballard *v.* Franklin Ins. Co., 81 Ind. 239; Woodworth *v.* Anderson, 63 Ia. 503; Hocknell *v.* Sheley, 66 Kan. 357; Warder, etc., Co. *v.* Willyard, 46 Minn. 531; Walton Plow Co. *v.* Campbell, 35 Neb. 173; Martendale *v.* Follett, 1 N. H. 95; Smith *v.* Mace, 44 N. H. 553; Clute *v.* Small, 17 Wend. 238; Kennedy *v.* Crandell, 3 Lans. 1; Meyer *v.* Huneke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 22. Otherwise in South Carolina. See the following note.

[3] Vogle *v.* Ripper, 34 Ill. 100; Elliott *v.* Blair, 47 Ill. 342; Tate *v.* Fletcher, 77 Ind. 102; Bowman *v.* Mitchell, 79 Ind. 84; Hocknell *v.* Sheley, 66 Kan. 357; Walton Plow Co. *v.* Campbell, 35 Neb. 173.

In South Carolina, even a fraudulent alteration by the holder of the note or bond will not discharge the mortgage. Plyler *v.* Elliott, 19 S. C. 264; Smith *v.* Smith, 27 S. C. 166; Heath *v.* Blake, 28 S. C. 406. See also Bailey *v.* Gilman Bank, 99 Mo. App. 571, 578.

[4] Elliott *v.* Blair, 47 Ill. 342; Clough *v.* Seay, 49 Ia. 411; Simpson *v.* Sheley, 9 Kan. App. 512; Jeffrey *v.* Rosenfeld, 179 Mass. 506; Hoffman *v.* Molloy, 91 Mo. App. 367; Bailey *v.* Gilman Bank, 99 Mo. App. 571; Gillette *v.* Smith, 18 Hun, 10; Cheek *v.* Nall, 112 N. C. 370.

[5] Parke Co. *v.* White River Lumber Co., 110 Cal. 658; Hoffman *v.* Molloy, 91 Mo. App. 367.

Though an obligor whose obligation has been materially and fraudulently altered may thus keep the consideration which he has received without giving any equivalent for it, he would not be allowed to enforce an executory obligation, given in exchange for the altered obligation, while repudiating his own obligation on account of the alteration. He must either perform his obligation as if it had not been altered, or rescind both obligations.[6]

Alteration of a Writing before Execution.

Alteration before contract becomes binding is fatal. To speak of alteration as a method of discharging contracts necessarily assumes a contract at one time binding, and subsequently altered. In some cases, however, a writing is altered before it has by delivery or assent become a binding contract. This most commonly happens where a surety or joint obligor signs an obligation and entrusts it to the principal debtor or co-obligor, who alters it before delivering it to the creditor, but the same question may arise in any case where a writing is entrusted to an agent to deliver and is altered before delivery. It seems clear on principle that, however innocent the obligee may be or however innocently the alteration may have been made, so long as it is material, the obligor cannot be held.[7] He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered nor assented to by the creditor. A court may on equitable principles enforce an obligation, once valid, though technically destroyed or discharged, but it can hardly construct and enforce an obligation which never existed on the ground that the defendant was once willing to enter into such an obligation and would have done so if the writing had not been altered.[8]

6 Singleton *v.* McQuerry, 85 Ky. 41.

7 Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75; Wood *v.* Steele, 6 Wall. 80; State *v.* Churchill, 48 Ark. 426; People *v.* Kneeland, 31 Cal. 288; Pelton *v.* San Jacinto Co., 113 Cal. 21; Hill *v.* O'Neill, 101 Ga. 832; Mulkey *v.* Long, 5 Idaho, 213; Weir Plow Co. *v.* Walmsley, 110 Ind. 242; State *v.* Craig, 58 Ia. 238; Warren *v.* Fant, 79 Ky. 1; Waterman *v.* Vose, 43 Me. 504; Howe *v.* Peabody, 2 Gray, 556; Citizens' Bank *v.* Richmond, 121 Mass. 110; Britton *v.* Dierker, 46 Mo. 591; Robinson *v.* Berryman, 22 Mo. App. 509; Mockler *v.* St. Vincent's Inst., 87 Mo. App. 473; McGavock *v.* Morton, 57 Neb. 385; Goodman *v.* Eastman, 4 N. H. 455; McGrath *v.* Clark, 56 N. Y. 34; Crawford *v.* West Side Bank, 100 N. Y. 50, 57; Cheek *v.* Nall, 112 N. C. 370; Jones *v.* Bangs, 40 Ohio St. 139; Newman *v.* King, 54 Ohio St. 273. See also Bracken Co. *v.* Daum, 80 Ky. 388; Sharpe *v.* Bellis, 61 Pa. 69.

8 This, however, was done in Latshaw *v.* Hiltebeitel, 2 Penny. 257.

Qualification of the rule. This principle is, however, subject to a qualification. If the writing was entrusted to one with actual or apparent authority to make the alteration in question, the obligor will be bound by the instrument in its altered form, and the courts have gone very far in inferring such authority. Thus where a note is entrusted by a signer to one who is to borrow money upon it, and the latter without authority procures additional signatures to the note,[9] or an attesting witness,[10] the original signer is liable. So where a note signed in blank for accommodation and entrusted to the accommodated party is filled out by him, and later before delivery altered,[11] and where a note entrusted to the accommodated party in a complete form was wrongly drawn and was altered before delivery so that it should conform to the intention of the parties;[12] and even where names of obligors previously on the note have been erased and others substituted, the same result has been reached.[13]

Pleading and Evidence.

Pleading. The pleading appropriate to enable a defendant to take advantage of alteration depends on whether the plaintiff bases his action on the obligation in its original or in its altered form. In the latter case the defendant should deny the making of the contract alleged by plea of *non est factum* or *non assumpsit* or modern equivalents.[14] In the former case the defendant may plead affirmatively

[9] Hochmark *v.* Richler, 16 Col. 263; Governor *v.* Lagow, 43 Ill. 134; Geddes *v.* Blackmore, 132 Ind. 551; Hall's Admr. *v.* McHenry, 19 Ia. 521; Graham *v.* Rush, 73 Ia. 451; Edwards *v.* Mattingly, 107 Ky. 332; Brey *v.* Hagan, 110 Ky. 566; Evans *v.* Partin, 22 Ky. L. Rep. 20, 21; Ward *v.* Hackett, 30 Minn. 150; Babcock *v.* Murray, 58 Minn. 385; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62. But see *contra*, Lunt *v.* Silver, 5 Mo. App. 186, and cp. Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75.

[10] Hall *v.* Weaver, 34 Fed. Rep. 110.

[11] Whitmore *v.* Nickerson, 125 Mass. 496; Douglass *v.* Scott, 8 Leigh, 43. But if the blanks are filled in and the note negotiated, the accommodated party cannot on subsequently recovering the note change its terms. Ofenstein *v.* Bryan, 20 App. D. C. 1.

[12] Boyd *v.* Brotherson, 10 Wend. 93.

[13] Jones *v.* Shelbyville Ins. Co., 1 Met. (Ky.) 58; Hall *v.* Smith, 14 Bush, 604, 612; King Co. *v.* Ferry, 5 Wash. 536. It is submitted that this result is wrong. Even though the alteration is not apparent, there can be no ground of estoppel unless the original signer was guilty of negligence. These decisions seem opposed to State *v.* Churchill, 48 Ark. 426; State *v.* Griswold, 32 Ind. 313. See also State *v.* Craig, 58 Ia. 238.

[14] Cook *v.* Coxwell, 2 C. M. & R. 291; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; J. I. Case Co. *v.* Peterson, 51 Kan. 713; Daniel *v.* Daniel, Dud. (Ga.) 239; Conner *v.* Sharpe, 27 Ind. 41; Lincoln *v.* Lincoln, 12 Gray, 45; Cape Ann. Bank *v.* Burns, 129 Mass. 596; Whitmer *v.* Frye, 10 Mo. 348; Nat. Bank *v.* Nickell, 34 Mo. App. 295; Schwarz *v.* Oppold, 74 N. Y. 307; Farmers' Trust Co. *v.* Siefke, 144 N. Y. 354; Zeigler *v.* Sprenkle, 7 Watts & S. 175.

that the obligation has been altered,[15] but in this country he would also generally succeed by denying the making of the obligation, for the burden would then be on the plaintiff to prove this and on the defendant's objection to the original writing because fraudulently altered and to secondary evidence because the non-production of the original was not satisfactorily accounted for, the plaintiff would be unable to sustain this burden.[16] The affirmative plea is, therefore, strictly necessary only in cases in which the rule of substantive law applicable is more stringent than the rule of evidence, as in jurisdictions where an innocent material alteration is held fatal.

Evidence. There are many decisions in regard to the admissibility of altered writings in evidence, and presumptions have been laid down as rules of law in a way to confuse the subject. Many courts hold that when a writing offered in evidence shows on its face an alteration, there is a presumption that the alteration was improperly made after the execution of the writing, and that, therefore, a burden is cast upon the party offering the writing to explain the alteration before the writing can be received in evidence.[17] Other courts hold that in the absence of suspicious circumstances there is exactly the opposite presumption, namely, that the alteration was made innocently and legally.[18] Nor is it always clear whether in

[15] Field *v.* Woods, 7 A. & E. 114; Davidson *v.* Cooper, 11 M. & W. 778; Croockewit *v.* Fletcher, 1 H. & N. 893.

[16] First Nat. Bank *v.* Mack, 35 Oreg. 122, 127; Kansas Mut. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64.

[17] Brady *v.* Berwind-White Co., 106 Fed. Rep. 824; Warren *v.* Layton, 3 Harring. (Del.) 404; Mulkey *v.* Long, 5 Idaho, 213; Mortag *v.* Linn, 23 Ill. 551; Landt *v.* McCullough, 206 Ill. 214; Dewey *v.* Merritt, 106 Ill. App. 156; Rambousek *v.* Supreme Council, 119 Ia. 263; McMicken *v.* Beauchamp, 2 La. 290; Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572 (*cp.* Jackson *v.* Day, 80 Miss. 800); Patterson *v.* Fagan, 38 Mo. 70 (but see Trimble *v.* Elkin, 88 Mo. App. 229, 234); Burton *v.* American Ins. Co., 96 Mo. App. 204; Courcamp *v.* Weber, 39 Neb. 533; Hills *v.* Barnes, 11 N. H. 395; Burnham *v.* Ayer, 35 N. H. 351; Ames *v.* Manhattan Ins. Co., 31 N. Y. App. Div. 180, 185; affd., 167 N. Y. 584; Simpkins *v.* Windsor, 21 Oreg. 382; First Bank *v.* Mack, 35 Oreg. 122; Clark *v.* Eckstein, 22 Pa. 507; Jordan *v.* Stewart, 23 Pa. 244; Burgwin *v.* Bishop, 91 Pa. 336; Park *v.* Glover, 23 Tex. 469; Collins *v.* Ball, 82 Tex. 259, 268; Bullock *v.* Sprowls, 54 S. W. Rep. 657 (Tex. Civ. App.); Elgin *v.* Hall, 82 Va. 680; Bradley *v.* Dells Lumber Co., 105 Wis. 245.

[18] Doe *v.* Catomore, 16 Q. B. 745; Little *v.* Herndon, 10 Wall. 26; Ward *v.* Cheney, 117 Ala. 241; Corcoran *v.* Doll, 32 Cal. 82; Kendrick *v.* Latham, 25 Fla. 819; Printup *v.* Mitchell, 17 Ga. 558; Bedgood *v.* McLain, 89 Ga. 793; Westmoreland *v.* Westmoreland, 92 Ga. 233; Dangel *v.* Levy, 1 Idaho, 722; Stoner *v.* Ellis, 6 Ind. 152; Sirrine *v.* Briggs, 31 Mich. 443; Brand *v.* Johnrowe, 60 Mich. 210; Wilson *v.* Hayes, 40 Minn. 531; Matthews *v.* Coalter, 9 Mo. 696; Stillwell *v.* Patton, 108 Mo. 352; Adams *v.* Yates, 143 Mo. 475, 481; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556; Paul *v.* Leeper,

speaking of presumptions of one sort or another the courts mean that in the absence of any evidence showing innocence or fraud these presumptions apply, or further that there is a burden upon the party who has not the advantage of a presumption of making out his contention by a preponderance of evidence, irrespective of the pleadings.

Tendency of best modern decisions. The tendency of the best modern decisions is to disregard these rules of presumption and to treat each case upon its own facts so far as the duty of adducing further evidence is concerned, and to throw the burden of ultimate proof upon whichever party has the burden of establishing the issue raised by the pleadings.[19]

Merger.

By judgment or bond. Where an obligation arising under a contract is reduced to judgment[20] or where an obligation arising under a simple contract is put in the form of a specialty[21] the original obliga-

98 Mo. App. 515; Dorsey *v.* Conrad, 49 Neb. 243; Hodge *v.* Scott, 95 N. W. Rep. 837 (Neb.); North River Co. *v.* Shrewsbury Church, 22 N. J. L. 424; Cass County *v.* American Bank, 9 N. Dak. 253; Franklin *v.* Baker, 48 Ohio St. 296; Richardson *v.* Fellner, 9 Okl. 513; Foley Co. *v.* Solomon, 9 S. Dak. 511; Farnsworth *v.* Sharp, 4 Sneed, 55 (cp. Organ *v.* Allison, 9 Baxt. 459); Beaman *v.* Russell, 20 Vt. 205; Wolferman *v.* Bell, 6 Wash. 84; Yakima Bank *v.* Knipe, 6 Wash. 348; Kleeb *v.* Bard, 12 Wash. 140; Maldaner *v.* Smith, 102 Wis. 30. See also Barclift *v.* Treece, 77 Ala. 528; Hart *v.* Sharpton, 124 Ala. 638; Gwin *v.* Anderson, 91 Ga. 827; Galloway *v.* Bartholomew, 74 Pac. Rep. 467 (Oreg.).

In Blewett *v.* Bash, 22 Wash. 536, this presumption was held not applicable to the erasure of a signature as that must necessarily have been done after execution. See also Burton *v.* American Ins. Co., 88 Mo. App. 392.

19 Rosenberg *v.* Jett, 72 Fed. Rep. 90; Harper *v.* Reaves, 132 Ala. 625; Klein *v.* German Bank, 69 Ark. 140; Hayden *v.* Goodnow, 39 Conn. 164; Baxter *v.* Camp, 71 Conn. 245; Catlin Coal Co. *v.* Lloyd, 180 Ill. 398; Stayner *v.* Joyce, 120 Ind. 99; Hagan *v.* Insurance Co., 81 Ia. 321; Magee *v.* Allison, 94 Ia. 527; University *v.* Hayes, 114 Ia. 690; Ely *v.* Ely, 6 Gray, 439; Comstock *v.* Smith, 26 Mich. 306; Stough *v.* Ogden, 49 Neb. 291; Cole *v.* Hills, 44 N. H. 227; Hunt *v.* Gray, 35 N. J. L. 227; Hoey *v.* Jarman, 39 N. J. L. 523; Riley *v.* Riley, 9 N. Dak. 580; Robinson *v.* Myers, 67 Pa. 9; Nesbit *v.* Turner, 155 Pa. 429; Cosgrove *v.* Fanebust, 10 S. Dak. 213; Conner *v.* Fleshman, 4 Va. 693.

20 See cases in following notes.

21 "If a man contract to pay money for a thing which he hath bought, if he take a bond for the money, the contract is discharged, and he shall not have an action of debt upon the contract." Fitz. Nat. Brev. 120, n.

"If a man be indebted to me by contract, and afterward makes me a bond for the same debt, the contract is hereby determined, for in debt on the contract it is a good plea that he has a bond for the same debt. But if a stranger makes an obligation to me for the same debt, the contract still re-

tion is by operation of law extinguished and merged in the new obligation.

Judgment on other causes than bonds. That a judgment and satisfaction of the judgment merged and extinguished any personal cause of action other than a formal obligation was undoubtedly recognized from very early times.

That a judgment without satisfaction had the same effect upon a simple contract debt leaving the creditor to his remedy on the judgment exclusively seemed clear in the minds of the judges at least by 1469,[22] though whether the principle extended to personal actions generally seems to have been somewhat doubted.[23]

Judgment on a bond. The case of a bond gave more trouble. As the bond itself was regarded as constituting the obligation, so long as that bond existed the obligation necessarily existed. Accordingly when judgment was given in an action on a bond the bond was "damned." [24] But if the defendant did not procure the bond to be damned he was liable to be sued again thereon.[25] In *Higgens's case*,[26] however, Coke held not only that "there is not any question but judgment and execution upon a bond is a good bar in a new action thereon," but that even though no execution had issued, so long as the judgment remained in force there could be no new action on

mains, because it is by another person, and both are now debtors." Bro. Ab. tit. Contract, pl. 29.

So Hooper's Case, 2 Lev. 110; Oldfield's Case, Noy, 140; Davis *v.* Curtis, Ch. Cas. 226; Twopenny *v.* Young, 3 B. & C. 210; U. S. *v.* Lyman, 1 Mason, 482; Howell *v.* Webb, 2 Ark. 360; Chambers *v.* McDowell, 4 Ga. 185, 189; Rhoads *v.* Jones, 92 Ind. 328; Kennion *v.* Kelsey, 10 Ia. 443; Davidson *v.* Kelly, 1 Md. 492, 500; Atty.-General *v.* Whitney, 137 Mass. 450; Van Brunt *v.* Mismer, 8 Minn. 232; Baker *v.* Baker, 28 N. J. L. 13; Renard *v.* Sampson, 12 N. Y. 561; McNaughten *v.* Partridge, 11 Ohio St. 223, 232; Share *v.* Anderson, 7 S. & R. 43; Chalmers *v.* Turnipseed, 21 S. C. 126; Witz *v.* Fite, 91 Va. 446, 453.

Similarly a negotiable instrument which is a mercantile specialty merges the debt on account of which it was given. Ames Cas. B. & N. II, 874.

[22] 9 Edw. IV, 50, pl. 10. "For by the recovery the nature of the duty was changed."

[23] *Ibid.*, abridged in Bro. Ab. Judgment, pl. 47. In an action of account the defendant pleaded a previous judgment of account for the same matter from which an appeal was then pending, and it was doubted, if execution was not taken out whether the plaintiff could have a new action. "Littleton and Choke, justices, it is a good plea that he has previously recovered. Contrary, Danby and Moyle, justices, for if execution was not taken out he can have a new action and if the plaintiff sued out execution on both, the defendant shall have *audita querela*."

[24] *I. e.*, canceled. See *e. g.*, 9 Edw. IV, 50, 51, pl. 10.

[25] See the early case stated in Higgens's Case, 6 Co. 44*b*, 45*b*.

[26] 6 Co. 44*b*, 46*a*.

the bond. The general application of this principle to all kinds of contracts has not since been doubted.[27]

Distinction between merger and res judicata. Merger of contract rights in judgment is based not simply on the principles applicable to merger generally, namely that a larger and more important obligation or estate, which fully expresses or includes a lower form of obligation or estate, as it renders the latter unnecessary, extinguishes it, but on the broader principle, necessary to prevent vexation of litigants and courts with repeated trials of the same dispute, the matters which have once passed into judgment are, as between parties to the litigation or their successors, conclusively settled by the decision of the court. The doctrines of *res judicata* include more than can be properly brought under the heading of merger, since they debar parties from calling in question in any litigation any matter actually decided in the earlier litigation,[28] but all the essential consequences of the merger of the plaintiff's right in a judgment are also necessary consequences of the principles of *res judicata.*

Requisites for merger. In order to effect a merger of a lower obligation into a higher, the obligations must be between the same parties[29]

27 Connecticut Ins. Co. *v.* Jones, 8 Fed. Rep. 303; Ries v. Rowland, 11 Fed. Rep. 657; Schuler *v.* Israel, 27 Fed. Rep. 851, 120 U. S. 506; Runnamaker *v.* Cordray, 54 Ill. 303; Peoria Savings Co. *v.* Elder, 165 Ill. 55; Wilson *v.* Buell, 117 Ind. 315; North *v.* Mudge, 13 Ia. 496; Harford *v.* Street, 46 Ia. 594; Scott *v.* Sanders' Heirs, 6 J. J. Marsh, 506; Campbell *v.* Mayhugh, 15 B. Mon. 142; West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736; Sweet *v.* Brackley, 53 Me. 346; Alie *v.* Nadeau, 93 Me. 282; Bank of United States *v.* Merchants' Bank, 7 Gill, 415; Schaferman *v.* O'Brien, 28 Md. 565; Standifer *v.* Bush, 16 Miss. 383; Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477; Tourville *v.* Wabash R. Co., 148 Mo. 614; Grant *v.* Burgwyn, 88 N. C. 95; Ellis *v.* Staples, 9 Humph. 238; Saunders *v.* Griggs' Admr., 81 Va. 506. Cp. Boynton *v.* Ball, 121 U. S. 622; Bacon *v.* Reich, 121 Mich. 480. See as to a decree in equity, Laur *v.* People, 17 Ill. App. 448; Meyer *v.* Meyer, 40 Ill. App. 94; Foster *v.* The Richard Busteed, 100 Mass. 409; Mutual Ins. Co. *v.* Newton, 50 N. J. L. 571.

28 Thus a judgment in an action on part of a continuing contract not only merges that right of action but may have the effect of conclusively fixing a construction of the contract for all future disputes.

29 White *v.* Cuyler, 6 T. R. 176; Holmes *v.* Bell, 3 Man. & G. 213; Bell *v.* Banks, 3 Man. & G. 258; Ansell *v.* Baker, 15 Q. B. 20; Boaler *v.* Mayor, 19 C. B. N. S. 76; Mowatt *v.* Londesborough, 4 E. & B. 1; Aspden *v.* Nixon, 4 How. 467; Chase *v.* Swain, 9 Cal. 130; Cook *v.* Morris, 66 Conn. 137; Harvey *v.* State, 94 Ind. 159; Gilbert *v.* Thompson, 9 Cush. 348; Gage *v.* Ames, 26 Minn. 64; Richardson *v.* Richards, 36 Minn. 111; McGill *v.* Wallace, 22 Mo. App. 675; Gardner *v.* Raisbeck, 28 N. J. Eq. 71; Rodman *v.* Devlin, 23 Hun. 590; Rhoads *v.* Armstrong County, 41 Pa. 92. Thus an action *in rem* against a vessel does not merge a subsequent action on the same contract against the owners of the vessel. Toby *v.* Brown, 11 Ark. 308. See also Tabor *v.* The Cerro Gordo, 54 Fed. Rep. 391.

and upon the same debt.[30] Moreover a foreign judgment, while it will bind the parties by its determination, will not have the technical effect of merging the original cause of action.[31] A domestic action may be brought and the foreign judgment will then be conclusive evidence as to the rights of the parties, if the foreign court had full jurisdiction of the parties and the subject-matter of the dispute.[32] A judgment of a court of one of the United States is not, however, treated as a foreign judgment for the purposes of this rule. Such a judgment merges the cause of action.[33]

Arbitration and Award.

General principle. If a claim arising from contract is by agreement of the parties submitted to arbitration and an award is made by the arbitrators, although the award has not been performed, this is conclusive upon the parties. If the award merely fixes the amount due upon the original cause of action, the plaintiff may still sue upon that cause of action[34] (though he may also sue upon the award or agreement of arbitration), but the defendant may set up the award as a bar to any recovery in excess of the amount awarded.[35] If, however, the

[30] Norfolk Ry. *v.* McNamara, 3 Ex. 628; Snyder's Admr. *v.* McComb's Exr., 39 Fed. Rep. 292; Chapman *v.* Brainard, 2 Root, 375; Illinois Central R. Co. *v.* Schwartz, 13 Ill. App. 490; Willson *v.* Binford, 81 Ind. 588; Tracy *v.* Kerr, 47 Kan. 656; Brou *v.* Becnel, 22 La. Ann. 610; Lehan *v.* Good, 8 Cush. 302; Harding *v.* Hale, 2 Gray, 399; Parr *v.* Greenbush, 112 N. Y. 246; Vinal *v.* Continental Co., 53 Hun, 247; Raven *v.* Smith, 87 Hun, 90; Knott *v.* Stephens, 5 Oreg. 235; Kaster *v.* Welsh, 157 Pa. 590.

[31] Hall *v.* Odber, 11 East, 118; Smith *v.* Nicolls, 5 Bing. N. C. 208; Bank of Australasia *v.* Nias, 16 Q. B. 717; Bank of Australasia *v.* Harding, 9 C. B. 661; Lyman *v.* Brown, 2 Curt. 559; New York, etc., R. Co. *v.* McHenry, 17 Fed. Rep. 414; Wood *v.* Gamble, 11 Cush. 8; Hays *v.* Cage, 2 Tex. 501; Frazier *v.* Moore's Admr., 11 Tex. 755; Eastern Township Bank *v.* Beebe, 53 Vt. 177. *Contra*, Jones *v.* Jamison, 15 La. Ann. 35 (statutory). If the foreign judgment has been paid, however, the cause of action is fully satisfied. Barber *v.* Lamb, 8 C. B. N. S. 95.

[32] Ricardo *v.* Garcias, 12 Cl. & F. 368; Nouvion *v.* Freeman, 15 A. C. 1; Eastern Township Bank *v.* Beebe, 53 Vt. 177.

[33] Union Pacific Ry. Co. *v.* Baker, 5 Kan. App. 253; North Bank *v.* Brown, 50 Me. 214; Bank of United States *v.* Merchants' Bank, 7 Gill, 415; Harrington *v.* Harrington, 154 Mass. 517; Graef *v.* Bernard, 162 Mass. 300; Stearns *v.* Wiborg, 123 Mich. 584, 588; Child *v.* Eureka Powder Works, 45 N. H. 547; Barnes *v.* Gibbs, 31 N. J. L. 317; Traflet *v.* Empire Life Ins. Co., 64 N. J. L. 387; Gray *v.* Richmond Bicycle Co., 167 N. Y. 348; Baxley *v.* Linah, 16 Pa. 241; Paine *v.* Schenectady Ins. Co., 11 R. I. 411; McGilvray *v.* Avery, 30 Vt. 538; Green *v.* Starr, 52 Vt. 426. See also Hatch *v.* Spofford, 22 Conn. 485, 500.

[34] Allen *v.* Milner, 2 C. & J. 47; Whitehead *v.* Tattersall, 1 A. & E. 491; Keeler *v.* Harding, 23 Ark. 697; Howell *v.* Monical, 25 Ill. 122.

[35] Freeman *v.* Bernard, 1 Ld. Raym. 247; Bates *v.* Townley, 2 Ex. 152, 157; Commings *v.* Heard, L. R. 4 Q. B. 669. See also Sanborn *v.* Maxwell, 18 App. D. C. 245.

award substitutes a new debt or duty for the original cause of action, the plaintiff's remedy is exclusively upon the award or agreement for arbitration.[36]

Exceptions at common law. The common law made an exception to this rule if the original cause of action was for a debt upon a bond,[37] or a record.[38] The dignity of the bond or record was regarded as such that it could not be merged by an award. But if the bond obliged the parties to any performance other than the payment of money, arbitration and award was conclusive as to the amount of damages recoverable for breach of the bond.[39] This nicety which also obtained in the doctrines of accord and satisfaction[40] is probably obsolete everywhere, and doubtless arbitration and award upon a sealed contract is subject to the same rules as upon rights growing out of simple contracts.[41]

Authority to arbitrate revocable before award. Until the award is made, the original claim still exists, and the agreement to arbitrate, like an unexecuted accord, is no bar to an action upon the claim.[42] Moreover, a revocation by either party to the arbitration of the authority given by him to the arbitrators will invalidate any award made thereafter.[43] The only redress for breach of an agreement to refer is an action for damages.[44] A court of law will not enforce the

[36] Allen *v.* Harris, Ld. Raym. 122; Gascoyne *v.* Edwards, 1 Y. & J. 19; Parkes *v.* Smith, 15 Q. B. 297; Gardner *v.* Newman, 135 Ala. 522; Curley *v.* Dean, 4 Conn. 259; Merritt *v.* Merritt, 11 Ill. 565; Walters *v.* Hutchins, 29 Ind. 136; Groat *v.* Pracht, 31 Kan. 656; Duren *v.* Getchell, 55 Me. 241; Knowles *v.* Shapleigh, 8 Cush. 333; Bentley *v.* Davis, 21 Neb. 685; Varney *v.* Brewster, 14 N. H. 49; Pickering *v.* Pickering, 19 N. H. 389; Armstrong *v.* Masten, 11 Johns. 189; West *v.* Stanley, 1 Hill, 69. See further Macdonald *v.* Bond, 195 Ill. 122; Weichardt *v.* Hook, 83 Pa. 434; Vaughn *v.* Herndon, 91 Tenn. 64. Cp. Matter of Lurman, 90 Hun, 303; affd., 149 N. Y. 588; Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 57 N. Y. App. Div. 393.

[37] Morris *v.* Creach, 1 Lev. 292; Blake's Case, 6 Co. 43*b*.

[38] Viner's Ab., Arbitrament (8).

[39] Blake's Case, 6 Co. 43*b*; Whitehead *v.* Tattersall, 1 A. & E. 491.

[40] See *supra*, p. 835.

[41] See *supra*, p. 836, as to accord and satisfaction.

[42] Wright *v.* Evans, 53 Ala. 103; Gaither *v.* Dougherty, 18 Ky. L. Rep. 709; Welch *v.* Miller, 70 Vt. 108.

[43] Vynior's Case, 8 Coke, 80*a*; Rouse *v.* Meier, L. R. 6 C. P. 212; Fraser *v.* Ehrensperger, 12 Q. B. D. 310; Fooks *v.* Lawson, 40 Atl. Rep. 661 (Del.); Gregory *v.* Pike, 94 Me. 27; Boston, &c., R. Corp. *v.* Nashua, &c., R. Corp., 139 Mass. 463; Jones *v.* Harris, 59 Miss. 214; Butler *v.* Greene, 49 Neb. 280; Allen *v.* Watson, 16 Johns. 205; Sartwell *v.* Sowles, 72 Vt. 270. But see *contra*, McGeehen *v.* Duffield, 5 Pa. 497; McCune *v.* Lytle, 197 Pa. 404. Death of one of the parties effects a revocation of the arbitrators' authority. Cooper *v.* Johnson, 2 B. & Ald. 394; Gregory *v.* Boston Safe Deposit Co., 36 Fed. Rep. 408; Gregory *v.* Pike, 94 Me. 27; Marseilles *v.* Kenton, 17 Pa. 245; Sutton *v.* Tyrrell, 10 Vt. 94.

[44] Noble *v.* Harris, 3 Keb. 745; Warburton *v.* Storr, 4 B. & C. 103; Reg. *v.*

stipulation by disregarding any attempted revocation, nor will a court of equity enforce specifically the agreement.[45]

When writing necessary. "A submission to arbitration may be either oral, in writing or under seal, depending on the subject-matter of the arbitration. If a writing is necessary to pass title to the thing in controversy, an award, disposing of such title, to be valid must be in writing." [46]

Arbitrator must follow authority. In order that an award shall be binding, the arbitrators must follow exactly the authority given them by the agreement of the parties.[47] If arbitrators exceed their authority the award is void to that extent, and if the part which is void cannot be separated from the rest without injustice, the whole award is void.[48] On the other hand "unless an arbitrator renders his award on all matters within the submission, and of which he had notice, the award is wholly void." [49] It is also essential to the validity of an award that it be final, that is, a termination of the

Hardey, 14 Q. B. 529; Brown *v.* Leavitt, 26 Me. 251; Call *v.* Hagar, 69 Me. 521; Quimby *v.* Melvin, 28 N. H. 250; Dexter *v.* Young, 40 N. H. 130; Miller *v.* Junction Canal Co., 53 Barb. 590, 41 N. Y. 98; Craftsbury *v.* Hill, 28 Vt. 763; Rison *v.* Moon, 91 Va. 384.

[45] Street *v.* Rigby, 6 Ves. 815; Viekers *v.* Viekers, L. R. 4 Eq. 529; Tobey *v.* Bristol County, 3 Story, 800; Hill *v.* More, 40 Me. 515; Rowe *v.* Williams, 97 Mass. 163; St. Louis *v.* St. Louis Gas-light Co., 70 Mo. 69; March *v.* Eastern R. Co., 40 N. H. 548; Hurst *v.* Litchfield, 39 N. Y. 377; Rison *v.* Moon, 91 Va. 384.

[46] Brown *v.* Mize, 119 Ala. 10, 17. Oral submission to arbitration is generally good. Gardner *v.* Newman, 135 Ala. 522; Shaw *v.* State, 68 Ark. 580; Phelps *v.* Dolan, 75 Ill. 90; Dilks *v.* Hammond, 86 Ind. 563; Peabody *v.* Rice, 113 Mass. 131; Cady *v.* Walker, 62 Mich. 157. Otherwise in Louisiana by statute. McCleandon *v.* Kemp, 18 La. Ann. 162. Where title to land is involved a deed or writing is necessary. Copeland *v.* Wading River Co., 105 Mass. 397; French *v.* New, 28 N. Y. 147; Fort *v.* Allen, 110 N. C. 183.

[47] McCormick *v.* Gray, 13 How. 26; De Groot *v.* United States, 5 Wall. 419; Reynolds *v.* Reynolds, 15 Ala. 398; Comer *v.* Thompson, 54 Ala. 265; Brown *v.* Mize, 119 Ala. 10; Lee *v.* Onstott, 1 Ark. 206; Waller *v.* Shannon, 44 Conn. 480; Fountain *v.* Harrington, 3 Har. (Del.) 22; Denman *v.* Bayless, 22 Ill. 300; Buntain *v.* Curtis, 27 Ill. 374; Sthreshly *v.* Broadwell, 1 J. J. Marsh. 340; Boynton *v.* Frye, 33 Me. 216; Sawtells *v.* Howard, 104 Mich. 54; Gibson *v.* Powell, 13 Miss. 712; Adams *v.* Adams, 8 N. H. 82; Hiscoek *v.* Harris, 74 N. Y. 108; McCracken *v.* Clarke, 31 Pa. 498; Toomey *v.* Niehols, 6 Heisk. 159. Cp. O'Neill *v.* Clark, 57 Neb. 760.

[48] Falkingham *v.* Victorian Ry. Commissioners, [1900] A. C. 452; Reynolds *v.* Reynolds, 15 Ala. 398; Brown *v.* Mize, 119 Ala. 10; Boynton *v.* Frye, 33 Me. 216; Orcutt *v.* Butler, 42 Me. 83; Skillings *v.* Coolidge, 14 Mass. 43; Gibson *v.* Powell, 13 Miss. 712; Yeaton *v.* Brown, 52 N. H. 14; Cox *v.* Jagger, 2 Cow. 635; Scott *v.* Barnes, 7 Pa. 134.

[49] Carnochan *v.* Christie, 11 Wheat. 446; Porter *v.* Scott, 7 Cal. 312; Buntain *v.* Curtis, 27 Ill. 374, 379; Stearns *v.* Cope, 109 Ill. 340; Steere *v.* Brownell, 113 Ill. 415; McGregor, &c., R. Co. *v.* Sioux City, &c., R. Co., 49 Ia. 604; McNear *v.* Bailey, 18 Me. 251; Rollins *v.* Townsend, 118 Mass. 224; Harker *v.* Hough, 2 Halst. 428; Jones *v.* Welwood, 71 N. Y. 208; Young *v.*

question under arbitration.[50] Further, the award must be certain, so that no reasonable question can be made as to its meaning.[51]

Statutory arbitration. In England and most of the United States a form of arbitration under the direction of the courts is provided for by statute. The reference is made by order of court and the award is returned into court and becomes the basis of a judgment. Such statutes do not supersede arbitration at common law, but give an alternative and generally more desirable mode of procedure.

Kinney, 48 Vt. 22; Bean *v.* Bean, 25 W. Va. 604; Blakeston *v.* Wilson, 14 Manitoba, 271.

[50] Baillie *v.* Edinburgh Oil Gas-light Co., 3 Cl. & F. 639; The Nineveh, 1 Low. 400; Comer *v.* Thompson, 54 Ala. 265; Manuel *v.* Campbell, 3 Ark. 324; Colcord *v.* Fletcher, 50 Me. 398; Carter *v.* Calvert, 4 Md. Ch. 199; Paine *v.* Paine, 15 Gray, 299; Smith *v.* Holcomb, 99 Mass. 552; Hoit *v.* Berger-Crittenden Co., 81 Minn. 356; Rhodes *v.* Hardy, 53 Miss. 587; Spofford *v.* Spofford, 10 N. H. 254; Parker *v.* Dorsey, 68 N. H. 181; McKeen *v.* Olyphant, 18 N. J. L. 442; Waite *v.* Barry, 12 Wend. 377; *In re* Williams, 4 Denio, 194; Herbst *v.* Hagenaers, 137 N. Y. 290, affg. 62 Hun, 568; Spalding *v.* Irish, 4 S. & R. 322; Connor *v.* Simpson, 104 Pa. 440; Conger *v.* James, 2 Swan, 213; Hooker *v.* Williamson, 60 Tex. 524.

[51] Alexander *v.* McNear, 28 Fed. Rep. 403; Evans *v.* Sheldon, 69 Ga. 100; Stanford *v.* Treadwell, 69 Ga. 725; Ingraham *v.* Whitmore, 75 Ill. 24; Alfred *v.* Kankakee, &c., R. Co., 92 Ill. 609; Hollingsworth *v.* Pickering, 24 Ind. 435; Woodward *v.* Atwater, 3 Ia. 61; Crawford *v.* Berry, 11 Gill & J. 310; Calvert *v.* Carter, 6 Md. 135; Fletcher *v.* Webster, 5 Allen, 566; Mather *v.* Day, 106 Mich. 371; Hoit *v.* Berger-Crittenden Co., 81 Minn. 356; Parker *v.* Dorsey, 68 N. H. 181; Hoffman *v.* Hoffman, 2 Dutch. 175; Jackson *v.* De Long, 9 Johns. 43; Hicks *v.* Magoun, 167 N. Y. 540; Carson *v.* Carter, 64 N. C. 332; Barnet *v.* Gilson, 3 S. & R. 340; Gratz *v.* Gratz, 4 Rawle, 411; Stanley *v.* Southwood, 45 Pa. 189; Harris *v.* Social Mfg. Co., 9 R. I. 99.

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Note A.

Terminology and Fundamental Conceptions of Contract.

In the first two editions I made use of Savigny's definition of *Vertrag* (which can only be translated by Agreement, but in a wider sense than is known to any English writer). It now seems to me out of place in a special treatise on Contract. In the third volume of his System Savigny deals in the most general way with the events capable of producing changes in rights and duties in the field of private law. Such events he calls *juristische Thatsachen;* an expression to which our own accustomed "acts in the law" seems well fitted to correspond. (Acts in the law must be carefully distinguished from acts *of* the law, which are really neither acts nor events, but legal consequences of events. But the terms are not common enough for any serious risk of confusion to arise.) To speak, as some writers do, of "juridical facts," is to use language which is so far from being English that it becomes intelligible only by a mental re-translation into German. Greater nicety might be obtained, if desired, by coining the term "event in the law" for *juristische Thatsache* in its widest sense, and reserving "act in the law" for the species which Savigny proceeds to mark off from the genus, namely, *freie Handlung,* or better, perhaps, for the further specified kind of voluntary acts which manifest an intention to bring about particular legal consequences. Such an act is called by Savigny *Willenserklärung.* Specifying yet more, we distinguish the acts in which the will of only one party is expressed from those in which the wills of two or more concur. This last species gives the conception of *Vertrag.* Savigny defines it as the concurrence of two or more persons in the expression of a common intention, whereby mutual rights and duties of those persons are determined. "Vertrag ist die Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse

bestimmt werden." (Syst. 3. 309.) This covers a much wider field
680] than that of *contract in any proper sense. Every transaction answering this description includes an agreement, but many transactions answer to it which include far more; conveyances of property, for example, including dispositions *inter vivos* by way of trust and even gifts, and marriage. A still further specification is needful to arrive at the notion of Contract. A contract, in Savigny's way of approaching it, is an agreement which produces or is meant to produce an obligation (*obligatorischer Vertrag*). It is thus defined in his Obligationenrecht § 52 (vol. ii. p. 8): "Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch unter ihnen eine Obligation entstehen soll." Now the use of the more general notion of *Vertrag*, as Savigny himself explains, is not to clear up anything in the learning of contracts. It is to bring out the truth that other transactions which are not contracts, or which are more than contracts, have in common with them the character of consent being an essential ingredient. Moreover we should have to consider, before adopting this terminology, the wider question whether the retention of Obligations as a leading division in a modern system of law, and especially English law, be necessary or desirable. On the other hand, this definition leaves aside the somewhat important question whether and in what cases a binding obligation can be produced by a merely unilateral declaration.

The distinction between the ideas denoted by *dominium* and *obligatio* is certainly as fundamental in England as anywhere else: and the habit of using "obligation" as a synonym of "duty," though respectable authority may be found for it, is in my opinion to be deprecated. But to apply the Roman terminology to the Common Law would be as violent a proceeding, in any case, as to ignore it in Roman law.

For these reasons Savigny's definition, admirable as it is for its own purposes and its own context, and instructive as his work is almost everywhere as an example of scientific method, is now reserved for this note. The reasons for which I am no longer content to adopt the Indian Contract Act to the same extent as in the two first editions have been sufficiently explained in the text.

Note B. (p. *37).

Authorities on Contract by Correspondence.

Adams v. Lindsell. The first case of any importance is *Adams* v. *Lindsell*, 1 B. & Ald. 681 (1818), Finch Sel. Ca. 102. Defendants
681] wrote to plaintiffs, *"We now offer you 800 tods of wether fleeces, &c." (specifying price and mode of delivery and payment), "receiving your answer in course of post." Here, therefore, the mode and time for acceptance were prescribed. This letter was misdirected, and so arrived late. On receiving it, the plaintiffs wrote and sent by

post a letter accepting the proposal, but the defendants, not receiving an answer when they should have received it if their proposal had not been delayed, had in the meantime (between the despatch and the arrival of the reply) sold the wool to another buyer. The jury were directed at the trial that as the delay was occasioned by the neglect of the defendants, they must take it that the answer did come back by course of post. On the argument of a rule for a new trial, it was contended that there was no contract till the answer was received. To this the Court replied:—

"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiff's answer was received in course of post."

As far as the case goes, it seems to amount to this: As acceptance by letter is complete as against the proposer from the date of posting the acceptance if it arrives within the prescribed time, if any, or otherwise within a reasonable time; but if the communication of the proposal is delayed by the fault of the proposer, and the communication of the acceptance is consequently delayed, such delay is not to be reckoned against the acceptor.

Dunmore v. Alexander (Sc.). In the Scotch case of *Dunmore* v. *Alexander*, 9 Shaw & Dunlop, 109, and Finch. Sel. Ca. 120 (1830)[1] the defendant wrote to a friend desiring her to engage a servant on terms which, that friend had already informed the writer, would be agreeable to the servant. A letter revoking this was written the next day; ultimately they were both posted and delivered to the servant at the same time. It was held that no contract was concluded, but it is not clear whether the majority of the Court meant to decide that an acceptance sent through the post is neutralized by a revocation arriving at the same *time though posted later, or that the first letter [682 was only a proposal. Neither is it clear how far and for what purposes they regarded the intermediate person as an agent for either or both of the parties. No distinction was taken between postal and other communications. The French Court of Cassation had held in 1813 that when an acceptance and the revocation of it arrive together there is no contract. Merlin, Répertoire, *Vente*, § 1, Art. 3, No. 11 *bis*, Langdell Sel. Ca. Cont. 155.

1 In the later case of Thompson *v.* James, 18 Dunlop, 1; Langdell's Sel. Cas. Cont. 125, it was decided, *dissentiente* Ld. Curriehill, that a contract by letter is complete from the moment of posting the acceptance.

Potter v. Sanders. In *Potter* v. *Sanders* (1846) 6 Ha. 1, the posting of a letter of acceptance is said to be an act which "unless interrupted in its progress" concludes the contract as from the date of the posting. This seems to imply that a letter not received at all would not bind the proposer.

Dunlop v. Higgins. Then comes *Dunlop* v. *Higgins* (1848) 1 H. L. C. 381, Finch Sel. Ca. 108, a Scotch appeal decided by Lord Cottenham. Here the proposal did not prescribe any time, but the nature of it (an offer to sell iron) implied that the answer must be speedy. The acceptance was posted, not by the earliest possible post, but in business hours on the same day when the proposal was received. The post was then delayed by the state of the roads, so that the acceptance was received at 2 p.m. instead of 8 a.m., the hour at which that post should have arrived. The decision was that the contract was binding on the proposer; and it might well have been put on the ground that the acceptance in fact reached him within a reasonable time. Lord Cottenham, however, certainly seems to have thought the contract was absolutely concluded by the posting of the acceptance (within the prescribed or a reasonable time), and that it mattered not what became of the letter afterwards. It appears to have been so understood in *Duncan* v. *Topham* (1849) 8 C. B. 225, 18 L. J. C. P. 310, where, however, the decision was on other grounds.

Hebb's case and Reidpath's case. The later cases arose out of applications for shares in companies being made and answered by letter. *Hebb's case* (1867) L. R. 4 Eq. 9, decides only that an allotment of shares not duly despatched will not make a man a shareholder; for the letter of allotment was sent to the company's local agent, who did not deliver it to the applicant till after he had withdrawn his application. But the same judge (Lord Romilly) held in *Reidpath's case* (1870) L. R. 11 Eq. 86, 40 L. J. Ch. 39, that the applicant was not bound if he never received the letter.

British and American Telegraph Co. v. Colson. In *British and American Telegraph Company* v. *Colson* (1871) L. R. 6 Ex. 108, 40 L. J. Ex. 97, it was found as a fact that the letter of allotment was never received. The Court (Kelly C. B., Pigott B., and Bramwell B.) held
683] that the defendant was not *bound, and endeavoured to restrict the effect of *Dunlop* v. *Higgins*.

Townsend's case. In *Townsend's case* (1871) L. R. 13 Eq. 148, 41 L. J. Ch. 198, the letter of allotment miscarried, and was delayed some days by the applicant's own fault in giving a defective address. By a simple application of *Adams* v. *Lindsell* (expressly so treated in the judgment, L. R. 13 Eq., p. 154) it was held that the applicant was bound, and that a withdrawal of his application, posted (and it seems delivered, p. 151) before he actually received the letter of allotment, was too late.

Harris' case. In *Harris' case*, L. R. 7 Ch. 587, the letter of allotment was duly received, but in the meantime the applicant had written a

letter withdrawing his application on the ground of the delay (ten days) in answering it. These letters crossed. The Lords Justices (James and Mellish) held that the applicant was bound, on the authority of *Dunlop* v. *Higgins,* with which they thought it difficult to reconcile *British and Amer. Telegraph Co.* v. *Colson* (*a*). On this, however, no positive opinion was given, "because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted" (per Mellish L.J. at p. 597).

Wall's case. In *Wall's case* (1872) L. R. 15 Eq. 18, 42 L. J. Ch. 372, Malins V.-C. held that as a fact the letter had been received, inclining, however, to think *Harris' case* an authority for the more stringent construction of *Dunlop* v. *Higgins*—*viz.*, that the contract is absolute and unconditional by the mere posting. This construction was held by the Court of Appeal in *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216, 48 L. J. Ex. 577, p. *36, above, to be the correct one.

American and foreign authorities. The American case of *Tayloe* v. *Merchants' Fire Insurance Co.,* 9 How. S. C. 390 (1850) is of less importance to English readers than it formerly was, the ground being now fully covered by our own decisions. The insurance company's agent wrote to the plaintiff offering to insure his house on certain terms. The plaintiff wrote and posted a letter accepting those terms, which was duly received. The day after it was posted, but before it was delivered, the house was burnt. The objection was made, among others, that there was no complete contract before the receipt of the letter, an assent of *the company after the acceptance of [684 the proposed terms being essential. But the Court held that such a doctrine would be contrary to mercantile usage and understanding, and defeat the real intent of the parties. This decides that a contract is complete as against the proposer by posting a letter which is duly delivered. It may still be useful to cite part of the judgment:—

"The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. . . It is obviously impossible ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. . . It seems to us more consistent

(*a*) It seems not to have been disputed that the letter of allotment was in fact sent within a reasonable time.

with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

"For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part after an unconditional acceptance by the party to whom it is addressed?" (Pp. 400, 401.)

Place of contract where it is made by correspondence. There seems to be a fair *consensus* of authority, such as there is, for holding that the *place* to which a contract made by correspondence should be referred is that whence the acceptance is despatched. Savigny, Syst. 8. 253, 257; *Newcomb* v. *De Roos* (1859) 2 E. & E. 270, 29 L. J. Q. B. 4.[2] Conversely, where an offer to buy goods is made by a letter posted in the City of London, and accepted by sending the goods to the writer's place of business in the City, the whole cause of action arises in the City. *Taylor* v. *Jones* (1875) 1 C. P. D. 87, 45 L. J. C. P. 110. So in criminal law a false pretence contained in a letter sent by post is made at the place where the letter is posted. *Reg.* v. *Holmes* (1883) 12 Q. B. D. 23, 53 L. J. M. C. 37.

685] *NOTE C. (p. *88).

History of the Equitable Doctrine of Separate Estate.

Separate estate: Power of alienation. When the practice of settling property to the separate use of married women first became common, it seems probable that neither the persons interested nor the conveyancers had any purpose in their minds beyond excluding the husband's marital right so as to secure an independent income to the wife. The various forms of circumlocution employed in all but very modern set-

2 Shattuck *v.* Insurance Co., 4 Cliff. 598; Levy *v.* Cohen, 4 Ga. 1; Gipps Brewing Co. *v.* De France, 91 Ia. 108; Latrobe *v.* Winans, 89 Md. 636; Commonwealth Ins. Co. *v.* Knabe, 171 Mass. 265; Insurance Co. *v.* Tuttle, 40 N. J. L. 476; State *v.* Groves, 121 N. C. 632; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380; Tillinghast *v.* Lumber Co., 39 S. C. 484; cp. Farmers' Co. *v.* Bazore, 67 Ark. 252; Bell *v.* Packard, 69 Me. 105; Milliken *v.* Pratt, 125 Mass. 374; Meyer *v.* Estes, 164 Mass. 457; Baum *v.* Birchall, 150 Pa. 104. If a person residing in one State orders goods of one residing in another State, who there delivers the goods ordered to a carrier for the purchaser, the contract is made there, and its validity depends upon the law of the State of the seller's residence. Frank *v.* Hoey, 128 Mass. 263; Milliken *v.* Pratt, 125 Mass. 374; Kline *v.* Baker, 99 Mass. 253; Finch *v.* Mansfield, 97 Mass. 89; Webber *v.* Donnelly, 33 Mich. 469; Boothby *v.* Plaisted, 51 N. H. 436; Fuller *v.* Leet, 59 N. H. 163; Tegler *v.* Shipman, 33 Ia. 194; State *v.* Hughes, 22 W. Va. 743; Tuttle *v.* Holland, 43 Vt. 542; Garbracht *v.* Commonwealth, 96 Pa. 449. Even though the goods are shipped C. O. D. the better view is that the title passes on shipment. See 4 Col. L. Rev. 541.

tlements to express what is now sufficiently expressed by the words "for her separate use," will at once suggest themselves as confirming this. In course of time, however, it was found that by recognizing this separate use the Court of Chancery had in effect created a new kind of equitable ownership, to which it was impossible to hold that the ordinary incidents of ownership did not attach. Powers of disposition were accordingly admitted including alienation by way of mortgage or specific charge as well as absolutely; and we find it laid down in general terms in the latter part of the eighteenth century that a *feme covert* acting with respect to her separate property is competent to act as a *feme sole* (*c*). Nevertheless the equitable ownership of real estate by means of the separate use, carrying as incidents the same full right of disposition by deed or will that a *feme sole* would have, was fully recognized only by much later decisions (*d*). From a mortgage or specific charge on separate property to a formal contract under seal, such as if made by a person *sui iuris* would even then have bound real estate in the hands of his heir, we may suppose that the transition did not seem violent; and instruments expressing such a contract to be entered into by a married woman came to be regarded as in some way binding on any separate property she might have. In what way they were binding was not settled for a good while, for reasons best stated in the words of V.-C. Kindersley's judgment in *Vaughan* v. *Vanderstegen* (*e*).

Power to bind the separate estate by formal instruments: historical view given by V.-C. Kindersley. "The Courts at first ventured so far as to hold that if" a married woman "made a contract for payment of money by a written instrument with a certain degree of formality and solemnity, as by *a bond under her hand and seal, in that [686 case the property settled to her separate use should be made liable to the payment of it; and this principle (if principle it could be called) was subsequently extended to instruments of a less formal character, as a bill of exchange or promissory note, and ultimately to any written instrument. But still the Courts refused to extend it to a verbal agreement or other assumpsit, and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts,* and for that purpose they invented reasons to justify the application of the separate estate to their payment without recognizing them as debts or letting in verbal contracts. One suggestion was that the act of disposing of or charging separate estate by a married woman was in reality the execution of a power of appointment (*f*),

(*c*) *Hulme* v. *Tenant* (1778) 1 Wh. & T. L. C. In *Peacock* v. *Monk* (1750–1) 2 Ves. Sr. 190, there referred to by Lord Thurlow, no such general rule is expressed. As to the recognition of separate property by Courts of Common Law, see *Duncan* v. *Cashin* (1875) L. R. 10 C. P. 554, 44 L. J. C. P. 396.

(*d*) *Taylor* v. *Meads* (1865) 4 D. J. & S. 597, 34 L. J. Ch. 203; *Pride* v. *Bubb* (1871) L. R. 7 Ch. 64, 41 L. J. Ch. 105.

(*e*) (1853) 2 Drew. 165, 180.

(*f*) *E.g. Duke of Bolton* v. *Williams* (1793) 2 Ves. Jr. at p. 149.

and that a formal and solemn instrument in writing would operate as an execution of a power, which a mere assumpsit would not do. . . . Another reason suggested was that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation."

Earlier doctrines now untenable. Both these suggestions are on the later authorities untenable, as indeed V.-C. Kindersley then (1853) judged them to be (*g*); the theory of specific charge was revived in the later case of *Shattock* v. *Shattock* (*h*), but this must be considered as overruled (*i*). It had really been discarded by Lord Eldon as long ago as 1803 in a case which seems to have been overlooked (*k*). One or two other suggestions—such as that a married woman should have only such power of dealing with her separate estate as might be expressly given her by the instrument creating the separate use—were thrown out about the beginning of the nineteenth century (*l*), during a period of reaction in which the doctrine was thought to have gone too far, but they did not find acceptance; and the dangers which gave rise to these suggestions were and still are provided **687]** against *in another way by the curious device of the restraint on anticipation (*m*).[3]

Judgment of Turner L.J. in Johnson v. Gallagher. The modern *locus classicus* on the subject is the judgment of Turner L.J. in *Johnson* v. *Gallagher* (*n*), which had the full approval of the Judicial Committee (*o*) and of the Court of Appeal in Chancery (*p*). The general result was to this effect:

"General engagements" may bind separate estate without special form: rules as to this: "Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their

(*g*) Cp. *Murray* v. *Barlee* (1834) 3 M. & K. 209, where the arguments show the history of the doctrine; *Owens* v. *Dickenson* (1840) 1 Cr. & Ph. 48. 53, where the notions of power and charge are both dismissed as inapplicable by Lord Cottenham.

(*h*) (1866) L. R. 2 Eq. 182, 193, 35 L. J. Ch. 509.

(*i*) *Robinson* v. *Pickering* (1881) 16 Ch. Div. 660, 50 L. J. Ch. 527.

(*k*) *Nantes* v. *Corrock*, 9 Ves. 182, 7 R. R. 156.

(*l*) See *Jones* v. *Harris* (1804) 9 Ves. 486, 497, 7 R. R. 282, 288; *Parkes* v. *White* (1804–5) 11 Ves. 209, 220 sqq.; and collection of cases 5 Ves. 17, note.

(*m*) See Lord Cottenham's judgment in *Tullett* v. *Armstrong* (1838) 4 My. & Cr. 393, 405, 48 R. R. 127. Restraint on anticipation can exist only as incidental to a trust for separate use. Such a trust cannot be supplied in order to give effect to a restraint: *Stogdon* v. *Lee* [1891] 1 Q. B. 661, 670, 60 L. J. Q. B. 669. C. A.

(*n*) (1861) 3 D. F. & J. 494, 509 sqq., 30 L. J. Ch. 298.

(*o*) *London Chartered Bank of Australia* v. *Lempriére* (1873) L. R. 4 P. C. 572, 42 L. J. P. C. 49.

(*p*) *Picard* v. *Hine* (1869) L. R. 5 Ch. 274.

[3] See Brown *v.* McGill, 87 Md. 161.

separate estates" (3 D. F. & J. 514); and property settled to a married woman's separate use for her life, with power to dispose of it by deed or will, is for this purpose her separate estate (*q*).

These "general engagements" are subject to the forms imposed by the Statute of Frauds or otherwise on the contracts made *in pari materia* by persons competent to contract generally, but not to any other form: there is no general rule that they must be in writing.[4]

A "general engagement" is not binding on the separate estate unless it appear "that the engagement was made with reference to and upon the faith or credit of that estate" (3 D. F. & J. 515).

Whether it was so made is a question of fact to be determined on all the circumstances of the case: it is enough "to show that the married woman intended to contract so as to make herself—that is to say, her separate property—the debtor" (L. R. 4 P. C. 597.)

Such intention is presumed in the case of debts contracted by a married woman living apart from her husband (3 D. F. & J. 521).[5] (This tallies with the rule of common law, which in this case excludes even as to necessaries the ordinary presumption of authority to pledge the husband's credit: see notes to *Manby* v. *Scott* in 2 Sm. L. C.)

The like intention is inferred where the transaction would be otherwise unmeaning, as where a married woman gives a guaranty *for her husband's debt (*r*)[6] or joins him in making a promis- [688
sory note (*s*).[7]

The "engagement" of a married woman differs from a contract, inasmuch as it gives rise to no personal remedy against the married woman, but only to a remedy against her separate property (*t*).

(*q*) *Mayd* v. *Field* (1876) 3 Ch. D. 587, 593, 45 L. J. Ch. 699, s. v. *Roper* v. *Doncaster*, note (*x*) next page.

(*r*) *Morrell* v. *Cowan* (1877) 6 Ch. D. 166 (reversed 7 Ch. Div. 151, 47 L. J. Ch. 73, but only on the construction of the document), where no attempt was made to dispute that the guaranty, though not expressly referring to the separate estate, was effectual to bind it.

(*s*) *Davies* v. *Jenkins* (1877) 6 Ch. D. 728.

(*t*) Hence, before the Act of 1882, the married woman, not being a real debtor, was not subject to the bankruptcy law in respect of her separate estate: *Ex parte Jones* (1879) 12 Ch. Div. 484, 48 L. J. Bk. 109.

[4] Indiana Yearly Meeting *v.* Haines, 47 Ohio St. 423.

[5] Coleman *v.* Wooley's Exr., 10 B. Mon. 320; Johnson *v.* Cummins, 16 N. J. Eq. 97; Harshberger's Admr. *v.* Alger, 31 Gratt. 52, 63.

[6] Williamson *v.* Cline, 40 W. Va. 194.

[7] Williams *v.* Urmston, 35 Ohio St. 296; Cowles *v.* Morgan, 34 Ala. 535; Nunn *v.* Givhan, 45 Ala. 375; McKenna *v.* Rowlett, 68 Ala. 186; Lincoln *v.* Rowe, 51 Mo. 571; Burnett *v.* Hawpe's Exr., 25 Gratt. 481, 488; or gives her note in payment of her husband's debt; Wicks *v.* Mitchell, 9 Kan. 80; Skidmore *v.* Jett, 39 W. Va. 544; or gives him her blank indorsement, even though he misapply it; Frank *v.* Lilienfeld, 33 Gratt. 377. "Such presumption cannot be overcome by testimony by the wife, that such was not her intention. Unless there are circumstances surrounding the transaction which show that such was not her intention, it is not material what her secret purpose was, and the presumption aforesaid will prevail." Hershizer *v.* Florence, 39 Ohio St. 516; Harris *v.* Wilson, 40 Ohio St. 301. But see note 9 below.

But it creates no specific charge, and therefore the remedy may be lost by her alienation of such property before suit (3 D. F. & J. 515, 519, 520-2) (*u*).[8] On the same principle the exercise by a married woman of a general testamentary power of appointment does not make the appointed fund liable to her engagements, for it is never her separate property (*x*).

In cases where specific performance would be granted as between parties *sui iuris*, a married woman may enforce specific performance of a contract made with her where the consideration on her part was an engagement binding on her separate estate according to the above rules; and the other party may in like manner enforce specific performance against her separate estate (*y*).[9]

(*u*) *Acc. Robinson* v. *Pickering* (1881) 16 Ch. Div. 660, 50 L. J. Ch. 527, which decided that a creditor of a married woman on the faith of her separate estate is not thereby entitled to a charge on her separate property, or to an injunction to restrain her from dealing with it.

(*x*) *Roper* v. *Doncaster* (1888) 39 Ch. D. 482, 58 L. J. Ch. 31; *qu.* how far consistent with *Mayd* v. *Field*, note (*q*), last page. As to the effect of s. 4 of the Married Women's Property Act, 1882, see now *Re Ann* [1894] 1 Ch. 549, 63 L. J. Ch. 334; *Re Hughes* [1898] 1 Ch. 529, 67 L. J. Ch. 279, C. A.; *Re Hodgson* [1899] 1 Ch. 666, 68 L. J. Ch. 313.

(*y*) The cases cited in Sug. V. & P. 206, so far as inconsistent with the modern authorities (see *Picard* v. *Hine* (1869) L. R. 5 Ch. 274, where the form of decree against the separate estate is given, *Pride* v. *Bubb* (1871) L. R. 7 Ch. 64, 41 L. J. Ch. 105), must be considered as overruled.

[8] The creditor has no lien before suit brought and creditors are not entitled to priority in the order in which they became such. Western Bank *v.* National Bank, 91 Md. 613; Klenke *v.* Koeltze, 75 Mo. 239; Davis *v.* Smith, 75 Mo. 219; Maxon *v.* Scott, 55 N. Y. 247; Hill *v.* Myers, 46 Ohio St. 183; Ekerly *v.* McGee, 85 Tenn. 661; Hughes *v.* Hamilton, 19 W. Va. 366; Bruff *v.* Thompson, 31 W. Va. 16; Todd *v.* Lee, 16 Wis. 480. The engagement of a married woman, entered into when she had no separate estate, will not bind her subsequently acquired separate property. Palliser *v.* Gurney, 19 Q. B. D. 519; Ankeney *v.* Harmon, 187 U. S. 118; Parker *v.* Marks, 82 Ala. 548; Kocher *v.* Cornell, 59 Neb. 315; Fallis *v.* Keys, 35 Ohio St. 265; Sticken *v.* Schmidt, 64 Ohio St. 354; Crockett *v.* Doriot, 85 Va. 240. *Contra*, Williamson *v.* Cline, 40 W. Va. 194. Cp. Harvey *v.* Curry, 47 W. Va. 800. Under statutes permitting married women to acquire property by purchase, it has been held that a married woman "may purchase property, either real or personal, upon credit, and is personally liable for the purchase price as if she were a *feme sole*; and this although she had no separate estate at the time of the purchase and without regard to the question as to the purpose for which the purchase was made." Tiemeyer *v.* Turnquist, 85 N. Y. 516; Ackley *v.* Westervelt, 86 N. Y. 448; Jones *v.* Fleming, 104 N. Y. 418, 432; Cramer *v.* Hanaford, 53 Wis. 85. But see Leinbach *v.* Templin, 105 Pa. 522, 24 A. L. Reg. 127, and the note thereto.

[9] Bruner *v.* Wheaton, 46 Mo. 363; Hinkley *v.* Smith, 51 N. Y. 21. A married woman who makes an engagement binding on her separate estate for the purchase of land is liable in damages for breach of the engagement. Boeckler *v.* McGowan, 9 Mo. App. 373. In Morgan *v.* Perhamus, 36 Ohio St. 517, it was held that a married woman who being engaged in business with her separate property on her own account, had sold her stock of goods together with the good-will of her business and engaged not to carry on the same business within certain limits, should be enjoined from carrying on such business in violation of her engagement.

"It is not the woman, as a woman, who becomes the debtor, but her engagement has made that particular part of her property which is settled

A married woman's engagement relating to her separate property will have the same effect as the true contract of an owner *sui iuris* in creating an obligation which will be binding on the property in the hands of an assignee with notice (*z*).

Effect of cessation of coverture. If a married woman becomes *sui iuris* by the death of the husband, judicial separation or otherwise, what

(*z*) Per Jessel M.R. *Warne* v. *Routledge* (1874) L. R. 18 Eq. 500, 43 L. J. Ch. 604.

to her separate use a debtor, and liable to satisfy the engagement." *Ex parte* Jones, 12 Ch. D. 484, 490; Kocher *v.* Cornell, 59 Neb. 315; Dougherty *v.* Sprinkle, 88 N. C. 300. The confusion in regard to the power of a married woman to charge her separate estate and as to what engagements of hers will affect it has been even greater in this country than in England. The subject is exhaustively reviewed in Radford *v.* Carwile, 13 W. Va. 572, 653, the opinion in which case may be fairly called a treatise on the law of separate estate. The uncertainty attending the subject is illustrated by the earliest two cases of any note relating to it. Ewing *v.* Smith, 3 Desaus. 417, and Meth. Ep. Church *v.* Jacques, 3 Johns. Ch. 77. The former, reversing the judgment of Ch. Desaussure, laid down the rule that a married woman can charge her separate estate only in so far as the instrument creating it expressly confers that power. In the latter this rule was laid down by Ch. Kent only to be reversed by the Court of Errors, in 17 Johns. 548. The prevailing doctrine now is that the *jus disponendi* is an incident to the possession of a separate estate, and that, in any manner not forbidden by the instrument creating it, a married woman may dispose of or incumber her property. Cheever *v.* Wilson, 9 Wall. 108; Imlay *v.* Huntington, 20 Conn. 146; Phillips *v.* Graves, 20 Ohio St. 371; Burnett *v.* Hawpe's Exr., 25 Gratt. 481; Bain *v.* Buff, 76 Va. 371; Hughes *v.* Hamilton, 19 W. Va. 366; Radford *v.* Carwile, 13 W. Va. 572, 653. Where the engagement of a married woman is made expressly upon the credit of her separate estate, or the indebtedness is expressly made a charge upon it, it is agreed that equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. Stephen *v.* Beall, 22 Wall. 329; Bank *v.* Traver, 7 Sawyer, 210; Hall *v.* Eccleston, 37 Md. 510; Heburn *v.* Warner, 112 Mass. 271, 276; Insurance Co. *v.* Babcock, 42 N. Y. 613; Knowles *v.* Toone, 96 N. Y. 534; Wooden *v.* Perkins, 5 Gratt. 345; Elliott *v.* Gower, 12 R. I. 79. Where by the agreement the consideration is to inure to the benefit of the married woman, or of her separate estate, the intention to bind the separate estate need not be expressed but may be implied. Williams *v.* King, 13 Blatchf. 282; Wells *v.* Thorman, 37 Conn. 318; McVey *v.* Cantrell, 70 N. Y. 295; Patrick *v.* Littell, 36 Ohio St. 79; Dale *v.* Robinson, 51 Vt. 20; Sargeant *v.* French, 54 Vt. 384. See also Geiger *v.* Blackley, 86 Va. 328. Cp. Stowell *v.* Grider, 48 Ark. 220.

It is generally agreed that when a married woman executes a note, bond, or other written obligation, her intention to bind her separate estate may be inferred therefrom. Ozley *v.* Ikelheimer, 26 Ala. 332; Sprague *v.* Tyson, 44 Ala. 338; Dobbin *v.* Hubbard, 17 Ark. 189, 196; Dallas *v.* Heard, 32 Ga. 604; Jarman *v.* Wilkerson, 7 B. Mon. 293; Lillard *v.* Turner, 16 B. Mon. 374; Bank *v.* Taylor, 62 Mo. 338; Bank *v.* Collins, 75 Mo. 280; Batchelder *v.* Sargent, 47 N. H. 262, 265; Phillips *v.* Graves, 20 Ohio St. 371; Mitchell *v.* Raymond, 164 Pa. 566; Garland *v.* Pamphlin, 32 Gratt. 305; Bain *v.* Buff, 76 Va. 371.

This implication is not affected by the fact that the wife, with her husband, executes a mortgage to secure the payment of such note. Avery *v.* Vansickle, 35 Ohio St. 270.

The separate estate may be bound though the plaintiff did not know there was any. Lee *v.* Cohick, 49 Mo. App. 188.

A married woman who conveys her realty by deed with covenant of war-

becomes of the debts of her separate estate? It appears that they **689]** do not become legal debts; *for this would be to create a new right and liability quite different from those originally created by the parties; but that the creditor's right is to follow in the hands of the owner or her representatives the separate estate held by her at the time of contracting the engagement, and still held by her

ranty makes her separate estate liable for breach of the covenant. Barlow *v.* Delaney, 36 Fed. Rep. 577; Gunter *v.* Williams, 40 Ala. 561; Kolls *v.* De Leyer, 41 Barb. 208; Gerlach *v.* Redinger, 40 Ohio St. 388.

In some States, however, it is held that unless the consideration of the contract is to inure to the benefit of the married woman, or of her separate estate, the intention to bind her separate estate must be expressed, and that her giving a note for the debt is no expression of such intention. Fechheimer *v.* Pierce, 70 Mich. 440; Citizens' Bank *v.* Smout, 62 Neb. 223. Where, for instance, she signs a note as surety for another, even though that other be her husband, it is held that this is not enough to make her separate estate liable, unless she expressly declare such intention in the note itself, (or in a co-temporaneous writing which may be read and construed with the note as one paper (Knowles *v.* Toone, 96 N. Y. 534), and that the existence of such intention cannot be established by oral evidence. Ferrand *v.* Beshoar, 9 Col. 291; Flanders *v.* Abby, 6 Biss. 16; Williams *v.* Hugunin, 69 Ill. 214; Hodson *v.* Davis, 43 Ind. 258; Willard *v.* Eastham, 15 Gray, 328; Nourse *v.* Henshaw, 123 Mass. 96; Smith *v.* Bond, 56 Neb. 529; Peake *v.* La Baw, 21 N. J. Eq. 269; Yale *v.* Dederer, 18 N. Y. 265, 22 N. Y. 450, 68 N. Y. 329; Bank *v.* Pruyn, 90 N. Y. 250; Manhattan Co. *v.* Thompson, 58 N. Y. 80; Pippen *v.* Wesson, 74 N. C. 437.

In every State in the Union statutes have been passed intended to increase the power of married women to contract. These, and the interpretations put upon them, differ so in the various States as to make a brief general statement of what engagements of a married woman are or are not binding simply impossible. Nearly every State has a statute which makes the property of a woman which belongs to her at the time of her marriage, or which comes to her by gift, devise, descent, or purchase with her separate means after marriage, her separate estate. In consequence of these statutes, a large part of the wealth of every State must always be in the hands of married women, and this fact will doubtless operate towards the establishment, either by legislation or the course of judicial decision, of the only simple and logical rule, that the separate estate of a married woman shall be held liable for all engagements entered into by her, when it appears expressly or by fair inference that she intended to contract on her own responsibility.

A married woman may be a shareholder in a company, and in the event of a winding-up a contributory in respect of her separate estate, if there is nothing special to prevent it in the constitution of the company. Matthewman's Case, 3 Eq. 781. And see Bundy *v.* Cocke, 128 U. S. 185; Keyser *v.* Hitz, 133 U. S. 138; Hobart *v.* Johnson, 19 Blatchf. 359; Anderson *v.* Line, 14 Fed. Rep. 405; Witters *v.* Sowles, 32 Fed. Rep. 767, 35 Fed. Rep. 640, 38 Fed. Rep. 700; *Re* First Bank, 40 Fed. Rep. 120; Robinson *v.* Turrentine, 59 Fed. Rep. 554; Kerr *v.* Urie, 86 Md. 72; In the Matter of the Reciprocity Bank, 22 N. Y. 9.

There appears to be nothing to prevent a married woman from entering into an ordinary partnership as far as concerns her separate estate. Penn *v.* Whitehead, 17 Gratt. 503. Cp. under statutes on the one hand, Abbott *v.* Jackson, 43 Ark. 212; Clay *v.* Van Winkle, 75 Ind. 239; Plumer *v.* Lord, 5 Allen, 462; Vail *v.* Winterstein, 94 Mich. 230; Newman *v.* Morris, 52 Miss. 402; Bitter *v.* Rathman, 61 N. Y. 512; on the other, Bradstreet *v.* Baer, 41 Md. 19, 23; Miller *v.* Marx, 65 Tex. 131; Carey *v.* Burrus, 20 W. Va. 571. See also De Graum *v.* Jones, 23 Fla. 83. Whether she may become a partner with her husband under modern statutes has been much litigated. That she may. *Re* Kinkead, 3 Biss. 405; Bernard, etc., Mfg. Co. *v.* Packard, 64 Fed.

when she became *sui iuris,* but not any other property.[10] Property subject to a restraint on anticipation cannot in any case be bound (*a*).

Liability of separate estate for debts before marriage. A kindred and still open question is this: Can the separate estate of a woman married before January 1, 1883, be held liable for her debts contracted before marriage? Apart from recent legislation it seems no less difficult to hold that the coverture and the existence of separate property enable the creditor to substitute for a legal right a wholly different equitable right, than to hold that the cessation of the coverture turns that sort of equitable right into a legal debt.[11] It has been held that after the husband's bankruptcy the wife's separate estate is liable in equity to pay her debts contracted before the marriage (*b*);[12] but Malins V.-C. seems to have decided this case partly on the ground that the bankruptcy was evidence that the settlement of the property to the wife's separate use was fraudulent as against her creditors. Before the Debtors Act, 1869, when a married woman and her husband were sued at law on a debt contracted by her before the mar-

(*a*) *Pike* v. *Fitzgibbon* (1881) 17 Ch. Div. 454, 50 L. J. Ch. 394. Earlier cases are indecisive. For the view taken in the Court below in *Johnson* v. *Gallagher*, where the bill was filed after the death of the husband, see 3 D. F. & J. 495, and the decree appealed from at p. 497. The Act of 1882 (modified only as to payment of costs by the Act of 1893) gives no power to touch such property, see p. *89, above.

(*b*) *Chubb* v. *Stretch* (1870) L. R. 9 Eq. 555, 39 L. J. Ch. 329, following *Biscoe* v. *Kennedy* (1762) briefly reported in marginal note to *Hulme* v. *Tenant* (1778) 1 Bro. C. C. 17. The decision of the C. A. in *Pike* v. *Fitzgibbon* (1881) throws great doubt on this.

Rep. 309 (C. C. A.); Schlapback *v.* Long, 90 Ala. 525; Burney *v.* Savannah Grocery Co., 98 Ga. 711; Hoaglin *v.* Henderson, 119 Ia. 720; Louisville, etc., R. Co. *v.* Alexander, 16 Ky. L. Rep. 306; Toof *v.* Brewer, 3 So. Rep. 571 (Miss.); Noel *v.* Kinney, 106 N. Y. 74; Suau *v.* Caffe, 122 N. Y. 308; Lane *v.* Bishop, 65 Vt. 575. That she cannot. Gilkerson-Sloss Co. *v.* Salinger, 56 Ark. 294; Haas *v.* Shaw, 91 Ind. 384; Haggett *v.* Hurley, 91 Me. 542; Mayer *v.* Soyster, 30 Md. 402; Lord *v.* Parker, 3 Allen, 127; Bowker *v.* Bradford, 140 Mass. 521; Edwards *v.* McEnhill, 51 Mich. 165; Artman *v.* Ferguson, 73 Mich. 146; Payne *v.* Thompson, 44 Ohio St. 192; Gwynn *v.* Gwynn, 27 S. C. 525; Theuss *v.* Dugger, 93 Tenn. 41; Seattle Board *v.* Hayden, 4 Wash. 263; Fuller, etc., Co. *v.* McHenry, 83 Wis. 573.

10 Dobbin *v.* Hubbard, 17 Ark. 189, 197; Klenke *v.* Koeltze, 75 Mo. 239; Davis *v.* Smith, 75 Mo. 219; cp. Leaycraft *v.* Hedden, 3 Green's Ch. 512, 552. And see Quinn's Est., 144 Pa. 444.

11 "After her death, or that of her husband, her creditors on demands existing against her before marriage have an equal right to satisfaction of their demands out of what was her separate property with creditors who have no claim against her personally, but only demands which they may enforce against her separate property, while the latter class of creditors have no right whatever to satisfaction of their demands out of her general property. Marriage suspends the rights of her creditors, then existing, to sue her alone and proceed against her separate or general property, but the dissolution of the marriage by the death of either husband or wife revives the right of her general creditors against her and her property." Klenke *v.* Koeltze, 75 Mo. 239; Davis *v.* Smith, 75 Mo. 219.

12 Dickson *v.* Miller, 11 S. & M. 594; *contra*, Vanderheyden *v.* Mallory, 1 N. Y. 452.

riage and either the husband and wife or the wife alone had been taken in execution, the wife was entitled to be discharged only if she had not separate property out of which the debt could be paid (*c*); and an order for payment can now be made under s. 5 of the Debtors Act on a married woman, and the existence of sufficient separate estate would justify commitment in default (*d*). But the practice of the Courts in the exercise of this kind of judicial discretion does not throw much light on the question of a direct remedy.

690] ***How far is a married woman's "engagement" bound by the ordinary forms of contract?** On principle it should seem that a married woman's engagement with respect to her separate estate, while not bound by any peculiar forms, is on the other hand bound in every case by the ordinary forms of contract; in other words, that no instrument or transaction can take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui iuris*. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui iuris*, and then he must show, by proof or presumption as explained above, an intention to make the separate estate the debtor.

McHenry v. Davies: quære. There is, however, a decision the other way. In *McHenry* v. *Davies* (*e*), a married woman, or rather her separate estate, was sued in equity on a bill of exchange indorsed by her in Paris. It was contended for the defence, among other things, that the bill was a French bill and informal according to French law. Lord Romilly held that this was immaterial, for all the Court had to be satisfied of was the general intention to make the separate estate liable, of which there was no doubt. This reasoning is quite intelligible on the assumption that engagements bind separate estate only as specific charges; the fact that the instrument creating the charge simulated more or less successfully a bill of exchange would then be a mere accident (*f*). The judgment bears obvious marks of this theory; we have seen indeed that it was expressly adopted by the same judge in an earlier case (*g*), and we have also seen that it is no longer tenable. In *Johnson* v. *Gallagher* it is assumed that a married woman's engagements concerning her separate interest in

(*c*) *Ivens* v. *Butler* (1857) 7 E. & B. 159, 26 L. J. Q. B. 145; *Jay* v. *Amphlett* (1862) 1 H. & C. 637, 32 L. J. Ex. 176.

(*d*) *Dillon* v. *Cunningham* (1872) L. R. 8 Ex. 23, 42 L. J. Ex. 11. Here the married woman had been sued alone, and there was no plea of coverture: but probably the same course would be taken in the case of a judgment against husband and wife for the wife's debt *dum sola*.

(*e*) (1870) L. R. 10 Eq. 88.

(*f*) Note, however, that in the case of parties *sui iuris* a bill of exchange cannot be treated as an equitable assignment: *Shand* v. *Du Buisson* (1874) L. R. 18 Eq. 283, 43 L. J. Ch. 508. Nor a cheque: *Hopkinson* v. *Foster* (1874) L. R. 19 Eq. 74. [The law is otherwise in some jurisdictions in this country. See Daniel on Neg. Inst. § 1643 *et seq.*; 42 Cent. L. J. 243; 11 Harv. L. Rev. 548; Fourth Street Bank *v.* Yardley, 165 U. S. 634.]

(*g*) *Shattock* v. *Shattock* (1866) L. R. 2 Eq. 182, 35 L. J. Ch. 509, *supra* p. *669.

real estate must satisfy the conditions of the Statute of Frauds (*h*). An engagement which if she were *sui iuris* would owe its validity as a contract to the law merchant must surely in like manner satisfy the forms and conditions of the law merchant. It is submitted, therefore, that *McHenry* v. *Davies* (*i*) is not law on this point.

Statute of Limitation. It is now held that the Statute of Limitation, or rather its analogy, applies to claims against the separate estate (*k*).

Can the separate estate be made liable on quasi-contract? It is said that a married woman's separate estate cannot be made liable as on an obligation implied in law, as, for instance, to the repayment of money paid by mistake or on a consideration which *has wholly [691 failed (*l*). But the decisions to this effect belong (with one exception) to what we have called the period of reaction, and are distinctly grounded on the exploded notion that a "general engagement," even if express, is not binding on the separate estate.

The exception is the modern case of *Wright* v. *Chard* (*m*), where V.-C. Kindersley held that a married woman's separate estate was not liable to refund rents which had been received by her as her separate property, but to which she was not in fact entitled. But the language of the judgment reduces it to this, that in the still transitional state of the doctrine, and in the absence of any precedent for making the separate estate liable in any case without writing (this was in 1859, *Johnson* v. *Gallagher* not till 1861), the V.-C. thought it too much for a court of first instance to take the new step of making it liable "in the absence of all contract": and he admitted that "the modern tendency has been to establish the principle that if you put a married woman in the position of a *feme sole* in respect of her separate estate, that position must be carried to the full extent, short of making her personally liable." The test of liability would seem on principle to be whether the transaction out of which the demand arises had reference to or was for the benefit of the separate estate.

Tendency of modern authority and legislation. The spirit of the modern authorities is, on the whole, in the direction of holding that a married woman's "engagement" differs from an ordinary contract only in the remedy being limited to her separate property. Her creditor is in a position like that of a creditor of trustees for a society, or the like, who has agreed to look only to a specified fund for payment. And on this view the Married Women's Property Act of 1882 is framed, though it might be wished that the principle had been carried out more thoroughly.

(*h*) (1861) 3 D. F. & J. at p. 514.
(*i*) (1870) L. R. 10 Eq. 88.
(*k*) *Re Lady Hastings* (1887) 35 Ch. Div. 94.
(*l*) 3 D. F. & J. 512, 514, referring to *Duke of Bolton* v. *Williams* (1793) 2 Ves. 138; *Jones* v. *Harris* (1804) 9 Ves. 486, 493, 7 R. R. 282, and *Aguilar* v. *Aguilar* (1820) 5 Madd. 414.
(*m*) (1859) 4 Drew. 673, 685: on appeal, 1 D. F. & J. 567, 29 L. J. Ch. 82, but not on this point.

Note D. (p. *129 above).

Limitation of Corporate Powers by Doctrines of Partnership and Agency.

Application of partnership law: Simpson v. Denison. A case in which this reason appears most clearly is *Simpson* v. *Denison* (1852) 10 Ha. 51. The suit was instituted by dissentient shareholders to restrain the carrying out of an agreement between their company (the Great Northern) and another railway company, by which the Great North-
692] ern was to take over the whole of that *company's traffic, and also to restrain the application of the funds of the Great Northern Company for obtaining an Act of Parliament to ratify such agreement. The V.-C. Turner treated it as a pure question of partnership: "How would this case have stood," he says in the first paragraph of the judgment, "if it had been the case of an ordinary limited partnership?" The Railways Clauses Consolidation Act became in this view a statutory form of partnership articles, to which every shareholder must be taken to have assented: and the general ground of the decision was that "no majority can authorize an application of partnership funds to a purpose not warranted by the partnership contract." For the purposes of the case before the Court this analogy was perfectly legitimate; and the dissent expressed by Parke B. (in *South Yorkshire, &c. Co.* v. *G. N. R. Co.* (1853) 9 Ex. 88, 22 L. J. Ex. 315) must be considered only as a warning against an unqualified extension of it to questions between the corporate body and strangers.

Statement of the principle in Pickering v. Stephenson. In *Pickering* v. *Stephenson* (1872) L. R. 14 Eq. 322, 340, 41 L. J. Ch. 493, the same rule is thus set forth by Wickens V.-C.—"The principle of jurisprudence which I am asked here to apply is that the governing body of a corporation that is in fact a trading partnership cannot in general use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not of course mean exclusively either directors or a general council (*n*), but the ultimate authority within the society itself, which would ordinarily be a majority at a general meeting. According to the principle in question the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association." Nothing is said here on the extent to which a corporation may be bound by the *unanimous* assent of its members.

Rights of dissenting shareholders. Any dissenting shareholder may call for the assistance of the Court to restrain unconstitutional acts of the governing body, but he must do so in his proper capacity and interest as a shareholder and partner. If the Court can see that in fact he represents some other interest, and has no real interest of his own

(*n*) Referring to the peculiar constitution of the company then in question.

in the action, it will not listen to him; as when the proceedings are taken by the direction of a rival company in whose hands the nominal plaintiff is a mere puppet, and which indemnifies him against costs: *Forrest* v. *Manchester, &c. Ry. Co.* (1861) 4 D. F. & J. 126: so where the suit *was in fact instituted by the plaintiff's solicitor on [693 grounds of personal hostility, *Robson* v. *Dodds* (1869) L. R. 8 Eq. 301, 38 L. J. Ch. 647. But if he has any real interest and is proceeding at his own risk, he is not disqualified from suing by the fact that he has collateral motives, or is acting on the suggestion of strangers or enemies to the company, or even has acquired his interest for the purpose of instituting the suit: *Colman* v. *E. C. Ry. Co.* (1846) 10 Beav. 1, 16 L. J. Ch. 73; *Seaton* v. *Grant* (1867) L. R. 2 Ch. 459, 36 L. J. Ch. 638; *Bloxam* v. *Metrop. Ry. Co.* (1868) L. R. 3 Ch. 337. For full collection of cases, see Lindley on Companies, 597.

Parties to action. As a rule the plaintiff in actions of this kind sues on behalf of himself and all other shareholders whose interests are identical with his own; but there seems to be no reason why he should not sue alone in those cases where the act complained of cannot be ratified at all, or can be ratified only by the unanimous assent of the shareholders: *Hoole* v. *G. W. Ry. Co.* (1867) L. R. 3 Ch. 262. There is another class of cases in which abuse of corporate powers or authorities is complained of, but the particular act is within the competence of, and may be affirmed or disaffirmed by, "the ultimate authority within the society itself" (in the words of Wickens V.-C. just now cited), and therefore the corporation itself is *prima facie* the proper plaintiff. See Lindley on Companies, 574 sqq.; *Gray* v. *Lewis* (1869) L. R. 8 Ch. 1035, 1051; *Macdougall* v. *Gardiner* (1875) L. R. 10 Ch. 606, 1 Ch. D. 13, 21; *Russell* v. *Wakefield Waterworks Co.* (1875) L. R. 20 Eq. 474, 44 L. J. Ch. 496. "The majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly" (*o*). The exception is when a majority have got the government of the corporation into their own hands, and are using the corporate name and powers to make a profit for themselves at the expense of the minority; then an action is rightly brought by a shareholder on behalf of himself and others, making the company a defendant: *Menier* v. *Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350, 43 L. J. Ch. 330; *Mason* v. *Harris* (1879) 11 Ch. Div. 97, 48 L. J. Ch. 589. We mention these cases only to distinguish them from those with which we are now concerned.

Limited agency of directors, &c. With regard to the doctrine of limited agency, and its peculiar importance in the case of companies constituted by public documents, all persons dealing with them being

(*o*) Mellish L.J. 1 Ch. D. at p. 25. As to a shareholder's right to use the company's name as plaintiff, see *Pender* v. *Lushington* (1877) 6 Ch. D. 70, 46 L. J. Ch. 317; *Duckett* v. *Gover* (1877) 6 Ch. D. 82, 46 L. J. Ch. 407; *Silber Light Co.* v. *Silber* (1879) 12 Ch. D. 717, 48 L. J. Ch. 385; *Harben* v. *Phillips* (1882-3) 23 Ch. D. 14, 29, 38.

694] considered to know the *contents of those documents and the limits set to the agent's authority by them, it may be useful to give Lord Hatherley's concise statement of the law (when V.-C.) in *Fountaine* v. *Carmarthen Ry. Co.* (1868) L. R. 5 Eq. 316, 322, 37 L. J. Ch. 429.

"In the case of a registered joint stock company, all the world of course have notice of the general Act of Parliament and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (*p*), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. This is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*." For fuller exposition see Lindley on Companies, 166 sqq.

Royal British Bank v. Turquand, &c. The contrast of the two classes of cases is well shown in *Royal British Bank* v. *Turquand* (*p*), and *Balfour* v. *Ernest* (1859) 5 C. B. N. S. 601, 28 L. J. C. P. 170. In the former case there was power for the directors to borrow money if authorized by resolution: and it was held that a creditor taking a bond from the directors under the company's seal was not bound to inquire whether there had been a resolution. Jervis C.J. said in the Exchequer Chamber (the rest of the Court concurring):—

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions."

The same principle has been followed in many later cases (*Ex parte Eagle Insurance Co.* (1858) 4 K. & J. 549, 27 L. J. Ch. 829; *Campbell's case, &c.* (1873) L. R. 9 Ch. 1, 24, 43 L. J. Ch. 1; *Totterdell* v. *Fareham Brick Co.* (1866) L. R. 1 C. P. 674, 35 L. J. C. P. 278; *Re County Life Assce. Co.* (1870) L. R. 5 Ch. 288, 39 L. J. Ch. 471, a very strong case, for the persons who issued the policy were assuming to carry on business as directors of company without 695] *any authority at all; *Romford Canal Co.* (1883) 24 Ch. D. 85, 52 L. J. Ch. 729), and it was decisively affirmed by the House of Lords in *Mahony* v. *East Holyford Mining Co.* (1875) L. R. 7 H. L. 869. In that case a bank had honoured cheques drawn by persons acting as directors of the company, but who had never been properly appointed; and these payments were held to be good as against

(*p*) 5 E. & B. 248, 6 *ibid.* 237, 24 L. J. Q. B. 327, 25 *ibid.* 327.

the liquidator, the dealings having been on the face of them regular, and with *de facto* officers of the company. Shareholders who allow persons to assume office and conduct the company's business are, as against innocent third persons, no less bound by the acts of these *de facto* officers than if they had been duly appointed. It is for the shareholders to see that unauthorized persons do not usurp office, and that the business is properly done (*q*). Similarly where the proper quorum of directors fixed by internal regulations of the company was not present: *County of Gloucester Bank* v. *Rudry Merthyr, &c. Co.* [1895] 1 Ch. 629, 64 L. J. Ch. 451. Creditors are entitled to rely on the authority of a managing director purporting to exercise powers which under the articles he might have: *Biggerstaff* v. *Rowatt's Wharf* [1896] 2 Ch. 93, 102, 65 L. J. Ch. 536.

In *Balfour* v. *Ernest* the action was on a bill given by directors of an insurance company for a claim under a policy of another company, the two companies having arranged an amalgamation; this attempted amalgamation, however, had been judicially determined to be void: *Ernest* v. *Nicholls,* 6 H. L. C. 401, revg. S. C. nom. *Port of London Co.'s case* (1854) 5 D. M. & G. 465. The directors had power by the deed of settlement to borrow money for the objects and business of the company and to pay claims on policies granted by the company, and they had a power to make and accept bills, &c. which was not restricted in terms as to the objects for which it might be exercised. It was held that, taking this with the other provisions of the deed, they could bind the company by bills of exchange only for its ordinary purposes, and not in pursuance of a void scheme of amalgamation, that the plaintiffs must be taken to have known of their want of authority, which might have been ascertained from the deed, and that they therefore could not recover. "This bill is drawn by procuration," said Willes J., "and unless there was authority to draw it the company are not liable (*r*) . . . this is the bare case of one taking a bill from Company A. in respect of a debt due from Company B., there being nothing *in the [696 deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it."

The connection with ordinary partnership law is brought out in the introductory part of Lord Wensleydale's remarks in *Ernest* v. *Nicholls* (1857) 6 H. L. C. 401, 417:—

"The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and as agent for the rest binds them upon all contracts made in the course of the ordinary scope of the partnership business. . . . . Any restriction upon the authority of each partner, imposed by mutual agreement among themselves, could not affect

(*q*) Opinion of judges, L. R. 7 H. L. at p. 880; per Lord Hatherley, at pp. 897–8.

(*r*) In form it was a bill drawn by two directors on the company's cashier, and sealed with the company's seal.

third persons, unless such persons had notice of them; then they could take nothing by contract [sc. as against the firm] which those restrictions forbade. [The law in this form, *i.e.,* the presumption of every partner being the agent of the firm, being obviously inapplicable to joint-stock companies], the legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders by requiring the copartnership deed to be registered . . . and made accessible to all." The continuation of the passage, however, goes too far; in fact, it disregards the distinction established by *Royal British Bank* v. *Turquand,* and the Courts have distinctly declined to adopt it: *Agar* v. *Athenæum Life Assce. Soc.* (1858) 3 C. B. N. S. 725, 27 L. J. C. P. 95; *Prince of Wales Assce. Co.* v. *Harding* (1857) E. B. & E. 183, 27 L. J. Q. B. 297. See *Chapleo* v. *Brunswick Building Society* (1881) 6 Q. B. Div. 696, 50 L. J. Q. B. 372, for an example of the society not being bound by a loan contracted beyond its borrowing powers: the directors, having held themselves out as authorized, were found personally liable.

Ratification of irregular transactions by assent of all the shareholders. Transactions in the conduct of a company's affairs which in their inception were invalid as against any dissenting shareholder may nevertheless be made binding on the partnership and decisive of its collective rights, as between the company and its own past or present members, by the subsequent assent of all the shareholders, though such assent be informal and shown only by acquiescence. The leading examples on this head are given by the well-known cases in the House of Lords which arose in the winding-up of the Agriculturists' Cattle Insurance Company.

It is to be observed that these cases turned on the internal constitution and affairs of the company, and there was no occasion to
697] *consider to what extent or in what transactions the assent of shareholders was capable of binding the company as against strangers. They therefore stand apart from the question of positive statutory limitations of corporate powers as between the company and outsiders. Moreover, the irregular act which was ratified was unauthorized as to the manner and form of it, but belonged to an authorized class (*s*). The general nature of the facts was thus: At a meeting of the company an arrangement was agreed to, afterwards called the Chippenham arrangement, by which shareholders who elected to do so within a certain time might retire from the company on specified terms by a nominal forfeiture of their shares. The deed of settlement contained provisions for forfeiture of shares, but not such as to warrant this arrangement. It was held—

In *Evans* v. *Smallcombe* (1868) L. R. 3 H. L. 249, that the

(*s*) See per Lord Romilly (L. R. 3 H. L. 244–5). See also the judgment of Archibald J. in *Riche* v. *Ashbury Railway Carriage Co.* (1875) L. R. 9 Ex. 289, 43 L. J. Ex. 177.

Chippenham arrangement could be supported (as having become part of the internal regulations of the company) only by the assent of all the shareholders, but that in fact there was knowledge and acquiescence sufficiently proving such assent. A shareholder who had retired on the terms of the Chippenham arrangement was therefore not liable to be put on the list of contributories. (Cp. *Brotherhood's case* (1862) 4 D. F. & J. 566, an earlier and similar decision in the same winding-up.)

In *Spackman* v. *Evans* (1868) L. R. 3 H. L. 171, 34 L. J. Ch. 321, that a later and distinct compromise made with a smaller number of dissentient shareholders had not in fact been communicated to all the shareholders as distinct from the Chippenham arrangement, and could not be deemed to have been ratified by that acquiescence which ratified the Chippenham arrangement; and that a shareholder who had retired under this later compromise was therefore rightly made a contributory.

In *Houldsworth* v. *Evans* (1868) L. R. 3 H. L. 263, that time was of the essence of the Chippenham arrangement, so that when a shareholder was allowed to retire on the terms of the Chippenham arrangement after the date fixed for members to make their election, this, in fact, amounted to a distinct and special compromise, which ought to have been specially communicated to all the shareholders: this case therefore followed *Spackman* v. *Evans* (*t*). Cp. *Stewart's case* (1866) L. R. 1 Ch. 511.

The question of the shareholders' knowledge or assent in each case involved delicate and difficult inferences of fact, and on [698 these the opinions of the Lords who took part in the decisions were seriously divided. It may perhaps also be admitted that on some inferences of mixed fact and law there was a real difference; but it may safely be affirmed that on any pure question of law there was none (*u*). These cases appear to establish in substance the following propositions: (1.) For the purpose of binding a company as against its own shareholders, irregular transactions of an authorized class may be ratified by the assent of all the individual shareholders. (2.) Such assent must be proved as a fact. Acquiescence with knowledge or full means of knowledge may amount to proof of assent, and lapse of time, though not conclusive, is material. The converse proposition that the assent of a particular shareholder will bind him to an irregular transaction as against the company is likewise well established, but does not fall within our present scope. See *Campbell's case, &c.* (1873) L. R. 9 Ch. 1, 43 L. J. Ch. 1.

Phosphate of Lime Co. v. Green. The later case of *Phosphate of Lime Co.* v. *Green* (1871) L. R. 7 C. P. 43, was of much the same kind though in a different form. The action was by the company against past shareholders for a debt, and the defence rested on an accord and satisfaction which had been effected by an irregular forfeiture of the

(*t*) (1868). See also L. R. 7 C. P. 51, 52, and note the remark of Willes J. p. 53, 34 L. J. Ch. 321.

(*u*) See per Willes J., L. R. 7 C. P. 60.

defendant's shares, and which in the result was upheld on the ground of the shareholder's acquiescence. It was not necessary to consider the distinction between irregular acts which can be ratified and acts contrary to the constitution of the company which cannot be ratified in any way, nor was it brought to the attention of the Court (*x*).

Statutory prohibition: Companies Act, 1862. With regard to cases in which ratification is impossible by reason of the corporation being absolutely disabled from undertaking the transaction, the existence of such cases has been recognized almost from the beginning of modern corporation law. "A company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be" (*y*). The application of this principle to companies under the Companies Act, 1862 (the most important class of cases in practice), was fixed by the House of Lords in 1875 in *Ashbury, &c. Co.* v. *Riche,* p. *128, above. The House decided that, by the frame and intention of the Act as a whole, **699]** the memorandum of association *is the fundamental constitution of the company, and the company is incompetent to undertake anything outside its objects as thereby defined. As a consequence of this, any provision in the articles for applying the company's capital to a purpose not warranted by the memorandum is itself invalid: *Guinness* v. *Land Corporation of Ireland* (1882) 22 Ch. Div. 349. For some time past it has been the practice of company draftsmen to frame the memorandum in the most comprehensive terms, in order to prevent questions of this kind from arising; but the decisions remain in full force, and the practice and forms in use cannot be adequately understood without reference to them. As to when the Attorney-General is entitled to interfere, see *A.-G.* v. *G. E. Ry. Co.* (1880) 11 Ch. Div. 449; 49 L. J. Ch. 545; *A.-G.* v. *London County Council* [1901] 1 Ch. 781, 70 L. J. Ch. 367, C. A. This last case also decides that a county council under the Local Government Act, 1888, is a purely statutory body and has not the general powers of a corporation at common law.

Note E.

Classification of Contracts in Roman and Medieval Law.

The verbal contract. Formal Contracts (legitimae conventiones) gave a right of action irrespective of their subject-matter. In Justinian's time the only kind of formal contract in use was the Stipulation (*z*), or verbal contract by question and answer, the question

(*x*) See further on the subject of ratification by companies, Lindley on Companies, 175–181.

(*y*) So laid down as well-settled doctrine by Lord Cranworth in *E. C. Ry. Co.* v. *Hawkes* (1855) 5 H. L. C. 331, 24 L. J. Ch. 601.

(*z*) The *litterarum obligatio* (Gai. 3. 128) was obsolete. What appears under that title in the Institutes (3. 21) is a general rule of evidence unconnected with the ancient usage: see Moyle's Justinian, Exc. viii.

being put by the creditor and answered by the debtor (as Dari spondes? spondeo: Promittis? promitto: Facies? faciam). The origin of the Stipulation is believed to have been religious (*a*), though the precise manner of its adoption into the civil law remains uncertain. In our authorities it appears as a formal contract capable of being applied to any kind of subject-matter at the pleasure of the parties. Its application was in course of time extended by the following steps. *1. The question and answer were not required [700 to be in Latin (*b*). 2. An exact verbal correspondence between them was not necessary (*c*). 3. An instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having actually taken place (*d*), and it might be presumed that the form of question and answer had been duly observed even without express words to that effect (*e*). Hence the medieval development of operative writings.

Nudum pactum and causa. Informal agreements (pacta) did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called *causa*. Practically the term covers a somewhat wider ground than our modern "consideration executed": but it has no general notion corresponding to it, at least none co-extensive with the notion of contract; it is simply the mark, whatever that may be in the particular case, which distinguishes any particular class of agreements from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on (*f*). The term *nudum pactum* is sometimes used, however, with a special and rather different meaning, to express the rule that a contract without delivery will not pass property (*g*).

The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without

(*a*) Savigny's derivation of the Stipulation from the *nexum* is abandoned, so far as I know, by all recent writers. It seems quite possible that the earliest type of contract is to be sought in covenants made between independent tribes or families. Cf. Gai. 3. 94 on the use of the word *spondeo* in treaties. If this were so, one would expect the covenant to be confirmed by an oath, of which Muirhead (on Gai. 3. 92) finds a trace on other grounds in the form *promittis? promitto*.

(*b*) Gai. 3. 93, I. 3. 15, de v. o. § 1.

(*c*) C. 8. 38. de cont. et comm. stipul. 10.

(*d*) C. 8. 38. de cont. et comm. stipul. 14, I. 3. 19. de inut. stipul. § 12. Probably Greek and provincial use of written agreements had much to do with this.

(*e*) Paul. Sent. V. 7, § 2. For detailed discussion see Seuffert, Zur Geschichte der obligatorischen Verträge, § 3.

(*f*) They gave rise however to imperfect or "natural" obligations which had other legal effects.

(*g*) Traditonibus et usucapionibus dominia rerum, non nudis pactis, transferuntur. Cod. 2. 3. de pactis. 20. But the context is not preserved, and the particular *pactum* in question may have been *nudum* in the general sense too. When the contrary rule of the Common Law became fixed is a question for which more light is still wanted.

classical authority but very common: it is adopted to the full extent by our own early writers (*h*).

701] * What informal contracts enforceable. The privileged informal contracts were the following: 1. *Real* contracts, where the *causa* consisted in the delivery of money or goods: namely, *mutui datio, commodatum, depositum, pignus,* corresponding to our bailments. This class was expanded within historical times to cover the so-called innominate contracts denoted by the formula *Do ut des,* &c. (*i*), so that there was an enforceable obligation *re contracta* wherever, as we should say, there was a consideration executed: yet the procedure in the different classes of cases was by no means uniform (*k*).

2. *Consensual* contracts, being contracts of constant occurrence in daily life in which no *causa* was required beyond the nature of the transaction itself. Four such contracts were recognized, the first three of them at all events (*l*), from the earliest times of which we know anything, namely, Sale, Hire, Partnership, and Mandate. (Emptio Venditio, Locatio Conductio, Societas, Mandatum.) To this class great additions were made in later times. Subsidiary contracts (pacta adiecta) entered into at the same time and in connexion with contracts of an already enforceable class became likewise enforceable: and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum,* covering the English heads of *account stated* and *guaranty.* Justinian added the *pactum donationis,* it seems with a special view to gifts to pious uses (*m*). Even after all these extensions, however, matters stood thus: "The Stipulation, as the only formal agreement existing in Justinian's time, gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made. All other informal agreements (*nuda pacta*) gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of Contract" (*n*). It is

(*h*) "Pactum nudum est non vestitum stipulatione vel re vel litteris vel consensu vel contractus cohaerentia". Azo, Summa in Cod. ap. Seuffert op. cit. 41; Maitland, Bracton and Azo, 143. "Obligatio quatuor species habet quibus contrahitur et plura vestimenta," Bracton, 99a. "Obligacioun deit estre vestue de v. maneres de garnisementz," Britton 1. 156. Austin (Jurisprudence, 2. 1016, 3rd ed.) spoke *per incuriam* of the right of action itself, instead of that which gives the right, as being the "clothing."

(*i*) Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias; in quibus quaeritur quae obligatio nascatur. D. 19. 5. de praescr. verbis, 5 pr. Blackstone (Comm. ii. 444) took this formula for a classification of *all* valuable considerations, and his blunder was copied without reflection by later writers.

(*k*) Dig. 1. c. §§ 1–4.

(*l*) See Muirhead on Gai. 3. 216.

(*m*) C. 8. 54, de donat, 35, § 5. The establishment of emphyteusis as a distinct species of contract is of minor importance for our present purpose.

(*n*) Sav. Obl. 2. 231. Muirhead, on Gai. 3. 134, says that "amongst peregrins a *nudum pactum* was creative of action:" which seems to be a slip. Provincial usage, so far as known, was less advanced than Roman; thus the contract of sale was (as in Germanic custom) real and

desirable to bear in mind that in Roman, and *therefore also [702 in early English law-texts, *nudum pactum* does not mean an agreement made without consideration. Many *nuda pacta,* according to the classical Roman law, would be quite good in English law, as being made on sufficient consideration; while in many cases obligations recognized by Roman law as fully binding (*e.g.,* from mandate or *negotiorum gestio*) would be unenforceable, as being without consideration, in the Common Law.

Modern civil law. When the Roman theory came to be adopted or revived in Western Christendom, the natural obligation admitted to arise from an informal agreement was, under the influence of the canonists, gradually raised to full validity, and the difference between *pactum* and *legitima conventio* ceased to exist (*o*). The process, however, was not completed until English law had already struck out its own line.

The deed in English medieval law. The identification of Stipulation with formal writing, complete on the Continent not later than the 9th century (*p*), was adopted by our medieval authors. In Glanvill we find that a man's seal is conclusive against him (*q*). Bracton, after setting forth almost in the very words of the Institutes how "*Verbis* contrahitur obligatio per stipulationem," &c. adds: "Et quod per *scripturam* fieri possit stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promisisse, perinde habetur ac si interrogatione praecedente responsum sit" (*r*). There is no doubt that he means only a writing under seal, though it is not so expressed: Fleta does say in so many words that a writing unsealed will not do (*s*). The equivalent for the Roman Stipulation being thus fixed, the classes of Real and Consensual contracts are recognized, in the terms of Roman law so far as the recognition goes: the Consensual contracts are but meagrely handled for form's sake, as the Roman rules could not be reconciled with English practice (*t*). We hear of *nothing corresponding to the later Roman extensions [703 of the validity of informal agreements. Such agreements in general

not consensual: Gilson, L'étude du droit romain comparé aux autres droits de l'antiquité (1899) p. 217.

(*o*) Seuffert op. cit. cp. Harv. Law Rev. vi. 390, 391. See Esmein, Etudes sur les contrats dans le très ancien droit français, Paris 1883, for the earlier medieval history.

(*p*) Details and authorities in Brunner, Röm. u. German, Urkunde.

(*q*) L. x. c. 12.

(*r*) 99 *b.* 100 *a.* Later students of Roman law seem to have been dissatisfied; at any rate the following curious marginal note occurs in an early 14th century MS. of Bracton in the Cambridge University Library (Dd. 7. 6): Differt pactum a conventione quia pactum solum consistit in sermonibus, ut in stipulationibus, conventio tam in sermone quam in opere, ut cum in scriptis redigitur.

(*s*) Lib. 2, c. 60, § 25. Non solum sufficiet scriptura nisi sigilli munimine stipulantis (see p. *137, above) roboretur cum testimonio fide dignorum praesentium.

(*t*) Bracton's law of sale, like Glanvill's, is the old Germanic law in which the contract is not consensual but real: fo. 61 *b.*, Güterbock, p. 113. Mandate is still unknown to the Common Law.

give no right of action: in Glanvill it is expressly said: "Privatas conventiones non solet curia domini regis tueri" (*u*); the context makes it doubtful whether even agreements under seal were then recognized by the King's Court unless they had been made before the Court itself. In Bracton too, notwithstanding his elaborate copying of Roman sources, we read: "Indicialis autem esse poterit stipulatio, vel conventionalis: iudicialis, quae iussu iudicis fit vel praetoris. Conventionalis quae ex conventione utriusque partis concipitur, nec iussu iudicis vel praetoris, et quarum totidem sunt genera quot paene (*x*) rerum contrahendarum, *de quibus omnibus omnino curia regis se non intromittit nisi aliquando de gratia*" (fo. 100*a*).

NOTE F. (p. *217).

Early Authorities on Assignments of Choses in Action.

1. Cases where a direct assignment only is in question. In Mich. 3 Hen. IV, 8, pl. 34, is a case where a grantee of an annuity from the king sued on it in his own name. No question seems to have been raised of his right to do so.

In Hil. 37 Hen. VI. 13, pl. 3, it appears that by the opinion of all the justices an assignment of debts (not being by way of satisfaction for an existing debt) was no consideration (*quid pro quo*) for a bond, forasmuch as no duty was thereby vested in the assignee: and the Court of Chancery acted on that opinion by decreeing the bond to be delivered up. The case is otherwise interesting, as it shows pretty fully the relations then existing between the Court of Chancery and the Courts of Common Law, and the cardinal doctrine that the jurisdiction of equity is wholly personal is stated with emphatic clearness.

In Hil. 21 Ed. IV. 84, pl. 38, the question was raised whether an annuity for life granted without naming assigns could be granted 704] *over; and the dictum occurs that the right of action, whether on a bond or on a simple contract, cannot be granted over.

Mich. 39 Hen. VI. 26, pl. 36. If the king grant a duty due to him from another, the grantee shall have an action in his own name: "*et issint ne puit nul autre faire.*"

So Mich. 2 Hen. VII. 8, pl. 25. "*Le Roy poit granter sa accion ou chose qui gist en accion; et issint ne poit nul auter person.*"

In Rolle Abr. Action sur. Case, 1. 20, pl. 12, this case is stated to

(*u*) Lib. x. c. 18, and more fully *ib.* c. 8. "Curia *domini regis*" is significant, for the ecclesiastical courts, and, it seems, local and private courts, did take cognizance of breaches of informal agreements as being against good conscience, *ib.* c. 12; Blackstone, Comm. i. 52, and authorities there cited; Archdeacon Hale's Series of Precedents and Proceedings, where several instances will be found; Harv. Law. Rev. vi. 402.

(*x*) This is evidently the true reading: the printed book has *poenae*, seemingly a mere printer's misreading of *pene*, which is given by the best MSS. Bracton was copying the language of I. 3. 18, § 3.

have been decided in B. R., 42 Eliz., between Mowse and Edney, *per curiam:* A. is indebted to B. by bill (*i.e.,* the now obsolete form of bond called a single bill), and B. to C. B. assigns A.'s bill to C. Forbearance on C.'s part for a certain time is no consideration for a promise by A. to pay C. at the end of that time (*s. v. contra, ib.* 29, pl. 60) : for notwithstanding the assignment of the bill, the property of the debt remains in the assignor.

In none of these cases is there a word about maintenance or public policy. On the contrary, it appears to be assumed throughout that the impossibility of effectually assigning a chose in action is inherent in the legal nature of things. Finally, in *Termes de la Ley,* tit. *Chose in Action,* the rule is briefly and positively stated to this effect: Things in action which are certain the king may grant, and the grantee have an action for them in his own name: but a common person can make no grant of a thing in action, nor the king himself of such as are uncertain. No reason is given.

The exception in favour of the Crown may perhaps be derived from the universal succession accruing to the Crown on forfeitures. This would naturally include rights of action, and it is easy to understand how the practice of assigning over such rights might spring up without much examination of its congruity with the legal principles governing transactions between subjects.

Before the expulsion of the Jews under Edward I. they were treated as a kind of serfs of the Crown (*ipsi Iudaei et omnia sua regis sunt,* Pseudo-L. Edw. Conf. c. 25; *tayllables au Roy come les soens serfs et a nul autre:* Statutes of Jewry, *temp. incert.,* dated by Prynne, 3 Ed. I.), and the king accordingly claimed and exercised an arbitrary power of confiscating, releasing, assigning, or licensing them to assign, the debts due to them. Cp. charter of Frederick II. Pet. de Vineis Epist. lib. 6, no. 12: "omnes et singuli Iudaei degentes ubique per terras nostrae iurisdictioni subiectas Christianae legis et Imperii praerogativa servi sunt nostrae Camerae speciales." And see on this subject Y. B. 33 Ed. I. pp. xli. 355, and Prynne's "Short Demurrer to the Jews," &c. (Lond. 1656, a violent polemic against their re-admission to England), *passim.*

[705 *2. **Cases where the right of an assignee to sue in the name of the assignor was in question.*** In Hil. 9 Hen. VI. 64, pl. 17, Thomas Rothewel sues J. Pewer for maintaining W. H. in an action of detinue against him, Rothewel, for "*un box ove charters et muniments.*" Defence that W. H. had granted to Pewer a rentcharge, to which the muniments in question related, and had also granted to Pewer the box and the deeds, then being in the possession of Rothewel to the use of W. H. wherefore Pewer maintained W. H., as he well might. To this Paston, one of the judges, made a curious objection by way of dilemma. It was not averred that W. H. was the owner of the deeds, but only that Rothewel had them to his use; and so the property of them might have been in a stranger: "*et issint ceo fuit chose en accion et issint tout void.*" The precise meaning of these words is not very clear, but the general drift is that, for anything

that appeared, W. H. had no assignable interest whatever; and it looks as if the strong expression *tout void* was meant to take a higher ground, distinguishing between a transaction impeachable for maintenance and one wholly ineffectual from the beginning. It may have been supposed that an assignment by a person out of possession could have no effect. But if W. H. was the true owner, Paston continued, then the whole property of the deeds, &c., passed to Pewer, who ought to have brought detinue in his own name (*y*). Babington C.J. and Martyn J., the other judges present, were of a contrary opinion, holding that any real interest in the matter made it lawful to maintain the suit. The attempt to assign a chose in action is here compared by the counsel for the plaintiff to the grant of a reversion without attornment; showing that the personal character of the relation was considered the ground of the rule in both cases.

In Mich. 34 Hen. VI. 30, pl. 15, Robert Horn sued Stephen Foster for maintaining the administrators of one Francis in an action against him, R. Horn: the circumstances being that Horn was indebted to Francis by bond, and Francis being indebted to Stephen in an equal sum assigned the debt and delivered the bond to him, authorizing him, if necessary, to sue on it in his (Francis') name, to which Horn agreed; and now Francis had died intestate, and Stephen was suing on the bond in the name of the administrators with their consent. And this being pleaded for the defendant, was held good. Prisot, **706]** in giving judgment, compared the case of the **cestui que use* of lands, whether originally or claiming by purchase through him to whose use the feoffment was originally made, taking part in any suit touching the lands. On this Fitzherbert remarks (*Mayntenauns*, 14) "*Nota icy que per ceo il semble que un duite puit estre assigne pour satisfaction.*" So it is said in Hil. 15 Hen. VII. 2, pl. 3, that if one is indebted to me, and deliver to me an obligation in satisfaction of the debt, wherein another is bound to him, I shall sue in my debtor's name, and pay my counsel and all things incident to the suit; and so may do he to whom the obligation was made, for each of us may lawfully interfere in the matter.

Brooke, Abr. 140 *b*, observes, referring to the last-mentioned case: "*Et sic vide que chose in accion poet estre assigne oustre pur loyal cause, come iust det, mez nemy pur maintenance.*" This form of expression is worth noting, as showing that assignment of a chose in action meant to the writer nothing else than empowering the assignee to sue in the assignor's name. He was at no pains to explain that he did not mean to say the assignee could sue in his own name; for he did not think any one could suppose he meant to assert such a plainly impossible proposition.

It was long supposed (as is implied in Fitzherbert's and Brooke's language—and see the case in 37 Hen. VI., cited p. *703, above) that

(*y*) Another argument put by the plaintiff's counsel, though not very material, is too quaint to be passed over: Whatever interest Pewer might have had by the grant of the rent and the deeds relating to it, yet he had none in the box, and therefore in respect of the box, at all events, there was unlawful maintenance on his part.

the assignment of a debt by way of sale, as opposed to satisfaction of an existing liability, was maintenance. Even under the Restoration the Court of Chancery would not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee: Freem. C. C. 145, pl. 185, see Prof. Ames in Harv. Law Rev. i. 6, note; and further on the whole matter, Harv. Law Rev. iii. 337 *sqq.*

This evidence seems sufficient to establish with reasonable certainty the statement in the text. The historical difficulty is one which extends to the whole of our law of contract, namely, that of tracing any continuity of general principles in the interval between the Romanized expositions of them in Bracton and Britton and their first appearance in a definitely English form.

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*Note G. (pp. *300, *301). **[707**

Occupations, dealings, &c., regulated or restrained by statute.

(The list here given is probably not complete. A certain number of the references have been taken from the Index to the Revised Statutes without further verification. The occasional asterisks mean that further remarks on the Act or matter thus denoted will be found in the chapter on Agreements of Imperfect Obligation.)

Anchors. See *Chain Cables.*

Apothecaries. 55 Geo. 3, c. 194; 37 & 38 Vict. c. 34.

Art Unions. Excepted from Lotteries Acts, 9 & 10 Vict. c. 48.

Attorneys. See *Solicitors.*

Bankers. 3 & 4 Wm. 4, c. 98; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76; 17 & 18 Vict. c. 83, ss. 11, 12. See Lindley on Partnership, 103.

Brewers. Inland Revenue Act, 1880, 43 & 44 Vict. c. 20, Part 2; 48 & 49 Vict. c. 51.

Brokers. 6 Ann. c. 68 (Rev. Stat.); 57 Geo. 3, c. lx.; rep. in part, 33 & 34 Vict. c. 60; 47 Vict. c. 3. *Smith* v. *Lindo* (1858) 4 C. B. N. S. 395; 5 *ib.* 587; 27 L. J. C. P. 196, 335.

Building. See *Metropolitan Buildings.*

Cabs and Hackney Carriages (London). See 16 & 17 Vict. c. 33; 32 & 33 Vict. c. 115; 59 & 60 Vict. c. 27.

Cattle. (Sale in London) 31 Geo. 2, c. 40.

Chain Cables and Anchors. (Sale forbidden if not tested and stamped) 62 & 63 Vict. c. 23.

Chemists. 15 & 16 Vict. c. 56; 31 & 32 Vict. c. 121; 61 & 62 Vict. c. 25; and see *Poison* (sale of).

Chimney Sweepers must take out a certificate, and are liable to penalties if they exercise their business without one: 38 & 39 Vict. c. 70.

Clergy. Charging benefices forbidden, 13 Eliz. c. 20; *Ex parte Arrowsmith* (1878) 8 Ch. D. 96, 47 L. J. Bk. 46; and see the Benefices Act, 1898, 61 & 62 Vict. c. 48. Trading forbidden, 1 & 2 Vict. c. 106. *Supra,* p. *298.

Coals. (Sale in London) 1 & 2 Vict. c. cli.

Coal Mines Regulation Act, 1887, 50 & 51 Vict. c. 58, Part 1; 1894, 57 & 58 Vict. c. 52.

Companies. (Formation of; partnerships of more than ten persons for banking, or twenty for other purposes, must, if not otherwise privileged, be registered under the Act) Companies Act, 1862, s. 4. As to what is an association for the acquisition of gain
708] *within that sect., see *Smith* v. *Anderson* (1880) 15 Ch. Div. 247, 50 L. J. Ch. 39, overruling *Sykes* v. *Beadon* (1879) 11 Ch. D. 170, 48 L. J. Ch. 522.

Conveyancers. 54 & 55 Vict. c. 39, s. 44. *Supra,* p. *296.

Dangerous Goods (importation, manufacture, sale, and carriage).

Nitro-glycerine, &c. Explosives Act, 1875, 38 Vict. c. 17.

Petroleum, &c. 34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47.

Generally: Explosive Substances Act, 1883, 46 Vict. c. 3 (but this has only a remote bearing on any contract).

Dentists. 41 & 42 Vict. c. 33; 49 & 50 Vict. c. 48, s. 26.

Excise. Many early statutes and most of the recent annual Finance Acts contain general regulations as to trades and businesses subject to the excise laws. It is not thought necessary to set out these in detail.

Fertilisers and Feeding Stuffs. 56 & 57 Vict. c. 56.

Food. The sale of any article "diseased, unsound, unwholesome, or unfit for the food of man" forbidden; 53 & 54 Vict. c. 59, s. 28; and see 62 & 63 Vict. c. 51.

Game (sale of). 1 & 2 Wm. 4, c. 32. *Porritt* v. *Baker* (1855) 10 Ex. 759.

Gaming Securities. 5 & 6 Wm. 4, c. 41; 55 Vict. c. 9.

Goldsmiths. 17 & 18 Vict. c. 96 (and several earlier Acts).

Gunpowder (manufacture and keeping). Explosives Act, 1875, 38 & 39 Vict. c. 17.

Insurance (Life). Assured must have interest,[13] 14 Geo. 3, c. 48. The statute is a defence for the insurers, but if they choose to pay on an insurance without interest the title to the insurance moneys as between other persons is not affected: *Worthington* v. *Curtis* (1875) 1 Ch. Div. 419, 45 L. J. Ch. 259, see p. *382, *supra.*

Restriction on insurance of lives of infants: 39 & 40 Vict. c. 22, s. 2.

(Marine.) The like: insurances of goods on British ships, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer," are made void by 19 Geo. 2, c. 37. See notes to *Goram* v. *Sweeting,* 2 Wms. Saund. 592-7. The prohibition of this statute extends to policies on profit and commission: *Allkins* v. *Jupe* (1877) 2 C. P. D. 375, 46 L. J. C. P. 824.

* Requirement of stamped policy, 54 & 55 Vict. c. 39, s. 92.

Intoxicating Liquors. Licensing Acts, 1872-1874, 35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49 (and several earlier Acts).

[13] In this country since wagers have been held illegal at common law insurable interest is necessary for the creation of a valid policy. See 16 Am. & Eng. Encyc. of Law (2d ed.), 845 *et seq.*

56 Vict. c. 17 (as to the sale of spirituous liquors in the North Sea).
1 Edw. 7. Sale of intoxicating liquors to children.

**Landlord and Tenant.* Property tax: 5 & 6 Vict. c. 35, [709
s. 103. *Lamb* v. *Brewster* (1879) 4 Q. B. Div. 607, 48 L. J. Q. B. 421. Ground game: 43 & 44 Vict. c. 47, s. 3.

Loans, to Infants, Forbidden. 55 Vict. c. 4. As to presumption of knowledge of infancy, see 63 & 64 Vict. c. 51, s. 5.

Lotteries. Forbidden by 10 Wm. 3, c. 23 (Rev. Stat.: *al.* 17) and a series of penal statutes, of which the last is 8 & 9 Vict. c. 74.

Marine Store Dealers. Public Stores Act, 1875, 38 & 39 Vict. c. 25, ss. 9-11.

* *Medical Practitioners.* 21 & 22 Vict. c. 90, 22 Vict. c. 21, 23 & 24 Vict. cc. 7, 66, 39 & 40 Vict. cc. 40, 41 (the latter Act expressly permitting the registration of women), 49 & 50 Vict. c. 48.

Metropolitan Buildings. 18 & 19 Vict. c. 122, 25 & 26 Vict. c. 102.

Money. Contracts, &c., must be made in terms of *some* currency. Coinage Act, 1870, 33 Vict. c. 10, s. 16.

Money-lenders. The Money-lenders Act, 1900 (63 & 64 Vict. c. 51). See p. *631, above.

Old Metal. (Minimum quantities to be bought at one time by dealer in) Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 13.

Pawnbrokers. 35 & 36 Vict. c. 93. *Supra,* p. *297.

Poison (sale of). 31 & 32 Vict. c. 121, s. 17, and see 32 & 33 Vict. c. 117, s. 3. *Berry* v. *Henderson* (1870) L. R. 5 Q. B. 296, 39 L. J. M. C. 77.

Postage Stamps. 47 & 48 Vict. c. 76, s. 7, makes it an offence to deal in or sell any fictitious stamp (including imitations of colonial and foreign stamps).

Printing. 32 & 33 Vict. c. 24. *Bensley* v. *Bignold* (1822) 5 B. & Ald. 335, 24 R. R. 401, *supra,* p. *293.

Public Office (sale forbidden). 5 & 6 Edw. 6, c. 16; 3 Geo. 1, c. 15; 49 Geo. 3, c. 126; 53 Geo. 3, c. 54; 1 & 2 Geo. 4, c. 54; see *Græme* v. *Wroughton* (1855) 11 Ex. 146, 24 L. J. Ex. 265.

Railway Servants. Restriction on excessive hours of labour: 56 & 57 Vict. c. 29.

Religious Opinions (expression of). 9 Wm. 3, c. 35 (Rev. Stat.: *al.* c. 32). See *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230, 36 L. J. Ex. 124.

Seamen. Sale of or charge upon wages or salvage invalid, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 163 (1), 212. As to seamen's wages generally, see 57 & 58 Vict. c. 60, ss. 131—167.

Shipping (passenger steamers). Voyage without Board of Trade certificate unlawful, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 271, 281. *Dudgeon* v. *Pembroke* (1874) L. R. 9 Q. B. 581, 43 L. J. Q. B. 220.

Simony. Purchase of next presentation, 13 Ann. c. 11 (Rev. *Stat.: *al.* 12 Ann. Stat. 2, c. 12). The purchase of a life es- [710
tate in an advowson is not within the statute, and the purchaser, if a clerk, may offer himself for admission on the next avoidance: *Walsh* v. *Bishop of Lincoln* (1875) L. R. 10 C. P. 518, 44 L. J. C. P. 244.

Slave Trade. Illegal, and contracts relating to avoided, 5 Geo. 4, c. 113, 6 & 7 Vict. c. 98, 36 & 37 Vict. c. 88. As to construction of the statutes on contracts made abroad, *Santos* v. *Illidge* (1860) 6 C. B. N. S. 841, 28 L. J. C. P. 317, in Ex. Ch. 8 C. B. N. S. 861, 29 L. J. C. P. 348.

Solicitors. 23 & 24 Vict. c. 127, 51 & 52 Vict. c. 65. Unqualified persons are forbidden to practise, and a solicitor omitting to take out annual certificate cannot recover costs. Special agreements in writing between solicitor and client as to remuneration are now valid, 33 & 34 Vict. c. 28, ss. 4–15, if not in the nature of champerty, s. 11: *they cannot be sued upon, but may be enforced or set aside in a discretionary manner on motion or petition, ss. 8, 9. See *Rees* v. *Williams* (1875) L. R. 10 Ex. 200, 44 L. J. Ex. 116. A promise to charge no costs at all in the event of losing the action is good apart from the statute, and is not touched by s. 11. *Jennings* v. *Johnson* (1873) L. R. 8 C. P. 425. As to non-contentious business, this Act is superseded by the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44).

Spirits, &c. (sale of). *In small quantities, 24 Geo. 2, c. 40, s. 12 (Tippling Act); 25 & 26 Vict. c. 38; 51 & 52 Vict. c. 43, s. 182. To steerage passengers on ship during voyage, 57 & 58 Vict. c. 60, s. 326.

Spirits (methylated). As to making, warehousing, sale, &c.: 52 & 53 Vict. c. 42, Part iv. (and several later Acts).

Sunday. Work in ordinary callings by tradesmen, &c., and public sales by any person on Sunday forbidden, 29 Car. 2, c. 7.

Theatres. 6 & 7 Vict. c. 68 (licences; examination of plays); 35 & 36 Vict. c. 94, s. 72, 37 & 38 Vict. c. 69, s. 7, 43 & 44 Vict. c. 20, s. 43 (5) (sale of liquors); 42 & 43 Vict. c. 34; 57 & 58 Vict. c. 41, ss. 2, 3; 60 & 61 Vict. c. 52 (performances by children).

Tobacco. Growing tobacco is forbidden by 12 Car. 2, c. 34, 1 & 2 Wm. 4, c. 13 (extending the prohibition to U. K.): and the tobacco trade is further regulated by a great number of Customs and Excise Acts.

**Trade Union Contracts.* 34 & 35 Vict. c. 31, s. 4.

Usury. The various statutes which fixed (with sundry exceptions) a maximum rate of lawful interest were all repealed by 17 & 18 Vict. c. 90. *As to securities given after repeal of usury laws for money lent
711] on usurious terms before the repeal, *Flight* v. *Reed* *(1863) 1 H. & C. 703, 32 L. J. Ex. 265. The Money-lenders Act, 1900 (63 & 64 Vict. c. 51), has a different kind of operation, see p. *631, above.

Veterinary Surgeons. 44 & 45 Vict. c. 62, 63 & 64 Vict. c. 24.

Wagers. 8 & 9 Vict. c. 109, 55 Vict. c. 9 (this Act is not retrospective; *Knight* v. *Lee* [1893] 1 Q. B. 41, 62 L. J. Q. B. 28); and see *Tatam* v. *Reeve* [1893] 1 Q. B. 44, 62 L. J. Q. B. 30, *supra*, p. *300. As to the extent of the exceptions, *Parsons* v. *Alexander* (1855) 5 E. & B. 263, 24 L. J. Q. B. 277; *Coombes* v. *Dibble* (1866) L. R. 1 Ex. 248, 35 L. J. Ex. 167; *Diggle* v. *Higgs* (1877) 2 Ex. Div. 422, 46 L. J. Ex. 721; *Trimble* v. *Hill* (appeal to J. C. from New S. Wales on colonial statute in same terms), 5 App. Ca. 342, 49 L. J.

P. C. 49. Forbearance of proceedings to enforce payment of racing debts by purely conventional sanctions is not an unlawful consideration: *qu.* whether or not a good consideration; *Bubb* v. *Yelverton* (1870) L. R. 9 Eq. 471, 39 L. J. Ch. 428.

Wages. Payment otherwise than in money forbidden, 1 & 2 Wm. 4, c. 37 (Truck Act, 1831), to workmen as defined by 38 & 39 Vict. c. 90, s. 10 (see 50 & 51 Vict. c. 46). *Cutts* v. *Ward* (1867) L. R. 2 Q. B. 357, 36 L. J. Q. B. 161; see generally, 50 & 51 Vict. c. 46, and 59 & 60 Vict. c. 44. The stoppage of wages for frame rents, &c., in the hosiery manufacture is forbidden, and all contracts to stop wages and contracts for frame rents and charges are made illegal, null and void, by 37 & 38 Vict. c. 48. See *Willis* v. *Thorp* (1875) L. R. 10 Q. B. 383, 44 L. J. Q. B. 137; *Smith* v. *Walton* (1877) 3 C. P. D. 109, 47 L. J. M. C. 45.

Weights and Measures. Standards defined, and use of other weights and measures forbidden: 41 & 42 Vict. c. 49; 52 & 53 Vict. c. 42, s. 29. The use of the metric system is legalized by 60 & 61 Vict. c. 46. Sales by customary weights or measures which are well known multiples of standard weight or measure are not unlawful: *Hughes* v. *Humphreys* (1854) 3 E. & B. 954, 23 L. J. Q. B. 356; *Jones* v. *Giles* (1854) 10 Ex. 119, 23 L. J. Ex. 292.

Note H. (p. *498).

Bracton on Fundamental Error.

De acquirendo rerum domino, fo. 15 *b,* 16:—"Item non valet donatio, nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et *donatarius animum recipiendi. Nuda enim donatio (*z*) et **[712** nuda pactio non obligant aliquem nec faciant aliquem debitorem; ut si dicam, Do tibi talem rem, et non habeam (*a*) animum donandi nec tradendi nec a traditione incipiam, non valet, ut si dicam, Do tibi istam rem, et illam nolim (*b*) tradere vel (*b*) sustinere quod illam tecum feras vel arborem datam succidas, non valet donatio quia donator plene non consentit. Item oportet quod non sit error in re data, quia si donator senserit de una re et donatarius de alia, non valet donatio propter dissensum: et idem erit si dissentio fiat in genere, numero, et quantitate. . . . [Then follow instances.] Et in fine notandum quod si in corpus quod traditur sit consensum, non nocet, quamvis circa causam dandi atque recipiendi sit dissentio: ut si pecuniam numeratam tibi tradam, vel quid tale, et tu eam quasi creditam (*c*) accipias, constat ad te proprietatem transire."

(*z*) ***ratio*** MS. Hobhouse, Lincoln's Inn.

(*a*) ***habuero*** MS. Hobh.

(*b*) MS. Hobh.: edd. *nolui, et.*

(*c*) Traditam ed. 1569, followed without remark by Sir T. Twiss, 1878, who also gives by a misprint, and translates, *tali* for *tale* immediately above. (See on the general character of this edition "The Text of Bracton," by Prof. Paul Vinogradoff, L. Q. R. i. 189.) But *creditam*

NOTE I. (p. *520).

Mistake in Wills.[14]

Properly speaking, there is no jurisdiction in any court to rectify a will on the ground of mistake. The Court of Probate may reject words of which the testator is proved to have been ignorant, whether inserted by the fraud or by the mistake of the person who prepared the will (*d*). But it has no power to insert words (*e*) or otherwise remedy a mistake "by modifying the language used by the draughtsman and adopted by the testator so as to make it express the supposed intention of the testator. . . . Such a mode of dealing with wills **713]** would lead to the most dangerous consequences, *for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator" (*f*). Exactly the same rule has been laid down in equity (*g*).[15]

The cases in which it is said that the Court will interfere to correct mistakes in wills may be classified thus:

1. Cases purely of construction according to the general intention collected from the will itself (*h*).

2. Cases of equivocal description, of words used in a special habitual sense, or of a wrongly given name which may be corrected by a sufficient description (*i*).

3. Cases of dispositions made on what is called a *false cause* (*k*),[16] *i.e.*, on the mistaken assumption of a particular state of facts existing, except on which assumption the disposition would not have been

is the reading of a majority of good MSS. (Lincoln's Inn, Camb. Univ., Brit. Mus., Bibl. Nat. Paris) and is evidently required by the sense. Bracton is quoting from the Digest, 41. 1. de acq. rer. dom. 36: cp. Güterbock, Henr. de Bracton, p. 85, who assumed, without cause, as the MSS. now show, that Bracton misunderstood the passage. The corruption, however, is an easy and early one.

(*d*) *E. g. Morrell* v. *Morrell*, 7 P. D. 68, 51 L. J. P. 49, following *Fulton* v. *Andrew* (1875) L. R. 7 H. L. 448, 44 L. J. P. 17.

(*e*) *In the goods of Schott* [1901] P 190, 70 L. J. P. 46.

(*f*) *Harter* v. *Harter* (1873) L. R. 3 P. & D. 11, 21, 44 L. J. P. 1, following *Guardhouse* v. *Blackburn* (1866) L. R. 1 P. & D. 109, 35 L. J. P. 116.

(*g*) *Newburgh* v. *Newburgh* (1820) 5 Madd. 364.

(*h*) See Hawkins on Construction of Wills, Introduction.

(*i*) Not only an equivocal name may be explained, but a name which applies to only one person may be corrected by a description sufficiently showing that another person is intended: *Charter* v. *Charter* (1874) L. R. 7 H. L. 364.

(*k*) *Campbell* v. *French* (1797) 3 Ves. 321, 4 R. R. 5.

[14] See 38 Am. L. Reg. (N. S.) 425.

[15] Willis *v.* Jenkins, 30 Ga. 167; Decker *v.* Decker, 121 Ill. 341; Chambers *v.* Watson, 56 Ia. 676; Schlottman *v.* Hoffman, 73 Miss. 188; Lyon *v.* Lyon, 96 N. C. 439; Sherwood *v.* Sherwood, 45 Wis. 357.

[16] Mordecai *v.* Boylan, 6 Jones Eq. 365; Dunham *v.* Averill, 45 Conn. 61, 80; Hayes' Ex'rs *v.* Hayes, 21 N. J. Eq. 265; Gifford *v.* Dyer, 2 R. I. 99. But equity will not relieve in case of an executed gift *inter vivos* made under the influence of such a mistake. Pickslay *v.* Starr, 149 N. Y. 432.

made. These are analogous to the cases of contract governed by *Couturier* v. *Hastie* (*l*): and just as in those cases, the expressed intention is treated as having been dependent on a condition which has failed.

But the true view of all these cases appears to be not that the words are corrected, but that the intention when clearly ascertained is carried out notwithstanding the apparent difficulty caused by the particular words.

NOTE K. (p. *525).

On the supposed equitable doctrine of "making representations good."

Original statement in Hammersley v. De Beil. This once frequently alleged head of equity, in so far as it purports to establish any rule or principle apart from the ordinary rules as to the formation of contracts on the one hand, and the principle of estoppel by assertion as to existing facts on the other, is now known to be imaginary. In the principal class of cases the "repre*sentation" is of an inten- [714 tion to make a provision by will for persons about to marry, in reliance on which representation the marriage takes place. The leading authority is *Hammersley* v. *De Beil* (*m*), decided by the House of Lords in 1845 on appeal from the Court of Chancery. In the Court below (*n*) Lord Cottenham had laid down the proposition that "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation." This appears to be the source of all the similar statements which have since been made (*o*). Taken with its context, however, it need not mean more than that an exchange of proposals and statements by which the conduct of parties is determined may, as containing all the requisites of a good agreement, amount to a contract, though not to a formal contract. To Mr. Justice Stephen Lord Cottenham's words appeared "to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct" (*p*). And in this sense the rule seems to have been understood in the House of Lords both in the same and in subsequent cases. Lord Brougham and Lord Campbell speak of the transaction in plain terms as a contract. In the Rolls Court it had also been dealt with on that footing (*q*). Still more pointed is the remark made by Lord St.

(*l*) (1856) 5 H. L. C. 673, 25 L. J. Ex. 253. *Supra*, pp. *420, *488.

(*m*) (1845) 12 Cl. & F. 45.

(*n*) 12 Cl. & F. at p. 62.

(*o*) The turn of language is in itself not novel. It seems to be modelled on that which had long before been used in cases of a different class and for a different purpose. See *Evans* v. *Bicknell* (1801) 6 Ves. 174, 5 R. R. 245.

(*p*) *Alderson* v. *Maddison* (1880) 5 Ex. D. 293, 299, 50 L. J. Q. B. 466.

(*q*) Nom. *De Beil* v. *Thomson* (1841) 3 Beav. 469.

Leonards in 1854:—"Was it merely a representation in *Hammersley* v. *De Beil?* Was it not a proposal with a condition which, being accepted, was equivalent to a contract?" (*r*). In the terms of the Indian Contract Act, it was the case of a proposal accepted by the performance of the conditions. The statement "I will leave you 10,000*l.* by my will, if you marry A.," if made and acted on as a promise, becomes a binding contract (the marriage undertaken on the faith of that promise being the consideration), and so does a statement in less plain language which amounts to the same thing. On the other hand the statement "If you marry A. I think, as at present advised, I shall leave you 10,000*l.*" is not a promise and cannot become a contract: neither can it act as an estoppel, for it cannot matter
715] to the other party's *interest whether the statement of an intention which may be revoked at any time is at the moment true or false. And the same is true of any less explicit statement which is held on its fair construction to amount to this and no more. Such was the result of the case where Lord St. Leonards put the question just cited (*s*). And in that case the true doctrine was again distinctly affirmed by Lord Cranworth (*t*).

"By what words are you to define whether a party has entered into an engagement as distinct from a contract, but which becomes a contract by another person acting upon it? Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not: in the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil." Again: "There is no middle term, no *tertium quid* between a representation so made as to be effective for such a purpose, and being effective for it, and a contract: they are identical." [17]

He proceeded to comment on *Hammersley* v. *De Beil,* and to express a decided opinion that the language there used by Lord Cottenham was not meant to support, and did not support, the notion that words or conduct not amounting to a true contract may create an equitable obligation which has the same effect. "The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." In the case of *Jorden* v. *Money* (*u*),[18] which came before the House of Lords some months later, it was held, first, that the statement there relied on as binding could not work an estoppel, because it was a statement not of fact but of intention; secondly, that on the evidence it did not amount to a promise, and therefore could

(*r*) *Maunsell* v. *Hedges White* (1854) 4 H. L. C. at p. 1051; cp. p. 1059.

(*s*) *Maunsell* v. *Hedges White* (1854) 4 H. L. C. 1039.

(*t*) At pp. 1055–6.

(*u*) (1854) 5 H. L. C. 185, 23 L. J. Ch. 865. A pretty full summary is given by Stephen J. 5 Ex. D. at p. 301.

17 *Acc.* Knowlton *v.* Keenan, 146 Mass. 86.

18 Followed in Chadwick *v.* Manning, [1896] A. C. 231.

not be binding as a contract. Lord St. Leonards dissented both on the evidence and on the law. His opinion seems on the whole to come to this: "My inference from all the facts is that this statement was a promise: but if not, I say it is available by way of estoppel, for I deny the existence of any rule that equitable estoppel can be by statement of fact only and not of intention." On this point, however, the opinion of the majority (Lord Cranworth and Lord Brougham) is conclusive (*x*).

* **Cases in Court of Chancery — Opinion of Stuart V.-C.** In a much [716 earlier case of the same class before Lord Eldon (*y*) the language used is indecisive: "arrangement" and "engagement" seem preferred to "agreement." In two later ones decided by Sir John Stuart (*z*), an informal statement or promise as to a settlement on a daughter's marriage, and an informal promise to leave property by will to an attendant as recompense for services, were held to be enforceable. The Vice-Chancellor certainly seems to have adopted the opinion that a "representation" short of contract had somehow a binding force. He appears further to have held that, inasmuch as these were not properly cases of contract, it was immaterial to consider whether the Statute of Frauds applied to them, and to have thought that the opinion of Lord Cranworth in *Jorden* v. *Money* was inconsistent with the decision in *Hammersley* v. *De Beil* (*a*). But these opinions are inconsistent with the true meaning and effect of the cases in the House of Lords which have already been cited: and one of them is now expressly overruled (*b*). Later judicial expressions are to be found which in some degree countenance them; but these have been, without exception, unnecessary for the decision of the cases in which they occurred. It is remarkable that the au-

(*x*) And see Mr. Justice Stephen's criticism, 5 Ex. D. at p. 303.

(*y*) *Luders* v. *Anstey* (1799) 4 Ves. 501, 4 R. R. 276.

(*z*) *Prole* v. *Soady* (1859) 2 Giff. 1; *Loffus* v. *Maw* (1862) 3 Giff. 592 (1862). In *Loffus* v. *Maw* there is a suggestion that the "representation" affects the specific property as an equitable charge.

(*a*) *Loffus* v. *Maw* (1862) 3 Giff. at pp. 603–4. In *Prole* v. *Soady*, a strange and entangled case, no point was made on the Statute of Frauds. But there it appears to have been established as a fact that the wife's father represented to the intended husband, an Englishman, that a certain trust disposition of Scotch land in the proper Scottish form was irrevocable. This was, as regards the person to whom it was made, a representation of foreign law, and therefore equivalent to a representation of fact. And thus the decision may have been right on the ground of estoppel. But it is far from easy to discover on what ground it really proceeded. The case went to the Appeal Court, but was compromised: see 1 Ch. 145. The still later case of *Skidmore* v. *Bradford* (1869) L. R. 8 Eq. 134, decided by the same judge in 1869, may be and has been regarded as a case of true contract: Fry on Specific Performance, § 314, pp. 141, 142, 3rd ed.

(*b*) *Loffus* v. *Maw* (1862) is clearly disapproved by Lord Selborne and Lord O'Hagan in *Maddison* v. *Alderson* (1883) 8 App. Ca. at pp. 473, 483. Cf. *Coles* v. *Pilkington* (1874) L. R. 19 Eq. 174, see at p. 178, 44 L. J. Ch. 381; it is now enough to say that it was decided by Malins V.-C. on the authority of *Loffus* v. *Maw*, which, if possible, it exceeds in audacity.

thoritative explanation of *Hammersley* v. *De Beil* (*c*) given in *Maunsell* v. *Hedges White* (*d*) has in almost all the recent cases been left unnoticed.

Later cases of same class. *Coverdale* v. *Eastwood* (1872) (*e*) was a **717]** case of precisely the same *type as *Hammersley* v. *De Beil*. Bacon V.-C. decided it on the ground that the transaction amounted to a contract, and so it was expressed in the decree. But he also thought that there existed, and was applicable to the case in hand, "this larger principle, that where a man makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively." Later, in *Dashwood* v. *Jermyn* (*f*) (1879), which was another marriage case, he held that the connection between the statement relied on as a promise and the marriage alleged to have taken place on the faith of it was not sufficiently made out. He stated the general rule thus:—"If a man makes a representation on the faith of which another man alters his position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform." This appears to qualify to some extent the dicta of the same judge in *Coverdale* v. *Eastwood*. Here we read no longer of two distinct kinds of obligation, by contract and by "representation," but of one kind of obligation, and that a contractual one, arising from the representations made by one party with the intent that they should be acted upon, and the conduct of the other who does act upon them. If the learned judge thought that the same facts might amount to a contract in equity and not at law, he was clearly mistaken. In *Alderson* v. *Maddison* (1880) (*g*) there was an agreement to leave property by will as a reward for services. Here Stephen J. set forth the view that it must be a contract or nothing; and he held that a contract was proved by the facts of the case. The decision was reversed by the Court of Appeal on the ground that, the case being within the Statute of Frauds, there was no sufficient part performance: and the same view was taken by the House of Lords. No encouragement whatever, to say the least, was given to the doctrine of "representation." Finally, in *Re Fickus* (*h*), where a faint attempt was made to revive it, Cozens-Hardy J. summarily disposed of it with a reference to the decisions in the House of Lords.[19]

(*c*) (1845) 12 Cl. & F. 45.
(*d*) (1854) 4 H. L. C. 1039.
(*e*) L. R. 15 Eq. 121, 42 L. J. Ch. 118.
(*f*) (1879) 12 Ch. D. 776.
(*g*) 5 Ex. D. 293, 7 Q. B. Div. 174, 8 App. Ca. 467, 50 L. J. Q. B. 466.
(*h*) [1900] 1 Ch. 331, 334, 69 L. J. Ch. 161.

[19] Another class of cases which is hard to distinguish in principle is composed of cases where a promisor promises without consideration to convey

*** Cases of collateral "representations" inducing contracts.** So far [718 the authorities as to direct enforcement of "representations." We do not count among them *Piggott* v. *Stratton* (*i*), decided by the Court of Appeal in 1859, in which Lord Campbell incidentally took a minimizing view of the effect of *Jorden* v. *Money* (*j*). That case, so far as it did not proceed on express covenant, was one of equitable estoppel. *Mills* v. *Fox* (1887) (*k*) was also decided expressly on the ground of estoppel by representation of fact. The representation was not of intention at all, but that a certain state of facts with its legal consequences existed and would continue to exist. But another class of decisions now calls for mention. These lay down, or seem to lay down, a rule to the effect that where a contract has been entered into upon the representations of one party that he will do something material to the other party's interest under it, and he does not make good that representation, he cannot enforce specific performance of the contract: and in one case the contract has even been set aside at the suit of the party misled. It is difficult in these cases to see why the so-called representation does not amount to a collateral agreement, or even to a term in the principal contract itself. In the first set of cases, where specific performance was refused, a vendor or lessor had represented that he would do something for the purchaser's or lessee's benefit, either in the way of repair or improvement on the property itself (*l*), or by executing works on adjoining property as part of a general plan (*m*). In these cases it has been thought immaterial, since the remedy of specific performance is "not matter of absolute right," to consider whether the collateral "independent engagement" could or could not have been sued on as a contract or warranty (*n*). In the one case which goes farther the contract was a partial re-insurance effected by one insurance society (A.) with another (B.) for one-third of the original risk, the secretary of society A. stating, when he proposed the re-insurance, that one-third was to be re-insured in like manner with another office C., and the remaining one-third retained by A., the first insurers. This last one-third was afterwards re-insured by A. with C. without communication with B. It was held that *society B. was entitled to set aside the policy of re- [719 insurance given by it on the faith that society A. would retain part of the liability. And it was said to make no difference that such an intention was really entertained at the time: for the change of inten-

(*i*) 1 D. F. & J. 33, 29 L. J. Ch. 1.

(*j*) At p. 51. But Lord Selborne seems to adopt the opinion of Lord Cranworth to its full extent in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L. R. 6 H. L. at p. 360, 43 L. J. Ch. 269.

(*k*) 37 Ch. D. 153, 57 L. J. Ch. 56.

(*l*) *Lamare* v. *Dixon* (1873) L. R. 6 H. L. 414, 43 L. J. Ch. 203.

(*m*) *Beaumont* v. *Dukes* (1822) Jac. 422; *Myers* v. *Watson* (1851) 1 Sim. N. S. 523.

(*n*) Lord Cranworth, 1 Sim. N. S. 529; Lord Cairns, L. R. 6 H. L. 428.

land, and on the faith of the promise the promisee makes improvements. Under such circumstances the promise is generally enforced. Pomeroy Eq. Jur., § 1294; Ames Cas. Eq. Jur. I. 300.

tion ought to have been communicated. "If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances" (*o*).

This case, decided by the Lords Justices in 1864, is that which gives rise to most difficulty. No reason appears why the retaining of the specified part of the risk by the re-insuring office should not have been deemed a term or condition of the contract (*p*). Indeed it seems to have been an integral part of the proposal, and evidence was offered that by the constant usage of insurance offices it was so understood. The judgments, however, certainly do not proceed on that footing. Possibly it might be said that the representation in this case, being of something to be done not in a more or less distant future, but at the same time with and as part of the proposed transaction, was in the nature of a representation of fact. It might be put thus: "We are re-insuring one-third with C.; one-third of the risk we keep; will you, B., take the other third?" And thus put, it might be regarded as an alternative case of contract or estoppel, in which (for some reason not evident from the report) the Court preferred the less simple course.

In the other cases it is by no means clear that the existence of a true collateral agreement or warranty is excluded; in at least one similar case (*q*) the question is treated as one of agreement entirely. In *Lamare* v. *Dixon* (*r*), which came before the House of Lords in 1873, the principal agreement was for a lease of cellars to be used as wine vaults. During the negotiations the lessor assured the lessee either that he had already taken, or that he would forthwith **720]** *take, sufficient measures to keep the cellars dry and fit for a wine merchant's use. It seems most natural to regard this as a warranty: still, so far as it related to anything already done, it might be regarded as a positive statement of fact. "You will find the cellars dry," or any speech to that effect, might mean either: "I undertake to make the cellars dry," or, "That has been done which is known by competent experience to be sufficient to ensure dryness." The line between warranty and estoppel is here a fine one, and perhaps not worth drawing, but still it is possible to draw it: and when Lord Cairns said "I quite agree that this representation is not a guarantie,"

(*o*) *Traill* v. *Baring* (1864) 4 D. J. & S. 318, 329, per Turner, L. J. approved by Fry L.J., *Scottish Petroleum Co.* (1883) 23 Ch. Div. at p. 438.

(*p*) Cp. *Barnard* v. *Faber* [1893] 1 Q. B. 340, 62 L. J. Q. B. 159, C. A.

(*q*) *Peacock* v. *Penson* (1848) 11 Beav. 355.

(*r*) L. R. 6 H. L. 414, 43 L. J. Ch. 203.

he may have meant that he preferred to regard it as a statement of fact operative by way of estoppel. There certainly does run through these cases, however, the idea that specific performance is so far a discretionary remedy that it may be refused to a party seeking it on grounds which do not affect his legal rights under the contract. But it seems a tenable position that equity judges have taken a needlessly narrow view of what is a binding agreement on the principles of the common law (*s*). In fact agreements collateral to leases, and not in writing, have of late years been enforced without doubt (*t*). In all these cases the facts appear undistinguishable in their character from those which were treated in the Court of Chancery as establishing a right to relief on the ground of "representation."

Cases where false representation gives, as wrong, a substantive right of action. There remains a class of cases in equity in which it has been held that a statement made to a person intended to act upon it by one who knows it to be false, or is recklessly ignorant whether it is true or false, may create in the person who acts on it to his injury a substantive right to compensation. Here the statement is a wrong, and the remedy is precisely analogous to, and before the Judicature Acts was concurrent with, that which was given at law by the action of deceit, or action on the case in the nature of an action of deceit (*u*).

*It is worth remark that not unfrequently a difficulty occurs [721 in drawing the line between contract or warranty and fraud, as we have already seen that there does between contract and estoppel. "Most of the cases . . . when looked at, if they do not absolutely amount to contract, come uncommonly near it. . . . If you choose to say, and say without inquiry, 'I warrant that,' that is a contract. If you say 'I know it,' and if you say that in order to save the trouble of inquiring, that is a false representation—you are saying what is false to induce them to act upon it" (*x*). Thus cases are possible, as has been mentioned in the text, in which the legal effect of the facts may equally be considered as warranty, estoppel, or duty *ex delicto*. And since equity judges, dealing with facts and law together, were not bound to distinguish with precision, and often did not distinguish, on which of two or more possible grounds they rested their decisions, it is not surprising that a good deal of ambiguity has gathered round the subjects discussed in this note.

(*s*) It would be curious to know in what proportion of cases under the old practice a party left by the Court of Chancery, as the phrase was, to make what he could of it at law, derived substantial or any profit from that liberty.

(*t*) *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46; *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Angell* v. *Duke* (1875) L. R. 10 Q. B. 174, 44 L. J. Q. B. 78; *De Lassalle* v. *Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A. (warranty of drains being in good order). The ground taken as to the Statute of Frauds is that the collateral agreement is not a "contract or sale of lands," &c.: the effect of the Statute being as it were exhausted by the principal contract; with which the collateral one must of course be consistent.

(*u*) See for details the section on Deceit in Chap. viii. of my work on the Law of Torts.

(*x*) Lord Blackburn in *Brownlie* v. *Campbell* (1880) (Sc.) 5 App. Ca. at p. 952: the whole passage should be studied.

Note L. (p. *622).

French law on "inofficious" gifts and captation.

French authorities before Revolution. French jurisprudence has sometimes been cited in our Courts as affording useful analogies in cases where it was sought to set aside gifts on the ground of undue influence, especially spiritual influence. (Œuvres d'Aguesseau, 1. 284. 5. 514, ed. 1819; *Lyon* v. *Home,* L. R. 6 Eq. 571.) Without denying the instructiveness of the comparison, it may be pointed out that these French cases proceeded on rather different grounds. Charitable bequests in general were unfavourably looked on as being "inofficious" towards the natural successors. This principle is strongly brought out by D'Aguesseau in the case of the *Religieuses du Saint-Sacrement* (Œuvres, vol. 1. p. 295):—

"Ces dispositions universelles, contraires aux droits du sang et de la nature, qui tendent à frustrer les héritiers d'une succession légitime, sont en elles-mêmes peu favorables; non que ce seul moyen soit peut-être suffisant pour anéantir un tel legs; mais lorsqu'il est soutenu par les circonstances du fait . . . lorsque la donation
722] est immense, qu'elle est excessive, qu'elle renferme *toute la succession . . . dans toutes ces circonstances la justice s'est toujours élevée contre ces actes odieux; elle a pris les héritiers sous sa protection; elle a cassé ces donations inofficieuses, excessives et contraires à l'utilité publique."

Modern law of captation. In modern French practice a will may be set aside for *captation* or *suggestion.* But, as with us, the burden of proof is on the objector to show that the testator's will was not free, and something amounting to fraudulent practice must be proved. "La suggestion ne saurait être séparée," says Troplong, "d'un dol subversif de la libre volonté du testateur . . . On a toujours été trés difficile en France à admettre la preuve de la suggestion et da la captation." (Droit civil expliqué, Des donations entre-vifs et des testaments, art. 492.)

On the other hand the Code Civil (art. 907, 909-911) contains express and severe restrictions on dispositions by wards in favour of their guardians, and by persons in their last illness in favour of their medical or spiritual advisers. These apply alike to wills and to gifts *inter vivos.*

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