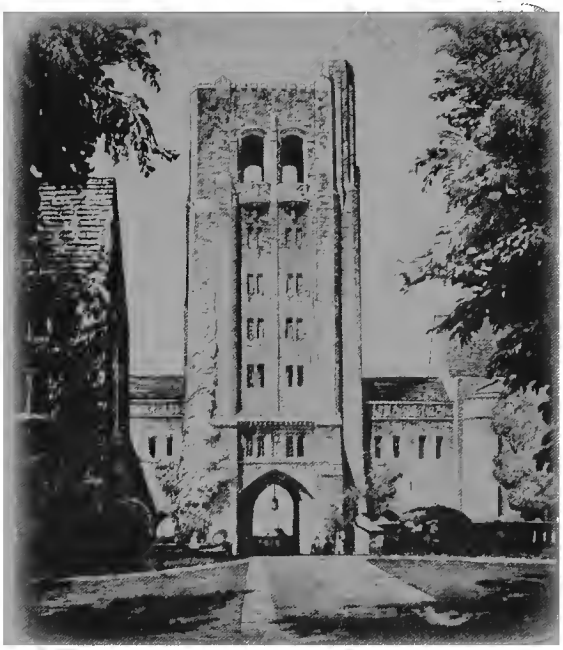

A

SELECTION OF CASES

ON THE

LAW OF CONTRACTS

EDITED AND ANNOTATED

BY

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IN TWO VOLUMES

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PREFACE.

THE plan of this book needs little explanation. I have endeavored, in the light of all that has been done before, to prepare a selection of cases on the law of contracts adapted to the use of students. In order to cover the subject fairly in two volumes of reasonable size, I have been obliged frequently to shorten the reports of cases. Arguments of counsel have been generally omitted, and where the opinion of the court contains an adequate statement of facts, the opinion only has been printed. I have thought this general statement would be sufficient warning to the reader of such omissions. When other changes from the original reports have been made, they are specifically indicated. Head-notes are of course omitted, and for the same reason the headings of chapters and sections are general, and the subdivision of topics is not always as minute as might be convenient to one seeking authority on a particular matter. Headings of sections may easily be made a key to the result of the cases, and it is desirable for the student to work out this result for himself with the aid only of such suggestion as proves necessary in the class room. The annotations, for the same reason, are mostly confined to lists of cases in accord or opposed to the case which is printed. An index at the end of the second volume, I hope, will make the contents of the book reasonably accessible without being open to the objection of giving the student the answer before he has done the problem.

Every teacher of law who prepares a volume of cases for the instruction of students is consciously or unconsciously indebted to the work of Professor Langdell; but an indebtedness greater than that which every worker owes to the pioneer in his chosen field, must here be acknowledged. The law of contracts was the

subject selected by Professor Langdell for his first collection of cases. That collection, first published in 1871 and in a second edition in 1876, has been used continuously since its publication in the Harvard Law School, and in recent years in other law schools. The development of the law during the past thirty years has now made it desirable to substitute a new book for one which must be regarded as marking an epoch in legal education. In preparing the new book, I should have found it impossible, had I made the attempt, to avoid deriving benefit from the selection and arrangement in the earlier book. Fortunately, no such effort has been necessary, since Professor Langdell has kindly permitted me to make such use as I wished of his work. Of this permission I have freely availed myself.

SAMUEL WILLISTON.

CAMBRIDGE, 1903.

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A. — Offer.

PAYNE *v.* CAVE.

In the King's Bench, May 2, 1789.

[*Reported in* 3 *Term Reports*, 148.]

This was an action tried at the Sittings after last term at Guildhall, before Lord Kenyon, wherein the declaration stated that the plaintiff, on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c., of all which premises the defendant afterwards, to wit, &c., had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale to be performed by the plaintiff as seller, &c., undertook, and then and there promised the plaintiff to perform the conditions of the sale to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale hereinafter mentioned are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one

lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the meantime, the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of Simon *v.* Motivos,[1] which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed. *Rule refused.*[2]

COOKE *v.* OXLEY.

In the King's Bench, May 14, 1790.

[*Reported in* 3 *Term Reports*, 653.]

This was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, &c., a certain

[1] 3 Burr, 1921.

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

discourse was had, &c., concerning the buying of two hundred and sixty-six hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said two hundred and sixty-six hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day;* the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant *to deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise.

Erskine and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o'clock, yet, not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco and not for not selling it.

Lord KENYON, Ch. J. (stopping Bearcroft, who was to have argued in support of the rule): Nothing can be clearer than that, at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum.*

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was first made. Then, as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise.

Rule absolute.[1]

[1] This judgment was affirmed in the Exchequer Chamber; M. 32 G. 3. Head *v.* Diggon, 3 Man. & Ry. 97, *acc.* See also Routledge *v.* Grant, 4 Bing. 653.

ADAMS AND OTHERS *v.* LINDSELL AND ANOTHER.

IN THE KING'S BENCH, JUNE 5, 1818.

[*Reported in* 1 *Barnewall & Alderson*, 681.]

ACTION for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before BURROUGH, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday, the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, *Worcestershire:* "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35*s.* 6*d.* per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants to Bromsgrove, *Leicestershire*, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 P. M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, *Puller*, and *Richardson* showed cause. They contended that, at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and *Campbell* in support of the rule. They relied on Payne *v.* Cave, and more particularly on Cooke *v.* Oxley. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them,

and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

THE COURT said, that 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 plaintiffs' answer was received in course of post. *Rule discharged.*

NYULASY *v.* ROWAN.

SUPREME COURT OF VICTORIA, MAY 7–JUNE 23, 1891.

[*Reported in* 17 *Victorian Law Reports*, 663.]

HIGINBOTHAM, C. J. This is an appeal from a judgment of MOLESWORTH, J. The statement of claim contains three alternative causes of action. The first of these, for shares bargained and sold, was abandoned at the hearing. The second was founded on a verbal agreement alleged to have been made by and between the plaintiff and the defendant on 21st July, 1890, by which it was agreed, in consideration, that the plaintiff would not proceed at that time to sell 400 shares, which he held in the Melbourne Tramway and Omnibus Company, at the then market price, and would not place the shares at that time on the market for sale at that price, that the defendant should, on being requested by the plaintiff so to do, at any time within three months from 21st July, 1890, purchase from the plaintiff his said 400 shares at the price of 8*l.* each. The plaintiff alleged performance of this agreement on his part — a request made by him to the defendant to purchase the shares on or about 21st August, 1890, and a refusal by the defendant to purchase. The learned primary judge held that this agreement was made between the parties on 21st July, and that it was broken by the defendant, and he gave judgment for the plaintiff on this claim. The third alternative cause of action was founded upon a verbal offer alleged to have been made by the defend-

ant to the plaintiff on or about 21st July to purchase the plaintiff's 400 shares at the price of 8*l.* per share, such offer to remain open three months from that date; acceptance of the offer by the plaintiff on or about 21st August, within the three months, and while the defendant's offer was still open and unretracted, and refusal by the defendant to accept the shares. The learned judge found that the plaintiff had established by proof this claim as well as the second, and he gave judgment on it for the plaintiff.

The defendant now appeals against this judgment on both grounds. With regard to the second ground of claim it has been contended that there was no agreement between the parties on 21st July, as there was no consideration for the promise which it was admitted the defendant gave on that day. The plaintiff's answer to this argument is that there is evidence of a request then made by the defendant that the plaintiff should not immediately sell his shares or place them on the market, and that such request, if complied with by the plaintiff, was a good consideration for the defendant's promise. Crears *v.* Hunter.[1] The question, then, that is raised upon this part of the case is whether there was any evidence upon which the judge might reasonably act, that the defendant did at that time really, and not by way of banter only,[2] request the plaintiff not to sell his shares or place them on the market. We are of opinion that there was such evidence. The defendant's answer to the whole claim of the plaintiff was that, having been asked by a friend of the plaintiff, who was anxious and distressed by the falling state of the market, to comfort the plaintiff, he spoke to the plaintiff jocularly only, intending to comfort him, and that he gave him an unreal and false promise without intending to perform it. The defendant, however, admits that the plaintiff did not seem to take his words of comfort as a joke. Now, the judge has found upon evidence amply sufficient that this defence is untrue, that the defendant spoke to the plaintiff, not in joke, but in earnest, and influenced by a desire to protect the stock of which he was a large holder himself. Then, as regards a request, the plaintiff swore that the defendant said to him on 21st July: "Don't be foolish to sell now and lose money." The defendant, in answer to an interrogatory, stated that he did not, to the best of his knowledge, information, or belief, say to the plaintiff: "Your trams are all right; don't be so foolish as to sell them at a loss;" but he admits that he may have used words to that effect. Now, assuming, as we are bound to do, that the defendant spoke at

[1] 19 Q. B. D. 341.

[2] Keller *v.* Holderman, 11 Mich. 248, was an action on a check given for a silver watch. The trial judge found "the whole transaction was a frolic and banter — the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," but held the defendant liable. The Supreme Court reversed this judgment on the ground that "no contract was ever made by the parties." McClurg *v.* Terry, 21 N. J. Eq. 225; Bruce *v.* Bishop, 43 Vt. 161, *acc.* But see Armstrong *v.* McGhee, Add. (Pa.) 261.

this conversation seriously, and that he was using the opportunity then represented to him to make in his own interest and for his own advantage a *bona fide* offer to the plaintiff, who accepted his words seriously, what is the meaning that should be given to these words, or words to the like effect then uttered by the defendant? The judge has found that forbearance by the plaintiff to sell his shares was on account of an implied, though perhaps not an express, request by the defendant. I should be inclined to say that these words might be taken to convey an express request by the plaintiff not to sell. We are of opinion that they are evidence, either express or by implication, of such a request; that the judge was justified in concluding that a request was made by the defendant, and that it was in consequence of such request that the plaintiff forebore to sell his shares. The judgment, therefore, cannot be disturbed on this ground.

With respect to the third alternative ground of action, it has been contended, for the defendant, that there must be consideration for a continuing offer of this kind, that the plaintiff did not accept the offer at the time it was made, and that when he did accept it the defendant had changed his mind; so that, treating the transaction of 21st July as an offer only and not as a contract, the parties never were *ad idem*, and no contract was entered into between them subsequently to 21st July. In support of this view, Cooke *v.* Oxley[1] was relied on. The effect and the authority of that case have been the subject of some controversy which is still unsettled. See Benjamin on Sales (4th ed.), p. 69; Pollock on Principles of Contract (5th ed.), p. 25, note. Cooke *v.* Oxley,[1] which was decided on a motion in arrest of judgment, may be supported on the ground that the declaration did not aver that the defendant actually left the offer open until the hour named, but only that he promised to do so.[2] But if Cooke *v.* Oxley is to be supported upon this ground of pleading, it would not govern the present case, where it is alleged in the statement of claim and proved in evidence, that the plaintiff by letter accepted the offer while it was still open and unretracted. Unless, therefore, there is some distinction to be drawn between an offer by letter or telegram and an offer by word of mouth, and we are not aware of any reason or authority for such a distinction; see per LUSH, J., in Stevenson *v.* McLean;[3] the present case comes within the artificial but convenient explanatory rule laid down in Adams *v.* Linsdell,[4] and the offer of the defendant on 21st July, unsupported by any consideration, must be considered in law as having been made by the defendant during every instant of the in-

[1] *Ante*, p. 2.

[2] "The offer was not limited in time, and the presumption is, that it was open on the fifth day after it was made, nothing to the contrary appearing. The revocation of it, if it had been revoked, was matter of defence." Wilson *v.* Stump, 103 Cal. 255, 258. See also, Quick *v.* Wheeler, 78 N. Y. 300.

[3] 5 Q. B. D. 351.

[4] *Ante*, p. 4.

tervening time until 19th August, when a contract was made between the parties by the plaintiff's letter, accepting the offer and tendering his shares to the defendant. The defendant has failed, in our opinion, on this ground also to show that the judgment was wrong. *The appeal will be dismissed with costs.*

SPENCER AND ANOTHER *v.* HARDING AND OTHERS.

IN THE COMMON PLEAS, JUNE 29, 1870.

[*Reported in Law Reports, 5 Common Pleas,* 561.]

THE second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade a circular in the words and figures following; that is to say, "28 King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1 Milk Street, amounting as per stock-book to 2,503*l.* 13*s.* 1*d.*, and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1 Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us, sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our office on Tuesday morning. Honey, Humphreys & Co." And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular. And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular. And the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf. And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular. And all conditions were performed, etc., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to accept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, etc.

Demurrer, on the ground that the count showed no promise to accept the plaintiffs' tender or sell them the goods. Joinder.

Holl, in support of the demurrer.

Morgan Lloyd, contra. .

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, — that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons.[1] But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.[2]

[1] See Warlow *v.* Harrison, 1 E. & E. 295; Mainprice *v.* Westley, 6 B. & S. 420; Harris *v.* Nickerson, L. R. 8 Q. B. 286; South Hetton Coal Co. *v.* Haswell, [1898] 1 Ch. 465; Johnston *v.* Boyes, [1899] 2 Ch. 73; Tillman *v.* Dunman, 114 Ga. 406; McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277; 57 L. R. A. note.

[2] In Rooke *v.* Dawson, [1895] 1 ch. 480, the announcement of an examination for a scholarship was held not to amount to an offer to award the scholarship to such applicant as should fulfil the requirements of the trust deed under which the scholarship fund was held. Compare Neidermeyer *v.* Univ. of Missouri, 61 Mo. App. 654.

EDGE MOOR BRIDGE WORKS *v.* COUNTY OF BRISTOL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 3–28, 1898.

[*Reported in* 170 *Massachusetts*, 528.]

CONTRACT. The declaration alleged that, under the provisions of St. 1893, c. 368, and of various acts in amendment thereof and in addition thereto, the county commissioners of Bristol were authorized and directed to widen the bridge between New Bedford and Fairhaven within the county of Bristol, and were authorized and empowered to reconstruct the existing bridge, or to construct a new bridge; and it was further provided that the expense of the construction should in the first instance be borne by the county; and that, acting under the authority so conferred, the commissioners inserted in several newspapers published in the county and elsewhere two advertisements, the material provisions of which were as follows: —

"Sealed proposals addressed to the County Commissioners of Bristol County, and indorsed 'Proposals for building the substructure of the middle portion of the New Bedford and Fairhaven Bridge,' and 'Proposals for building the superstructure of the middle portion of the New Bedford and Fairhaven Bridge,' will be received by the County Commissioners of Bristol County at New Bedford, Mass., until 2.30 o'clock P.M. of the 2d day of August, 1897, and at that time will be publicly opened and read at the court house, New Bedford.

"Each bidder will be required to present a certified check upon a National Bank for $5,000, payable to Treasurer of Bristol County, twenty-four (24) hours before the date and hour above fixed for opening the proposals, said check to be returned to the bidder unless he fails to execute the contract should it be awarded to him.

"An agreement for five thousand dollars ($5,000) liquidated damages will be required for the faithful performance of the contract, with sureties to be residents of or qualified to do business in the State of Massachusetts and satisfactory to said county commissioners.

"The person or persons to whom the contract may be awarded will be required to appear at the court house, New Bedford, with the agreement and sureties offered by them, and execute the contract within six days (not including Sunday) from the date of notification of such award, and the preparation and readiness for signature of the contract; and in case of failure or neglect so to do, he or they will be considered as having abandoned it, and the check accompanying the proposal shall be forfeited to the County of Bristol.

"All bids must be made upon the blank forms furnished by the engineer. Prices must be given in writing and in figures for each material or division of the construction enumerated, which prices are to include and cover the furnishings of all the materials and the performance of all the labor requisite or proper for the purpose, in the manner

set forth, described, and shown in the specifications and on the plans for the work and in the form of contract approved by the counsel for the commissioners."

The declaration further alleged that, in accordance with the advertisements, and relying upon the terms and conditions thereof, the plaintiff delivered to the commissioners prior to the time named therein sealed proposals for building the substructure and superstructure of the middle portion of the New Bedford and Fairhaven Bridge, which proposals were upon printed forms furnished by the engineer of the commissioners; that the plaintiff presented to the commissioners previously to the day so named two certified checks upon national banks for $5,000 each, in accordance with the terms and provisions of the advertisements above mentioned; that the plaintiff did everything required of it under the terms of the advertisements to entitle it to the award of the contracts named therein; that thereafter, at a meeting of the commissioners held on August 13, 1897, at which all three of the commissioners were present, a vote was duly passed and entered upon the records of the commissioners, the material part of which was as follows: "Voted, That the cumulative bid of Edge Moor Bridge Works is accepted, and that the contract thereon be awarded to said party"; that a copy of the vote was mailed to the plaintiff by the clerk of the commissioners, and received by it on August 15, 1897; that thereafter upon the same day the plaintiff sent to the commissioners a letter accepting the award of the contract, which was duly received by the commissioners on or before August 18, 1897; that the plaintiff on that day, acting by its president, appeared before the commissioners and offered to execute a contract in the form annexed to the proposal submitted by the plaintiff, according to the terms of its proposal, and tendered at the same time an agreement with the required amount of liquidated damages for the faithful performance of the contract with a corporation qualified to do businsss in the State of Massachusetts as surety; that the plaintiff was on August 18, and ever since had been, ready and willing and able to execute the contract required by the terms of its proposal and the acceptance thereof by the commissioners, and to furnish an agreement with the required amount of liquidated damages for the faithful performance of the contract with a surety or sureties qualified to do business in the State of Massachusetts, and satisfactory to the commissioners; but the commissioners refused to execute the contract required by the award, and the plaintiff had suffered great loss.

The defendant demurred to the declaration, assigning various grounds of demurrer. In the Superior Court, the demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

O. Prescott, Jr., for the plaintiff.

T. M. Stetson, for the defendant.

ALLEN, J. The ground of action relied on by the plaintiff corpora-

tion is, not that the county commissioners actually entered into a contract with it, under which it was to do the work, but that they agreed to enter into such a contract, and afterwards refused to do so. To support this view, the plaintiff relies on the vote of the county commissioners accepting its bid and awarding the contract. We have, therefore, to consider whether, in view of the circumstances, the vote bears that construction.

The vote is to be construed with reference to the advertisements under which the proposals of the plaintiff were submitted. The contract mentioned in the vote is the same contract mentioned in the advertisements, namely, the contract which was to be executed within six days from the date of notification of the award, and of the preparation and readiness for signature of the contract. A formal written contract, according to the form submitted to the bidders, was expressly provided for. After the award, the parties were to meet and execute such a contract. Where proposals and an award made thereon look to the future execution of the contract, such award is not necessarily a contract of any kind, nor an agreement to enter into a contract based upon the proposals; it is at most a matter to be determined whether such an agreement exists, upon a consideration of the terms and purpose of the award, construed in the light of the existing circumstances. In Lyman *v.* Robinson, 14 Allen, 242, where it was sought to establish a contract from letters, it was said: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" See also Ridgway *v.* Wharton, 6 H. L. Cas. 238, and cases there cited; Winn *v.* Bull, 7 Ch. D. 29; Rossiter *v.* Miller, 3 App. Cas. 1124; Starkey *v.* Minneapolis, 19 Minn. 203; Eads *v.* Carondelet, 42 Mo. 113; Pollock, Con. 41. Especially where the supposed contract is found only in a vote passed by a board of public officers, which looks to the preparation and execution of a formal contract in the future, care must be taken not to hold that to be a contract which was intended only to signify an intention to enter into a contract. See Dunham *v.* Boston, 12 Allen, 375; Water Commissioners *v.* Brown, 3 Vroom, 504, 510.

In the present case, the county commissioners had advertised for proposals for doing a public work, with careful provisions looking to the final execution of a formal contract between themselves and the bidder whose proposals should be accepted. The bidders were to be bound to stand by their proposals, under a certain penalty or forfeiture. But the county was not to be bound until subsequently it should agree to be bound. The plaintiff concedes that no contract was made under which the work was to be done, but insists that the county commission-

ers did agree that they would thereafter enter into such a contract. We are unable to put that construction upon the vote. While it is possible for a party to agree in express terms to enter into an executory contract in the future (Drummond *v.* Crane, 159 Mass. 577, and Pratt *v.* Hudson River Railroad, 21 N. Y. 305), the present case is not one of that description. The vote was but a step in the negotiation. It showed an expectation and an intention, for the time being, to enter into a contract with the plaintiff upon the basis of its proposals. But the execution of the contract was an act to be done in the future, and till that should be done no intention to be legally bound is fairly to be inferred. The vote meant merely to say that the plaintiff's proposals were accepted, subject to the preparation and execution of a formal contract. There is nothing to indicate an intention to bind the county by a preliminary agreement that a formal contract should be executed in the future.

This is especially apparent when the state of the existing legislation concerning the powers and duties of county commissioners is considered. By St. 1897, c. 137, § 2, it was provided that all contracts made by county commissioners for the construction of public works, if exceeding eight hundred dollars in amount, shall be made in writing, after notice for proposals therefor has been published; that all proposals shall be publicly opened in the presence of a majority of the commissioners, and a record thereof made upon their record; that all such contracts shall be in writing, and recorded in a book to be kept for the purpose with the records of the county; and that no contract made in violation of the provisions of this section shall be valid against the county, and no payment thereon shall be made from the county treasury. By St. 1897, c. 153, a greatly increased strictness was established in respect to expenditures by counties, and the duties of county commissioners in respect thereto were defined, and their powers limited. In these statutes, the purpose of the Legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work. This question, however, need not now be determined, because it is quite obvious that the county commissioners of Bristol County were seeking to conform carefully to the spirit of the provisions of the statutes, and that by their vote they did not intend to bind the county by a preliminary agreement, such as that upon which the plaintiff relies.

Judgment for the defendant affirmed.[1]

[1] See also Kingston-upon-Hull Guardians *v.* Petch, 10 Ex. 610; Weitz *v.* Independent District, 79 Ia. 423; Leskie *v.* Haseltine, 155 Pa. 98.

ARCHIE D. SANDERS ET AL., APPELLANTS, *v.* POTTLITZER BROS. FRUIT COMPANY, RESPONDENT.

NEW YORK COURT OF APPEALS, DECEMBER 7–18, 1894.

[*Reported in* 144 *New York*, 209.]

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

"BUFFALO, N. Y., Oct. 28, 1891.

"MESSRS. POTTLITZER BROS. FRUIT CO., Lafayette, Ind.:

"GENTLEMEN, — We offer you ten carloads of apples to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows: —

"First car between 1st and 15th December, 1891.

"Second car between 15th and 30th December, 1891, and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of $2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars, this proposition to be accepted not later than the 31st inst., and you to pay us $500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of $100 per car on the last five cars.

"Yours respectfully, "J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31st as follows: —

"LAFAYETTE, IND., 31st October.

"J. SANDERS & SON:

"We accept your proposition on apples, provided you will change it to read 'car every eight days from January first, none in December;' wire acceptance. "POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this despatch to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows: —

"Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract and we will then forward draft.

"POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4, when the plaintiffs received the following letter from the defendant: —

"LAFAYETTE, IND., November 2, 1891.

"J. SANDERS & SON, Stafford, N. Y.:

"GENTS, — We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples,

still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and, therefore, we do not think it advisable to take the contract unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same, "POTTLITZER FRUIT CO."

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph: —

"November 4th.

"POTTLITZER BROTHERS FRUIT COMPANY, Lafayette, Ind.:

"Letter received. Will accept conditions. If satisfactory, answer and will forward contract. "J. SANDERS & SON."

The defendant replied to this message by telegraph saying: "All right, send contract as stated in our message." The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be form-

ally expressed in a single paper which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and if they constituted a contract of themselves the absence of the formal agreement contemplated was not under the circumstances material. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. Vassar *v.* Camp, 11 N. Y. 441; Brown *v.* Norton, 50 Hun, 248; Pratt *v.* H. R. R. R. Co., 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge SELDEN in the case last cited in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market

or other events occurring subsequent to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the interference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case is this, Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if at the close of the correspondence the plaintiffs became bound by their offer and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of great confusion and uncertainty into the law of contracts. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL, GRAY, and BARTLETT, JJ., dissenting.

Judgment reversed.[1]

[1] In the following cases it was held that there was a contract, though it was agreed that a written contract should be subsequently prepared. Bonnewell *v.* Jenkins, 8 Ch. D.

DANIEL R. DONNELLY, Defendant in Error, *v.* THE CURRIE HARDWARE COMPANY, Plaintiff in Error.

New Jersey Supreme Court, February 27 – June 10, 1901.

[*Reported in* 66 *New Jersey Law*, 388.]

Dixon, J. The plaintiff, being about to bid for a contract to build a music pavilion in Atlantic City, submitted the plans and specifications to the defendant for an estimate as to the price at which the latter would do the metal work required, and on March 31st, 1899, received a letter from the defendant saying that it would do the work for $2,650. Accordingly the plaintiff put in his bid for the construction of the building, and, after the making of some changes, not affecting the metal work, the job was awarded to him and the contract was signed on April 5th, 1899. During the next morning the plaintiff telephoned to the defendant's manager that he had signed a contract for the building, and would be prepared to sign a written contract with the defendant at four o'clock that afternoon, to which the manager answered "all right." Shortly before that hour the plaintiff telephoned to the manager that he had not had time to prepare the contract, and would sign it in the morning, to which the manager again replied "all right." The next morning the plaintiff called on the manager, and the latter informed the plaintiff that the defendant would be unable to perform the work in the time agreed upon by the plaintiff, and had not room to do the work so quickly, and refused to sign the proposed contract. Afterwards the plaintiff was compelled to pay a higher price for the metal work, and brought this suit for breach of contract. On this state of facts, shown by the plaintiff's evidence, the defendant moved for a nonsuit and for direction of a verdict in favor of defendant. These motions being overruled, exceptions were sealed.

The case is governed by the rule established in Water Commissioners *v.* Brown, 3 Vroom, 504, 510, where Mr. Justice Elmer, speaking for the Court of Errors, said: "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side." The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was

70, 73; Bolton *v.* Lambert, 41 Ch. D. 295; Bell *v.* Offutt, 10 Bush, 632; Montague *v.* Weil, 30 La. Ann. 50; Allen *v.* Chouteau, 102 Mo. 309; Green *v.* Cole (Mo.), 24 S. W. Rep. 1058; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266; Blaney *v.* Hoke, 14 Ohio St. 292; Mackey *v.* Mackey's Adm., 29 Gratt. 158; Paige *v.* Fullerton Woolen Co., 27 Vt. 485; Lawrence *v.* Milwaukee, &c. Ry. Co., 84 Wis. 427; Cohn *v.* Plumer, 88 Wis. 622.

expected by both parties. Indeed, it cannot reasonably be determined that the parties had agreed upon all the matters which they would expect to have included in their bargain, for the time allowed for the beginning and completion of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting probably the outcome of the plaintiff's proposal for the erection of the building.

We therefore think that no contract was made by the defendant, and that the motions mentioned should have prevailed.

The judgment is reversed.[1]

JOHNSTON BROTHERS *v.* ROGERS BROTHERS.

ONTARIO HIGH COURT OF JUSTICE, FEBRUARY 2, 1899.

[*Reported in* 30 *Ontario*, 150.]

AN appeal by the defendants from the judgment of WILLIAM ELLIOTT, senior Judge of the County Court of Middlesex, in favour of the plaintiffs in an action in that Court, the facts of which are fully set out in the following [portion of the] opinion delivered by that Judge: —

The plaintiffs are bakers, and seek to recover damages from the defendants for breach of a contract for the sale and delivery of a quantity of flour.

The following letter is the basis of the plaintiffs' claim: —

[1] 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. Ridgway *v.* Warton, 6 H. L. C. 238, 264, 268, 305; Chinnock *v.* Marchioness of Ely, 4 De G. J. & S. 638, 646; Winn *v.* Bull, 7 Ch. D. 29; 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; Morrill *v.* Tehama Co., 10 Nev. 125; Water Commissioners *v.* Brown, 32 N. J. L. 504; 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. See also Jones *v.* Daniel, [1894] 2 Ch. 332.

In Mississippi, &c. S. S. Co. *v.* Swift, 86 Me. 248, 258, the Court said: "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 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."

"TORONTO, April 26, 1898.

"DEAR SIR, — We wish to secure your patronage, and, as we have found the only proper way to get a customer is to save him money, we therefore are going to endeavor to save you money.

"It is hardly prudent for us to push the sale of flour just now, as prices are sure to advance at least 50 cents per barrel within a very few days, and give you the advantage of a cut of from 20 to 25 cents per barrel seems a very foolish thing, but nevertheless we are going to do it, just to save you money and secure your patronage.

"We quote you (R. O. B. or F. O. B.) your station, Hungarian $5.40, and strong Bakers $5.00, car lots only, and subject to sight draft with bill of lading.

"We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us.

"Yours respectfully,

"ROGERS BROS."

This communication was received by the plaintiffs on the 27th April. The plaintiffs telegraphed the defendants the same morning as follows: —

"LONDON, April 27, 1898.

"TO ROGERS BROS., Confederation Life Building, Toronto.

"We will take two cars Hungarian at your offer of yesterday.

"JOHNSTON BROS."

On the same day, namely, the 27th April, the plaintiffs received the following communication by telegraph: —

"TORONTO, ONT., April 27, 1898.

"Flour advanced sixty. Will accept advance of thirty on yesterday's quotations. Further advance certain.

"ROGERS BROS."

Then followed a letter, dated the 28th April, from Messrs. Hellmuth & Ivey, solicitors for the plaintiffs, calling upon the defendants to fulfil the order "according to the offer contained in your letter of the 26th and duly accepted by them by wire on April 27th; and upon your refusal damages will be demanded."

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 26th January, 1899.

W. Carleill-Hall and *J. W. Payne*, for the defendants.

Hellmuth, for the plaintiffs.

FALCONBRIDGE, J. — The facts and the correspondence are fully set out in the very careful judgment of the learned Judge.

I shall not refer to the second and third grounds of appeal further than to say that they have been fully considered, and, to my mind, satisfactorily disposed of, by the trial Judge.

The real crux of the case is whether there is a contract.

Leaving out the matters of inducement (in both the legal and the ordinary sense) in the letter of the 26th, the contract, if there is one, is contained in the following words: —

LETTER, DEFENDANTS TO PLAINTIFFS.

"27th April, 1898.

"We quote you, F. O. B. your station, Hungarian $5.40 and strong Bakers $5.00, car lots only, and subject to sight drafts with bills of lading."

TELEGRAM, PLAINTIFFS TO DEFENDANTS.

"27th April, 1896.

"We will take 2 cars Hungarian at your offer of yesterday."

I should expect to find American authority as to the phrase "we quote you," which must be in very common use amongst brokers, manufacturers, and dealers in the United States; but we were referred to no decided case, and I have found none where that phrase was used.

In the "American and English Encyclopædia of Law," 2d ed., vol. 7, p. 138, the law is stated to be: "A quotation of prices is not an offer to sell, in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. It requires the acceptance by the one naming the price, of the order so made, to complete the transaction. Until thus completed there is no mutuality of obligation."

Of the cases cited in support of this proposition, Moulton *v.* Kershaw (1884), 59 Wis. 316, 48 Am. Rep. 516, is the nearest to the present one, but in none is the word "quote" used.

The meaning of "quote" is given in modern dictionaries as follows: —

"Standard" (Com.) — To give the current or market price of, as bonds, stocks, commodities, etc.

"Imperial," ed. 1884 — In com., to name as the price of an article; to name the current price of; as, what can you quote sugar at?

"Century" (Com.) — To name as the price of stocks, produce, etc.; name the current price of.

"Webster" (Com.) — To name the current price of.

"Worcester" — To state the price as the price of merchandise.

See also "Black's Law Dictionary," subtit. "Quotation."

There is little or no difference between any of these definitions. Now if we write the equivalent phrase into the letter — "We give you the current or market price, F. O. B. your station, of Hungarian Patent $5.40 — " can it be for a moment contended that it is an offer which needs only an acceptance in terms to constitute a contract?

The case of Harty *v.* Gooderham (1871), 31 U. C. R. 18, is principally relied on by the plaintiffs. But that case presents more than one point of distinction. There the first inquiry was from the plaintiff, which, I think, is an element in the case. He writes the defend-

ants to let him "know your lowest prices for 50 O. P. spirits," etc. To which defendants answered, mentioning prices and particulars: "Shall be happy to have an order from you, to which we will give prompt attention," which the court held to be equivalent to saying "We will sell it at those prices. Will you purchase from us and let us know how much?" And so the contract was held to be complete on the plaintiff's acceptance.

But there is no such offer to sell in the present defendant's letter. Harvey *v.* Facey (1893), A. C. 552, is strong authority against the plaintiffs.

I have not overlooked the concluding paragraph of the letter, viz., "We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us." The learned Judge considers this to be one of the matters foreign to a mere quotation of prices. I venture, on the contrary, to think that this suggestion is more consistent with a mere quotation of prices, which might vary from day to day or from hour to hour. There could be no question of the prices becoming "beyond reach" in a simple offer to sell at a certain price.

In my opinion, the plaintiffs have failed to establish a contract, and this appeal must be allowed with costs, and the action dismissed with costs.

See also Thorne *v.* Butterworth (1866), 16 C. P. 369; Am. & Eng. Encyc. of Law, 2d ed., vol. 7, pp. 125, 128, 133, 138; Ashcroft *v.* Butterworth (1884), 136 Mass. 511; Fulton *v.* Upper Canada Furniture Co. (1883), 9 A. R. 211.[1]

[1] In Moulton *v.* Kershaw, 59 Wis. 316, the defendants, salt dealers, wrote to the plaintiff, a dealer in salt, accustomed to buy salt in large quantities as the defendants knew, as follows: —

"DEAR SIR, — In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city at 85 cents per barrel 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."

The plaintiff, on the day this letter reached him, telegraphed: —

"Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt as offered in your letter. Answer."

The defendants replied on the following day, refusing to fill the order.

The Court held that no contract had been created, chiefly because the defendants' letter did not specify any limit of quantity.

In Beaupré *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155, the plaintiffs 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.

Harvey *v.* Facey, [1893] A. C. 552; Talbot *v.* Pettigrew, 3 Dak. 141; Knight *v.* Cooley, 34 Ia. 218; Smith *v.* Gowdy, 8 Allen, 566; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, *acc.* See also Kinghorne *v.* Montreal Tel. Co., U. C. 18 Q. B. 60.

T. F. SEYMOUR *v.* ARMSTRONG & KASSEBAUM.

KANSAS SUPREME COURT, JANUARY TERM, 1901.

[*Reported in* 62 *Kansas*, 720.]

JOHNSTON, J.[1] This was an action to recover damages for the breach of an alleged contract. On February 15, 1896, Armstrong & Kassebaum, commission merchants of Topeka, inserted an advertisement in a weekly newspaper, which, among other things, contained the following proposition: —

"We will pay 10½ cents net, Topeka, for all fresh eggs shipped us to arrive here by February 22. Acceptance of our bid with number of cases stated to be sent by February 20."

On February 20, 1896, T. F. Seymour, a rival commission merchant of Topeka, sent the following note to Armstrong & Kassebaum in response to their proposition: —

"I accept your offer in 'Merchants' Journal,' 10½ cents, Topeka, for fresh eggs, and will ship you on C. R. I. & P. R. R. 450 cases fresh eggs, to arrive on or before February 22. The eggs are all packed in new No. 2 whitewood cases, and I will accept fifteen cents each for them, or you can return them or new ones in place of them."

On receipt of this note, Armstrong & Kassebaum at once notified Seymour that they would not accept the eggs on the terms proposed by him. Notwithstanding the refusal, Seymour procured a car and loaded it with eggs. Not having a sufficient number of cases to fill the car, he found two other commission merchants who were willing to co-operate with him, and who furnished 190 of the 450 cases, which were loaded in Topeka, only a few hundred feet away from the place of business of Armstrong & Kassebaum, sealed up, and then pushed a short distance over to their business house. They refused to receive the eggs, and Seymour shipped them to Philadelphia, where they were sold for $391.83 less than they would have brought at the price named in Seymour's note of acceptance. For this amount the present action was brought, and the plaintiff is entitled to recover, if the defendants' offer on eggs was unconditionally accepted. At the trial a verdict was returned in favor of the defendants, and the result of the general finding is that the pretended acceptance of Seymour was not unconditional, and that no contract was, in fact, made between him and the defendants.

Did the negotiations between the parties result in a contract? A contract may originate in an advertisement addressed to the public generally, and if the proposal be accepted by any one in good faith, without qualifications or conditions, the contract is complete. The fact that there was no limit as to number or quantity of eggs in the offer did not prevent an acceptance. The number or quantity was

[1] A portion of the opinion is omitted.

left to the determination of the acceptor, and an unconditional acceptance naming any reasonable number or quantity is sufficient to convert the offer into a binding obligation. It is essential, however, that the minds of the contracting parties come to the point of agreement — that the offer and acceptance coincide; and if they do not correspond in every material respect there is no acceptance or completed contract. In our view, the so-called acceptance of the plaintiff is not absolute and unconditional. It affixed conditions not comprehended in the proposal, and there could be no agreement without the assent of the proposer to such conditions. It is true the plaintiff agreed to furnish eggs at 10½ cents per dozen, but his acceptance required the defendant to pay fifteen cents each for the cases in which the eggs were packed or to return the cases or new ones in place of them. It appears from the record that, according to the usages of the business, the cases go with the eggs.

THE SATANITA.

COURT OF APPEAL, MARCH 28, 1895.

[*Reported in Law Reports*, [1895] *Probate*, 248.]

ACTION of damage by collision. The "Valkyrie" and the "Satanita" were manœuvring to get into position for starting for a fifty-mile race at the Mudhook Yacht Club regatta, when the "Satanita" ran into and sank the "Valkyrie."

The entry of the "Satanita" for the regatta contained this clause: "I undertake that, while sailing under this entry, I will obey and be bound by the sailing rules of the Yacht Racing Association and the by-laws of the club.

Among the rules was the following: Rule 24: " . . . If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht . . . she shall forfeit all claim to the prize, and shall pay all damages."

LORD ESHER, M.R. This is an action by the owner of a yacht against the owner of another yacht, and, although brought in the Admiralty Division, the contention really is that the yacht which is sued has broken the rules which by her consent governed her sailing in a regatta in which she was contesting for a prize.

The first question raised is whether, supposing her to have broken a rule, she can be sued for that breach of the rules by the owner of the competing yacht which has been damaged; in other words, Was there any contract between the owners of those two yachts? Or it may be put thus: Did the owner of the yacht which is sued enter into any obligation to the owner of the other yacht, that if his yacht broke the rules, and thereby injured the other yacht, he would pay damages? It seems to me clear that he did; and the way that

he has undertaken that obligation is this. A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgated certain rules, and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is, that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you, that if by a breach of any of our rules you do damage or injury to the owner of a competing yacht, you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners. There are other conditions with regards to these matches which constitute a relation between each of the yacht owners who enters his yacht and sails it and the committee; but that does not in the least do away with what the yacht owner has undertaken, namely, to enter into a relation with the other yacht owners, that relation containing an obligation.

Here the defendant, the owner of the "Satanita," entered into a relation with the plaintiff Lord Dunraven, when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that if, by any breach of any of these rules, he did damage to the yacht of Lord Dunraven, he would have to pay the damages.[1]

DAVID SEARS, JR., *v.* EASTERN RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1867.

[*Reported in* 14 *Allen*, 433.]

CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties. Cheney *v.* Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad *v.* Proctor, 1 Allen, 267; Najac *v.* Boston & Lowell Railroad, 7 Allen, 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it. Denton *v.* Great Northern Railway, 5 El. &

[1] The statement of the case is abbreviated, and only so much of Lord Esher's opinion is printed as relates to the question whether a contract had been made. Lopes, L.J., and Rigby, L.J., delivered concurring opinions. The judgment for the plaintiff was affirmed in Clarke *v.* Dunraven, [1897] A. C. 59. See also Vigo Agricultural Society *v.* Brumfiel, 102 Ind. 146.

Bl. 860. It is an offer which, when once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had a reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9.30 P. M., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown *v.* Eastern Railroad, 11 Cush. 101; Malone *v.* Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the "Boston Daily Advertiser," "Post," and Courier," and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-table from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as

extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware *v.* Hayward Rubber Co., 3 Allen, 84.

The Court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.

B. — Duration and Termination of Offers.

THE BOSTON AND MAINE RAILROAD *v.* JOSEPH H. BARTLETT AND ANOTHER.

Supreme Judicial Court of Massachusetts, March Term, 1849.

[*Reported in* 3 *Cushing*, 224.]

This was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants, on the 1st of April, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land for the sum of twenty thousand dollars, if the said corporation would take the same within thirty days from that date;" that afterwards, and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," &c., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on the 29th of May, 1844, while the extended contract was in full force and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to

execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

J. P. Healy, for the defendants.

G. Minot (with whom was *R. Choate*), for the plaintiffs.

Healy, in reply, said that in all the cases cited for the plaintiffs except the last, there was a consideration.

FLETCHER, J. In support of the demurrer in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill; namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of Bean *v.* Burbank, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration; and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respect-

able authors regard it as inconsistent with the plain principles of equity that a person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text books. The case of Cooke *v.* Oxley, 3 Term Rep. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

WILLIAM LORING AND ANOTHER *v.* CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1844.

[*Reported in* 7 *Metcalf*, 409.]

ASSUMPSIT to recover a reward of $1000, offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th, 1841.

At the trial before Wilde, J., the following facts were proved: On the 26th of May, 1837, this advertisement was published in the daily papers in Boston: "$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26, 1837. Samuel A. Eliot, Mayor." On the 27th of May, 1837, the following advertisement was published in the same papers: "$1000 reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27, 1837. Samuel A. Eliot, Mayor." These advertisements were continued in the papers but about a week; but there was

no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burnt. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of $1000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March Term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the State Prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the fire department in Boston, in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May, 1837; but that from that time till the close of the year 1841, there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case was taken from the jury by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit, as the full Court should decide.

Peabody & J. P. Rogers, for the plaintiffs.

J. Pickering (City Solicitor), for the defendants.

SHAW, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce.[1] That this principle applies to the offer of a reward to

[1] "The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding con-

the public at large was settled in this Commonwealth in Symmes v. Frazier, 6 Mass. 344; and it has been frequently acted upon, and was recognized in the late case of Wentworth v. Day, 3 Met. 352.

The ground of defence is, that the advertisement, offering the reward of $1000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction; that this reward was so offered in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published May 26th, 1837, offering a reward of $500; and another on the day following, increasing it to $1000. No time is inserted in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years or more; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing, then, that by fair implication there must be some limit to this offer, and there being no limit in terms, then by a general rule of

tract. Of course, until the performance, the offer of a reward is a proposal merely, and not a contract, and therefore may be revoked at the pleasure of him who made it." Shaw, C. J., Freeman v. City of Boston, 5 Met. 56, 57.

law it must be limited to a *reasonable time;* that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen, and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large; and for that purpose the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and, if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit then from such a promise of reward must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance (perhaps a slight one) is that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time as reasonable time; it must depend on many circumstances. It is somewhat analogous to the case of notes payable on demand, where the question formerly was, within what time such note must be presented, and, in case of dishonor, notice be given, in order to charge

the indorser. In the earliest reported case on the subject (Field *v.* Nickerson, 13 Mass. 131), the Court went no farther than to decide that eight months was not a reasonable time for that purpose.

Under the circumstances of the present case, the Court are of the opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

Plaintiffs nonsuit.[1]

AVERILL AND ANOTHER *v.* HEDGE.

SUPREME COURT OF ERRORS OF CONNECTICUT, JUNE, 1838.

[*Reported in* 12 *Connecticut Reports*, 424.]

THIS was an action of assumpsit, alleging that the defendant, who conducted business at Wareham, Mass., under the name of the "Washington Iron Company," promised to deliver to the plaintiffs a quantity of rods, shapes, and band-iron, in March, 1836.

The cause was tried at Hartford, February Term, 1838, before WILLIAMS, C.J.

The plaintiffs claimed to have proved their case by a correspondence between the parties in the year 1836; particularly by a letter from the plaintiffs to the defendant, dated the 29th of February; the defendant's answer of the 2d of March; a letter from the plaintiffs, dated the 14th of March; and the answer of the defendant, also dated the 14th of March by mistake, in fact written the 16th of March; and the plaintiffs' reply thereto dated the 19th of March. The whole correspondence between the parties was read in evidence; the substance of which was as follows: —

[1] 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 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 Shaub *v.* Lancaster, 156 Pa. 362.

HARTFORD, 29th February, 1836. DEAR SIR, — Regarding the future disposal of your nails as settled, it would be improper to importune you further on that point. Perhaps, however, you will not object to sending us a supply of rods and shapes for our spring sales. Please to say on what terms you will send us ten or fifteen tons, assorted, by first packet in the spring. We shall also be glad to purchase our hollow ware of you on the same terms as heretofore. Shall be pleased to hear from you soon. [Signed, "J. & H. AVERILL," the plaintiffs; and addressed to JOHN THOMAS, Esq.]

WAREHAM, 2d March, 1836. On the writer's return from the South last evening, he found your favor of the 29th ult., to which we now reply. We will deliver to you in Hartford ten or fifteen tons of rods, shapes, and band-iron, as follows: say — shapes and band-iron, at $110 per gross ton, six months; and old sable rods, at $116, six months. Old sable iron is now quick at $110 per ton in Boston; and there is but very little iron there at any price. We will deliver you at Hartford a common assortment of hollow ware, at $28 per ton, six months. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, 14 March, 1836. DEAR SIR, — We have bought of Ripley & Averill their stock of hollow ware, with the understanding that we were to receive the benefit of their orders given you last July. The balance of this order we believe was in readiness last fall; but, owing to the early closing of our navigation, was not shipped. Will you ship us this lot of ware by first packet, on terms then agreed on with R. & A.? Please advise us by return mail if we may expect it. [Signed by plaintiffs, and addressed to JOHN THOMAS, Esq.]

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WAREHAM, March 14, 1836. DEAR SIRS, — Your favor of the 14th inst. is at hand, and contents noted. We shall most cheerfully comply with your request to ship to you the balance of Ripley & Averill's order of hardware, not filled in consequence of the early frost last autumn; such being the understanding between yourselves and Mr. Ripley. We learn from our neighbors, engaged in the manufacture of this article, that they now hold it at $30 per ton, and shall not sell it at a less price through the season; and consequently we shall not consider ourselves holden to the offer made to you on the 2d inst., unless you signify your acceptance thereof by return mail, but shall furnish the balance of Ripley & Averill's order in conformity with the contracts made with them.

Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you? [Signed, "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, March 19th, 1836. DEAR SIR, — Your favor of the 17th came to hand last evening, too late to be answered before this morning. We note and duly appreciate your prompt assent to send us the balance of R. & A.'s order for hollow ware, at old prices. In our future purchases of that article, we will buy of you at $28 per ton, six months, as offered in your favor of the 2d. We will also take the following shapes, &c., on your terms there given: 160 bundles of new sable or Swedes, different shapes, specified; also 40 bundles smaller shapes, to be of old sable, assorted; 120 bundles band-iron, assorted; 60 bundles half-inch spike rods; 200 bundles P S I horse-nail rods, or a ton, if convenient, in 28lb. bundles, sending 5 tons in all. [Signed by the plaintiffs, and addressed to JOHN THOMAS, Esq.]

In a letter dated March 21st, 1836, addressed to John Thomas, Esq., the plaintiffs alter their order for band-iron, varying the sorts.

WAREHAM, April 2d, 1836. Your favors of the 19th and 21st reached here in the absence of the writer. We regret that you had not sooner signified your acceptance of our proposition of the 2d of March, touching supplies of shapes, band-iron, &c , as we had, prior to the reception of your favors above alluded to, entered into such engagements in other markets as rendered it impossible for us to supply you with those articles on any terms. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

On the 6th of April, 1836, the plaintiffs addressed a letter to the defendant's agent, remonstrating against his conduct in refusing to send them the iron ordered. The defendant's agent replied, by a letter dated the 8th of April, as follows: —

On 29th February you ask our terms for 10 or 15 tons of rods and shapes. On 2d March we give them to you per mail. On 14th March you again address us upon another subject; but although our proposition, in ordinary course of mail, must have been in your hands 10 to 12 days, yet no allusion was made to it. On 16th, after replying to yours of 14th, we ask if you accede to our proposition of the 2d. After this, we waited for your reply until the 22d, when, not having heard from you, we made such other arrangements as made it impossible for us to fill your orders of 19th or 21st, both which came together in the same mail on 23d. We did not intend the question proposed to you in ours of 16th as a renewal of our proposals of the 2d ult., nor do we believe that it will bear that construction; but nevertheless we should have filled your order had it been seasonably received.

This correspondence was conducted through the mail; upon the part of the defendant, by his avowed agent, John Thomas, and by the plaintiffs themselves on their part. The plaintiffs resided in the city of Hartford, near the post-office.

The letter written by the defendant on the 16th of March, dated 14th, arrived at Hartford on the 18th of March, about 2 o'clock P. M. The plaintiff's answer to the letter, dated the 19th of March, was post-marked the 20th; and the letter written by the plaintiffs on the 21st of March was post-marked on the day of its date; and both letters arrived at Wareham at the same time, viz., on the 23d of March.

The plaintiffs claimed that during said month of March the price of the article, which was the subject of controversy, was constantly advancing in the market; and that they had sustained loss in their business by the non-compliance of the defendant with his contract.

The defendant introduced a witness to prove that letters mailed at Hartford for Wareham were, by the usual course of mail, sent by Providence, and would reach that place on the evening of the day after leaving Hartford, — but might be sent by Boston; although, when sent by Boston, on the days that both mails went, a letter would be one day longer in reaching Wareham; that a mail was sent every day from Hartford to Boston, and every day but Sunday from Hartford to Providence; that the Providence mail usually left the post-office in Hartford about 5 o'clock every morning, except Sunday, when no mail was sent, and Monday, when it left about 10 o'clock A.M. The mails were, in the course of business, closed one hour before they

left the office. Upon the 19th of March, 1836, the Providence mail left the office at 25 minutes past 5 o'clock in the morning, and on the 21st at 6 minutes past ten in the morning. The 20th was Sunday; and letters put into the office on Saturday evening and on Sunday evening would be forwarded by the same mail. The usual course of business at the post-office in Hartford was to stamp or post-mark all letters, not on the day they were forwarded, but the day they were received into the office, — unless received after 9 o'clock in the evening, when they were post-marked as of the succeeding day.

Upon the facts so proved and disclosed in the correspondence, the plaintiffs claimed that the proposal of the defendant, in his letter of the 2d of March, to furnish the plaintiffs with rods, shapes, and band-iron, was renewed by his letter written 16th of March, and dated 14th; and that the plaintiffs, by their answer of the 19th of March, in due time signified their assent to the proposal therein contained; and thus was the contract stated in the declaration completed.

These claims of the plaintiffs were all resisted and denied by the defendant.

The Court charged the jury, that in mercantile transactions of this character, affected as they must be by the constant fluctuations of markets, the utmost promptitude must be exacted consistent with a due regard to ordinary business; and that if the letter written by the plaintiffs, accepting the proposal of the defendant relative to said rods, bands, &c., was not delivered into the post-office in Hartford before the day it was post-marked, viz. the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory upon the defendant.

A verdict was thereupon returned for the defendant; and the plaintiffs moved for a new trial.

Hungerford, in support of the motion.

T. C. Perkins, contra.

Bissell, J. From the correspondence between these parties, and which is made a part of the case, it appears, that on the 29th of February, 1836, the plaintiffs inquired of the defendant upon what terms he would supply them with ten or fifteen tons of rods, shapes, and band-iron. To this communication the defendant replied on the 2d of March, specifying the terms on which he would furnish the articles in question. On the 14th the plaintiffs wrote to the defendant on other business; but took no notice of his offer. The defendant replied on the 16th; and at the close of his letter he inquires of the plaintiffs whether they accept his proposal regarding the rods, shapes, and bands. This letter, it appears, arrived at Hartford on the 18th, about 2 o'clock afternoon. The plaintiffs accept the defendant's proposals in a letter dated on the 19th, but which the jury have found was not delivered into the post-office at Hartford until the 20th; and the 20th being Sunday, and no mail leaving Hartford on that day, the letter was not actually sent until the morning of the 21st. And it further appears that this letter, and also another from the plaintiffs, dated the 21st, reached the defendant on the 23d. It also appears that the defendant,

having waited for the plaintiffs' answer until the 22d, and having heard nothing from them, then made such arrangements as rendered it impossible for him to comply with their order. It is further found, that on the 19th of March the Providence mail left the office at Hartford at 25 minutes past 5 o'clock; and that a letter forwarded by that mail would have reached the defendant on the evening of the following day.

The great question in the case is, whether upon these facts there has been such an acceptance of the defendant's offer as that he is bound by it.

The jury were instructed that if the letter written by the plaintiffs, accepting the proposal of the defendant, was not delivered into the post-office at Hartford until the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory on the defendant.

Several questions, not immediately growing out of the charge, but which, if decided in favor of the defendant, make an end of the case, have been much discussed at the bar.

1. It has been contended that the proposal of the defendant, in his letter of the 2d, was not renewed by his letter of the 16th of March. Upon this point no opinion was given by the judge on the circuit, unless an opinion may be inferred from the ground on which he rested the case in his instructions to the jury. Nor is it essential that a decided opinion on the question should be expressed by this Court; because there are other grounds on which we are unanimously of opinion that the ruling of the judge below must be sustained.

Were this, however, a turning point in the case, we should probably be prepared to say that the defendant's letter of the 16th of March does contain a distinct renewal of his former proposal. His language is certainly very strong to show that such was his intention. He says: "Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you?" Now we cannot but think that the fair and obvious construction of this language is that the defendant then stood ready to supply the articles upon the terms already specified. And such appears to have been his own view of the case, as is manifest from his subsequent letter of the 8th of April.

2. It has been urged, that admitting this letter to contain a renewal of the former proposal, yet, *by the terms of it*, the plaintiffs were bound to signify their acceptance by return of mail. The question, in this aspect of it, is manifestly independent of any mercantile usage. That the defendant had a right to attach this condition to his offer is undeniable. The question is, whether he has done so; and whether such is the true construction of his letter.

In his letter of the 2d of March, the defendant had offered to supply the plaintiffs an assortment of hollow ware at certain prices; and in regard to this offer, in his letter of the 16th, he says: "We shall not consider ourselves holden to the offer made you on the 2d inst., unless you signify your acceptance thereof by return of mail;" and he

then puts the inquiry with regard to rods, shapes, and band-iron, that has been already mentioned. Now, it should be borne in mind, that the defendant's proposal, in regard to these articles, had already been before the plaintiffs for at least ten or twelve days; and one claim put forth by them on the trial was, that during the month of March the price of these articles was constantly advancing in the market. The question then arises, whether under these circumstances it was the intention of the defendant to give them further time; and whether such intention can be fairly inferred from the language of his communication. In regard to the hollow ware, there can be no question. The plaintiffs were positively required to signify their acceptance by return mail. And when, in the same letter and under similar circumstances, they are also required to decide upon the proposal in regard to the rods, &c., it is certainly not easy to see why the defendant should have made, or should have intended to make, a distinction between these classes of articles. Had the judge directed the jury that the defendant was not bound, unless the plaintiffs signified their acceptance by return of mail, we are by no means satisfied that the direction would have been wrong. As, however, he placed the case on grounds more favorable to the plaintiffs' claim, a decision upon this point is unnecessary. Any further discussion of it is therefore waived.

3. We come then to the inquiry, whether the instruction actually given to the jury is correct in point of law. And here it may be remarked, that it is very immaterial when the letter of the plaintiffs was *written:* until *sent*, it was entirely in their power and under their control, and was no more an acceptance of the defendant's offer than a bare determination, locked up in their own bosoms and uncommunicated, would have been. And it surely will not be claimed that mere volitions, a mere determination to accept a proposal, constitute a contract. The plaintiffs then did not accept the defendant's proposition until the 20th, and for aught that appears [not] until the evening of that day. That they were bound to accept within a reasonable time was distinctly admitted in the argument; and if not admitted, the position is undeniable. The case of the plaintiffs then comes to this, and this is the precise ground of their claim: That they had a right to hold the defendant's offer under advisement for more than forty-eight hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now, in regard to such a claim, we can only say, that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it derives the slightest support.

Indeed, it seems to us to be subversive of the whole law of contracts. For it is most obvious, that, if during the interval the defendant was bound by his offer, there was an entire want of mutuality: the one party was bound, while the other was not. Had the proposition been made at a personal interview between the parties, there can be no pretence that it would have bound the defendant beyond the termination

of the interview. The case of Cooke *v.* Oxley, 3 Term Rep. 653, is decisive on this point, and goes much further. There, A., having proposed to sell goods to B., gave him, at his request, a certain time to determine whether he would buy them or not; and it was held, that although B. determined within the time, A. was not bound. And Lord Kenyon there says: "Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum*." So also in the case of Payne *v.* Cave, 3 Term Rep. 148, it was decided that the bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding at any time before the hammer is down.

Now, it is most manifest, that if the principle of these cases is to be applied to and govern the present, they are entirely decisive of it in favor of the defendant. It is however claimed, and perhaps justly, that the case of Cooke *v.* Oxley has been disregarded, if not overruled, by the more modern decisions; or at least that it has been holden not to apply to mercantile contracts, negotiated through the medium of the post-office. Thus, in the case of Adams *v.* Lindsell, 1 B. & A. 681, there was an offer to sell goods on certain specified terms, provided an acceptance of the offer was signified by return of mail. This was done; and it was held (the defendant not having retracted his offer in the mean time), that the contract was complete. It is not easy to reconcile this decision with that of Cooke *v.* Oxley, unless it can be distinguished on the ground that, as the offer was made through the mail, the party is to be considered as repeating the offer at every moment until the other party has had an opportunity of manifesting his acceptance. And this seems to have been the ground on which the case was placed by the Court of King's Bench. They say: "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 defendant had received their answer, and was bound by it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of 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."

These positions are questioned, if not directly controverted, by Best, C. J., in the case of Routledge *v.* Grant, 4 Bing. 653. He says, "If they are to be considered as making the offer till it is accepted, the other may say, 'Make no further offer, because I shall not accept it;' and to place them on an equal footing, the party who offers should have the power of retracting, as well as the other of rejecting; therefore I cannot bring myself to admit that a man is bound when he says, 'I will sell you goods on certain terms, receiving your answer in course of post.'" He does not, however, profess to overrule the case of Adams *v.* Lindsell; nor was it necessary, as there were other grounds on which the rule in Routledge *v.* Grant was discharged.

In the case of M'Culloch *v.* The Eagle Ins. Co., 1 Pick. 281, decided by the Supreme Court of Massachusetts, the case of Cooke *v.* Oxley is cited with approbation and followed. And the decision there cannot easily be reconciled to the doctrines advanced in Adams *v.* Lindsell. For it was there held, that an offer to insure the plaintiff's vessel at a given premium, communicated by mail and promptly accepted, was not binding on the defendants, they having in the mean time written a letter retracting their offer. This decision proceeded upon the ground that the treaty was open until the plaintiff's letter notifying his acceptance, was received; and that, in the mean time, the defendants have a right to withdraw their offer. Parker, C. J., in giving the opinion of the Court, said, "The offer did not bind the plaintiff until it was accepted; and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed."

The case of Adams *v.* Lindsell is regarded as an authority, and followed, by the Supreme Court of Errors of the State of New York, in Mactier *v.* Frith, 6 Wend. 103. And there the doctrine is asserted. that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not in the mean time revoked it. And the rule adopted in Massachusetts, that regards the contract as incomplete until the party making the offer is notified of the acceptance, is rejected. The doctrine of Adams *v.* Lindsell and of Mactier *v.* Frith may perhaps be considered as receiving the implied sanction of the Supreme Court of the United States, in the case of Eliason *v.* Henshaw, 4 Wheat. 225; although a decision upon the precise point was unnecessary, the offer there not having been accepted according to the terms on which it was made.

We do not feel that the task is imposed upon us of reconciling these conflicting authorities, if indeed they do conflict; for within the principle of none of them can the claim of the plaintiffs be established.

In Mactier *v.* Frith, which goes as far as any of the cases on this subject, the rule is laid down, that the offer continues until the letter containing it is received, and the party has had a fair opportunity to answer it. And it is further said, that a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An offer then, made through a letter, is not continued beyond the time that the party has a "fair opportunity" to answer it. This is substantially the doctrine of the charge. And it is not only highly reasonable, but is supported by all the analogies of the law. Once establish the principle that a party to whom an offer is made may hold it under consideration more than forty-eight hours, watching in the mean time the fluctuations of the market, and then bind the other party by his acceptance, and it is believed that you create a shock throughout the commercial community, utterly destructive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

It is only necessary to apply these principles to the case before us; and their application is exceedingly obvious. The proposal of the defendant, which had already been several days before the plaintiffs, was renewed early on the afternoon of the 18th. They show no act done by them signifying their acceptance, until the evening of the 20th. Was this within a reasonable time? Was this the first fair opportunity of manifesting their acceptance? We think this can hardly be claimed. Had the defendant had an agent in Hartford, through whom the offer was made, might the plaintiffs thus have delayed the communication of their acceptance to him? This would not be pretended. And can it vary the principle, that the offer, instead of being thus made, was made through the agency of the post-office? Had the offer of the defendant been promptly accepted, information of the acceptance would have reached the defendant on the evening of the 20th, in due course of mail. He waited until the 22d; and hearing nothing from the plaintiffs, he then virtually retracted his offer, by making such arrangements as made it impossible for him to fill their order. We think he was fully justified in so doing; and that upon every sound principle the rule in this case must be discharged.

In this opinion the other Judges concurred.

New trial not to be granted[1]

BYRNE & CO. *v.* LEON VAN TIENHOVEN & CO.

IN THE COMMON PLEAS DIVISION, MARCH 6, 1880.

[*Reported in* 5 *Common Pleas Division*, 344.]

LINDLEY, J.[2] [This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates pursuant to an alleged contract.

The defendants carried on business at Cardiff and the plaintiffs at

[1] In Kempner *v.* Cohn, 47 Ark. 519, it was held that in the case of an offer to sell real estate, a delay of five days in accepting was not as matter of law unreasonable. In Ortman *v.* Weaver, 11 Fed. Rep. 358, a delay of two weeks in accepting such an offer was held unreasonable. In Hargadine, McKittrick Co. *v.* Reynolds, 64 Fed. Rep. 560, a delay of six days in accepting an offer to sell cotton manufactured goods was held unreasonable. In Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. 431, it was held that in the case of an offer by telegram to sell oil, then the subject of rapid fluctuation in price, a telegraphic reply after twenty-four hours' delay was too late.

See also Ramsgate Hotel Co. *v.* Montefiore, L. R. 1 Ex. 109; *Re* Bowron, L. R. 5 Eq. 428, L. R. 3 Ch. 592; De Witt *v.* Chicago, &c. Ry. Co., 41 Fed. Rep. 484; Ferrier *v.* Storer, 63 Ia. 484; Tronnstine *v.* Sellers, 35 Kan. 447; Park *v.* Whitney, 148 Mass. 278; Stone *v.* Harmon, 31 Minn. 512; Hallock *v.* Insurance Co., 2 Dutch. 268; Mizell *v.* Burnett, 4 Jones, L. 249; Baker *v.* Holt, 56 Wis. 100; Sherley *v.* Peehl, 84 Wis. 46.

[2] A brief statement of facts has been substituted for the statement of the court. Only so much of the opinion is given as relates to the question of revocation.

New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The defendants on October 1 offered to sell to the plaintiffs 1000 boxes of tinplates at 15*s.* 6*d.* a box "subject to your cable on or before the 15th inst. here." The plaintiffs sent a telegram on October 11th accepting this offer, and confirmed it by letter dated October 15th. On October 8th the defendants wrote a letter withdrawing their offer. This letter reached the plaintiffs on October 20th, but they claimed the revocation was ineffectual and brought this action.]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. Routledge *v.* Grant, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 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?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged 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. This is the view taken in the United States: see Tayloe *v.* Merchants Fire Insurance Co., 9 How. Sup. Ct. Rep. 390, cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: Harris' Case, Law Rep. 7 Ch. 587; Dunlop *v.* Higgins, 1 H. L. 381, even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly

or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.[1]

[1] Stevenson *v.* McLean, 5 Q. B. D. 346; Henthorn *v.* Fraser, [1892] 2 Ch. 27; *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. Cash Register Co., 5 Col. App. 162; Wheat *v.* Cross, 31 Md. 99; Brauer *v.* Shaw, 168 Mass. 198, *acc.* 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 was ineffectual if not received before acceptance, 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."

HYDE *v.* WRENCH.

IN CHANCERY, DECEMBER 8, 1840.

[*Reported in* 3 *Beavan*, 334.]

THIS case came on upon general demurrer to a bill for specific performance, which stated to the effect following: —

The defendant, being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for 1,200*l.*, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me 1,200*l.* for my farm; I will only make one more offer, which I shall not alter from; that is, 1,000*l.* lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant 950*l.* for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June, the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and, the instant I receive his reply, will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the 950*l.* for the purchase on the 26th of June; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of 950*l.* for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm; viz., 1,000*l.* through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the defendant "returned a verbal answer to the last-mentioned letter, to the effect he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. *Kindersley* and Mr. *Keene*, in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the

terms proposed. Holland *v.* Eyre.[1] The plaintiff, instead of accepting the alleged proposal for sale for 1,000*l.* on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. *Pemberton* and Mr. *Freeling*, contra. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there therefore exists a valid subsisting contract. Kennedy *v.* Lee,[2] Johnson *v.* King,[3] were cited.

The Master *of the* Rolls.

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for 1,000*l.*, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own to purchase the property for 950*l.*, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it;[4] and that therefore there exists no obligation of any sort between the parties; the demurrer must be allowed.[5]

STEVENSON, JAQUES & CO. *v.* McLEAN.

In the Queen's Bench Division, May 25, 1880.

[*Reported in* 5 *Queen's Bench Division*, 346.]

Lush, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40*s.* per ton, nett cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May last.

[1] 2 Sim. & St. 194.

[2] 3 Mer. 454.

[3] 2 Bing. 270.

[4] Lord Langdale. — Ed.

[5] 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; W. & H. M. Goulding Co. *v.* Hammond, 54 Fed. Rep. 639 (C. C. A.); 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, *acc.*

The plaintiffs are makers of iron, and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39*s.*, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms: —

"Referring to R. A. McLean's letter to you *re* warrants, I have seen him again to-day, and he considers 39*s.* too low for same. At 40*s.* he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram: —

"Cannot make an offer to-day; warrants rather easier. Several sellers think might get 39*s.* 6*d.* if you could wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day:

"Your telegram duly to hand re warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39*s.* 6*d.*, but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows: —

"Mr. Fossick's clerk showed me a telegram from him yesterday mentioning 39*s.* for No. 3 as present price, 40*s.* for forward delivery. I instructed the clerk to wire you that I would now sell for 40*s.*, nett cash, open till Monday."

No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40*s.*, nett cash, and would

hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: —

"Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This a question, not a dismissal

This telegram was received at the office at Moorgate at 10.1 A.M., and was delivered at the defendant's office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40*s.*, nett cash, and at 1.25 sent off a telegram to the plaintiffs: —

"Have sold all my warrants here for forty nett to-day."

This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: —

"Have secured your price for payment next Monday — write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed:

"Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied:

"Your two telegrams received, but your sale was too late; your sale was not per my instructions."

And to this the plaintiffs rejoined: —

"Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker at 41*s.* 6*d.*, and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40*s.*

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on

the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to Hyde *v.* Wrench, 3 Beav. 334, where one party offered his estate for 1000*l.*, and the other answered by offering 950*l.* Lord Langdale, in that case, held that after the 950*l.* had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in Cooke *v.* Oxley, 3 T. R. 653, that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of Cooke *v.* Oxley, 3 T. R. 653, does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff

266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till 4 in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was *nudum pactum*.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with Cooke *v.* Oxley, 3 T. R. 653. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see Routledge *v.* Grant, 4 Bing. 653. But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it: Adams *v.* Lindsell, 1 B. & A. 681. "Common sense tells us," said Lord Cottenham, in Dunlop *v.* Higgins, 1 H. L. C. 381, "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. Cooke *v.* Oxley, 3 T. R. 653, if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in Cooke *v.* Oxley, 3 T. R. 653, the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted:" Tayloe *v.* Merchants' Fire Insurance Co., 9 How. Sup. Court Rep. 390; and in Bryne & Co. *v.* Leon Van Tienhoven & Co., 49 L. J. (C. P.) 316, my brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40*s.*, nett cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and

their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for 1900*l.* The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

DICKINSON *v.* DODDS.

IN THE HIGH COURT OF JUSTICE, JANUARY 25, 26, 1876.
IN THE COURT OF APPEAL, MARCH 31, APRIL 1, 1876.

[*Reported in* 2 *Chancery Division*, 463.]

ON Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows: —

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of 800*l.* As witness my hand this tenth day of June, 1874.

800*l.* (Signed) JOHN DODDS.

P.S. — This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874. (Signed) J. DODDS.

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 A.M., within which to determine whether he would or would not purchase, and that he should absolutely have, until that time, the refusal of the property at the price of 800*l.*, and that the plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance, in writing, of the offer to sell the property. According to the evidence of Mrs. Burgess, this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington

railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the defendant Allan for 800*l.*, and had received from him a deposit of 40*l.*

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on the 25th of January, 1876.

Kay, Q. C., and *Caldecott*, for the plaintiff.

Swanston, Q. C., and *Crossley*, for the defendant Dodds.

Jackson, Q. C., and *Gazdar*, for the defendant Allan.

[Bacon, V. C., decreed specific performance in favor of the plaintiff, on the ground that by the original offer or agreement with the plaintiff, and by relation back of the acceptance to the date of the offer, Dodds had lost the power to make a sale to Allan. From this decision the defendants appealed.]

James, L.J., after referring to the document of the 10th of June, 1874, continued: —

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: "This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before

a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one at the same moment of time; that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not, in point of law, withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that, before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L.J. I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other

accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says — and it is a perfectly clear rule of law — that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when, on the next day, he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and, before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come

and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can, by acceptance, make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead,[1] and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as, when a man who has made an offer dies before it is accepted, it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.[2]

SHUEY, Executor, *v.* UNITED STATES.

Supreme Court of the United States, October Term, 1875.

[*Reported in* 92 *United States*, 73.]

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due him of the reward of $25,000 offered by the Secretary of War, on the 20th of April, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The court below found the facts as follows: —

[1] The Palo Alto, 2 Ware, 343, 359; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First M. E. Church, 96 Ill. 179; 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, *acc.* 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."

[2] Baggallay, J. A., concurred, and the bill was dismissed with costs. Coleman *v.* Applegarth, 68 Md. 21, was very similar in its facts to Dickinson *v.* Dodds, and that case was cited and followed.

1. On the 20th April, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," $25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On the 14th November, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American minister, over Surratt. Thereupon certain diplomatic correspondence passed between the government of the United States and the Papal government relative to the arrest and extradition of Surratt; and on the 6th November, 1866, the Papal government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American minister at Rome, being informed of the escape by the Papal government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American government to the United States; but the American minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the act of 27th July, 1868 (15 Stat. 234, sect. 3), the sum of $10,000.

Such payment was made by a draft on the treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing finding, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly: whereupon an appeal was taken to this Court.

Ste. Marie having died *pendente lite*, his executor was substituted in his stead.

Mr. D. B. Meany and *Mr. F. Carroll Brewster*, for the appellant.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

Mr. Justice Strong delivered the opinion of the Court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest, — persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it;

and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made. *Judgment affirmed.*[1]

BIGGERS ET AL. *v.* OWEN ET AL.

GEORGIA SUPREME COURT, OCTOBER TERM, 1887.

[*Reported in* 79 *Ga.* 658.]

BLANDFORD, Justice. McMichael and Owens brought their action of assumpsit against B. A. Biggers, P. J. Biggers, Jr., and T. J. Pearce (the plaintiff in error here) in the city court of Columbus, to recover a reward of $500, which they alleged had been offered by the defendants. The offer of reward was printed as an advertisement in a newspaper in Columbus, as follows: —

"We will pay $500, the above reward, for the delivery to the sheriff of Muscogee County of the party or parties, with evidence to convict, who administered the poison in the meal which proved fatal to J. W. Biggers and J. F. Burgess and wife on the 11th of November."

Signed B. A. BIGGERS, P. J. BIGGERS, JR., T. J. PEARCE.

Upon the trial of the case, the jury rendered a verdict in favor of the plaintiffs for the amount of the reward, $500.

It appeared from the evidence that when this reward was offered, the plaintiffs arrested a certain woman, and delivered her to the sheriff of Muscogee County; that a committing trial was had before a justice of the peace and the woman discharged for the want of sufficient evidence to commit. The reward was then withdrawn; but McMichael testifies that after it was withdrawn, Pearce told him to go on, that he would pay him what his services were worth. After this, a warrant was sued out for the same woman by Mr. Pearce. McMichael, being a bailiff in the Court, executed the warrant and arrested her. She was indicted for the poisoning, was tried and convicted. The judge in the Court below charged the jury that if this reward was offered, and the plaintiffs thereupon furnished evidence going to show that this woman was guilty of the crime, they were

[1] See also Hudson Real Estate Co. *v.* Tower, 161 Mass. 10.

entitled to recover the amount of the reward. The Court was requested to charge that if, after this reward was offered, it was withdrawn before the plaintiffs performed the services contemplated by the reward, then no recovery could be had, under the declaration in this case. The Court refused to give this in charge as requested, but charged to the contrary.

We think the Court erred in declining to charge as requested, and in charging as he did. An offer of reward is nothing more than a proposition; it is an offer to the public; and until some one complies with the terms or conditions of that offer, it may be withdrawn. This is well-settled law, as to which there can be no dispute, and counsel in this case did not contend otherwise. When this offer of reward was withdrawn, and Pearce afterwards told McMichael to go on with the case, that he would pay him for his services, Pearce did not thereby become liable to pay him the amount of this reward, but only to pay him for the value of his services. And this is not an action upon a *quantum meruit* to recover the value of such services; but is an action to recover specifically the amount of this reward, $500. There was no evidence introduced in the Court below to show what the value of the services were, and the record does not distinctly show what services were performed.

The Court having erred in failing to charge as requested, and in charging the jury as above set out, we consider it unnecessary to say more about the case; and we therefore reverse the judgment.

Judgment reversed.[1]

THE AMERICAN PUBLISHING AND ENGRAVING COMPANY, Appellant, *v.* JAMES WALKER, Respondent.

St. Louis Court of Appeals, March 4, 1901.

[*Reported in* 87 *Missouri Appeals*, 503.]

Goode, J. The appellant sued the respondent on the following written instrument: —

"It is agreed that the American Publishing and Engraving Company will not be held responsible for any provisions not embodied in writing herein, and

[1] By express provision of the codes in many European countries, an offer is 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 discussion and 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 carefully elaborated by von Ihering, Jahrbücher für Dogmatick, 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.

that this contract cannot be cancelled without the written consent of the said company.

"The American Publishing and Engraving Company, Syndicate Department, 146 to 150 Nassau Street, and 2 to 6 Spruce Street, New York: You are hereby authorized to furnish the undersigned for my exclusive use one cut and no duplicate and reading matter weekly to illustrate the merchant tailor business in the city of Springfield, State of Missouri, only, for the term of one year from the commencement of service, and until notified in writing to discontinue same, for which I agree to pay to your order at New York, the sum of seventy-five cents and postage for each cut, and twenty-five cents and postage for each duplicate at the end of each calendar month; matter sent is not to be duplicated to any other concern in my line of business in Springfield, Missouri.

(Name) "JAMES WALKER,
"Address 220 College Street,
"Dated February 26, 1898. Springfield, Mo."

The evidence shows, without conflict, that one of the appellant's travelling salesmen took the above order from the respondent on the date it bears, and sent to his principal, immediately. Thereupon, the financial standing of the respondent was investigated, which being found satisfactory, the appellant sent him an acceptance of the order, together with a copy of it. Cuts and reading matter were forwarded to the respondent as called for in the contract each week to May 14, 1898, when the respondent mailed the appellant a draft for the price of the cuts and reading matter he had received to that time and directed that no more be sent to him because he could not make arrangements with his home papers to use them. Notwithstanding this instruction of the defendant, plaintiff continued to send cuts to the end of the year, that is, to February 26, 1899. It shipped fifty-two cuts, testified to be worth seventy-five cents each, or a total value of $39, and expended $2.16 for necessary postage. The defendant, as above stated, paid $7.90 on this account and the action was to recover the balance.

The only defence interposed was that the contract was unilateral, not binding on the plaintiff, and, therefore, not binding on the defendant. It should be remarked that he declined to receive the advertisements forwarded to him after he had notified the appellant not to send any more.

The testimony shows that the publishing and engraving company had engaged to pay its soliciting salesman thirty-three per cent commission for securing the order. On receipt of the notice from the defendant to ship no more cuts, the company informed him that it could not release him from the contract unless he would reimburse it for the commission which it had paid this salesman on the unexpired portion.

We regret that we are unable to concur with the learned judge who tried the case below, in his construction of the foregoing contract. Whether the act of the plaintiff's agent in taking the order from the defendant would amount to an agreement by it to comply with the con-

tract which would be binding and effective, is unnecessary to decide. The testimony shows, without dispute, that a formal acceptance of the order was sent to the defendant as soon as it was received, and performance duly begun. Beyond question, this made the contract binding on both parties according to its terms. Granting, for the sake of argument, that Walker might have withdrawn his order before it was accepted, he could not lawfully do so afterwards, unless one party to an agreement may abrogate it at his pleasure. He makes no complaint of the kind of performance rendered by the plaintiff, and presumably the cuts and reading matter were satisfactory. It cannot be tolerated, then, that he should terminate his liability or the plaintiff's rights simply because his home newspapers refused to use the advertisements. Plaintiff was in no way responsible for that. If the contract was valid and binding from the first, or became so upon acceptance by the company, it was valid and binding to the full extent of its terms; that is, the company was bound to furnish the advertising matter for one year and thereafter until notified to cease by the defendant, and the latter was bound to pay for it at least one year. He could not construe the agreement as terminable when he would; for it may be that the plaintiff would not have been willing to enter into a contract for less than one year.

The signatures of both parties to a written agreement are not always indispensable to its validity. In fact, a large portion of the commercial affairs of to-day are transacted upon orders or proposals signed by one party which become effective and binding when acted upon by the other. It would introduce inextricable confusion into business transactions to hold that agreements so made might be dispensed with at the caprice or will of one of the parties. United States *v.* Carlisle, Fed. Cas. 14274; Mastin *v.* Grimes, 88 Mo. 478; Wordsworth *v.* Wilson, 11 La. Ann. 402; Hallock *v.* Comstock Inc., 26 N. J. Law, 268; Muscatine Waterworks *v.* Muscatine Lumber Co., 83 Ia. 112, 52 N. W. Rep. 108. The later authorities show an increasing liberality on this point, doubtless for the reason that trade usages have dictated a relaxation from the former strictness. The circumstance that a contract lacks the signature of one of the parties to it, is by no means controlling in determining whether or not it is mutual. It may be unilateral for that reason, but many written agreements signed by one side are obligatory. The requirement of mutuality is but a branch of the doctrine that a contract, to be recognized by the law, must be supported by a consideration. When a consideration is wanting, either because one of the parties did not assent to the contract, or because, though he did assent he was not obliged on his part to do anything, the contract is without mutuality or unilateral. It is not legally a contract at all. On the other hand, although not signed by the party suing on it, if it is clear either from his words or actions that he assented to it from the first, he must comply with, and may enforce, its obligations. The assent of a non-signing party, it is true, must be signified by some

positive act — a mere mental resolution is not enough. Lungstrass *v.* German Ins. Co., 48 Mo. 201. But many overt acts may be evidence of assent. Vogel *v.* Peacoc, 157 Ill. 339; Fairbanks *v.* Meyers, 98 Ind. 92; Griffin *v.* Bristle, 39 Minn. 456; Dows *v.* Morse, 62 Ia. 231; Grove *v.* Hodges, 55 Pa. St. 504; Flannery *v.* Dechert, 13 Pa. St. 505; Botkin *v.* McIntyre, 81 Mo. 567. It has been held that where a person made a written proposal to do certain work which was signed by him alone, proof that it was made in the presence of the defendant and assented to by him is sufficient to warrant the finding that the contract was complete. Berner *v.* Bagnell, 20 Mo. App. 543; Murphy *v.* Murphy, 22 Mo. App. 18. If one of the parties to a writing does not sign it, but the said party accepts a performance of its provisions, there is no merit in his objection when sued upon the instrument that it was unilateral. Stone *v.* Pennock, 31 Mo. App. 544.

The agreement in question, after the performance of it had been begun, was manifestly obligatory on the plaintiff for the full term of one year, and if it failed to furnish matter to defendant as stipulated for that term, it was responsible in damages. This being true, it was equally binding on him for the same period. In Lewis *v.* Mutual Life Ins. Co., 61 Mo. 534, a contract was construed whereby the plaintiff agreed to become the general agent of the defendant to work exclusively for it for five years. There were various other provisions, such as that he should furnish a full corps of energetic subagents, which need not be noticed. The company went out of business during the time of the contract, and, when sued by the plaintiff to pay for his services during the full period, claimed that it did not bind itself to continue in business for five years, and that its inability to execute the whole term was no breach. It was conceded the company did not covenant directly to carry on business for any certain time. Nevertheless, it was held bound for the whole period. The language of the opinion is applicable to the present controversy: "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied." The same doctrine was laid down in Glover *v.* Henderson, 120 Mo. 367.

The authority chiefly relied on by the respondent is Jones *v.* Durgin, 16 Mo. App. 370. But that case expressly recognizes the validity of instruments, like the one in question, and their binding force and effect on both parties. There was no proof, however, of any formal acceptance by the plaintiffs as there is here, and they were held properly nonsuited because their undertaking was so vague and indefinite as to be incapable of enforcement and insufficient to make them responsible in damages if they broke it. But here, the services which the plaintiff company agreed to render Walker are clearly and unmistakably stipu-

lated by the very language of the contract. Such executory agreements, when acted on, are always held binding. If it is clear that the minds of both parties have met, they stand on the same footing as any other contract, and are to have the same principles of law applied to them. Cary *v.* McIntyre, 7 Col. 173; Robson *v.* Mississippi Logging Co., 61 Fed. 193; Stone *v.* United States, 94 U. S. 76; Horn *v.* Hansen, 22 L. R. A. 617, 7 Am. and Eng. Ency. of Law (2d ed.), 115; Great Northern R. R. Co. *v.* Witham, 9 C. P. 16; Wise *v.* Ray, 3 G. Greene, 430; Mason *v.* Dechert, 77 N. Y. 595, 28 Am. Rep. 190; Kinder *v.* Brink, 82 Ill. 376.

It does not follow, however, that the plaintiff is entitled to recover the full price of the advertising matter sent after it was notified to stop sending it. On the defendant's refusal to accept any more cuts, it should have forborne to ship them. Under such circumstances the party notified has no right to continue to perform the contract and thus enhance the damages. The measure of the plaintiff's recovery is the profit it should have realized had it been permitted to continue to furnish the cuts to the end of the year. 7 Am. and Eng. Ency. of Law (2d ed.), 153; Moline Scale Co. *v.* Bend, 52 Ia. 307; Danforth *v.* Walker, 37 Vt. 239; Ward *v.* Thomas, 64 N. Y. 107; McGregor *v.* Ross, 96 Mich. 103; Collins *v.* Delaport, 115 Mass. 159.

The judgment is reversed, and the cause remanded, in which disposition of it all the judges concur.

C. — Acceptance.

RAFFLES *v.* WICHELHAUS AND ANOTHER.

In the Exchequer, January 20, 1864.

[*Reported in* 2 *Hurlstone & Coltman*, 906.]

Declaration: for that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollerah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼*d.* per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, &c. Breach: that the

defendants refused to accept the said goods or pay the plaintiff for them.

Plea: that the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex 'Peerless'" only mean that, if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C. B. It would be a question for the jury whether both parties meant the same ship called the "Peerless."] That would be so if the contract was for the sale of a ship called the "Peerless;" but it is for the sale of cotton on board a ship of that name. [POLLOCK, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that, if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." [MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (*Cohen* with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay, there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no *consensus ad idem*, and therefore no binding contract. [He was then stopped by the Court.]

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants

FALCK *v.* WILLIAMS.

IN THE PRIVY COUNCIL, ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES, DECEMBER 6, 9, 1899.

[*Reported in* [1900] *Appeal Cases*, 176.]

THE judgment of their Lordships was delivered by

LORD MACNAGHTEN. Mr. Falck, who was plaintiff in the action and is now the appellant, was a shipowner residing in Norway; Williams, the respondent, was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams.

Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the "Semiramis" that the difficulty arose which led to the present litigation.

Falck sued Williams for breach of a contract of affreightment to load the "Semiramis" with a cargo of copra in Fiji for delivery in the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith, and that the mistake was unintentional, whoever might be to blame for the misunderstanding.

The case came on for trial before OWEN, J., and a jury. A verdict was taken by consent for the defendant. The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the Full Court. The Full Court dismissed the action with costs.

The first question is, Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say that he misunderstood it? If that question be answered in the negative, all other questions become immaterial.

The negotiation in reference to the "Semiramis" began apparently on February 7, 1895, by a telegram from Williams to Buch. Williams offered to load the "Semiramis" with shale at Sydney Wharf for Barcelona "at freight per ton dead weight 27*s.*" Buch replied by telegram, dated February 9, asking 2250*l.* as a lump sum for freight. On February 12 Williams offered 27*s.* 6*d.* "per ton dead weight." On the 13th Buch offered to accept that sum on the ship's dead weight "capacity." By telegram on the 14th Williams explained that the rate offered was "per ton dead weight discharged." On the 15th Buch replied that the freight was to be payable "on guaranteed dead weight capacity," or to be a lump sum of 2100*l.*, adding a word interpreted to mean "Do your best to obtain our figures, vessel will not accept less."

Then, on the 16th, Williams asked what was the guaranteed dead weight capacity of the ship. The answer on the 17th was "1550" tons. On the 18th Williams telegraphed, "Shippers will not pay more than they have already offered at per ton dead weight discharged." He also offered in the same telegram to engage a vessel to load shale at Sydney for Liverpool, at freight per ton dead weight 23*s*.

Having had no reply to his telegram of the 18th, Williams, on the 21st, telegraphed to Buch, "Why do you not reply to our last telegraph? It is very important that we have immediate reply." And he went on to offer to engage a vessel to load copra at two ports in the Fiji Islands, deliverable in the United Kingdom, or some port on the Continent, at 47*s*. 6*d*. per ton cargo delivered.

Then we come to the disputed message. On February 22 Buch telegraphed as follows: "Shale Copyright Semiramis Begloom Estcorte Sultana Brilliant Argentina Bronchil." That message with the code words interpreted runs thus: "Shale. Your rate is too low, impossible to work business at your figures. Semiramis. Have closed in accordance with your order. — Confirm. Two ports Fiji Islands. Sultana. Brilliant. Argentina. Keep a good look-out for business for this vessel and wire us when anything good offers."

On the following day Williams telegraphed, "Semiramis, we confirm charter." And, in accordance with his reading of the telegram of February 22, he at once proceeded in the name and on behalf of Falck to charter the "Semiramis" to carry a cargo of shale from Sydney to Barcelona. So the controversy arose. And after mutual explanations or mutual recrimination the action was brought.

Now, it is impossible to contend that there was a contract in fact. Obviously the parties were not at one. Obviously the acceptance by Williams as he meant it to be understood had no connection with or reference to the proposal which Buch intended to make and thought he was making.

But then, said the learned counsel for the appellant, the message of February 22 was too plain to be misread. An intelligent child would have understood it. Business cannot go on if men of business are allowed to shelter themselves under such a plea. Their Lordships are unable to take that view of the disputed message. When the message was sent there were three matters under consideration. There was the Barcelona charter for the "Semiramis," there was the offer for a Liverpool charter, and there was the Fiji proposal. Of these the most important and the most pressing was the Barcelona charter. True, the negotiation was at a deadlock for the moment, but the parties were so nearly at one that it was only reasonable to expect that they would come to terms, and it is to be observed that during the negotiation, which seems to have been unusually protracted, the "Semiramis" was never once mentioned in connection with any other voyage. Whether the appellant's view or the respondent's view be correct, the telegram of February 22 seems to deal with all three points. The appellant says

that the first two words of the code message deal compendiously with both the Barcelona charter and the Liverpool proposal, and that the next three words deal with the "Semiramis," the last word of the three indicating clearly that she was to be sent to Fiji. The respondent says that the first two words refer to the Liverpool proposal, the second two to the Barcelona charter, and that the fifth word, "estcorte," is to be read with what follows. Indeed, the whole controversy when the matter is threshed out seems to be narrowed down to this question — "Is the word 'estcorte' to be read with what has gone before or with what follows? In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word "estcorte" before the word "begloom" instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this appeal must be dismissed. The appellant will pay the costs of the appeal.

NATHANIEL B. MANSFIELD *v.* BENJAMIN E. HODGDON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 23—JUNE 21, 1888.

[*Reported in* 147 *Massachusetts*, 304.]

HOLMES, J. This is a bill specifically to enforce a covenant to sell to the plaintiff "the farm situated in that part of Mount Desert Island called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon, but not by his wife. The defendant Clara E. Allen is a subsequent grantee of the premises, and the remaining defendant, William H. Allen, is her husband. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts. The

instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the thirty days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within ten days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract (see Warner *v.* Willington, 3 Drew. 523, 533), and perhaps whether it corresponded or not, as the message, even as testified to by Hodgdon, imported a willingness to correct mistakes.

The defendants take the ground that this deed did not correspond to the contract, because the deed included a mountain lot which is alleged not to be included in the land described by the contract. The question whether that lot is included in the contract is also important, of course, in deciding what land, if any, the defendant Allen should be required to convey. The words used must be construed in the light of the circumstances, and thus construed they might well have been found to import, and to have warranted the plaintiff in understanding that they imported, all the defendant Hodgdon's land in Mount Desert.

Hodgdon owned only three lots in Mount Desert. Two, of seventy and eighty acres respectively, are admitted to be embraced in the contract. The mountain lot, seemingly then regarded as of little or no value, and said to contain sixty acres, brings the total up to two hundred and ten acres. The contract was for between two hundred and sixty and two hundred and seventy acres. Hodgdon says that the plaintiff was introduced to him by a letter saying that he wished the refusal of the property down East for thirty days, evidently suggesting a bargain for the whole. The plaintiff testifies that, before signing, Hodgdon said that he had not so much land as was mentioned, but had so many acres in one lot, so many in another, and so many in a third, amounting in all to two hundred and fifteen acres, and that was all he owned; that the plaintiff said it did not make any difference whether it was two hundred and fifteen, or two hundred and sixty, or two hundred and seventy acres; and that thereupon Hodgdon signed. Hodgdon acquired all the land by one deed, had previously offered the whole land as two hundred and sixty acres to others, subsequently made a deed of the three lots to the plaintiff, which was not delivered, and conveyed them by a similar deed to the defendant Mrs. Allen.

It is suggested that Hodgdon understood that the plaintiff was to pay him $1,500 for the land, subject to a mortgage. But the agreement contains no such qualification, and must be construed as an agreement to convey a good title free from incumbrances, which there is evidence

tending to show was the meaning of the parties. Linton *v.* Hichborn, 126 Mass. 32. If, without the plaintiff's knowledge, Hodgdon did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts. Western Railroad *v.* Babcock, 6 Met. 346, 352; O'Donnell *v.* Clinton, 145 Mass. 461, 463.[1]

The plaintiff, although he signified his election to take the land within thirty days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract the plaintiff had a right to call upon Mr. Hodgdon to give a good title to the whole, but he was disposed to yield something. A discussion ensued, of course on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant Hodgdon had notice of the fact, and this was prolonged beyond the thirty days. When the parties came to terms, a new deed was prepared and tendered, was executed by the Hodgdons, and was handed to a Mr. Chapin, who had acted as a go-between. But later in the same day Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance.

Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her or her husband, and, although informed that the thirty days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Hodgdon might have trouble by reason of his refusal to convey to the plaintiff. Connihan *v.* Thompson, 111 Mass. 270; Hansard *v.* Hardy, 18 Ves. 455, 462. Mr. Allen was asked whether he knew that the plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's

[1] See also Baines *v.* Woodfall, 6 C. B. N. S. 657; Smith *v.* Hughes, L. R. 6 Q. B. 607; Ireland *v.* Livingston, L. R. 5 H. L. 395; Preston *v.* Luck, 27 Ch. D. 497; Van Praagh *v.* Everidge, [1902] 2 Ch. 266; Thompson *v.* Ray, 46 Ala. 224; Wood *v.* Duval, 100 Ia. 724; Lull *v.* Anamosa Nat. Bank, 110 Ia. 537; Wood *v.* Allen, 111 Ia. 97; Miller *v.* Lord, 11 Pick. 11; Stoddard *v.* Ham, 129 Mass. 383; Tallant *v.* Stedman, 176 Mass. 460, 466; Home F. I. Co. *v.* Bredehoft, 49 Neb. 152; Phillip *v.* Gallant, 62 N. Y. 256; Neufville *v.* Stuart, 1 Hill Eq. (S. C.) 159; J. A. Coates & Sons *v.* Buck, 93 Wis. 128. But see Green *v.* Bateman, 2 Woodb. & M. 359; Lamar Elevator Co. *v.* Craddock, 5 Col. App. 203; Hartford, &c. R. R. Co. *v.* Jackson, 24 Conn. 514; Rowland *v.* New York, &c. R. R. Co., 61 Conn. 103; Brant *v.* Gallup, 5 Ill. App. 262; Clay *v.* Rickets, 66 Ia. 362; Hogue *v.* Mackey, 44 Kan. 277; Frazer *v.* Small, 59 Hun, 619.

answer is not properly before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so. Connihan *v.* Thompson, *ubi supra.*

The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract. Carpenter *v.* Holcomb, 105 Mass. 280, 282; Ballou *v.* Billings, 136 Mass. 307; Gormley *v.* Kyle, 137 Mass. 189; Lowe *v.* Harwood, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. Galvin *v.* Collins, 128 Mass. 525, 527. *Decree affirmed.*[1]

F. S. Hesseltine, for the defendants.

G. Putnam and *J. Fox,* for the plaintiff.

FRED W. AYER *v.* WESTERN UNION TELEGRAPH COMPANY.

SUPREME JUDICIAL COURT OF MAINE, AUGUST 24, 1887.

[*Reported in* 79 *Maine,* 493.]

EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: —

"Will sell 800M. laths, delivered at your wharf, two ten net cash. July shipment. Answer quick."

The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: —

"Will sell 800M. laths delivered at your wharf two net cash. July shipment. Answer quick."

It will be seen that the important word "ten" in the statement of price was omitted.

[1] A portion of the opinion is omitted.

The Philadelphia party immediately returned by telegraph the following answer: —

"Accept your telegraphic offer on laths. Cannot increase price spruce."

Letters afterward passed between the parties which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at $2.00 per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for, or explain the mistake in the transmission of, the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. Bartlett *v.* Tel. Co., 62 Maine, 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims, it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds.[1]

II. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question, whether the message written by the sender and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard, that the negligence of the telegraph company, or any error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain

[1] The first ground was a stipulation printed on the telegraph blank, purporting to limit the liability of the company for unrepeated messages. A part of the opinion in which this defence was held invalid is omitted.

price, it would seem unjust that the telegraph company could bind him to sell at a less price by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In Durkee *v.* Vt. C. R. R. Co., 29 Vt. 137, it was held, that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In Saveland *v.* Green, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In Morgan *v.* People, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff, receiving such a telegram from the judgment creditor, was bound to follow it, as it read. There are dicta to the same effect, in Wilson *v.* M. & N. Ry. Co., 31 Minn. 481, and Howley *v.* Whipple, 48 N. H. 488.

Tel. Co. *v.* Schotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message, "Can deliver hundred turpentine at sixty-

four." As received from the telegraph company it read, "can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The Court held, however, that there was a complete contract at sixty — that the sender must fulfil it, and could recover his consequent loss of the telegraph company.

It follows, that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

Judgment for plaintiff for eighty dollars, with interest from the date of the writ.[1]

MARY ANN WILLIAMS *v.* WILLIAM CARWARDINE.

IN THE KING'S BENCH, APRIL 18, 1833.

[*Reported in* 4 *Barnewall & Adolphus*, 621.]

wrong

ASSUMPSIT to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to the discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Park, J., at the last Spring Assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a handbill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine, should, on conviction, receive a reward of

[1] Haubelt *v.* Rea & Page Mill Co., 77 Mo. App. 672, *acc.*; Henkel *v.* Pape, L. R. 6 Ex. 7; Verdin *v.* Robertson, 10 Ct. Sess. Cas. (3d series) 35; Postal Tel. Co. *v.* Schaefer (Ky.), 62 S. W. Rep. 1119; Pepper *v.* Telegraph Co., 87 Tenn. 554, *contra*.

The question has been disputed on the continent of Europe also. See Lyon-Caen et Renault, Traité de Droit Commercial, Vol. III. § 23.

20*l.*; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made, to William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer Assizes, 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23d of August, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the 20*l.* The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the 20*l.* was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of 20*l.* That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives. *Rule refused.*

GIBBONS *v.* PROCTOR.

IN THE QUEEN'S BENCH DIVISION, APRIL 22, 1891.

[*Reported in* 64 *Law Times, New Series,* 594.]

This case is wrong as it stands.

MOTION to set aside a nonsuit.

DAY, J. This action is brought to recover a reward, which the defendant advertised as payable to the person who should prosecute to conviction the perpetrator of a certain crime. The facts are simple. The defendant published on the 29th May a handbill, in which he stated that he would give 25*l.* to any person who should give information leading to the conviction of the offender in question, such information to be given to a superintendent of police of the name of Penn. The plaintiff is a police officer, and, in the early morning of the 29th May, the day on the afternoon of which the bill was published, communicated important information which led to the conviction of the offender to a comrade and fellow policeman called Coffin, telling Coffin, as his agent, to carry the information to the proper authority. Coffin, in accordance with the rules of the force, first informed his own superior officer, Inspector Lennan, and Lennan sent on the information to Superintendent Penn. Both Coffin and Lennan were the agents of the plaintiff to carry on a message set going by him, and it reached Penn at a time when he had notice that the person sending him such information was entitled to the reward of 25*l.* The condition was fulfilled after the publication of the handbill and the announcement therein contained of the defendant's offer of the reward to the informant.

LAWRENCE, J. I entirely agree.

Nonsuit set aside, and verdict entered for the plaintiff for 25l.[1]

JOHN VITTY, APPELLANT, *v.* THOMAS ELEY, TRUSTEE OF SCHOOL DISTRICT, NO. 16.

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, APRIL TERM, 1900.

[*Reported in* 51 *New York, Appellate Division,* 44.]

SPRING, J. The defendant is trustee of a school district in the town of Lockport. In January, 1899, the schoolhouse in this district was broken into by one Joe White, and a quantity of property stolen

[1] 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, *acc.* See also Drummond *v.* United States, 35 Ct. Claims, 356.

therefrom or destroyed. The trustee, probably by authority of the citizens of the district, although his authority is not in question, offered a reward of twenty-five dollars "for the arrest and conviction of the party or parties" who perpetrated the crime. The evidence shows that White and the plaintiff lived together and were cronies. White, after breaking into the schoolhouse in the night, returned to the plaintiff's house bringing with him chalk, flags, window catches, and other stuff which he had taken from the schoolhouse. He also had two chickens, evidently stolen, which were eaten in the household. The plaintiff saw White burn two of these flags and secrete the other stuff under a board of the floor. White told the plaintiff not to "say anything about this." The testimony, therefore, shows that the plaintiff knew that White had stolen this stuff. Later on, after the reward and with notice of it, he testified that he told the bartender in the saloon of Mahar & Byrnes that Joe White broke into the schoolhouse; that Peter Hayes, who was working up the case, was called in from the back room and the plaintiff then voluntarily told him what he had seen, incriminating White. Hayes contradicted the plaintiff and said he was called from the back room, and the following occurred: "I said, 'I want you to come up to the sheriff's office and make a statement as to what you know about breaking into this schoolhouse.' He says, 'I don't know anything about it; I was home in bed the night the schoolhouse was broken into.' I said, 'From what I hear, either you or Joe or both of you went into that schoolhouse.' He said, 'I didn't go in there.' I said, 'If you don't come up to the sheriff's office and tell what you know about it, I will swear out a warrant against you.' He said that if he told what he knew about it, he would have no place to stay. I said, 'I will find you a place to stay, come with me,' and we went to the courthouse and called the sheriff out. I said, 'This man will make a statement.' We went into a side room. He said about what he testified this forenoon." If his version of the transaction is correct, the plaintiff did not voluntarily give up the information with the expectation of obtaining the reward, but it was extorted from him through fear that he might be arrested himself for complicity with White.

There is considerable contrariety in the decisions as to the real basis of the right to a reward. It, however, seems to be settled in this State that it is in the nature of a contract inuring to the benefit of the person who gives the information. A few principles out of the conflicting cases I think may be stated, although there is no uniformity among them.

1. The information must be given with knowledge of the reward. Fitch *v.* Snedaker, 38 N. Y. 248; Howland *v.* Lounds, 51 id. 604.[1]

[1] 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,

I think the evidence warrants the conclusion that plaintiff knew of the reward, although that is a little shadowy, for apparently he could not read.

2. As I have suggested, it is a contract obligation. This being so, it must be the voluntary giving up of the information by the person. If cork-screwed out of him by threats inducing fear of prosecution, I take it no recovery could be had. That would destroy the contract element. In the early English case of Williams *v.* Carwardine (4 Barn. & Ald. 621) the question of the motive was held to be unimportant, but the text writers and American authorities do not seem to have followed this doctrine strictly, although I find no case in this State distinctly overruling it. That case cannot be good law if the liability is contractual, as assent and a voluntary surrender of the information would be essential.

3. The authorities hold that the information must be imparted with a view to obtaining the reward. 18 Encyc. of Pl. & Pr. 1155; Hewitt *v.* Anderson, 56 Cal. 476. And in Howland *v.* Lounds (*supra*) the court says, at page 609: "That a party claiming a reward of this character must give some information or do something having some reference of the reward offered, is very obvious. The action is, in fact, upon 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."

In the present case the plaintiff does not claim that there was any talk between him and Hayes to the effect that he expected the reward. The information given by the plaintiff was undoubtedly valuable, and even essential to secure the conviction of White. The justice, however, on conflicting evidence, or upon inferences properly deducible from the evidence, has decided adversely to the plaintiff. This decision implies that he reached the conclusion that the information was imparted through fear of arrest, or without any expectation of receiving the reward. The conclusion is supported by the proofs, and we are not inclined to interfere with the disposition of the case made by the justice.

The Judgment is affirmed, with costs to the respondent.

36 N. J. L. 490; Fitch *v.* Snedaker, 38 N. Y. 248; Stamper *v.* Temple, 6 Humph. 113, *acc.* See also City Bank *v.* Bangs, 2 Edw. Ch. 95; Brecknock School District *v.* Frankhouser, 58 Pa. 380.

JAMES WILLIAMS *v.* THE WEST CHICAGO STREET RAILWAY CO.

ILLINOIS SUPREME COURT, OCTOBER 24, 1901.

[*Reported in* 191 *Illinois*, 610.]

MR. JUSTICE HAND delivered the opinion of the Court: —

This is an action of assumpsit brought by the appellant, against the appellee, in the Circuit Court of Cook County, to recover a reward offered by the appellee for the arrest and conviction of the murderer or murderers of C. B. Birch, who was killed while in the service of the appellee, which, as published, was in the following terms: —

"$5,000 Reward.

"OFFICE WEST CHICAGO STREET RAILROAD CO.,
"June 24, 1895.

"The above reward will be paid by the West Chicago Street Railroad Company for the arrest and conviction of the murderer or murderers of C. B. Birch, who was fatally shot while in discharge of his duty as receiver, on the morning of June 23, at the Armitage Avenue barn.

"CHARLES T. YERKES, *Pres't.*"

At the close of all the evidence the Court directed the jury to find the issues for the defendant, which was accordingly done, and a judgment having been rendered on said verdict, which judgment has been affirmed by the Appellate Court for the First District, a further appeal has been prosecuted to this Court.

At about two o'clock on Sunday morning, June 23, 1895, Birch, whose duty it was to receive the money brought in by the conductors, was fatally shot at the barn of appellee located at Armitage Avenue, in the city of Chicago. The appellant, who was also an employee of the appellee, and whose duty consisted of going from barn to barn each night to inspect the cash registers, was in the barn from midnight until two o'clock in the morning, and left just before the killing of Birch. As he drove away in his buggy he noticed two men coming across the street toward the barn. They looked sharply at him and he looked at them. On Monday morning, June 24, the appellant went to the appellee's office, where he met its general superintendent, who inquired of him if he saw any men near the barn as he drove away. Appellant told him that he had seen two men and that he thought he could identify them, whereupon the superintendent gave him a note and told him to go and see Captain Larson of the police force. He called upon Captain Larson that afternoon, told him what he had seen and gave him a description of the two men, whereupon the officer said that he had a man in custody at that time who he thought answered the description of one of the men described by him. The man, whose name was Julius Mannow, was brought up

and was identified by the apellant as one of the men he had seen near the barn as he drove away. Captain Larson told him to come to the station the next day, and in the meantime he would hunt up and have arrested the other man he had described. The murder of Birch led the police authorities to at once issue what was termed a "drag-net order," — that is, an order to the various patrolmen to arrest all suspicious characters in their respective districts and bring them in for examination as to their whereabouts at the time of the commission of the crime. Mannow was thus arrested and brought to the station. A police officer named Jurs testified upon the trial of this cause that about two months before the time of the murder Mannow had narrated to him a plan for the robbing of a coal office in the manner in which the Armitage Avenue robbery was accomplished, and had described Joseph Windrath as concerned in the plan, and that after the Armitage Avenue robbery and the murder of Birch the witness at once recalled this fact and suspected Mannow and Windrath and took steps to cause their arrest. This was before the information was given by the appellant. On Tuesday morning, the 25th day of June, the appellant for the first time learned of the offered reward by reading the same as published in the "Chicago Tribune." Afterwards, on that day, he went again to the police station and identified Windrath, who had been arrested in the meantime, as the man he had seen in company with Mannow near the barn just before the killing. The services rendered by the appellant in connection with the arrest and conviction of Mannow and Windrath after he knew of the offered reward, consisted in his identification of Windrath, and his testifying before the coroner's jury, the grand jury, and upon the trial in the criminal court, that he had seen Mannow and Windrath together near the Armitage Avenue barn on the night and near the time of the commission of the crime. Other information was obtained by the police authorities shortly after the identification of Mannow and Windrath which fastened the crime upon the two men. Mannow pleaded guilty and Windrath was tried and convicted. The offered reward was paid by the appellee to another claimant.

The offer of a reward remains conditional until it is accepted by the performance of the service, and one who offers a reward has the right to prescribe whatever terms he may see fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Thus, if the reward is offered for the arrest and conviction of a criminal, or for his arrest and the recovery of the money stolen, both the arrest and conviction or arrest and recovery of the money are conditions precedent to the recovery of the reward; and when the offer is for the delivery of a fugitive at a certain place the reward cannot be earned by the delivery of him at another place, and an offer for a capture of two is not acted upon by the capture of one. The reward cannot be apportioned. The offer is an entirety, and as such must be enforced, or not at all. 21 Am. & Eng. Ency.

of Law, 1st ed., 391–397; Hogan *v.* Stophlet, 179 Ill. 150; Furman *v.* Parke, 21 N. J. L. 310; Fitch *v.* Snedaker, 38 N. Y. 248; Juniata County *v.* McDonald, 122 Pa. St. 115; Shuey *v.* United States, 92 U. S. 73.

In Hogan *v.* Stophlet, *supra*, which was an action for the recovery of a reward offered for the "apprehension and conviction of a criminal," this Court said (p. 153): "The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was offered, not for the conviction alone, but for the apprehension *and* conviction of the guilty party. Appellant is entitled to recover for both or he cannot recover at all. The reward cannot be apportioned, — that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety, or not at all."

In Furman *v.* Parke, *supra*, the reward was "for the apprehension and conviction of such person or persons as may have been implicated in the murder of John B. Parke, John Castner, Maria Castner and child." The Court say: "The reward is to be paid for the apprehension and conviction, not of one of several persons implicated, but of the person (if one) or the persons (if more than one) who were implicated, not in the murder of John B. Parke alone, but of John B. Parke and three other persons. . . . The person, therefore, to be entitled to the reward, must aver and prove that the person or persons implicated in each of the four murders has or have been apprehended and convicted."

In Fitch *v.* Snedaker, 38 N. Y. 248, the offer was "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder," etc. It appeared that the claimant gave evidence which led to the conviction of the offender but did nothing towards securing his discovery or arrest, and it was held that he was not entitled to the reward. The Court said (p. 250): "It is entirely clear that in order to entitle any person to the reward offered in this case he must give such information as shall lead to both apprehension and conviction, — that is, both must happen, and happen as a consequence of information given. No person could claim a reward whose information caused the apprehension, until conviction followed. Both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that had the information been concealed or suppressed there could have been no conviction. This is according to the plain terms of the offer of the reward."

In Juniata County *v.* McDonald, *supra*, the reward was for the capture and delivery of a criminal to the jail, and a person who furnished information from which the capture resulted, but who did

not deliver the prisoner or cause him to be delivered, was held not to be entitled to the reward. The Court said: "A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his capture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse, yet on that officer fell the duty of arrest and the plaintiff was relieved of all responsibility."

And in Shuey *v.* United States, *supra*, which was a suit for a reward offered by the Secretary of War "for the apprehension of John H. Surratt, one of Booth's accomplices," it was held that one who had made disclosures to which were due the discovery and arrest of Surratt was not entitled to the reward for his apprehension. The Court say: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest — persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were."

Under the authorities above cited the appellant cannot recover unless the evidence shows he caused the arrest and conviction of both Mannow and Windrath. He did neither. At most he furnished some information to the police which led to the arrest of Windrath, and identified both men as having been in the vicinity of the barn at the time of the commission of the crime, which does not bring him within the terms of the offered reward, which was for "the arrest and conviction of the murderer or murderers of C. B. Birch."

We are of the opinion that the appellant is not entitled to recover in this case for the further reason that the services performed by him were substantially all rendered before the reward was offered or at a time when he was ignorant of the fact that a reward had been offered. After the appellant had informed the superintendent of appellee and the captain of police that he had seen Mannow and his companion near the scene of the murder at about the time the same was committed, he did nothing towards securing the conviction of the prisoners other than what he could have been required to do as a witness. The reward was not offered for information which was already in the possession of the officers nor for witnesses who would come forward and testify to facts which were then known to be within their knowledge, but for the arrest and conviction of the murderer or murderers. The right to recover a reward arises out of the contractual relation

which exists between the person offering the reward and the claimant, which is implied by law by reason of the offer on the one hand and the performance of the service on the other, the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such service, and no such promise can be implied unless he knew at the time of the performance of the service that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the service specified in such offer. Fitch *v.* Snedaker, *supra;* Howlands *v.* Lounds, 51 N. Y. 604; Stamper *v.* Temple, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296.

In Stamper *v.* Temple, *supra*, which was an action to recover the amount of a reward, the Court say: "To make a good contract there must be an *aggregatio mentium*, — an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?"

In Fitch *v.* Snedaker, *supra*, on the trial several questions were asked of the plaintiff, who was a witness in his own behalf, relative to the person to whom he gave information in relation to the murder before the reward was offered or before he heard of it. The Court sustained objections thereto and excluded the evidence. The ruling of the trial court in this regard on appeal was held to be correct, and the Court on page 251 say: "The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties? To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. . . . Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard? . . . The offer could only operate upon plaintiffs after they heard of it."

And in Howlands *v.* Lounds, *supra*, the Court say (p. 605): "In order to entitle a party to recover a reward offered, he must establish between himself and the person offering the reward, not only the offer and his acceptance of it, but his performance of the services for which the reward was offered; and upon principle, as well as upon authority, the performance of this service by one who did not know of the offer and could not have acted in reference to it cannot recover."

We are of the opinion the appellant failed to make out a cause of action, and that the trial court, for the reasons above suggested, properly directed a verdict for the appellee. The judgment of the Appellate Court will therefore be affirmed. *Judgment affirmed.*

OFFORD *v.* DAVIES AND ANOTHER.

IN THE COMMON PLEAS, JUNE 2, 1862.

[*Reported in* 12 *Common Bench Reports, New Series,* 748.]

THIS was an action upon a guaranty. The first count of the declaration stated, that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following, that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of 600*l.* And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys." Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, &c.; yet that the defendants broke their said promise, and did not pay to the plaintiff, or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys, if the said bills had been duly paid at maturity.

Fourth plea, to the first count, — so far as the same relates to the

sums payable by the defendants in respect of the sums of money payable by the said bills of exchange, and the said sums so advanced, — that, after the making of the said guaranty, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guaranty, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred; the ground of demurrer stated in the margin being "that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guaranty [for a definite period] has no power to countermand it without the assent of the person to whom it is given." Joinder.

Prentice (with whom was *Brandt*), in support of the demurrer. A guaranty like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received?] For any thing disclosed by the plea, the plaintiff might have altered his position in consequence of the guaranty, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. In Calvert *v.* Gordon, 1 M. & R. 497, 7 B. & C. 809, 3 M. & R. 124, it was held that the obligor of a bond conditioned for the faithful service of A. whilst in the employ of B. cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such a notice.[1] Lord Tenterden, in giving judgment in that case, says (3 M. & R. 128): "The only question raised by the defendant's second plea is, whether it is competent to the surety to put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship on the surety if this liability must necessarily continue during the whole time that the principal remains in his service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time, after notice given. This he has not done." Here, the defendants *have* stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [BYLES, J. Suppose a man gives an open guaranty, with a stipulation that he will not withdraw it, — what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract. Hassell *v.* Long, 2 M. & Selw. 363, is an authority to the same effect as Calvert *v.* Gordon.

[1] And see Gordon *v.* Calvert, 2 Sim. 253, 4 Russ. 581, where an injunction to restrain proceedings at law upon the bond was dissolved.

E. James, Q. C. (with whom was *T. Jones*), contra. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. This is more like the *mandatum pecuniæ credendæ* treated of by Pothier — on Obligations, Part II. c. 6, § 8, art. 1. If so, it is subject to all incidents of a mandate or authority. [WILLES, J. *Mandatum* does not mean a bare authority which may be revoked.] . . . A mutual agreement to rescind can only be necessary where there is a mutual contract. But, in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co., of Newtown, had become notoriously insolvent, would the defendants continue bound by their guaranty, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J. 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?] Not after the coach-builder has commenced the carriage. [ERLE, C. J. 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.] In an American work of considerable authority, Parsons on Contracts, p. 517, it is said, "A promise of guaranty is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and, after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract, enforceable at law, to deliver the residue." Brocklebank *v.* Moore, cor. Abbott, C. J., Guildhall Sittings after Trinity Term, 1823, referred to in 2 Stark. Evid., 3d edit. 510, n., is a direct authority that "a continuing guaranty is countermandable by parol." And the same principle is clearly deducible from Mason *v.* Pritchard, 12 East, 227. [WILLIAMS, J. That would have been applicable, if this had been a guaranty for 600*l.*, with no mention of the twelve calendar months.] The mention of twelve months would not compel the plaintiff to go on discounting for that period. In Holland *v.* Teed, 7 Hare, 50, under a guaranty given to a banking-house

consisting of several partners, for the repayment of such bills drawn upon them by one of their customers as the bank might honor, and any advances they might make to the same customer, within a certain time, it was held that the guaranty ceased upon the death of one of the partners in the bank before the expiration of the time to which the guaranty was expressed to extend; that bills accepted before the death of the partner, and payable afterwards, were within the guaranty; and that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act. [BYLES, J. The case of a change in the firm is now provided for by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, § 4. ERLE, C. J. What meaning do you attribute to the words "at our request" in this guaranty?] As and when we request. The notice operated a retractation of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

Brandt, in reply. The Court of Exchequer have decided in this term, in a case of Bradbury *v.* Morgan,[1] that the death of the surety does not operate a revocation of a continuing guaranty. If that be so, it is plain that the guaranty is not a mere *mandatum*, but a contract. In Gordon *v.* Calvert, 2 Sim. 253, 4 Russ. 581, the executrix of the deceased surety gave notice to Calvert & Co., the obligees, that she would no longer consider herself liable on the bond; but the Vice-Chancellor (Sir L. Shadwell) said, that, "by the original contract, the liability of the surety was to continue as long as Calvert & Co. kept Richard Edwards, or he chose to remain in their service; that after Calvert & Co. had received the plaintiff's letter they never gave her any intimation that they did not consider her as continuing liable under her husband's bond; that their conduct did not operate in any manner upon her; and that therefore the injunction ought to be dissolved." That shows that, in the opinion of that learned Judge, the assent of the three persons concerned and interested in the bargain would be requisite to its dissolution. The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. [*T. Jones.* The fact undoubtedly is so.]

Cur. adv. vult.

[1] Since reported, 31 Law J. Exch. 462; [1 H. & C. 249]. There the guaranty was in the following terms: "Messrs. Bradbury & Co., — I request you will give credit in the usual way of your business to H. L.; and, in consideration of your doing so, I do hereby engage to guarantee the regular payment of the running balance of his account with you, *until I give you notice to the contrary*, to the extent of 100*l.*;" and it was held, that the liability was not determined by the death of the surety, but that his executors were liable to Bradbury & Co. for goods sold and credit given to H. L. subsequently to the surety's death, — on the ground (contrary to the doctrine laid down in Smith's Mercantile Law, 4th edit. 425, 6th edit. 477, and adopted in Williams on Executors, 5th edit. 1604) that the guaranty was a *contract* to be answerable to the extent stipulated for credit given to the principal debtor, until the creditors should receive a notice to put an end to it. — REP.

ERLE, C. J., now delivered the judgment of the Court.

The declaration alleged a contract by the defendants, in consideration that the plaintiff would, at the request of the defendants, discount bills for Davies & Co., not exceeding 600*l.*, the defendants promised to guarantee the repayment of such discounts *for twelve months*, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raised the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that, consequently, the plea is good.

This promise by itself creates no obligation.[1] It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guaranty for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that the same discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

[1] "A great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guaranty falls under that class; when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it." Parke, B., Kenneway *v.* Treleavan, 5 M. & W. 498, 501. "Suppose I say, if you will furnish goods to a third person, I will guarantee the payment: there you are not bound to furnish them; yet if you do furnish them in pursuance of the contract, you may sue me on my guaranty." Patteson, J., Morton *v.* Burn, 7 Ad. & El. 19, 23.

CHARLES A. BISHOP *v.* FRANK H. EATON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 13–JUNE 19, 1894.

[*Reported in* 161 *Massachusetts*, 496.]

CONTRACT, on a guaranty. Writ dated February 2, 1892. Trial in the Superior Court without a jury, before BRALEY, J., who found the following facts.

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22, 1891.

The judge ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.[1]

F. G. Cook, for the defendant.

R. W. Light, for the plaintiff.

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained

[1] The defendant's requests for rulings are omitted.

in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other persons as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It 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. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes

the consideration. Babcock *v.* Bryant, 12 Pick. 133; Whiting *v.* Stacy, 15 Gray, 270; Schlessinger *v.* Dickinson, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The Judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defence that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in Vinal *v.* Richardson, 13 Allen, 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from

his liability, unless he subsequently assented to the extension and ratified it. Chace *v.* Brooks, 5 Cush. 43; Carkin *v.* Savory, 14 Gray, 528. The Court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.[1]

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good law. Very important.

DUNLOP *v.* HIGGINS.

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 24, 1848.

DUNLOP AND OTHERS, *Appellants.*
VINCENT HIGGINS AND OTHERS, *Respondents.*

[*Reported in* 1 *House of Lords Cases*, 381.]

THIS was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You say 65*s.* net, for 2000 tons pigs. Does this mean for our usual four-months' bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65*s.* net, and not a four-months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock P. M. on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of *yesterday*, but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of

[1] The authorities upon the question whether notice of acceptance is necessary to the formation of a contract of guaranty are fully collected in Ames's Cases on Suretyship, 225, note 2. The different reasons given in the decisions, holding notice necessary, are considered, *ibid.* 230, 231 and notes. See also Parsons on Contracts, Vol. II. 13, note 1.

the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P. M. on that day. A letter so despatched would be due in Glasgow at two o'clock P. M. on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock A. M., and letters to be despatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock P. M. of Saturday, the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.[1]

Mr. *Bethell* and Mr. *Anderson*, for the appellants.

Mr. *Stuart Wortley* and Mr. *Hugh Hill*, for the respondents, were not called on.

The Lord Chancellor.[2] The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of January. A proposition had been made by the Glasgow house of Dunlop, Wilson, & Co., to sell 2,000 tons of pig-iron. The answer is of that date of the 31st of January: "Gentlemen, we will take the 2,000 tons, pigs,

[1] The statement of the proceedings in the lower courts have been omitted.

[2] Lord Cottenham. Portions of the opinion are omitted.

you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2,000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

The first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders being admitted to be dated on the 31st of January, and received in Glasgow by the mail which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of January was written and despatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3d of February) of any such accident having occurred."

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade,

an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance — the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed — it is a very frequent occurrence — that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible.

My Lords, the case of Stocken *v.* Collin[1] is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says, "It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it

[1] 7 Meeson & Welsby, 515.

would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of Adams *v.* Lindsell. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "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."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject, and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

It was ordered that the interlocutor complained of should be affirmed with costs.

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) *v.* GRANT.

IN THE EXCHEQUER DIVISION, COURT OF APPEAL, JULY 1, 1879.

[*Reported in* 4 *Exchequer Division*, 216.]

ACTION to recover £94 15*s.*, being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares, dated the 30th of September, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiffs' company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1*s.* per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favor of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.*, was also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury: 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative, and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs, on the authority of Dunlop *v.* Higgins, 1 H. L. C. 381.

The defendant appealed.

Finlay and *Dillwyn* for the defendant.

Wilberforce and *G. Arbuthnot* (*W. G. Harrison*, Q. C., with them), for the plaintiffs.

THESIGER, L. J.[1] In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is Dunlop *v.* Higgins, 1 H. L. C. 381. . . . But if Dunlop *v.* Higgins, 1 H. L. C. 381, were out of the way, Harris's Case, Law Rep. 7 Ch. 587, would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of Adams *v.* Lindsell, 1 B. & A. 681, which is recognized authority upon this branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in Hebb's case, Law Rep. 4 Eq. at p. 12, when in the course of his judgment he said: "Dunlop *v.* Higgins, 1 H. L. C. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post office is the common agent of both parties." Alderson, B., also, in Stocken *v.* Collin, 7 M. & W. at p. 516, a case of notice of dishonor, and the case referred to by Lord

[1] A portion of the opinion which discusses the effect of Dunlop *v.* Higgins is omitted. The concurring opinion of Baggallay, L. J., is also omitted.

Cottenham, says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, — a principle which has been distinctly negatived? This difficulty was attempted to be got over in the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108, which was a case directly on all fours with the present, and in which Kelly, C. B., is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is Potter *v.* Sanders, 6 Hare, 1. And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares; or, to put the question in the form in which it is put by Mellish, L. J., in Harris's case, Law Rep. 586, at p. 596, how there can be any relation back in a case of this kind, as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in Harris's case, Law Rep. 586, at p. 596, as well as in Dunlop *v.* Higgins, 1 H. L. C. 381, can really not be reconciled with the decision in the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108. James, L. J., in the passage I have already quoted, affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers, with approval, to Hebb's case, Law Rep. 4 Eq. 9. There a distinction was taken by the Master of the Rolls, that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent they had sent it through the post office, the applicant would have been bound, although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favor of this'

view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108, that although a contract is complete when the letter accepting an 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, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says, is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in Brogden *v.* Directors of Metropolitan Ry. Co., 2 App. Cas. 666, 691, "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer; and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me,

applying with slight alterations the language of the Supreme Court of the United States in Tayloe *v.* Merchants' Fire Insurance Co., 9 Howard S. Ct. Rep. 390, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right, and should be affirmed, and that this appeal should therefore be dismissed.

BRAMWELL, L. J. The question in this case is not whether the post office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner, and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case: —

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract, that there should be a communication of that acceptance to the proposer. Per Brian, C. J., and Lord Blackburn, Brogden *v.* Metropolitan Ry. Co., 2 App. Cas. at p. 592.

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, *i. e.* is by letter or message, as a rule it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode; and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the

defendant, if bound, must be bound by some general rule which makes a difference when the post office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, *e. g.* notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by check or bank-note, and posts a letter containing a check or bank-note to his tailor, which never reaches; is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and bank-notes to his banker by post, and posts a letter containing checks and bank-notes which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication; that those who affirm the contrary say the thing which is not; that if Brian, C. J., had had to adjudicate on the case, he would deliver the same judgment as that reported; that because a man who may send a communication by post or otherwise sends it by post, he should bind the person addressed though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it. It is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence. Suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed; could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is relied on is it really meant that that makes a

difference? If it should be said let the offerer wait, the answer is, maybe he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid; is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party? It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post; not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would [not], — that a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. Suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said: "Unless I hear from you by return of post the offer is withdrawn," the letter accepting it must reach him to bind him. There is indeed a case recently reported in the "Times," before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn," makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post, etc.," it is necessary the

letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words? Lord Blackburn says that Mellish, L. J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on, — as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in existence before the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108. But I wish to say a word as to Dunlop *v.* Higgins, 1 H. L. C. 381; the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court, has satisfied me that Dunlop *v.* Higgins, 1 H. L. C. 381, decided nothing contrary to the defendant in this case. Mellish, L. J., in Harris's case, Law Rep. 7 Ch. 596, says; "That case is not a direct decision on the point before us." It is true, he adds that he has great difficulty in reconciling the case of the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108, with Dunlop *v.* Higgins, 1 H. L. C. 381. I do not share that difficulty. I think they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So when a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out, in Harris's case, Law Rep. 7 Ch. 596, might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in Dunlop *v.* Higgins, 1 H. L. C. 381, was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the British and American Telegraph Co. *v.* Colson, Law Rep. 6 Ex. 108. Since the last case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had, in Harris's case, Law Rep. 7 Ch. 596, thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Lopes, J., in the present case. He says the proposer may guard himself against

hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous conseqnences he points out do not follow from that which I am contending for. I am at a loss to see how the post office is the agent for both parties. What is the agency as to the sender, — merely to receive? But suppose it is not an answer, but an original communication; what then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post office then? But how does an offerer make the post office his agent, because he gives the offeree an option of using that or any other means of communication?

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares; that to make such bargain there should have been an acceptance of the defendant's offer, and a communication to him of that acceptance; that there was no such communication; that posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post office. The difficulty has arisen from a mistake as to what was decided in Dunlop *v.* Higgins, 1 H. L. C. 381, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences; and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C. J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, *i. e.* must reach him.

Judgment affirmed.[1]

[1] Adams *v.* Lindsell, 1 B. & Ald. 681; Potter *v.* Sanders, 6 Hare, 1; Dunlop *v.* Higgins, 1 H. L. C. 381; Duncan *v.* Topham, 8 C. B. 225; Hebb's Case, L. R. 4 Eq. 9; Harris's Case, L. R. 7 Ch. 589; Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Brogden *v.* Metropolitan Ry. Co., 2 App. Cas. 666; McGiverin *v.* James, 33 U. C. Q. B. 203; 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.

HENTHORN *v.* FRASER.

IN THE CHANCERY DIVISION, COURT OF APPEAL, MARCH, 3, 26, 1892.

[*Reported in* [1892] 2 *Chancery*, 27.]

IN 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the

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, *acc.* The only contrary decision not overruled seems to be McCulloch *v.* Eagle Ins. Co., 1 Pick. 278. The letter must, however, 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.

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 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. By the United States Postal Laws, §§ 531, 533, the sender of a letter may regain it by complying with required formalities. 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 said: "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."

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. Stevenson *v.* McLean, 5 Q. B. D. 346; Cowan *v.* O'Connor, 20 Q. B. D. 640; 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.

The question when a contract by mail or telegraph is completed has been much disputed in the civil law, and there are four or five theories each of which has adherents. See Valéry, Contrats par Correspondance, § 130 *seq.*; Windscheid, Pandektenrecht, II. § 306.

property, which offer was declined by the directors; and on the 1st of July he made in the same way an offer of £700, which was also declined. On the 7th of July he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows: —

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter: —

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled."

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening; but, as he was out, did not reach his hands till about 8 o'clock.

On the same 8th of July the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows: —

"I am instructed by Mr. James Henthorn to write to you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in Birkenhead at 3.30 P. M., was delivered at 8.30 P. M. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the plaintiff appealed.

Farwell, Q. C., and *T. R. Hughes*, for the appeal.

Neville, Q. C., and *P. O. Lawrence*, for the defendant: —

We insist that the Vice-Chancellor has drawn a correct inference, — that there was no authority to accept by post; and if that be so, the acceptance will not date from the posting. Dunlop *v.* Higgins, 1 H. L. C. 381, went on the ground that it was the understanding of both parties that an answer should be sent by post. In Brogden *v.* Metropolitan Railway Company, Lord Blackburn puts it on the ground "that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted." It would be very inconvenient to hold the post admissible in all cases. Here, Liverpool and Birkenhead are at such a short distance from each other that it cannot be considered that the

plaintiff had an authority to reply by post. If the offer had been sent by post that would, no doubt, be held to give an authority to reply by post; but the offer was delivered by hand to the plaintiff, who was in the habit of calling at the defendant's office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited; the acceptance may be sent in any way; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the plaintiff had gone to the office and retracted it, surely he would have been free.

[LORD HERSCHELL. — It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the date from which an acceptance which has been received is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More evidence of authority to accept by post may be required in the latter case than in the former.]

Dickinson *v.* Dodds, 2 Ch. D. 463, shows that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

[LORD HERSCHELL. — In that case the person to whom the offer was made knew of the sale before he sent his acceptance.]

Farwell, in reply.

1892, March 26. LORD HERSCHELL.[1] If the acceptance by the plaintiff of the defendant's offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that 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. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of Adams *v.* Lindsell, 1 B. & Al. 681, which was approved by the Lord Chancellor in Dunlop *v.* Higgins, 1 H. L. C. 381, 399, and also with the opinion of Lord Justice Mellish in Harris's case, Law Rep. 7 Ch. 587. The very point was decided in the case of Byrne *v.* Van Tienhoven, 5 C. P. D. 344, by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them, and not on the letter being posted. It cannot, of course, be denied, after the decision in Dunlop *v.* Higgins, 1 H. L. C. 381, in the House of Lords, that, where an offer has been made through the medium of the

[1] Lord Herschell's restatement of the case is omitted. The concurring opinions of Lindley, L. J., and Kay, L. J., are also omitted.

post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendant's office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the Household Fire and Carriage Accident Insurance Company *v.* Grant, 4 Ex. D. 216, Lord Justice Baggallay said (ibid. 227): "I think that the principle established in Dunlop *v.* Higgins is limited in its application 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 authorized." And in the same case Lord Justice Thesiger based his judgment, 4 Ex. D. 218, on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete

as soon as it is posted.[1] It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of Dickinson *v.* Dodds, 2 Ch. D. 463, was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed, and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

IN RE LONDON AND NORTHERN BANK. EX PARTE JONES.

IN THE CHANCERY DIVISION, NOVEMBER 15–17, 1899.

[*Reported in* [1900] 1 *Chancery*, 220.]

COZENS-HARDY, J. On October 15, 1898, Dr. Jones, who resides at Sheffield, applied for 1000 ordinary shares of 10*l.* each in the company, upon which he paid a deposit of 500*l.*, being 10*s.* per share. His letter of application, with cheque enclosed, was received in due course by the company. On October 26 Dr. Jones wrote from Sheffield a letter withdrawing his application and asking for a return of his 500*l.* This letter of withdrawal was sent as a registered letter. It was delivered at the office of the company at about 8.30 on the morning of October 27 before the arrival of the secretary. On the afternoon of October 26 a board meeting of the company was held, at which it was resolved to allot 1000 shares to Dr. Jones. An allotment letter addressed to Dr. Jones, dated October 26, was delivered in Sheffield at about 7.30 in the evening of October 27. Dr. Jones now applies to have his name removed from the register in respect of the 1000 shares, and for a return of his deposit, on the ground that his application was withdrawn before notice of acceptance.

The company alleges that, although the notice of allotment did not reach Dr. Jones until the evening of the 27th, it was posted at or about 7.30 on the morning of the 26th, and therefore before the letter of withdrawal arrived. It is settled law that an offer is to be deemed accepted when the letter of acceptance is posted, the reason being that the post-office is considered the common agent of both parties. Harris's Case (1872), L. R. 7 Ch. 587. Hence, no delay on the part of the

[1] In Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, an offer made in Boston in conversation was to "stand until the next day." The plaintiff telegraphed an acceptance from Providence. It was held that the contract was completed in Rhode Island. "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial." See also Wilcox *v.* Cline, 70 Mich. 517.

post-office in delivering the letter will be material. The withdrawal, in order to be effectual, must be before the offer is clinched by the posting of the letter of acceptance. The question I have to decide is this: Was the letter of allotment posted before the letter withdrawing the offer was received by the company? Now, the envelope containing the letter of allotment is produced. It bears a stamp impressed with the words "11 A. M., 27 Oct., '98," with the figures "44" below. It has been proved that this stamp indicates that the letter was not posted at the general post-office at all, but was deposited at one of the district post-offices in London, from which letters are collected and taken to the general post-office. The letters thus collected are placed upon a separate bench or table, and this particular stamp is impressed on them. No work is done at this table until after 9.15. Letters posted at the general post-office are dealt with at a different table and are impressed with a different stamp. If the letter had been posted at 7.30 at the general post-office, it would have been forwarded by the 10 o'clock train to Sheffield and have been delivered before 7.30. It was in fact sent down in the ordinary course by a train at or about 12 o'clock, and was delivered in due course at 7.30.

This evidence raises a strong presumption in favor of the applicant. The company seeks to rebut this presumption, and the result of the evidence on its behalf is as follows: Mr. Claxton, who was employed by the promoters with a staff of about ten clerks, was engaged from shortly after the end of the board meeting on the afternoon of the 26th throughout the whole night in preparing from the allotment sheets the letters of allotment. Their task ended at about 7 in the morning, when Mr. Claxton and one of his clerks took the letters, which were fastened in bundles of fifty, in a cab to St. Martin's-le-Grand. They got out of the cab, and, seeing a porter in livery outside the building, had some conversation with him, in the course of which a postman came by and offered to take the letters. They gave him sixpence or a shilling for his trouble. He went into St. Martin's-le-Grand, came back, and said it was "all right." Mr. Claxton was not, in some respects, a satisfactory witness, but for the purposes of my judgment I assume that the letter of allotment to Dr. Jones was among those taken to St. Martin's-le-Grand and thus dealt with.

It was contended that this was a posting of the letter at St. Martin's-le-Grand. It seems to me, however, that the postman was not an agent of the post-office to receive the letters. The *Postal Guide*, at p. 47, expressly states that town postmen are not allowed to take charge of letters for the post. Mr. Anderson, the witness from the post-office, stated that any man would be reported if discovered to have done any such thing. I cannot, therefore, regard the postman as anything better than a boy messenger employed by Claxton to post the letters, and the mere fact of handing the letter to the postman outside St. Martin's-le-Grand was not a posting of the letter.

It is further urged that directly the postman entered St. Martin's-le-Grand the letter thereupon came into the lawful custody of the post-

office, and was posted, without reference to what the postman did with it. I am, however, unable to follow this view. It is not possible for me to ascertain precisely what was done with the letters by the unknown postman. He may have left them at a table or in a bag until some later hour. He may have taken them to a branch office. All I know is that it was not until a much later hour that they were found on the table appropriated to branch office letters. However that may be, I think that the company has failed to prove that the letter, which did not leave the post-office until about 11 o'clock, was posted before 8.30, or before 9.30, at which hour the secretary arrived and opened the letter of withdrawal.

As to the point that the notice of withdrawal did not reach the company when it was opened by the secretary, I think there is no foundation for the suggestion. The secretary is the man whose duty it was to receive and open letters of that nature. The result is that I think the withdrawal was in time, and I must therefore make an order removing the name of Dr. Jones from the register in respect of the 1000 shares; and I must order the return of the deposit, with interest at 4 per cent. The company must pay the costs of the motion.[1]

HELEN C. LEWIS *v.* MATTHEW P. BROWNING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 11, 1880—JANUARY 6, 1881.

[*Reported in* 130 *Massachusetts*, 173.]

CONTRACT for breach of the covenants of a written lease of a tenement in Boston. Trial in the Superior Court, without a jury, before Rockwell, J., who allowed a bill of exceptions in substance as follows:

The defendant admitted that there had been a breach of the conditions of the lease, and agreed that judgment might be entered for the plaintiff in the sum $2,168.22, unless the facts herein stated constituted a defence to this action.

The judge found that the defendant, who was a resident of New York in the year 1868, was, during the summer of that year, temporarily residing and practising his profession as a physician at Cape May, in the State of New Jersey, and that the plaintiff and her husband, Dr. Dio Lewis, residents of Boston at that time, were temporarily residing at Oakland, in the State of California; that, on June 10, 1878, Lewis,

[1] "It is clear that when the plaintiff in pursuance of defendant's request, deposited the duplicate of the contract signed by her, with her address, in the United States street mailing-box, the agreement by that act became complete." Watson *v.* Russell, 149 N. Y. 388, 391. See also Wood *v.* Calnan, 61 Mich. 402, 411; Greenwich Bank *v.* De Groot, 7 Hun, 210, *acc.* In Pearce *v.* Langfit, 101 Pa. 507, 511, the Court said: "It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier. . . . The postal regulations of the United States require that carriers while on their rounds shall receive all letters prepaid that may be handed them for mailing."

who was and still is the authorized agent of his wife, the plaintiff, wrote the defendant a letter, which was received by him, in which he requested the defendant to make him an offer for a new lease of said premises. The defendant replied, making such offer, by letter dated June 22, 1878. In this letter the defendant gave, as a reason for desiring to make the new contract, his anxiety to be released from all claim by the plaintiff.

On July 8, 1878, Lewis wrote the defendant a letter, which he received on July 17, 1878, at Cape May, in which Lewis accepted the defendant's offer with slight modifications, and which contained the following: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware. Telegraph me 'yes,' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'"

The defendant, on said July 17, went to the telegraph office of the Western Union Telegraph Company in Cape May, wrote a telegraphic despatch directed to Dio Lewis, Oakland, Cal., delivered it to the telegraphic agent and operator of said company, and paid the full price for its transmission to Oakland, and gave directions to have it forwarded at once. The defendant did not keep a copy of the telegram. He gave notice to the plaintiff to produce the telegram, and testified that he had exhausted all the means in his power in Boston, New York, and New Jersey in his endeavors to produce the telegram; that he had been to the Cape May office of the company, and had learned that the operator to whom he gave his despatch was not in charge of that office; that he had made diligent search for him without being able to learn his whereabouts; and that in this search he had had the aid of the superintendent and other officers of the company in Boston. He also offered to prove, by an officer of the company in Boston, that both by rule and custom of the company, so far as he knew the custom, the despatches received and sent from all the offices of the company were destroyed after they had been in the possession of the company six months. If, under these circumstances, it was competent to prove the contents of said despatch by oral testimony, the judge found that the word telegraphed was "yes."

The judge also found that Lewis never received said telegram; that the new lease to be made, as stipulated in the letters of Lewis and the defendant, was to be like the former lease in form, with the various modifications and changes contained in said letters, and was to be delivered in Boston, and the consideration then paid; and that the Mr. Ware mentioned in Lewis's letter was the plaintiff's attorney, residing in Boston.

The defendant contended that a contract was completed by said letters and telegram on July 17, under the law of the State of New Jersey; and that this case was controlled by the law of New Jersey. The judge found that the law of New Jersey is as stated in Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268; ruled, as matter of law, that the facts as above set forth did not show a new contract, and constituted

no defence to this action; and found for the plaintiff in the sum agreed upon. The defendant alleged exceptions.

O. T. Gray, for the defendant.

D. E. Ware, for the plaintiff, was not called upon.

GRAY, C. J. In M'Culloch *v.* Eagle Ins. Co., 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langdell on Contracts (2d ed.), 989–996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 398–400; Newcomb *v.* De Roos, 2 E. & E. 271; Harris's case, L. R. 7 Ch. 587; Lord Blackburn in Brogden *v.* Metropolitan Railway, 2 App. Cas. 666, 691, 692; Household Ins. Co. *v.* Grant, 4 Ex. D. 216; Lindley, J., in Byrne *v.* Van Tienhoven, 5 C. P. D. 344, 348; 2 Kent Com. 477, note *c.*; Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 1 Kernan, 441; Trevor *v.* Wood, 36 N. Y. 307; Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268, and 3 Dutcher, 645; Tayloe *v.* Merchants' Ins. Co., 9 How. 390.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Household Ins. Co. *v.* Grant, 4 Ex. D. 223; Pollock on Cont. (2d ed.) 17; Leake on Cont. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'" Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.[1]

[1] Household Ins. Co. *v.* Grant, 4 Ex. D. 216, 223, 238; Haas *v.* Myers, 111 Ill. 421, 423; Vassar *v.* Camp, 11 N. Y. 441, *acc.*

TINN *v.* HOFFMAN AND COMPANY.

IN THE EXCHEQUER CHAMBER, MAY 14, 15, 1873.

[*Reported in* 29 *Law Times* (*New Series*), 271.]

THIS was an action brought by the plaintiff against the defendants to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B., dated 30th May, 1872, the facts were stated for the opinion of the Court of Exchequer in the following

SPECIAL CASE.

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffman and Co., is an iron merchant, carrying on business at Middlesboro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth.

The plaintiff to the defendant: —

Nov. 22, 1871.

Messrs. Hoffman and Co.:

DEAR SIRS, — Please quote *your lowest price for* 800 *tons* No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.

Yours truly, J. TINN.

3. The defendants' reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
24th Nov. 1871.

Joseph Tinn, Esq., Bristol:

DEAR SIR, — We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible) at 69*s.* per ton delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.

We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear Sir,

Yours truly, A. HOFFMAN AND CO.

4. The plaintiff to the defendant: —

Bristol, 27th Nov. 1871.

Messrs. Hoffman and Co.:

DEAR SIRS, — The price you ask is high. If I made the quantity 1,200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige, J. TINN.

5. The defendant to the plaintiff, in reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
28th Nov., 1871.

Joseph Tinn, Esq., Bristol:

DEAR SIR, — In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge Middlesbro' pig iron, 200 tons in Jan., 200 tons in Feb., at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

Our to-day's market was very firm again, and we feel assured we shall see a further rise ere long.

Kindly let us have your reply by return of post as to whether you accept our offers of together 1,200 tons and oblige yours truly,

A. HOFFMAN AND CO.

6. The plaintiff to the defendants: —

Bristol, 28th Nov., 1871.

Messrs. Hoffman and Co.:

No. 4 Pig iron.

DEAR SIRS, — You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1,200 tons, referred to in my last, at 68*s.* per ton.

Yours faithfully, JOSEPH TINN.

7. The defendants' reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees.
29th Nov., 1871.

Joseph Tinn, Esq.:

DEAR SIR, — We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1,200 tons No. 4 forge at a lower price than that offered to you by us of yesterday, viz., 69*s.*, and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

A. HOFFMAN AND CO.

8. On the 1st Dec., 1871, the plaintiff sent a telegram to the defendants, of which the following is a copy: —

From Tinn, Ashton.

To Hoffman and Co., Middlesbro'-on-Tees.

Book other 400 tons pig iron for me, same terms and conditions as before.

And on the same day the plaintiff sent a letter to the defendants, of which the following is a copy: —

1st Dec., 1871.

Messrs. Hoffman and Co.:

DEAR SIRS, — I have your favor of the 29th ult. Please enter the remaining 400 tons No. 4 Forge Pig at 69*s.* *ex*-ship Portishead, delivery to commence Jan., 1872, payment by four months' acceptance against delivery. Kindly send me sold note for the 800 and 400 tons, and oblige, yours truly, J. TINN.

9. The following correspondence then took place between the plaintiff and the defendants' clerk, duly authorized in that behalf.

The defendants' clerk to the plaintiff: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
1st Dec., 1871.

Joseph Tinn, Esq., Bristol:

DEAR SIR, — We have your telegram of this day, "Book other 400 tons pig iron, same terms and conditions as before," which we note and shall lay before our Mr. Hoffman on his return next week. Yours truly, for A. Hoffman and Co., C. JERVELAND.

10. Memorandum: —

2d Dec., 1871.

From A. Hoffman and Co., Middlesbro'-on Tees.

To Joseph Tinn, Esq., Bristol.

The contents of your yesterday's favor is noted, and we shall lay same before our principal on his return next week.

11. The defendants to the plaintiff: —

The Queen's Hotel, Manchester,
4th Dec., 1871.

Joseph Tinn, Esq., Bristol:

DEAR SIR, — I am in receipt of telegram, "Book other 400 tons, same terms and conditions as before," and favor of 1st inst. addressed to my firm, in reply to which I very much regret to state that I am not able to book the 1,200 tons in question, as your reply to ours of the 28th and 29th Nov. did not reach us within the stipulated time; and as I had other offers for the same lot, I disposed of the latter previous to my leaving Middlesbro' and receiving your decision.

Trusting to be more fortunate in future, I remain, dear sir, yours truly,

A. HOFFMAN AND CO.

12. The plaintiff to the defendants: —

Messrs. Hoffman and Co.:

DEAR SIRS, — I regret you cannot enter me the 400 tons No. 4 Forge Pig on the same terms as the 800 tons. Please send me sold note for 800 tons per return. Yours truly, J. TINN.

13. The reply of the defendants: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
6th Dec., 1871.

Joseph Tinn, Esq., Bristol:

DEAR SIR, — Your favor of yesterday to hand; in reply to which we have to state that we cannot send you contract for pig iron, having sold you none.

The quotation for 1,200 tons in our respect of 29th ult. was for your acceptance by 12 o'clock the 30th; and failing to receive such, we disposed of the iron, being under other offers, as already intimated to you by our Mr. Hoffman, and it is now utterly impossible for us to book you on the quantity you require, or you may rest assured that we willingly would do so. We are, dear sir, yours truly,

Pro A. Hoffman and Co., C. JERVELAND.

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

16. The plaintiff contends that he has a binding contract with the defendant whereby the defendants are bound to deliver to him 800 tons of iron. The defendants on the other hand contend that there is no such contract, and refuse to deliver any of the said iron.

The questions for the opinion of the court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity, and on what terms and conditions.

If the court shall be of opinion in the affirmative on either of these questions, then it has been agreed between the parties in writing, in accordance with the provisions of the Common Law Procedure Act, 1852, that the amount of damages for breach of such contract shall be ascertained by reference to an arbitrator to be appointed by the said plaintiff and defendants, or in case of difference by any judge of one of the Superior Courts of Common Law, and judgment for the amount entered up for the plaintiffs with costs of suit.

If the court shall be of opinion in the negative, then judgment of *nol. pros.* with costs of defence shall be entered up for the defendants.

In the Court of Exchequer, Bramwell, Channell, and Pigott, BB., held the defendant entitled to judgment; Kelly, C. B., dissented.

Kingdon, Q. C., and *Arthur Charles*, for the plaintiff.

A. L. Smith and *H. Lloyd*, A. C., for the defendants.

BRETT, J. The question is, whether upon a true construction of this correspondence there is a binding contract between the plaintiff and the defendants for the 800 tons of iron at 69*s*. It is argued on the one side that such a contract is disclosed because, it is said, that the defendants' letter of the 24th November is an offer for the sale of 800 tons of iron, and this letter of the 28th November leaves open the time for accepting that offer of the 24th November, and makes a new offer with regard to another 400 tons; and that the defendants' offer of the 24th November being thus opened by their letter of the 28th, the plaintiffs' letter of the 28th is an acceptance of the defendants' offer of the 24th. On the other side it is argued that the defendants' letter of the 28th November is not an opening of their offer of the 24th, but that it is an offer with regard to 1,200 tons; and that even if it were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it reopens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer with regard to 400 tons; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of the 28th November was not in answer to that offer, but was a letter crossing it. Now, with regard to the construction of the defendants' letter of the 28th November, it seems to me that we must consider that the defendant's letter of the 24th November is in answer to a request of the plaintiff's of the 22d November for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left it open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words "Your reply by return of post" fixes the time for acceptance, and not the manner of accepting.[1] But that time elapsed; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of the 27th November rejects that offer; it rejects it on the ground that the price is higher than the plaintiff is willing to give. The offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1,200 tons, and the letter of the 28th November is a letter written "In reply to your favor of yesterday," — that is, In reply to your request for an offer with regard to 1,200 tons, — "I now make you this offer." That seems to show that the letter of the 28th November of the defendants is an offer with regard to 1,200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1,200

[1] As to the effect of these words, see Ortman *v.* Weaver, 11 Fed. Rep. 358, 362; Maclay *v.* Harvey, 90 Ill. 525; Bernard *v.* Torrance, 5 G. & J. 383; Taylor *v.* Rennie, 35 Barb. 272; Howells *v.* Stroock, 50 N. Y. App. Div. 344.

tons is made is this: "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons, I offer you to deliver them at the same price, but at different periods of delivery." I think that the defendants' letter of the 28th November, being a letter in answer to a request with regard to 1,200 tons, is an offer with regard to 1,200 tons, and that no such offer was ever accepted; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it *reopened* the offer of the 24th November. That offer was dead, and was no longer binding upon the defendants at all; and therefore it seems to me to be a wrong phrase to say that it *reopened* the offer of the 24th November. The only legal way of construing it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate offer with regard to 400 tons; but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted by the fact of the plaintiffs' letter of the 28th November crossing it. If the defendants' letter of the 28th November is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of the 28th November could only be considered as a cross offer. Put it thus: If I write to a person and say, "If you can give me £6,000 for my house, I will sell it you," and on the same day, and before that letter reaches him, he writes to me, saying, "If you will sell me your house for £6,000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other; therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post; those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the court below was right.

BLACKBURN, J. I also think that the judgment should be affirmed. The question turns upon the true construction of the defendants' letter of the 28th November, and that must be taken with the other letter to which it is an answer. The letter of the 24th is an offer of 800 tons. No reply was sent by return, and, that offer being one which required an answer by return of post, I agree with my brother Brett that it was gone as soon as there was no reply by return. It was perfectly competent to the defendants to renew it. Then, on the 27th November,

the plaintiff writes a letter, saying: "The price you ask is high;" so that not only was that out of time, for the 25th November was the day the answer was to have been sent, but it was not an acceptance of the offer, — it was a refusal. "The price you ask is high," and he goes on: "If I made the quantity 1,200 tons," delivery so and so, "I suppose you would make the price lower. Your reply by return will oblige." That is a request on the part of the plaintiff: "If I will make the order larger, will you make the price lower?" To that came in answer the defendants' letter of the 28th November, which has been read several times, and which I need not read over again. I think, taking the two letters together, the one in answer to the other, we can see what they mean. If, in answer to that letter of the 28th November written by the defendants to the plaintiff, in which they ask for an answer by return of post, there had been a letter sent saying, "I will accept the 800 tons and not take the 400 tons," and that had been relied upon as a binding contract, and that the defendants had resisted that, and said: "We did not offer you 800 tons, we offered you 1,200 tons if you would take them, but not 1,200 tons that you might split into two quantities, taking the 800 and rejecting the 400 tons," the question would have been raised whether this letter of the defendants, of the 28th November, read, as it must be read, with the plaintiff's letter of the 27th, was an offer of that sort which my brothers HONYMAN and QUAIN think it was, or whether it was, as the majority of the court have already said, an offer of 1,200 tons, and 1,200 tons only. I am of opinion that it was an offer of the 1,200 tons, and the 1,200 tons only. I do not think it necessary to repeat what has been said already, but that is a sufficient reason, and that is the only reason, as I understand, stated in the Court of Exchequer as a ground for their judgment, and that is the point upon which that judgment turns. But then there arises another question: on that same 28th November the plaintiff, before he received or knew of the defendants' letter of the 28th November, had written a letter which I read to be an offer on his part: "I will take 800 tons, at the price of 69*s*." That letter crossed the letter of the defendants, and I think my brothers HONYMAN and QUAIN necessarily, as part of their judgment, are of opinion that that offer, crossing the other offer, and being *ad idem*, according to their construction of the first contract, did make a binding engagement between the parties. It is not necessary in the present case for the Court of Exchequer Chamber to decide that point, and therefore what I am now going to say is not to be considered at all as part of the judgment of the Court of Error, but as my own individual opinion. When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other, — there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. There is, I

believe, a total absence of authority on the point. I do not think, though I am not sure, that the question has ever been raised before. The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other. Either of the parties may write and say, "I accept your offer, and, as you perceive, I have already made a similar offer to you," and then people would know what they were about; I think either side might revoke. Such grave inconvenience would arise in mercantile business if people could doubt whether there was an acceptance or not that it is desirable to keep to the rule that an offer that has been made should be accepted by an acceptance such as would leave no doubt on the matter. I am not aware, as I said before, that any point of this sort has ever been raised before, and consequently this must not be considered as the judgment of the majority of the Exchequer Chamber.

Judgment of the majority of the court below affirmed.[1]

MACTIER'S ADMINISTRATORS, Appellants, AND FRITH, Respondent.

New York Court of Errors, December, 1830.

[*Reported in* 6 *Wendell*, 103.]

Appeal from Chancery. At New York, in the autumn of 1822, the respondent and Henry Mactier, the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to New York, to be consigned to Mactier, who was to ship to the respondent at Jacmel, in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France, in French vessels, and the parties were to share equally in the result of the speculation all around.

In pursuance of this arrangement, Frith, on the 5th September, 1822, wrote Firebrace, Davidson, & Co., a mercantile house at Havre, to ship 200 pipes of brandy to New York to the consignment of Mactier. On the 24th of December, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace,

[1] Archibald and Keating, JJ., delivered concurring, and Honyman and Quain, JJ., dissenting, opinions. The statement of the decision in the lower court has been abbreviated.

Davidson, & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, *I would propose to you to take the adventure solely to your own account*, holding the value to cover the transaction to my account in New York." On the 17th January, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson, & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about the 1st of December then past; and adds, "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation. As you have, however, expressed a wish that I should take the adventure to my own account, *I shall delay coming to any determination till I again hear from you.* The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France, *in which case I will at once decide to take the adventure to my own account.* Our London accounts, down to the 5th of December, speak confidently of a war between France and Spain, — a measure which, if carried into effect, would operate to *your disadvantage.*" Also, "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;" and also, "Let what will happen, I trust you will in no way be a sufferer." On the 7th March, 1823, Frith wrote Mactier,[1] making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, *and note their respective contents.*" On the twelfth day of March, 1823, the ship La Claire arrived at New York, laden with the brandy in question, and was at the wharf on the morning of the 13th of March. A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said *he should take it to himself.* A merchant of New York also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. On the 17th of March, Mactier entered the brandy at the custom-house *as owner*, and not as consignee, took the usual oath, and gave a bond for the duties. On the twenty-second day of March, he sold 150 pipes of the brandy on the wharf to several commercial houses, and

[1] This letter was received on the 7th of April. 1 Paige, 434, 442.

took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier. On the twenty-fifth day of March, Mactier wrote a letter directed to Frith at Jacmel, in which he said: "I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January last, *I have decided to take this adventure to my own account.* I therefore credit you with the amount of the invoice," amounting to $\$14,254\frac{57}{100}$. To this letter was attached a postscript, dated the 31st of March. On the twenty-eighth day of March, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question, he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th of January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these two last letters at their respective places of direction, Mactier was dead, he having departed this life on the 10th of April, 1823. On the 21st of April, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of the 25th of March, says he has noted its contents, and requests Mactier to charter on his account a stanch, first-class vessel, and send out to Jacmel by her 400 barrels of flour, 150 barrels of pork, 150 barrels of beef, 100 barrels of mackerel, &c., &c. In the mean time, however, Mactier having died, administration of his goods, &c., was granted to A. N. Lawrence and another, who, in May, 1823, gave the requisite bonds to secure the duties on the 50 pipes of brandy which had not been bonded for by Mactier in his lifetime, except by the general bond on entering the goods at the custom-house, and took the 50 pipes from the public store and sold them at public auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a *pro rata* distribution, on the 1st of April, 1824, filed his bill in the Court of Chancery, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof.

By the answer it was admitted that the defendants had found among the papers of Henry Mactier two invoices of the 200 pipes of brandy, similar in all respects, except that one states the shipment to have been made "to the address and for the account of Henry Mactier," and the other states it to have been made "for the account of the complainant to the address of Henry Mactier." The first of the invoices was used upon entering the brandy at the custom-house. It also appeared in evidence that on the first day of March, 1823, Mactier effected an insurance on *commissions* arising on a consignment from Bordeaux to

New York, to the amount of $1500. In a petty cash-book of Mactier's there is the following entry: "1823, March 17, John A. Frith's sales of brandy, paid entry at custom-house, eighty cents." The clerk of Mactier, who made this entry, testified that the name of Frith, prefixed to the entry in the petty cash-book, does not necessarily prove that the brandy was Frith's, but it shows that he at that time supposed the brandy to be Frith's; if it had then belonged to Mactier, or if Mactier had decided to take it, and any entry in the books had been made showing that fact, he would have entered it, "Sales of brandy Dr. for entering," &c. At the time of making the entry, he considered the fact of ownership contingent. Mactier afterwards directed the account to be opened in the books, charging the brandy to himself, the account to be "Sales of brandy." An entry was made in the day-book, of the twenty-eighth day of March, crediting Frith with the invoice amount of the brandy. Entries, he said, are sometimes made several days after the transaction; then the entry refers back to the true date of the transaction, mentioning the time. The entry was made by the thirty-first day of March. He also testified that the letter of the 13th of March, mentioned in the complainant's bill, was copied on the night of that day, but he had no recollection when it left the office; it possibly might not have gone until the La Claire arrived.

On the 20th May, 1825, Chancellor Sanford made an order of reference to a master. Under this order the master reported that the complainant was not the owner of the shipment of brandy, neither at the time of the sale of the part thereof made by Mactier in his lifetime, or of the other part thereof made by the defendants as his administrators since his death, and had no lien on the brandy, or on the proceeds thereof in the hands of the administrators. To this report the complainant excepted, and the cause was heard upon the exceptions before Chancellor Walworth, who, in March, 1829, allowed the exception to that part of the master's report above stated (other exceptions to other parts of the report, which it has not been deemed essential to state, were disallowed), and decreed that the report be referred back to the master to alter and correct the same, and to take and state an account, and report the amount due the complainant, on the principle that he, as *survivor*, is entitled to the net proceeds of the adventure of brandy, so far as they can be traced and identified, and has a specific lien on the net proceeds of the 50 pipes of brandy sold by the administrators, and on the proceeds of the notes given for the 150 pipes which remained uncollected or not passed away at the time of Mactier's death, or on so much as is necessary to satisfy the balance due complainant for payment and disbursements on account of that adventure, after deducting from those proceeds the balance of the amount paid for duties and expenses, if any, over and above the amount of proceeds of the shipment of brandy which were received by Mactier in his lifetime. From this decree the defendants appealed. For the

reasons of the Chancellor for the decree pronounced by him, see 1 Paige, 434. The cause was argued here by

S. Boyd and *S. A. Talcott*, for the appellants.

S. Stevens and *G. Griffin*, for the respondent.

By Mr. Justice Marcy. The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came to their possession after his death, and the amount of such notes taken on the sale of the 150 pipes on the 22d of March, 1823, as were uncollected and undisposed of at the death of Mactier, or at least so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them are of course substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. Powell on Cont. 4. In testing the validity of contracts many things are to be considered. The contract that the appellants set up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred.

Where the negotiation between the contracting parties, residing at a distance from each other, is conducted, as it usually is, by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify, his acceptance of the proposition. This Pothier holds to be the legal presumption, unless the contrary appears. His language is: *Cette volonté est présumé tant qu'il ne parait rien de contraire.* This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless store-house of jurisprudence; it is found in the common law; indeed, it exists of necessity wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; Stark. Ev. 1252. The case of Adams *v.* Lindsell, 1 Barn. & Ald. 681, proceeds upon and affirms the principle, that the

willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "The defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter." Against the authority of the case of Adams v. Lindsell, we have urged on us a decision of a court of the highest respectability in one of our sister States. The case of M'Culloch v. The Eagle Ins. Co., 1 Pick. 278, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have therefore deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which would distinguish between a contract for insurance, and one for the sale of goods, in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve courts in a still more distressing embarrassment. Distinctions which are not founded on a difference in the nature of things are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules appealing to factitious reasons for their support, consequently difficult to be acquired, and often of uncertain application. The two cases referred to should have had applied to them the same rule of law, and we are required to say what that rule is, in deciding the case now under consideration.

The principle of the decision of the King's Bench is, simply that the acceptance of an offer made through the medium of a letter binds the bargain, if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The Chancellor, in deciding this case, gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact." The decision of the court of Massachusetts makes knowledge, by the party tendering the offer, of the other's acceptance, essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know, that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the

Chancellor; viz., the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities state a contract, or an agreement (which is the same thing), to be *aggregatio mentium*. Why should not this *meeting of the minds*, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not, and must it not be, the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds; for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument, that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts; and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made.

Testing the rules of law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me that we are not left at liberty to hesitate about the choice. If we are inclined, from the force of abstract reason, to prefer the rule laid down by the Court of King's Bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists. The Common Pleas, in England, seem to me to have given their approval to the decision of Adams *v.* Lindsell, 4 Bing. 653. Judge Washington, in delivering the opinion of the Court in Eliason *v.* Henshaw, 4 Wheaton, 228, said: "Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either." The inference from this proposition is, that the assent of the parties to the terms of the agreement, and not their knowledge of it, completes the con-

tract. It was decided in the Circuit Court of the United States for Pennsylvania, that contracts are formed by the offer on the one hand, and an acceptance on the other. After acceptance the contract is obligatory on both. Coxe's Dig. 192. In this case, knowledge of the acceptance is not brought into view as necessary to constitute the obligation. Both the Roman law and the French civil code, as we have seen by the references already made, contain a doctrine in accordance with the principle of these cases. I think I am therefore warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance.

What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other; the knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of the 24th of December was received at New York, and Mactier had a fair opportunity to answer it. If the answer of the 17th of January had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted. There was a promise to accept upon a contingency; for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is, in case of such a war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete

it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: *Verbum imperfecti temporis rem adhuc imperfectum significat.* There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If, in this case, the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor, after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain, without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do to effect an acceptance was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before the seventeenth day of March. The insurance that he effected on his commissions on the 1st of March disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place on the 17th of March. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; on the 17th of March, when that event was considered settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th, with a postscript of the 31st of March, he accepts the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March entries were made in his books, showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance to be transmitted after the mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until the 31st of March; if Frith intended it should stand so, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. On the 7th of March he acknowledges Mactier's letter of the 17th of January, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated.[1] . . .

Whereupon, on the question being put, Shall the decree of the Chancellor appealed from be reversed? Chief Justice SAVAGE and Justices SUTHERLAND and MARCY, and eighteen Senators, voted in the affirmative; and three Senators voted in the negative, — viz., Senators MCCARTY, TODD, and WHEELER.

The decree of the Chancellor was accordingly reversed with costs.

[1] A portion of the opinion is omitted. Concurring opinions were delivered by Senators Benton, Maynard, Oliver, and Throop.

EDWARD WHEAT AND OTHERS *v.* LEMUEL CROSS.

MARYLAND COURT OF APPEALS, APRIL TERM, 1869.

[*Reported in* 31 *Maryland*, 99.]

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee to recover the price of a horse sold to the appellants.

The plaintiff resided in Frostburg, and the defendants were engaged in the business of buying and selling horses in Baltimore. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse into their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering $140 for him clear of all expenses, and saying, "you can draw on us at sight for $140." This letter was received on the 15th or 16th of September; on the 16th the plaintiff signified his acceptance of the offer by drawing on the defendants for $140. The draft was sent on that day, and on the 17th the defendants refusing to pay the draft, it was protested.

On the 16th of September, the defendants addressed a letter to the plaintiff withdrawing their offer of the 12th, stating that "when they wrote they did not think the horse was so bad, but since it has turned out to be 'farcy,' they would not buy at any price," and directing him "not draw on them for the money, that they will not pay the draft until they see how the horse gets." This letter was not received by the plaintiff till after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case two positions have been taken by the defence —

1st. That there was not such mutual assent between the parties as to constitute a binding contract.

2d. That the offer by the defendants was made through mistake of a material fact as to the condition of the horse, and the nature of the disease under which it was suffering; and was withdrawn as soon as the mistake was discovered, and the acceptance thereof was not binding upon them.[1]

1st. On the first question, we consider the law well settled that where parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing

[1] Part of the opinion, holding the mistake immaterial, is omitted.

offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional.

The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the *onus* is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in Tayloe *v.* Merchants' Fire Ins. Co., 9 Howard, 390. That was a case arising upon an insurance contract, but the reasoning of the Court on this question, and the principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other. There the terms upon which the company was willing to insure were made known by letter, and it was held "that the contract was complete when the insured placed a letter in the post-office accepting the terms."

ELIASON ET AL. *v.* HENSHAW.

SUPREME COURT OF THE UNITED STATES, FEB. 17, 20, 1819.

[*Reported in* 4 *Wheaton*, 225, 4 *Curtis*, 382.]

ERROR to the Circuit Court for the District of Columbia.

Jones and *Key*, for the plaintiff in error.

Swann, for the defendant in error.

WASHINGTON, J., delivered the opinion of the Court.

This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us

that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times in Georgetown, and will be glad to serve you, either in receiving your flour in store when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and despatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th instant was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at $9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary, — payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the Court below, the plaintiffs in error, moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The Court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of

a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon by which the letter was despatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer; and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour; and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo.*

SAMUEL P. WHITE, RESPONDENT, *v.* JOHN W. CORLIES AND JONATHAN N. TIFT, APPELLANTS.

NEW YORK COURT OF APPEALS, NOVEMBER 17–20, 1871.

[*Reported in* 26 *New York*, 467.]

APPEAL from judgment of the General Term of the first judicial district affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Dey Street.

In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note: —

NEW YORK, September 29th.

Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

The writer will call again, probably between five and six this P. M.

W. H. R.,
For J. W. CORLIES & Co.,
32 Dey Street.

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent) before commencing the work."

"In my opinion it was not. He had a right to act upon the note and commence the job, *and that was a binding contract between the parties.*"

To this defendants excepted.

L. Henry, for appellants.

Mr. *Field*, for respondent.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail containing the acceptance. And in general, as soon as the answering letter is mailed the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which, in itself is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act, uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer, and that the purchase of stuff and working on it after receiving the note, made a

binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur but ALLEN, J., not voting.

Judgment reversed and new trial ordered.[1]

THE GREAT NORTHERN RAILWAY COMPANY *v.* WITHAM.

IN THE COMMON PLEAS, NOVEMBER 6, 1783.

[*Reported in Law Reports, 9 Common Pleas,* 16.]

THE cause was tried before BRETT, J., at the sittings at Westminster after the last term. The facts were as follows: In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows: —

I, the undersigned, hereby undertake to supply the Great Northern Railway Company, 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 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 company's officer wrote in reply as follows: —

Mr. S. Witham:

SIR, — I am instructed to inform you that my directors have accepted your tender, dated, &c., to supply this company at Doncaster station

[1] There are many cases where an acceptance, so called, did not complete the contract, because it imposed a new condition or slightly but materially varied the terms of the offer. See Honeyman *v.* Marryat, 6 H. L. C. 112; English, &c., Credit Co. *v.* Arduin, L. R. 5 H. L. 64; Appleby *v.* Johnson, L. R. 9 C. P. 158; Stanley *v.* Dowdeswell, L. R. 10 C. P. 102; Crossley *v.* Maycock, E. R. 18 Eq. 180; Jones *v.* Daniel, [1894] 2 Ch. 332; Lloyd *v.* Nowell, [1895] 2 Ch. 744; Ortman *v.* Weaver, 11 Fed.Rep. 358; Martin *v.* Northwestern Fuel Co., 22 Fed. Rep. 596; Coffin *v.* Portland, 43 Fed. Rep. 411; James *v.* Darby, 100 Fed. Rep 224 (C. C. A.); Robinson *v.* Weller, 81 Ga. 704; Corcoran *v.* White, 117 Ill. 118; Middaugh *v.* Stough, 161 Ill. 312; Stagg *v.* Compton, 81 Ind. 171; Siebold *v.* Davis, 67 Ia. 560; Gilbert *v.* Baxter, 71 Ia. 327; Howard *v.* Industrial School, 78 Me. 230; Putnam *v.* Grace, 161 Mass. 237; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 379; Commercial Telegram Co. *v.* Smith, 47 Hun, 494; Olds *v.* East Tenn. Stone Co. (Tenn.), 48 S. W. Rep. 333; North Texas Building Co. *v.* Coleman (Tex. Civ. App.), 58 S. W. Rep. 1044; Virginia Hot Springs Co. *v.* Harrison, 93 Va. 569; Baker *v.* Holt, 56 Wis. 100. And see 7 Am. & Eng. Encyc. of Law, 132. *Compare:* Hussey *v.* Horne Payne, 4 App. Cas. 311; Smith *v.* Webster, 3 Ch. D. 49; North *v.* Percival, [1898] 2 Ch. 128.

any quantity they may order during the period ending 31st of October, 1872, of the descriptions of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter,

(Signed) S. FITCH, *Assistant Secretary.*

To this the defendant replied: —

I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention.

S. WITHAM.

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs, —

Digby Seymour, Q. C., moved to enter a nonsuit, on the ground that the contract was void for want of mutuality. He contended that, as the company did not bind themselves to take any iron whatever from the defendant, his promise to supply them with iron was a promise without consideration. He cited Lees *v.* Whitcomb, 5 Bing. 34; Burton *v.* Great Northern Railway Co., 9 Ex. 507, 23 L. J. (Ex.) 184; Sykes *v.* Dixon, 9 Ad. & E. 693; and Bealey *v.* Stuart, 7 H. & N. 753, 31 L. J. (Ex.) 281. *Cur. adv. vult.*

BRETT, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiff's right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you 100*l.*," that is in a certain sense a unilateral contract. He has not promised to go to York; but if he goes it cannot be doubted that he will be entitled to receive the 100*l.* His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise.[1] So, here, the company having given the de-

[1] "It would be an ordinary case of a unilateral contract growing out of an offer of one party to do something if the other will do or refrain from doing something else.

fendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. Burton *v.* Great Northern Railway Company, 9 Ex. 507, 23 L. J. (Ex.) 184, is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.[1]

GROVE, J. I am of the same opinion, and have nothing to add.

Rule refused.[2]

THE CHICAGO AND GREAT EASTERN RAILWAY COMPANY, APPELLANT, *v.* FRANCIS B. DANE AND OTHERS, RESPONDENTS.

NEW YORK COURT OF APPEALS, DECEMBER 13–20, 1870.

[*Reported in* 43 *New York*, 240.]

THIS is an appeal from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the defendant entered upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract were the letters quoted in the opinion of the court. The defendant insisted that the agreement was invalid for want of the proper U. S. internal revenue stamp affixed at the time it was made. But the referee overruled the objection, holding that it was sufficient under section 173 of the Revenue Act of June 30, 1864, to stamp the instrument on its production in court. This point was not passed on in this court.

Titus and *Westervelt*, for the appellant.

H. W. Johnson, for the respondents.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps

If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer is unnecessary. Lent *v.* Padelford, 10 Mass. 230; Train *v.* Gold, 5 Pick. 380; Brogden *v.* Metropolitan Railway, 2 App. Cas. 666, 691; Weaver *v.* Wood, 9 Pa. 220; Patton *v.* Hassinger, 69 Pa. 311." Knowlton, J., in First Nat. Bank *v.* Watkins, 154 Mass. 385, 387.

[1] See Queen *v.* Demers, [1900] A. C. 103; Ford *v.* Newth, [1901] 1 K. B. 683; Attorney-General *v.* Stewards, 18 T. L. R. 131.

[2] A statement of the pleadings and the concurring opinion of KEATING, J., are omitted.

out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretence of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago and Great Eastern Railway Company, not exceeding six thousand tons gross (2,240 lbs.) in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15, 1864. On the 16th of April, the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6,000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6,000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it fol-

lows that there was no consideration for any promise of the defendants, and that the breach of such promises furnishes no foundation for an action. The counsel for the plaintiff insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the promises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

All the judges concurring, except ALLEN, J., who, having been of counsel, did not sit. *Judgment affirmed.*[1]

THE ROYAL INSURANCE COMPANY *v.* WILLIAM BEATTY.

PENNSYLVANIA SUPREME COURT, JANUARY 16—FEBRUARY 20, 1888.

[*Reported in* 119 *Pennsylvania State*, 6.]

AN action of covenant, afterward changed to assumpsit, was brought (when, not shown) by William Beatty against the Royal Insurance Company of Liverpool, to recover upon two policies of insurance, each for $3,000 and for the term of one year, expiring at the same time on January 6, 1886.

At the trial on June 11, 1887, the evidence, more fully appearing in the opinion of this court, was to the effect that on the day before the term of the policies expired, the clerk of an insurance broker who had charge of them was sent to the defendant company's office to "bind" them; that is, to have it agreed upon that they should be deemed in force till it was ascertained whether there would be a change in the rates, and then the insured would determine whether to drop the policies or renew them. The clerk had a memorandum of other policies for other people with him, to which it was desired that the night clause — the privilege of running at night — be extended, and asked the renewal clerk of the insurance company to "bind" the policies in suit and to have the night clause extended to the others. The insurance clerk discussed with the broker's clerk the subject of the night clause in the

[1] See Thayer *v.* Burchard, 99 Mass. 508.

other policies, but said nothing and did nothing with reference to "binding" the policies in suit. The broker's clerk assumed or believed he had assented, and so reported to his own office, where memoranda were made upon the broker's books indicating that the policies were renewed. The loss occurred on January 10th following. The defendant company's renewal clerk testified that he did not hear the request to "bind" the policies in suit, and the policies had not been renewed.

At the close of the testimony, the defendant requested the court to charge the jury, —

1. That there was no evidence of an acceptance by the defendant of the offer to renew the plaintiff's policies, and the verdict of the jury must be for the defendant.

The court, Hare, P. J., refused to affirm this point, and submitted the cause upon the evidence, the charge not appearing upon the paper books.

The verdict of the jury was for the plaintiff, amount not shown, and judgment being entered thereon, the defendant took this writ, assigning as error, *inter alia*, the refusal to affirm the point submitted by the defendant.

Mr. *R. C. McMurtrie*, for the plaintiff in error.

Mr. *George H. Earle, Jr.* (with him *Mr. Richard P. White*), for the defendant in error.

Mr. JUSTICE GREEN. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the

agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed and I went in and bound them. *Q.* State what was said and done. *A.* I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The court: Who were the policies for? *A.* For Mr. Beatty. The court: That is your name, is it not? *A.* Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The court: What did they say? *A.* They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "*Q.* Did you say anything about those policies (Robert Beatty's) at that time? *A.* No, sir; I only spoke of the two policies for William Beatty. *Q.* What did you say about them? *A.* I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it. *Q.* Were the other companies bound in the same way? *A.* Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done: how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty?

Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expresssed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request, and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.[1]

[1] Titcomb *v.* United States, 14 Ct. Cl. 263; Rutledge *v.* Greenwood, 2 Desaus. 389, 401; Raysor *v.* Berkeley Co., 26 S. C. 610, *acc.*

JOHN F. WHEELER AND ANOTHER *v.* A. W. KLAHOLT AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 7–MARCH 1, 1901.

[*Reported in* 178 *Massachusetts*, 141.]

HOLMES, C. J. This is an action for the price of one hundred and seventy-four pairs of shoes, and the question raised by the defendants' exceptions is whether there was any evidence, at the trial, of a purchase by the defendants.[1]

The evidence of the sale was this. The shoes had been sent to the defendants on the understanding that a bargain had been made. It turned out that the parties disagreed, and if any contract had been made it was repudiated by them both. Then, on September 11, 1899, the plaintiffs wrote to the defendants that they had written to their agent, Young, to inform the defendants that the latter might keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately via Wabash & Fitchburg Railroad, otherwise they will go through New York City and it would take three or four weeks to get them." On September 15, the defendants enclosed a draft for the price less four per cent, which they said was the proposition made by Young. On Sepember 18 the plaintiffs replied, returning the draft, saying that there was no deduction of four per cent, and adding, "if not satisfactory please return the goods at once by freight via Wabash & Fitchburg Railroad." This letter was received by the defendants on or before September 20, but the plaintiffs heard nothing more until October 25, when they were notified by the railroad company that the goods were in Boston.

It should be added that when the goods were sent to the defendants they were in good condition, new, fresh, and well packed, and that when the plaintiffs opened the returned cases their contents were more or less defaced and some pairs of shoes were gone. It fairly might be inferred that the cases had been opened and the contents tumbled about by the defendants, although whether before or after the plaintiffs' final offer perhaps would be little more than a guess.

Both parties invoke Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, the defendants for the suggestion on p. 197 that a stranger by sending goods to another cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. We are of opinion that this proposition gives the defendants no help. The parties were not strangers to each other. The goods had not been foisted upon the defendants, but were in their custody presumably

[1] A part of the opinion relating to a question of practice is omitted.

by their previous assent, at all events by their assent implied by their later conduct. The relations between the parties were so far similar to those in the case cited, that if the plaintiffs' offer had been simply to let the defendants have the shoes at the price named, with an alternative request to send them back at once, as in their letters, the decision would have applied, and a silent retention of the shoes for an unreasonable time would have been an acceptance of the plaintiffs' terms, or, at least would have warranted a finding that it was. See also Bohn Manuf. Co. *v.* Sawyer, 169 Mass. 477.

The defendants seek to escape the effect of the foregoing principle, if held applicable, on the ground of the terms offered by the plaintiffs. They say that those terms made it impossible to accept the plaintiffs' offer, or to give the plaintiffs any reasonable ground for understanding that their offer was accepted, otherwise than by promptly forwarding the cash. They say that whatever other liabilities they may have incurred they could not have purported to accept an offer to sell for cash on the spot by simply keeping the goods. But this argument appears to us to take one half of the plaintiffs' proposition with excessive nicety, and to ignore the alternative. Probably the offer could have been accepted and the bargain have been made complete before sending on the cash. At all events we must not forget the alternative, which was the immediate return of the goods.

The evidence warranted a finding that the defendants did not return the goods immediately or within a reasonable time, although subject to a duty in regard to them. The case does not stand as a simple offer to sell for cash received in silence, but as an alternative offer and demand to and upon one who was subject to a duty to return the goods, allowing him either to buy for cash or to return the shoes at once, followed by a failure on his part to do anything. Under such circumstances a jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell, although coupled with a failure to show that promptness on which the plaintiffs had a right to insist if they saw fit, but which they also were at liberty to waive. *Exceptions overruled.*

PRESCOTT *v.* JONES, ET AL.

NEW HAMPSHIRE SUPREME COURT, JUNE, 1898.

[*Reported in* 69 *New Hampshire,* 305.]

ASSUMPSIT. The declaration alleged, in substance, that the defendants, as insurance agents, had insured the plaintiff's buildings in the Manchester Fire Insurance Company until February 1, 1897; that on January 23, 1897, they notified him that they would renew the policy and insure his buildings for a further term of one year

from February 1, 1897, in the sum of $500, unless notified to the contrary by him; that he, relying on the promise to insure unless notified to the contrary, and believing, as he had a right to believe, that the buildings would be insured by the defendants for one year from February 1, 1897, gave no notice to them to insure or not to insure; that they did not insure the buildings as they had agreed and did not notify him of their intention not to do so; that the buildings were destroyed by fire March 1, 1897, without fault on the plaintiff's part. The defendants demurred.

John T. Bartlett, *Burnham*, *Brown & Warren*, and *Isaac W. Smith*, for the plaintiff.

Drury & Peaslee, for the defendants.

BLODGETT, J. While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made and notice thereof, either actual or constructive, given to the maker (Abbott *v.* Shepard, 48 N. H. 14, 17; Perry *v.* Insurance Co., 67 N. H. 291, 294, 295), it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him.

But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." Clark Cont. 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." More *v.* Insurance Co., 130 N. Y. 537, 547. And to constitute acceptance, "there must be words, written or spoken, or some other overt act." Bish. Cont., s. 329, and authorities cited.

If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because "it takes two to make a bargain," and as contracts rest on mutual promises, both parties are bound, or neither is bound.

The inquiry as to the defendants' liability for the non-performance of their offer thus becomes restricted to the question, Did the plaintiff accept the offer, so that it became by his action clothed with legal

consideration and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that, upon the facts before us, we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility. Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce; and as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise, and the law will not enforce it.

Then, again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer — for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract.

Nor is there any estoppel against the defendants, on the ground that the plaintiff relied upon their letter and believed they would insure his buildings as therein stated.

The letter was a representation only of a present intention or purpose on their part. "It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct. . . . The intent of a party, however positive or fixed, concerning his future action, is necessarily uncertain as to its fulfilment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. . . . On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain, and definite fact or state of things, permanent in its nature and not liable to change. . . . The doctrine of estoppel . . . on the ground that it is contrary to a previous statement of a party does not apply to such a representation. The reason on which the doctrine rests is, that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice, on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action." Langdon *v.* Doud, 10 Allen, 433, 436, 437, Jackson *v.* Allen, 120 Mass. 64, 79; Jorden *v.* Money, 5 H. L. Cas. 185.

"An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." Insurance Co. *v.* Mowry, 96 U. S. 544, 547. "The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention by the person with whom he is dealing." Ib. 548. See, in addition: White *v.* Ashton, 51 N. Y. 280; Mason *v.* Bridge Co., 28 W. Va. 639, 649; Jones *v.* Parker, 67 Tex. 76, 81, 82; Big. Estop. (5th ed.) 574.

To sum it up in a few words, the case presented is, in its legal aspects, one of a party seeking to reap where he had not sown, and to gather where he had not scattered. *Demurrer sustained.*[1]

PEASLEE, J., did not sit: the others concurred.

AUGUSTUS L. PHILLIPS, BY HIS GUARDIAN, *v.* GEORGE L. MOOR.

SUPREME JUDICIAL COURT OF MAINE, MARCH 8, 1880.

[*Reported in* 71 *Maine*, 78.]

BARROWS, J.[2] Negotiations by letter, looking to the purchase by the defendant of a quantity of hay in the plaintiff's barn, had resulted in the pressing of the hay by the defendant's men, to be paid for at a certain rate if the terms of sale could not be agreed on; and in written invitations from plaintiff's guardian to defendant, to make an offer for the hay, in one of which he says: "If the price is satisfactory I will write you on receipt of it;" and in the other: "If your offer is satisfactory I shall accept it; if not, I will send you the money for pressing." Friday, June 14th, defendant made an examination of the hay after it had been pressed, and wrote to plaintiff's guardian, same day . . . "Will give $9.50 per ton, for all but three tons, and for that I will give $5.00." Plaintiff's guardian lived in Carmel, fourteen miles from Bangor, where defendant lived, and there is a daily mail communication each way between the two places. The card containing defendant's offer was mailed at Bangor, June 15, and probably received by plaintiff in regular course, about nine o'clock A. M. that day. The plaintiff does not deny this, though he says he does not always go to the office, and the mail is sometimes carried by. Receiving no better offer, and being offered less by another dealer, on Thursday, June 20th, he went to Bangor, and

[1] Felthouse *v.* Bindley, 11 C. B. N. S. 868, *acc.*

[2] A portion of the opinion is omitted in which it was held that on the completion of the contract, title to the hay passed to the buyer.

there, not meeting the defendant, sent him through the post-office a card, in which he says he was in hopes defendant would have paid him $10.00 for the best quality: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the $10.00 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and Sunday morning the hay was burnt in the barn. Shortly after, when the parties met, the plaintiff claimed the price of the hay and defendant denied his liability, and asserted a claim for the pressing. Hence this suit.

The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes, as to what the defendant would have done, or what he would like to have him do, if the hay when hauled proved good enough. Aside from all this, the defendant was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both the parties that the property should pass. The defendant does not deny what the guardian testifies he told him at their conference after the hay was burned, — that he had agreed with a man to haul the hay for sixty cents a ton. The guardian does not seem to have claimed any lien for the price, or to have expected payment until the hay should have been hauled by the defendant. But the defendant insists that the guardian's acceptance of his offer was not seasonable; that in the initiatory correspondence the guardian had in substance promised an immediate acceptance or rejection of such offer as he might make, and that the offer was not, in fact, accepted within a reasonable time.

If it be conceded that for want of a more prompt acceptance the defendant had the right to retract his offer, or to refuse to be bound by it when notified of its acceptance, still the defendant did not avail himself of such right. Two days elapsed before the fire after the defendant had actual notice that his offer was accepted, and he permitted the guardian to consider it sold, and made a bargain with a third party to haul it.

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. Peru *v.* Turner, 10 Maine, 185; but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.[1]

[1] "In the instruction the Court ruled, in effect, that the acceptance became binding upon the parties, unless the plaintiff immediately notified the defendant that he had withdrawn his offer. The rule now supported by the great preponderance of authority, and almost, if not quite, universally adhered to, is that, when a proposal is accepted by letter, the contract is deemed to become complete when the letter is mailed, pro-

SECTION II.

CONSIDERATION.

A. — Early Development.

ANONYMOUS.

In the Common Pleas, Michaelmas Term, 1504.

[*Reported in Keilwey*, 77 *placitum*, 25.]

In action of trespass on the case the plaintiff counted that he had bought of the defendant twenty quarters of malt for a certain sum of money paid beforehand, and he left it with the defendant to safely keep to the use of the plaintiff until a certain day now passed, and to do this the defendant *super se assumpsit.* Before the day the defendant from the good custody of the defendant himself had con-

vided the offer is standing, and the acceptance is made within a reasonable time. . . . It will be seen that the rule is sharply defined. The instruction given seems to us to be a departure from it. It assumes that the contract in the case at bar was not necessarily complete when the letter of acceptance was mailed, and that no contract would have been made, if the plaintiff immediately upon the receipt of the letter had notified the defendant that the offer was withdrawn. The departure from the recognized rule must have been deemed called for upon the ground that the letter of acceptance was not mailed within a reasonable time. The court, doubtless, assumed the rule to be, that a contract by the correspondence is not completed by the mailing of the letter of acceptance, where that is not done, within a reasonable time. . . . Taking this to be the rule, we have to inquire whether an acceptance after the time limited, or, in the absence of an express limitation, after the lapse of a reasonable time, imposes upon the person making the offer any obligation. The theory of the court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited, or, if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. Chitty on Cont. (11th ed.), 17. After that there is no offer, and, properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time." Ferrier *v.* Storer, 63 Ia. 484, 487.] See also Maclay *v.* Harvey, 90 Ill. 525.

[The offerer when he has received an acceptance which is too late] "would act prudently and fairly if he informed his correspondent that he had given up the transaction and was no longer disposed to bind himself by the agreement in regard to which he had at first taken the initiative. Otherwise, indeed, his silence might be considered as importing tacit assent to the proposition *ex novo* contained in the late acceptance. . . . These considerations have such force that they have led to some legislation imposing on every one who has made an offer by correspondence the duty to inform his correspondent that the acceptance has arrived too late. German Commercial Code, Art. 319; Swiss Federal Code of Obligations, Art. 5;" Valéry, Contrats par Correspondance, § 203.

verted the said malt to his own use, to the injury and damage of the plaintiff, &c. *More.* The plaintiff has counted that he bought twenty quarters of malt and has not shown that it was in sacks, so by the purchase no property was passed, for the plaintiff cannot take this malt from the storehouse of the defendant because of such a purchase of uncertain malt, nor can he have action of detinue, nor, for the same reason, action on the case, but as the case is here he is put to his action of debt for the malt. And the matter was discussed at the bar, and then by all the bench. On which FROWIKE said: Truly the case is good, and many good cases touching the matter have been put; nevertheless the words at the purchase are the whole matter. As, if a man sells me one of his horses in his stable, and grants further that he will deliver the horse to me by a certain day, I shall not take the horse without his delivery. But if he sells to me one of his horses within his stable for a certain sum of money paid beforehand, I can take the horse — that is such horse as pleases me — without any delivery. And in both cases if he aliens or converts all his horses to his own use so that I cannot have my bargain carried out, I shall have action on my case against him because of the payment of the money. And so if I sell ten acres of land, parcel of my manor, and then I make feoffment of the manor, you will have good action against me on your case because of the receipt of your money, and in this case you have no other remedy against me. And so if I sell you certain land, and I covenant further to enfeoff you by a certain day and do not, you will have good action on the case, and that is adjudged. And so if I sell you twenty oaks from my wood for money paid, and then I alien the wood, action on the case lies. And so if I deliver money to a man to deliver over and he does not, but converts the money to his own use, I can elect to have action of account against him or action on my case; but the stranger has no other remedy except action of account. And so if I bail my goods to a man to safely keep, and he takes the custody upon him, and my goods for lack of good custody are lost or destroyed, I shall have action of detinue, or on my case at my pleasure, and shall charge him by this word *super se assumpsit.* And if I make use of my action of detinue and he wages his law, I shall be barred in action on my case, because since I had liberty to elect action of detinue it was at my peril, and I have lost the advantage of the action on my case, and this is adjudged. As, if I hold an acre of land by fealty, twenty shillings of rent, or by a hawk or a rose, in the disjunctive, in this case before the rent day I have liberty to pay the hawk, rose, or otherwise the twenty shillings, at my pleasure. And if I covenant with a carpenter to build a house and pay him twenty pounds for the house to be built by a certain day, now I shall have good action on my case because of payment of my money, and still it sounds only in covenant, and without payment of money in this case no remedy; and still if he builds it and misbuilds it, action on my case lies. And also for nonfeasance, if the money is paid

action on the case lies. And hence it seems to me in the case at bar the payment of the money is the cause of the action on the case without any passing of any property, &c., *et adjournatur*, &c.[1]

HUNT *v.* BATE.

Easter Term, 1568.

[*Reported in Dyer*, 272.]

The servant of a man was arrested, and imprisoned in the Compter in London for trespass; and he was let to mainprize by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless against the party plaintiff from all damages and costs, if any should be adjudged, as happened afterwards in reality; whereupon the surety was compelled to pay the condemnation, *sc.* 31*l.*, &c. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. Wherefore, &c.

But in another like action on the case, brought upon a promise of 20*l.* made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant.[2] And land may be also given in frank-marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, &c. And therefore the opinion of the Court in this case this Term was, that the plaintiff should recover upon the verdict, &c. And so note the diversity between the aforesaid cases.

[1] The stages in the early development of assumpsit are shown in Professor Ames's articles on The History of Assumpsit, 2 Harv. L. Rev. 1, 53.

[2] Riggs *v.* Bullingham, Cro. Eliz. 715; Bosden *v.* Thinne, Yelv. 40; Field *v.* Dale, 1 Rolle's Ab. 11, plac. 8; Townsend *v.* Hunt, Cro. Car. 418; Oliverson *v.* Wood, 3 Lev. 419, *acc.*

SMITH AND SMITH'S CASE.

In the Queen's Bench, Michaelmas Term, 1583.

[*Reported in* 3 *Leonard*, 88.]

Lambert Smith, executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator, having divers children infants, and lying sick of a mortal sickness, being careful to provide for his said children infants, the defendant, in consideration the testator would commit the education of his children, and the disposition of his goods after his death, during the minority of his said children, for the education of the said children, to him, promised to the testator to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon *non assumpsit* pleaded, it was found for the plaintiff. And upon exception to the declaration in arrest of judgment for want of sufficient consideration, it was said by Wray, C. J., that here is not any benefit to the defendant that should be a consideration in law to induce him to make this promise; for the consideration is no other but to have the disposition of the goods of the testator *pro educatione liberorum*. For all the disposition is for the profit of the children; and notwithstanding that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not showed; and therefore the law shall intend that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which Ayliffe, J., granted; Gawdy, J., was of the contrary opinion. And afterwards by award of the Court it was that the plaintiff *nihil capiat per billam*.

SIDENHAM and WORLINGTON.

In the Common Pleas, Easter Term, 1585.

[*Reported in* 2 *Leonard*, 224.]

In an action upon the case upon a promise, the plaintiff declared that he, at the request of the defendant, was surety and bail for J. S., who was arrested in the King's Bench upon an action of 30*l*., and that after-

wards, for the default of J. S., he was constrained to pay the 30*l.*; after which the defendant, meeting with the plaintiff, promised him for the same consideration that he would repay that 30*l.*, which he did not pay; upon which the plaintiff brought the action. The defendant pleaded *non assumpsit*, upon which issue was joined, which was found for the plaintiff. *Walmesley*, Serjt., for the defendant, moved the Court that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration: as if one giveth me a horse, and a month after I promise him 10*l.* for the said horse, he shall never have debt for the 10*l.*, nor assumpsit upon that promise; for there it is neither contract nor consideration, because the same is executed. ANDERSON. This action will not lie; for it is but a bare agreement and *nudum pactum*, because the contract was determined, and not *in esse* at the time of the promise; but he said it is otherwise upon a consideration of marriage of one of his cousins, for marriage is always a present consideration. WINDHAM agreed with ANDERSON, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold. PERIAM, J., conceived that the action did well lie; and he said that this case is not like unto the cases which have been put of the other side: for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration and the promise and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite ought to concur and meet together, viz., the consideration of the one side, and the sale or the promise on the other side. But to maintain an action upon an assumpsit, the same is not requisite, for it is sufficient if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day. For in an action upon the case upon a promise, the declaration is laid that the defendant, for and in consideration of 20*l.* to him paid (*postea scil.*), that is to say, at a day after *super se assumpsit*, and that is good; and yet there the consideration is laid to be executed. And he said that the case in Dyer, 10 Eliz. 272, would prove the case. For there the case was, that the apprentice of one Hunt was arrested when his master Hunt was in the country, and one Baker, one of the neighbors of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt. Afterwards Hunt, the master, returning out of the country, thanked Baker for his neighborly kindness to his apprentice, and promised him that he would repay him the sum which he had paid for his servant and apprentice: and after wards, upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case that the action would not lie, because the consideration was precedent to the promise, because

it was executed and determined long before. But in that case it was holden by all the justices that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. RHODES, J., agreed with PERIAM; and he said that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20*l.* for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundanti* doth promise him 10*l.* more after his service ended, he shall not maintain an action for that 10*l.* upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices; and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff; and they much relied upon the case of Hunt and Baker, 10 Eliz., Dyer, 272.

CRIPPS *v.* GOLDING.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1586.

[*Reported in* 1 *Rolle's Abridgment*, 30.]

IF a man, in consideration of a surrender and of 10*l.* paid, promises to do such a thing, although the surrender cannot be made, so that that consideration is void, yet the action is maintainable upon the other consideration.[1]

SIR ANTHONY STURLYN *v.* ALBANY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587.

[*Reported in Croke Elizabeth*, 67.]

ASSUMPSIT. The case was, the plaintiff had made a lease to J. S. of land for life, rendering rent. J. S. grants all his estate to the defend-

[1] In 1 Leon, 296, s. c. *nom.* Crisp and Golding's Case, it was said by Coke, *arguendo*: "Where two or many considerations are put in a declaration, although some be void, yet if one be good, the action well lieth, and damages shall be taxed accordingly." Bradburne *v.* Bradburne, Cro. El. 149; Colston *v.* Carre, 1 Rolle's Ab. 30, Cro. El. 847; Crisp *v.* Gamel, Cro. Jac. 128; Best *v.* Jolly, 1 Sid. 38, *acc.*

ant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff allegeth that upon such a day of, &c., at Warwick, he showed unto him the indenture of lease by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, that there was no consideration to ground an action; for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action: and here the showing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages. But they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

Nota. In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c., that no action lieth upon this assumpsit; which was affirmed by the justices.

STRANGBOROUGH AND WARNER.

In the Queen's Bench, 1588 or 1589.

[*Reported in* 4 *Leonard*, 3.]

Note, That a promise against a promise will maintain an action upon the case, as in consideration that you do give to me 10*l.* on such a day, I promise to give you 10*l.* such a day after.[1]

[1] See also Pecke *v.* Redman, Dyer, 113 (1555).

JEREMY *v.* GOOCHMAN.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1595.

[*Reported in Croke Elizabeth*, 442.]

ASSUMPSIT. And declares that, in consideration *quod deliberasset et dedisset* to the defendant twenty sheep, he assumed to pay unto him five pounds at the time of his marriage; and allegeth *in facto* that he was married, &c. The issue was *non assumpsit*, and found for the plaintiff; and now moved in arrest of judgment, because it is for a consideration past; for it is in the preter tense *deliberasset*, and therefore no cause of action. And of that opinion was the whole court; wherefore judgment was stayed.[1]

RICHES AND BRIGGS.

IN THE QUEEN'S BENCH, EASTER TERM, 1601.

[*Reported in Yelverton*, 4.]

IN an action on the case the plaintiff declared that, in consideration he had delivered to the defendant twenty quarters of wheat, the defendant promised upon request to deliver the same wheat again to the plaintiff. And adjudged a good consideration; for by POPHAM and *tot. cur.* the very possession of the wheat might be a credit and good countenance to the defendant to be esteemed a rich farmer in the country, as in case of the delivery of 1,000*l.* in money to deliver again upon request; for by having so much money in his possession he may happen to be preferred in marriage. *Quære*, for it seems an hard judgment; for the defendant has not any manner of profit to receive, but only a bare possession. *Nota*, the truth of the case was (which doth not alter the reason *supra*) that the plaintiff had delivered to the defendant the said twenty quarters of wheat to deliver over to J. S. to whom the plaintiff was indebted in so many quarters, and the defendant promised to deliver the same quarters of wheat to J. S. And because they were not delivered, the plaintiff brought his action *ut supra;* and adjudged *ut supra*. But *nota*, the judgment was reversed in the Exchequer, Mich. 44 & 45 Eliz., as Hitcham told Yelverton.[2]

[1] Barker *v.* Halifax, Cro. Eliz., 741; Docket *v.* Voyel, Cro. Eliz., 411, *acc.*

[2] Howlet *v.* Osborne, Cro. El., 380; Game *v.* Harvie, Yelv. 50; Pickas *v.* Guile, Yelv. 128, *acc.;* Wheatley *v.* Low, Cro. Jac. 668, *contra*. See 2 Harv. L. Rev. 5.

MAYLARD *v.* KESTER.

In the King's Bench, Trinity Term, 1601.

[*Reported in Moore*, 711.]

Maylard brings action on the case against Kester on assumpsit, in consideration that he would sell and deliver to Kester woollen cloth for the funeral of a clerk, Kester assumed to pay him *cum inde requisitus.* And alleges that he sold and delivered divers cloth to him at various prices, viz., thirty-one black striped garments for 19*l.*, and so he recites other lots in the same manner, and the sum amounted to 160*l.*, which he requested Kester to pay, and he did not pay according to the promise and assumption aforesaid. The defendant pleaded *non assumpsit*, and verdict was for the plaintiff, and judgment given. And on writ of error brought, the judgment was reversed in the Exchequer Chamber, Michaelmas Term, 41 & 42 Elizabeth, because debt properly lies, and not action on the case, the matter proving a perfect sale and contract.

SLADE'S CASE.

In the King's Bench, Trinity Term, 1602.

[*Reported in* 4 *Coke*, 92 *b.*[1]]

John Slade brought an action on the case in the King's Bench against Humphrey Morley (which plea began Hil. 38 Eliz. Rot. 305), and declared, that whereas the plaintiff, 10th of November, 36 Eliz. was possessed of a close of land in Halberton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff the said 10th day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz. were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the rector, &c. excepted), assumed and promised the plaintiff to pay him 16*l.* at the feast of St. John the Baptist then to come: and for non-payment thereof at the said feast of St. John Baptist, the plaintiff brought the said action: the defendant pleaded *non assumpsit modo et forma;* and on the trial of this issue the jurors gave a special verdict, *sc.*, that the

[1] Some authorities and illustrations are omitted.

defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said declaration is alleged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain; and against the maintenance of this action divers objections were made by John Dodderidge of counsel with the defendant.

1. That the plaintiff upon this bargain might have ordinary remedy by action of debt, which is an action formed in the Register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the Register; for *ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, et nunquam decurritur ad extraordinarium ubi valet ordinarium*, as appears by all our books; *et nullus debet agere actionem de dolo, ubi alia actio subest.* The second objection was, that the maintenance of this action takes away the defendant's benefit of wager of law, and so bereaves him of the benefit which the law gives him, which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them, of which payment or satisfaction he has no witness, and therefore it would be mischievous if he should not wage his law in such case. And that was the reason (as it was said) that debts by simple contract shall not be forfeited to the King by outlawry or attainder, because then by the King's prerogative the subject would be ousted of his wager of law, which is his birthright, as it is held in 40 E. 3. 5 a. 50 Ass. 1. 16 E. 4. 4 b. and 9 Eliz. Dyer 262. and if the King shall lose the forfeiture and the debt in such case, and the debtor by judgment of the law shall be rather discharged of his debt, before he shall be deprived of the benefit which the law gives him for his discharge, although in truth the debt was due and payable; *a fortiori* in the case at bar, the defendant shall not be charged in an action in which he shall be ousted of his law, when he may charge him in an action, in which he may have the benefit of it: and as to these objections, the Courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held, that the action (notwithstanding such objections) was maintainable, and the Court of Common Pleas held the contrary. And for the honor of the law, and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure censeri*) the case was openly argued before all the Justices of England, and Barons of the Exchequer, *sc.* Sir John Popham, Knt. C. J. of England, Sir Edm. Anderson, Knt. C. J. of the Common Pleas, Sir W. Periam, Chief Baron of the Exchequer, Clark, Gawdy, Walmesley, Fenner, Kingsmill, Savil, Warburton, and Yelverton, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the defendant, and at another time the case was argued at Serjeants' Inn, before all the said Justices and Barons, by the Attorney-General for the plaintiff, and by Francis Bacon for the

defendant, and after many conferences between the Justices and Barons, it was resolved, that the action was maintainable, and that the plaintiff should have judgment. And in this case these points were resolved: — 1. That although an action of debt lies upon the contract, yet the bargainor may have an action on the case, or an action of debt at his election, and that for three reasons or causes: 1. In respect of infinite precedents (which George Kemp, Esq. Secondary of the Prothonotaries of the King's Bench showed me), as well in the Court of Common Pleas as in the Court of King's Bench, in the reigns of King H. 6. E. 4. H. 7. and H. 8. by which it appears, that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money, &c. in which cases the plaintiffs had judgment. . . . The second cause of their resolution was divers judgments and cases resolved in our books where such action on the case on Ass. has been maintainable, when the party might have had an action of debt, 21 H. 6. 55 b. 12 E. 4. 13. 13 H. 7. 26. 20 H. 7. 4 b. and 20 H. 7. 8 b. which case was adjudged as Fitz James cites it, 22 H. 8. Dyer 22 b. 27 H. 8. 24 & 25. in Tatam's case, Norwood and Read's case adjudged Plowd. Com. 180. 3. It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in Read and Norwood's case, Pl. Com. 128. 4. It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt, is a good bar in an action on the case on *assumpsit*. *Vide* 12 E. 4. 13 a. 2 R. 3. 14. (32) 33 H. 8. *Action sur le case.* Br. 105. 5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 & 3 Ph. and Mar. Dyer 113. they bargained together, that for a certain consideration Redman should deliver to Peck twenty quarters of barley yearly during his life, and for non-delivery in one year, it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it, but his executors or administrators, for debt doth not lie in such case, till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his neces-

sary use: so 5 Mar. Br. *Action sur le case* 108. that if a sum is given in marriage to be paid at several days, an action upon the case lies for non-payment at the first day, but no action of debt lies in such case till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be occasion of much perjury. 6. It was said, that an action on the case on *assumpsit* is as well a formed action, and contained in the register, as an action of debt, for there is its form: also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the Register. . . . And therefore it was concluded, that in all cases when the Register has two writs for one and the same case, it is in the party's election to take either. But the Register has two several actions, *sc.* action upon the case upon *assumpsit*, and also an action of debt, and therefore the party may elect either. And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his law, forasmuch as he might pay it in secret: to that it was answered, that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment he made: but the mischief would be rather on the other party, for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury: for *Jurare in propria causa* (as one saith) *est sæpenumero hoc seculo præcipitium diaboli ad detrudendas miserorum animas ad infernum:* and therefore in debt, or other action where wager of law is admitted by the law, the Judges without good admonition and due examination of the party do not admit him to it. And as to the case which was cited, that debts or duties due by single contract where the party may wage his law, shall not be forfeited by outlawry, because the debtor will be thereby ousted of his law: to that it was answered by the Attorney-General that in such case by the law, debts or duties shall be forfeited to the King, and so are the better opinions of the books.

RANN AND ANOTHER, *Executors of* MARY HUGHES, *v.* ISABELLA HUGHES, *Administratrix of* J. HUGHES.

IN THE HOUSE OF LORDS, MAY 14, 1778.

[*Reported in* 7 *Term Reports*, 350, *note* (*a*).]

THE declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator

awarded that the defendant's intestate should pay to the plaintiffs' testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid: by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum; and being so liable, she, in consideration thereof, undertook and promised to pay, &c. The defendant pleaded *non assumpsit*, *plene administravit*, and *plene administravit* except as to certain goods, &c., which were not sufficient to pay an outstanding bond-debt of the intestate's therein set forth, &c. The replication took issue on these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor; Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity; upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum*, *ex quo non oritur actio;* and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested; and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be coëxtensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that, if it were necessary to

support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed, upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of Pillans *v.* Van Mierop and Hopkins, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

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 endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case: the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of Pillans *v.* Van Mierop, in Burr., and the case of Losh *v.* Williamson, Mich. 16 G. 3, in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.[1]

[1] In 7 Brown's Parliament Cases, 550 (vol. 4 of Tomlin's ed., p. 27), the arguments of counsel are given. Upon the question of consideration, F. Buller and J. Dunning, for the plaintiffs in error, argued as follows: —

"In the case of a promise in writing, which this must be taken to be [and which they said it was in fact], it is not necessary to allege any consideration in the declaration; but if it were necessary, there was a sufficient consideration for the promise appearing upon this declaration. In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without seal, and a contract under the same circumstances, to which a party at the time of signing it puts a seal, or his finger on cold wax. In the case of a deed, *i. e.*, an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765 it was solemnly adjudged in the Court of King's Bench, Pillans *v.* Van Mierop, 3 Burr. 1663, that no consideration was necessary when the promise was

B. — General Principles.

WILKINSON *v.* OLIVEIRA.

In the Common Pleas, January 27, 1835.

[*Reported in* 1 *Bingham's New Cases*, 490.]

The declaration stated that divers disputes and controversies had arisen between the defendant and divers other persons respecting the disposition of the estate and effects of one Dominick Oliveira, then late deceased, and the right of the defendant to the possession of any and what part thereof; in which disputes and controversies it became and was necessary, for the termination thereof in favor of the defendant, that the defendant should prove that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien, and a native of Portugal; that the plaintiff was lawfully possessed of a certain writing and paper, being a letter written by the said Dominick Oliveira in his lifetime to the plaintiff, which said letter showed, declared, and proved, that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien and a native of Portugal; that the plaintiff, at the request of the defendant, gave to the defendant the said letter, to be used and employed by the defendant for the purpose of proving that the said Dominick Oliveira was such alien and native of Portugal at the time he made his will and at the time of his death; that the defendant used and employed the said letter for the said purpose; and that by means of the said letter and

reduced into writing. That opinion has since been recognized in the same court, and several judgments founded upon it; all which judgments must be subverted, and what was there conceived to be settled law totally overturned, if the plaintiffs in this cause were not entitled to recover. But further: if a consideration were necessary, a sufficient one for the promise appeared upon the declaration in this case. The defendant was the administratrix of John Hughes, she had effects of his in her hands, she was liable to be called upon by the plaintiffs in an action, to show to what amount she had effects, and how she had applied them; and under these circumstances she promised to pay the demand which the plaintiffs had against her. But it was said, that it did not appear on the declaration that she had effects of John Hughes sufficient to pay all his debts. To what amount she had effects, or what debts were due from Hughes at his death, was known to the defendant only, and not to the plaintiffs. They applied to the person against whom they had a right of action; she promised to pay them, and under that promise they rested satisfied. This promise, if it did not import an admission of effects, must naturally be understood to mean that the defendant would pay the debt whether she had effects or not; and if it was not so meant, it could only be intended to amuse, mislead, and deceive the plaintiffs. And after such a promise the defendant ought not to be permitted to say that she had not sufficient assets to pay this debt."

of the matters therein contained, the defendant was enabled to and did cause the said disputes and controversies to be determined in favor of him, the defendant; and did, by means of the said letter and of the matters therein contained, become lawfully possessed of and acquired a large portion of the estate and effects of the said Dominick Oliveira, of great value, to wit, of the value of 100,000*l.* &c. And thereupon, to wit, on, &c., at, &c., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there given the said letter to the defendant, the defendant then and there undertook and faithfully promised the plaintiff to give him, the plaintiff, a certain sum of money, to wit, the sum of 1000*l.*

Breach: refusal to give the 1000*l.* in conformity with the promise.

Plea: that the defendant was not, by means of the letter, enabled to, and did not by means thereof, cause the said disputes to be determined in favor of the defendant; and that the defendant did not, by means of the letter, become possessed of a portion of the estate of Dominick Oliveira, of the value of 100,000*l.*

Demurrer: for putting in issue matter not properly issuable, and for not denying or confessing and avoiding the breach of promise. Joinder.

Kelly, for the plaintiff, was called upon by the court to support the declaration. The consideration, though past, is alleged to have arisen at the defendant's request, which renders it sufficient to impart validity to the defendant's promise; and though the letter in question is alleged to have been given to the defendant, the statement amounts to this: that in consideration the plaintiff had put the defendant in possession of a document by which the defendant was enabled to recover 100,000*l.*, the defendant undertook to give the plaintiff in return 1000*l.* For such an undertaking the delivery of the document was ample consideration.

Talfourd, Serjt., contra, contended that, taking the whole declaration together, it appeared plainly the letter had been handed to the defendant by way of a spontaneous gift; and such gift was no consideration for a promise to pay.

TINDAL, C. J. What would you say to the case of a man who, entering a shop, should say, "I'll give you 10*l.* for such an article?" Here the word "give" is used on both sides. It is a gift upon a mutual consideration.

PER CURIAM. There must be *Judgment for the plaintiff.*

BAINBRIDGE *v.* FIRMSTONE.

IN THE QUEEN'S BENCH, NOVEMBER 2, 1838.

[*Reported in* 8 *Adolphus & Ellis*, 743.]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit, two boilers of the plaintiff, of great value, &c., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition, and as fit for use by plaintiff, as the same were in at the time of the consent so given by plaintiff; and that although in pursuance of the consent so given, defendant, to wit, on, &c., did weigh the same boilers, yet defendant did not, nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, &c., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterwards, to wit, on, &c., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, &c. Plea: *non assumpsit.*

On the trial before Lord Denman, C. J., at the London Sittings after last Trinity Term, a verdict was found for the plaintiff.

John Bayley now moved in arrest of judgment. The declaration shows no consideration. There should have been either detriment to the plaintiff, or benefit to the defendant. 1 Selwyn's N. P.[1] 45. It does not appear that the defendant was to receive any remuneration. Besides, the word "weigh" is ambiguous.

LORD DENMAN, C. J. It seems to me that the declaration is well enough. The defendant 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. The plaintiff might have given or refused leave.

PATTESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate there is a detriment to the plaintiff from his parting with the possession for even so short a time.

WILLIAMS and COLERIDGE, JJ., concurred. *Rule refused.*

[1] 9th edit.

HAIGH AND ANOTHER *v.* BROOKS.

IN THE QUEEN'S BENCH, JUNE 6, 1839.

[*Reported in* 10 *Adolphus & Ellis*, 309.]

BROOKS *v.* HAIGH AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JUNE 29, 1840.

[*Reported in* 10 *Adolphus & Ellis*, 323.]

ASSUMPSIT. The first count of the declaration stated that heretofore, to wit, on &c., in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guaranty of 10,000*l.*, on behalf of Messrs. John Lees & Sons, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees & Sons, paid at maturity; that is to say, a certain bill of exchange, bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees & Sons, payable three months after date, for 3466*l.* 13*s.* 7*d.*, and made payable at, &c.; and also a certain other bill, &c., describing two other bills for 3000*l.* and 3200*l.*, drawn by plaintiffs upon and accepted by Lees & Sons, and made payable at, &c. Averment: that plaintiffs, relying on defendant's said promise, did then, to wit, on, &c., give up to the said defendant the said guaranty of 10,000*l.* Breach, non-payment of the bills, when they afterwards came to maturity, by Lees & Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea to the first count: "That the said supposed guaranty of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guaranty was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit, the said Messrs. John Lees & Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guaranty or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guaranty or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guaranty, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing, signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say: —

MANCHESTER, 4th February, 1837.

MESSRS. HAIGH & FRANCEYS.

GENT., — In consideration of your being in advance to Messrs. John Lees & Sons in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guaranty for that amount (say 10,000*l.*) on their behalf.

JOHN BROOKS.

And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guaranty or special promise; wherefore the said defendant says that the supposed guaranty, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and, therefore, that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

Demurrer: assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guaranty in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was, therefore, executed by the said plaintiffs; and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder. The demurrer was argued in last Hilary Term.

Sir *W. W. Follett* for the plaintiffs.

Sir *J. Campbell*, Attorney-General, *contra*.

LORD DENMAN, C. J., in this Term (June 6th) delivered the judgment of the court.

It was argued for the defendant that this guaranty is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees's acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guaranty, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import.[1] As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

[1] See the discussion on the words "for giving his vote," in Lord Huntingtower *v.* Gardiner, 1 B. & C. 297.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so, the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guaranty could have been available within the doctrine of Wain *v.* Warlters,[1] the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded: he may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad; and the demurrer must prevail. *Judgment for the plaintiffs.*

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber.

The writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity Vacation, June 22d, 1840, before LORD ABINGER, C. B., BOSANQUET, COLTMAN, and MAULE, JJ., and ALDERSON and ROLFE, BB.

Sir *J. Campbell*, Attorney-General, for the plaintiff in error. . . .

Sir *W. W. Follett*, *contra.*

LORD ABINGER, C. B., in the same Vacation (June 29th) delivered the judgment of the Court.

In the case of Brooks *v.* Haigh the judgment of the Court is to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guaranty an ambiguity that might be explained by evidence, so as to make it a valid contract; and therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guaranty was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.[2]

[1] 5 East, 10.

[2] A portion of the case is omitted.

"The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced."

SCHNELL *v.* NELL.

INDIANA SUPREME COURT, NOVEMBER TERM, 1861.

[*Reported in* 17 *Indiana*, 29.]

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument: —

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks County, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following instalments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

Blackburn, J., in Bolton *v.* Madden, L. R. 9 Q. B. 55. See also Wolford *v.* Powers, 85 Ind. 294; Colt *v.* McConnell, 116 Ind. 249; Mullen *v.* Hawkins, 141 Ind. 363; Train *v.* Gold, 5 Pick. 380, 384; Wilton *v.* Eaton, 127 Mass. 174; Whitney *v.* Clary, 145 Mass. 156; Daily *v.* Minnick, 91 N. W. Rep. 913 (Iowa); Williams *v.* Jensen, 75 Mo. 681; Perkins *v.* Clay, 54 N. H. 518; Traphagen's Ex. *v.* Voorhees, 44 N. J. Eq. 21; Worth *v.* Case, 42 N. Y. 362; Earl *v.* Peck, 64 N. Y. 569; Cowee *v.* Cornell, 75 N. Y. 91; Judy *v.* Louderman, 48 Ohio St. 562; Cumming's Appeal, 67 Pa. 404; Giddings *v.* Giddings's Adm., 51 Vt. 227.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, [SEAL.]
"J. B. NELL, [SEAL.]
"WEN. LORENZ." [SEAL.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker *v.* Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed,[1] but to the exchange of something of, in itself, indeterminate value, for money, or perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded

[1] Wolford *v.* Powers, 85 Ind. 294, 301; Shepard *v.* Rhodes, 7 R. I. 470, *acc.*

as an earnest one. Hardesty *v.* Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr *v.* Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson *v.* Druley, 4 Ind. 519.

HARRISON *v.* CAGE AND HIS WIFE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1698.

[*Reported in* 5 *Modern*, 411.]

THIS is an action on the case, wherein the plaintiff declares that, in consideration the plaintiff would marry the defendant, the defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other defendant.

First. This action does not lie. Indeed it might be otherwise in the case of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in Anne Davis's Case,[1] and in the case of a

[1] 4 Rep. 16 *b*.

feoffment *causa matrimonii prælocuti*, which shows that there is a great difference between the two cases of a man and a woman; for it is a breach of a woman's modesty to promise a man to marry him, but it is not for a man to promise a woman to marry her.

Secondly. Here is no time laid when this marriage was to be; and it may be still.

Thirdly. The consideration is ill; it is no more than "I will be your husband if you will be my wife;" it is no more than this, "I will be your master, and you shall be my servant."

Fourthly. It is not reasonable that a young woman should be caught into a promise.

E contra. The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the counsel on the other side has so mean an opinion of a good woman as to think that she is no advancement to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

HOLT, C. J. Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum*, or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii prælocuti*, that goes upon another reason, there being a feoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise; but here, indeed, she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c., for this makes the promise void; but it is otherwise of a precontract.

TURTON, J. There is as much reason for the one as for the other; and Halcomb's Case in Vaughan is plain.

ROKEBY, J. If a man be scandalized by words *per quod matrimonium amisit*, a good action lies; and why not in this case?

TURTON, J. This action is grounded on mutual promises.

HOLT, C. J. The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum;* so that her promise must be good to make his signify any thing to her; and then, if her promise be good, why should not a good action lie upon it?

Judgment for the plaintiff.

HOLT *v.* WARD CLARENCIEUX.

In the King's Bench, Trinity Term, 1732.

[*Reported in* 2 *Strange*, 937.]

The plaintiff declared that it was mutually agreed between the plaintiff and defendant that they should marry at a future day which is past, and that, in consideration of each other's promise, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of 4,000*l.*

The defendant, with leave of the Court, pleaded double; viz., *non assumpsit*, and that the plaintiff, at the time of the promise, was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit*, and a verdict is found for her, with 2,000*l.* damages. And, as to the plea of infancy, demurred.

This cause was several times argued at the bar: 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant; when the Court inclined strongly with the plaintiff, because, though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, viz., by suit in the ecclesiastical court to compel a performance, the plaintiff being of the age of consent; and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted that, in the case of a contract *per verba de futuro* (as this was), there was no remedy, even against a person of full age, in the spiritual court; but only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de præsenti* is because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church.

After their arguments it was spoken to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this Term the Chief Justice delivered the resolution of the Court.

The objection in this case is, that, the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judg-

ment for the plaintiff, if we could have been satisfied by the arguments of the civilians that, as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaiutiff, was absolutely void. And we are all of opinion that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election. Cro. Car. 502; 2 Rol. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

WILLIAM J. ATWELL *v.* EDWARD J. JENKINS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 24–APRIL 2, 1895.

[*Reported in* 163 *Massachusetts*, 362.]

HOLMES, J. This is an action to recover four hundred dollars, put into the defendant's hands by the plaintiff through the Western Union Telegraph Company, under the following circumstances. One Hoes, an inhabitant of Chicago, committed an offence here and was arrested.

It seems to have been for his interest to keep the matter private. He retained the defendant, who, on receipt of the above mentioned money, recognized as surety for him and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of the insanity of Hoes. When arrested Hoes telegraphed to the plaintiff, "Telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney. . . . Am in trouble. Don't fail." The plaintiff thereupon sent the money.

It hardly needs to be said that this transaction made no contract between the plaintiff and the defendant. The plaintiff's advance was to Hoes. When the money was received by Jenkins, it was received by Hoes as between them and the plaintiff, and if the defendant kept it, that was by some arrangement between him and Hoes with which the plaintiff had nothing to do.

But there was evidence that Hoes was insane at the time, and the plaintiff claims a right to recover on that ground. This must mean that he had a right to avoid his contract on the ground of the other party's insanity, and to demand his money wherever he could find it, unless the defendant, to whose hands it was traced, stood as a purchaser for value, or had changed his position, which fact the plaintiff had a right to deny, and did controvert in this case, except as to fifty or sixty dollars. We presume that the argument is, that if Hoes had become sane and had affirmed his dealings with the defendant, the plaintiff still would have had the right to prove that the defendant had no contract with Hoes, and was not a purchaser for value, and that, on the other hand, if Hoes had avoided his contract, his right to the money would be subject to the plaintiff's paramount right to the same fund, always supposing that the plaintiff had the right to avoid his contract also. Buller *v.* Harrison, Cowp. 565, 568; Cox *v.* Prentice, 3 M. & S. 344.

But the question is whether the plaintiff had the right supposed. In Holt *v.* Ward Clarencieux, Strange, 937, it was held, on great consideration, that a person of full age contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without regard to whether the defendant knew or not. This case is accepted without dispute as the law. Thompson *v.* Hamilton, 12 Pick. 425, 429; Warwick *v.* Bruce, 2 M. & S. 205; Bruce *v.* Warwick, 6 Taunt. 118; Monaghan *v.* Agricultural Ins. Co., 53 Mich. 238, 243; Hunt *v.* Peake, 5 Cowen, 475; Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Johnson *v.* Rockwell, 12 Ind. 76, 81; Field *v.* Herrick, 101 Ill. 110; 2 Kent, Com. 78, 236; Leake, Con. (3d ed.) 476. The analogy between insane persons and infants is not perfect, but has prevailed in this matter. Allen *v.* Berryhill, 27 Iowa, 534; Harmon *v.* Harmon, 51 Fed. Rep. 113; Bish. Con. § 973; Clark, Con. 268. An insane

person like Hoes, if he was insane, not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. Carrier *v.* Sears, 4 Allen, 336, 337; Bullard *v.* Moor, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void because only one party had done the necessary overt act. A voidable promise is a sufficient consideration. Plympton *v.* Dunn, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and of course it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation. See Ring *v.* Phœnix Assurance Co., 145 Mass. 426, 429. The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. Upon these considerations, and in view of the decisions cited, we are of opinion that the plaintiff cannot repudiate his contract with Hoes. So long as that contract stands, at least, he cannot maintain an action against the defendant. Other defences need not be considered. We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides. *Exceptions overruled.*

ELEANOR THOMAS *v.* BENJAMIN THOMAS.

In the Queen's Bench, February 5, 1842.

[*Reported in* 2 *Queen's Bench Reports*, 851.]

Assumpsit. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or other assurances, grants, &c., or otherwise, assure a certain dwelling-house and premises, in the county of Glamorgan, unto plaintiff for her life, or so long as she should continue a widow and unmarried; and that plaintiff should, at all times during which she should have possession of the said dwelling-house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators, or assigns, the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and keep the said dwelling-house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant

promised to perform the same; and that although plaintiff afterwards and before the commencement of the suit, to wit, &c., required of defendant to grant, &c., by a necessary and sufficient deed, &c., the said dwelling-house, &c., to plaintiff for her life, or whilst she continued a widow; and though she had then continued, &c., and still was, a widow and unmarried, and although she did, to wit, on, &c., tender to the defendant for his execution a certain necessary and sufficient deed, &c., proper and sufficient for the conveyance, &c., and although, &c. (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, &c.

Pleas: 1. Non assumpsit. 2. That there was not the consideration alleged in the declaration for the defendant's promise. 3. Fraud and covin. Issues thereon.

At the trial before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling-houses in Merthyr Tidvil, in one of which, being the dwelling-house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, &c., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of 100*l.* instead thereof.

This declaration being shortly afterwards brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and after the lapse of a few days they and the plaintiff executed the agreement declared upon, which, after stating the parties and briefly reciting the will, proceeded as follows: —

"And whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house," &c., "or 100*l.* out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was not reduced to writing in the life-time of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect: Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises," the executors would convey the dwelling-house, &c., to the plaintiff and her assigns during her life, or

for so long a time as she should continue a widow and unmarried: "provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas or her assigns shall and will, at all times during which she shall have possession of the said dwelling-house, &c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, &c., the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair:" with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises for some time; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and shortly before the trial brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues; and in Easter Term last a rule *nisi* was obtained pursuant to the leave reserved.

Chilton and *W. M. James* now showed cause.

E. V. Williams, contra.

Lord Denman, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground-rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large: the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

Patteson, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here — a pious respect for the wishes of the testator — does not in any way move from the plaintiff: it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift

with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it: for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value: possibly that might be so: but suppose it would: the plaintiff contracts to take it, and does take it, whatever it is, for better for worse: perhaps a *bona fide* purchase for a valuable consideration might override it; but that cannot be helped.

Coleridge, J. The concessions made in the course of the argument have in fact disposed of the case. It is conceded that mere motive need not be stated; and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part: *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator; but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn, and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration: it is a valuable consideration: it is clearly a thing newly created, and not part of the old ground-rent.

Rule discharged.[1]

WILLIAM McMULLAN *v.* DICKINSON COMPANY.

Minnesota Supreme Court, January 14, 1896.

[*Reported in* 63 *Minnesota*, 405.[2]]

Collins, J. From the resolution which was incorporated bodily into the instrument executed by both parties as their contract it appears that it was resolved to employ plaintiff as an assistant man-

[1] Montpelier Seminary *v.* Smith's Estate, 69 Vt. 382, *contra*.

[2] Part of the case is omitted.

ager of the corporate business at a fixed salary per year, payable in monthly instalments. The term of employment was determined upon as the period of time during which the corporate business might be carried on; not to exceed, of course, the life of the corporation as fixed by law. Two provisos were appended to the paragraph relating to the term of employment, — one that plaintiff should properly and efficiently discharge his duties as such assistant; the other, that his term of employment should continue only so long as he owned and held, in his own name, fifty shares, fully paid up, of the defendant's capital stock. A recital that plaintiff had accepted the employment followed, and then the agreement whereby defendant employed plaintiff and the latter entered into the employment, each party being subject to the terms and conditions mentioned and prescribed by the resolution.

Counsel for defendant urges several objections to the validity of the contract, but they are all disposed of by considering the claim that it is and was void for lack of mutuality of consideration, the point being that, while the character of the services to be rendered and the compensation were fixed, no definite period of time was agreed upon during which the plaintiff should work or defendant employ and pay. The language used, independent of the provisos, was: "Said employment is to continue during the time the business of said corporation shall be continued, not exceeding the term and existence of the corporation." The only conditions mentioned and imposed being that, while in defendant's employ, the plaintiff should render proper and efficient service, and should own and hold in his own name certain shares of corporate stock.

As we construe the expressions used, the duration of the term of employment was sufficiently defined, for the law does not require that the precise number of days or months or years shall be stated; and there was mutuality of consideration. The term fixed, dependent only upon the condition as to plaintiff's ownership of the stock shares, was for such period of time as defendant corporation might continue to transact business. It might cease to do business voluntarily, or there might be an involuntary termination of its business transactions; for instance by proceedings in insolvency instituted by its creditors, or the business might terminate by operation of law at the end of not to exceed thirty years from the date of its organization, — that being the life term of corporations of this character under the statutes. The defendant agreed to keep plaintiff in its employ so long as he retained as the owner, and held in his own name, the shares, and it continued in business; and plaintiff, in consideration of defendant's agreement, stipulated that, so long as he remained in such employment, he would own and hold the stock, and would perform proper and efficient service. The requirement that plaintiff should own and continue to hold the stock as a condition to his retention by defendant was, presumptively, for the benefit of the

latter, and a detriment to the former. It was in defendant's interest to have its stock shares permanently held by its employés, for such holding would serve to stimulate them in the performance of their duties. It was an injury to plaintiff to hold the stock as a condition for his employment, especially when we consider that the business of the concern could be closed out at any time, leaving him out of employment, with the stock upon his hands. Had the plaintiff disposed of his shares, the defendant would have suffered a loss; and, had the latter ceased business, the former would have been injured. Had the relation of employer and employé terminated between these parties through the happening of either of these two contingencies, neither party would have been in *statu quo*. The consideration for the agreement was ample and mutual, although the term of service might be terminated by defendant's cessation of business or plaintiff's selling his stock in the corporation. See Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862. The expressions of a contingency whereby the contract might be terminated by the act of either party expressly excluded the idea that each was at liberty to terminate it at any time without regard to the happening of either contingency.[1]

MARGARET WELLS, APPELLANT, *v.* FRANCIS ALEXANDRE, ET AL., RESPONDENT.

NEW YORK COURT OF APPEALS, OCTOBER 13–DECEMBER 1, 1891.

[*Reported in* 130 *New York*, 642.]

PARKER, J.[2] December 31, 1887, the plaintiff addressed the following communication to the defendants: —

"Messrs. F. ALEXANDRE & SONS, New York:

"GENTS, — We propose to furnish your steamers, 'City of Alexandria,' 'City of Washington' and 'Manhattan,' with strictly free burning pea, delivered alongside Pier 3, North River, for the year 1888, commencing Jan. 1st to Dec. 31st, for the sum of three dollars and five cents per ton. We also agree to furnish any other steamers of your line with same coal and at same price at any time you wish. If, through any cause, we are unable to deliver pea coal, we will deliver you other sizes at an equitable adjustment of price.

"Yours, very respectfully,

"JOS. K. WELLS, *Agt.*"

[1] "When a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration." HOLMES, J., in Gutlon *v.* Marcus, 165 Mass. 335, 336.

[2] A small portion of the opinion is omitted.

To which the defendants on January 4, 1888, replied as follows: —

"Mr. Jos. K. Wells:

"Dear Sir, — We beg to accept your offer of 31st ult., to furnish our steamers, 'City of Alexandria' 'City of Washington' and 'Manhattan,' with strictly free burning pea coal, delivered along side Pier 3, North River, for the year 1888, commencing January 1st, for the sum of $3.05 per ton of 2,240 lbs.; also to furnish any other steamer of our line with same coal at same price, if we wish it. If, through any cause, you are unable to deliver pea coal, you will deliver us other sizes at an equitable adjustment of price.

"Yours truly,

"F. Alexandre & Sons."

Thereafter, and until the twenty-fifth day of June following, the plaintiff furnished to the defendants such quantities of coal as were required for the use of the steamships named. On that day the defendants sold to the New York and Cuba Steamship Company all their steamship property, charters, and business, including the steamers mentioned in the correspondence, and ceased to operate them. The steamers under the control and management of the purchaser of June twenty-fifth continued to make regular trips at stated intervals between the same ports as before, and during the remaining portion of the year required and used large quantities of coal. The plaintiff insists that the correspondence created a valid contract by which she became bound to deliver, and the defendants to receive, at the price named, all coal which would be required for the operation of the steamers during 1888, and as the coal required for their use was not received by the defendants after June twenty-fifth, that she is entitled to recover the damages sustained because of the default of the defendants.

The defendants, on the other hand, contend that the correspondence did not create a contract; that if it did, it was a contract for successive deliveries of coal, to be made only when the defendants should give the plaintiff notice that a delivery was required, and as notice had not been given, the defendants are not in default.

If in plaintiff's offer the words "one thousand tons" had been employed instead of "your steamers 'City of Alexandria,' 'City of Washington' and 'Manhattan,'" it would not be questioned that the written acceptance of the defendants created a valid contract. The offer and acceptance were unqualified; the price fixed; the duration of the contract limited to a period commencing January first, and ending December thirty-first of the same year; and the quantity would have been certain.

As it was not possible to determine the precise amount of coal that would be required to operate the steamers during the year, the plaintiff seems to have made his proposition as to amount as definite and certain as the situation permitted. Three of defendants' steamers made regular trips at stated intervals between certain ports and

necessarily required and used in so doing large quantities of coal, and in view of that condition the plaintiff offered to "furnish your steamers 'City of Alexandria,' 'City of Washington' and 'Manhattan,'" with coal for a period of about a year. It is very clear that the language employed by plaintiff in the light of surrounding circumstances was intended to make as definite as possible the quantity of coal which the defendants would be required to take. The quantity to be measured by the requirements of the three steamers for the year ensuing in an employment about which they had been long engaged. So, while at the date of the agreement the quantity was indefinite, it was, nevertheless, determinable by its terms and, therefore, certain, within the maxim, *certum est quod certum reddi potest.*

Defendants urged that if it be conceded that the proposition accepted was to furnish the steamers with coal for the year, at three dollars and five cents per ton, still the undertaking was to furnish coal from time to time when defendants should notify her that deliveries were required, and as no such notice has been given since the last delivery for which payment has been made, the defendants are not in default and no recovery can be had.

The argument made in support of this proposition briefly stated is, that it is apparent that it could not have been in the contemplation of the parties that the coal should be furnished in one lot, but rather at different times as the steamers required it for their several voyages; nor could the plaintiff know the amount which each steamer would require at the successive loadings. Therefore, the defendants were to determine the time and quantity for each delivery, and as the contract contained no promise to give the plaintiff notice, the defendants were bound to take only such coal as they notified the plaintiff to furnish.

It may be doubted whether there is anything in the record to warrant a determination that the plaintiff would not know the several amounts and times when coal would be needed, but if it were otherwise, we do not deem it controlling. As we have already said, the evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform all needful acts to give effect to the agreement; therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely to the mercy of the other. Jugla *v.* Trouttet, 120 N. Y. 21-28; New Eng. Iron Co. *v.* Gilbert E. R. R. Co., 91 id. 153; Booth *v.* C. R. M. Co., 74 id. 15.

The fact that the defendants deemed it best to sell the steamers, cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers

required, for the provisions of the agreement do not admit of a construction that it was to terminate in the event of a sale or other disposition of them by the defendants.

The judgment should be reversed.[1]

TRAVER *v.* ——.

wrong

IN THE KING'S BENCH, MICHAELMAS TERM, 1661.

[*Reported in* 1 *Siderfin*, 57.]

A WOMAN, after the death of her husband, said to one of his creditors that, if he would prove that her husband owed him 20*l.*, she would pay it; and upon this assumpsit the creditor brought an action on the case against the woman, without any proof made before the action brought; but in this action it was found by verdict that her husband owed him that amount. And it was moved in arrest of judgment that this action was not well brought, for he ought to have proved the debt to entitle himself to the action, and ought to have proved it before action brought.

But upon several debates the Court held clearly that the action was well brought, and that the plaintiff should have judgment. And it is not requisite to make any proof of it before action brought, but it can more properly and more naturally be tried in this action. And TWYSDEN, J. cited a case, 15 Jac., between Grinden and ——, which was, "In consideration you'll prove I have beaten your son, I'll pay you so much" (naming the sum), and adjudged that he can bring an action before any proof made, in which, if he proves it, he shall recover; and

[1] Hartley *v.* Cummings, 5 C. B. 247; 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.* Meyer, 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, *acc.* Compare Berk *v.* International Explosives Co., 7 Comm. Cas. 20.

Bailey *v.* Austrian, 19 Minn. 535; Cool *v.* Cunningham, 25 S. C. 136; Woodward *v.* Smith, 109 Wis. 607, *contra.*

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.); Morrow *v.* Southern Ex. Co., 101 Ga. 810; Savannah Ice Co. *v.* American Refrigerator Co., 110 Ga. 142; Vogel *v.* Pekoc, 157 Ill. 339; Sage *v.* W. H. Purcell Co, 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.

Proof must be made first.

it was said that the law is the same in the case of a wager. Also it was not denied by any but that this is a good consideration to support an action against the woman, though she was not administratrix, *sed qua* stranger; for it is a trouble and charge to the plaintiff to make the proof, though it is not any benefit to the woman.[1]

BROOKS *v.* BALL.

SUPREME COURT OF NEW YORK, OCTOBER TERM, 1820.

[*Reported in* 18 *Johnson*, 337.]

IN error to the Court of Common Pleas of Orange County. Ball brought an action of assumpsit against Brooks in the court below. The declaration contained a special count, stating that the plaintiff claimed of the defendant the sum of one hundred dollars, which the defendant denied that he owed to the plaintiff, but promised that, if the plaintiff would make oath to the correctness of his claim, he, the defendant, would pay the amount thereof; and averred that the plaintiff did make oath to the truth and correctness of his claim, but that the defendant, notwithstanding his promise, refused to pay the one hundred dollars, &c. The declaration also contained the common money counts. The defendant pleaded the general issue.

After the plaintiff's counsel had stated his case, the defendant's counsel insisted that, admitting the facts stated to be proved, they were not sufficient to support the action, because the promise of the defendant was without consideration and void, and the plaintiff could not lawfully support his claim on his own affidavit. He therefore moved that the plaintiff should be nonsuited, but the objection was overruled by the court. The plaintiff then went into the evidence in support of his case. It was proved that the defendant made the promise alleged; that the plaintiff had made the affidavit, and demanded payment of the one hundred dollars; and that the defendant had admitted his liability to pay the money, and intended to pay, but was advised to the contrary.

[1] "*Nota.* A., upon receipt of 1*s.* from B., assumed and promised that, if B. could prove that A. had beaten him in the chancel of such a church, he would pay him 20*l.* B. brought assumpsit upon this promise. A. pleaded *non assumpsit*, and the issue was found for the plaintiff. And it was moved in arrest of judgment that he brought the action before any duty accrued to him: for there was no duty before he had proved a battery in the chancel; and if that be found, then an action accrues to him. But Dodderidge and Chamberlaine (*absentibus* the other justices) held clearly that the action lies before, and this trial and proof of the battery shall be by the same jury which tries the assumpsit. Otherwise if he had said, 'After that you have proved that I struck you, &c., then I do assume to pay you 20*l.*' And it was said that it was so in 18 E. 4, and that it was so adjudged in this court; and the clerk of the court so affirmed that it was ruled in this court." Anon., Palm. 160.

The defendant's counsel then offered to prove that the plaintiff, in his affidavit, had sworn falsely, or was grossly mistaken. This evidence was objected to, and overruled by the court; and the counsel for the defendant tendered a bill of exceptions. The jury, under the direction of the court, found a verdict for the plaintiff for one hundred and ten dollars and fifty cents.

Wisner, for the plaintiff in error.

Betts, contra.

SPENCER, C. J., delivered the opinion of the court. The principal question presented by this case is, whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise. Another question was made on the trial, whether it was competent to the defendant below to prove that the plaintiff below either swore falsely or was grossly mistaken in the affidavit which he made.

It has been frequently decided that a promise to pay money, in consideration that the plaintiff would take an oath that it was due, was a valid and binding promise. Thus, in Bretton *v.* Prettiman, Sir T. Raym. 153, the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him; and the plaintiff averred that he swore before a master in chancery. On demurrer, it was adjudged for the plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In Amie & Andrews, 1 Mod. 166, there was a promise to pay, if the plaintiff would bring two witnesses before a justice of the peace, who should depose that the defendant's father was indebted to the plaintiff; and two judges against one thought it not a profane oath, because it tended to the determining a controversy, and the plaintiff had judgment. This case occurred before the Statute of Frauds. The promise would now be holden to be void, unless in writing, it being to pay the debt of a third person. The case of Bretton *v.* Prettiman is differently stated in 1 Sid. 283, and 2 Keb. 26, 44. It is there stated to be a promise to pay, if the plaintiff would procure a third person to make oath that the money was due. But this makes no difference in principle, for in either case the oath was extra-judicial.

In Stevens and others *v.* Thacker, Peake's N. P. Rep. 187, the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant, if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord Kenyon said that, had the defendant sworn to the affidavit, he should have held that he had discharged himself, though the affidavit had been false; for the plaintiffs, who had agreed to accept that affidavit as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action on the bill. In Lloyd & Wil-

lan, 1 Esp. Rep. 178, the defendant's attorney proposed to the plaintiff's attorney, that the defendant should pay the demand, if the plaintiff's porter would make an affidavit that he had delivered the goods in question to the defendant. The affidavit was made; and Lord Kenyon held it to be conclusive, and that the defendant was precluded from going into any defence in the case.

These cases, which stand uncontradicted, abundantly show that such a promise as the present is good in point of law, and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause, but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit, would be allowing him to alter the conditions of his engagement, and virtually to rescind his promise.

Judgment affirmed.[1]

JOHN SEMMES DEVECMON *v.* ALEXANDER SHAW AND CHRISTIAN DEVRIES, Executors of John S. Combs.

Maryland Court of Appeals, April Term, 1888.

[*Reported in* 69 *Maryland*, 199.]

Bryan, J., delivered the opinion of the court: —

John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "that the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the

[1] See 1 Vin. Abr 298, pl. 22; Seaward *v.* Lord, 1 Me. 163.

witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present; or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretence.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit;* and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his lifetime, at his request." In the bill of particulars, we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked, 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

KIRKSEY *v.* KIRKSEY.

ALABAMA SUPREME COURT, JANUARY TERM, 1845.

[*Reported in* 8 *Alabama*, 131.]

ERROR to the Circuit Court of Talladega.

Assumpsit by the defendant, against the plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts: —

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega County, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter: —

"DEAR SISTER ANTILLICO, — Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. . . I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. 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."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.[1]

[1] 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 diffi-

PRESBYTERIAN CHURCH OF ALBANY, APPELLANT, *v.* THOMAS C. COOPER ET AL. AS ADMINISTRATORS, ETC., RESPONDENTS.

NEW YORK COURT OF APPEALS, JANUARY 25—MARCH 5, 1889.

[*Reported in* 112 *New York*, 517.]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendants' intestate. The claim arose under a subscription paper, of which the following is a copy: —

"We, the undersigned, hereby severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18, 1884."

culty 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 see *contra*, Shirley *v.* Harris, 3 McLean, 330; Berry *v.* Graddy, 1 Met. (Ky.) 553; Bigelow *v.* Bigelow, 95 Me. 17; Steele *v.* Steele, 75 Md. 477; Adams *v.* Honness, 62 Barb. 326; Richardson *v.* Gosser, 26 Pa. 335.

In regard to the enforcement of promises relating to land, unenforceable at law, by courts of equity in order to prevent a fraud, see Pomeroy on Eq. Jur. § 1294; Ames, Cas. on Eq. Jur. 306–309.

The defendants' intestate made two subscriptions to this paper, — one of $5,000 and the other of $500. He paid upon the subscription $2,000. The claim was for the balance.

Matthew Hale, for appellant.

Walter E. Ward, for respondent.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action that there was no valid consideration to uphold the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz., "in consideration of one dollar to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the Chancellor as expressed in Hamilton College *v.* Stewart when it was before the Court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. Trustees, etc., *v.* Stetson, 5 Pick. 508; Watkins *v.* Eames, 9 Cush. 537. But the doctrine of the Chancellor, as we understand, was overruled when the Hamilton College case came before this court, 1 N. Y. 581, as have been also the *dicta* in the Massachusetts cases, by the court in that State, in the recent case of Cottage Street Methodist Episcopal Church *v.* Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger

both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfil the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees, did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in Hamilton College *v.* Stewart, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on sub-

scriptions, upon the mortgage debt, did not constitute a consideration for the promise of defendants' intestate. We are unable to distinguish this case in principle from Hamilton College *v.* Stewart, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other States. The cases of Barnes *v.* Perine, 12 N. Y. 18, and Roberts *v.* Cobb, 103 id. 600, are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisee. Judge Allen, in his opinion in Barnes *v.* Perine, said: "The request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed.

All concur. *Order affirmed and judgment accordingly.*[1]

[1] Charitable subscriptions have been held supported by sufficient consideration on various grounds: —

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

AUGUSTUS B. MARTIN and Others *v.* WILLIAM MELES and Others.

Supreme Judicial Court of Massachusetts, March 20–May 23, 1901.

[*Reported in* 179 *Massachusetts*, 114.]

Holmes, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others: "January 21, 1896, We, the undersigned, manu-

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; 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, 56 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; Galt'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. Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First Church, 96 Ill. 177; 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 jurisdictions 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.

In England a charitable subscription is not binding. *Re* Hudson, 54 L. J. Ch. 811. See also Culver *v.* Banning, 19 Minn. 303; 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 *In re* Hudson, Pearson, J., said: "If A. says, 'I will give you, B., 1000*l.*,' and B., in reliance on that promise, spends 1000*l.* in buying a house, B. cannot recover the 1000*l.* from A."

In a few cases of charitable subscriptions the special facts show 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.

facturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses under the direction of the committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants, who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription, refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in Ladies' Collegiate Institute *v.* French, 16 Gray, 196, 201 (see Maine Central Institute *v.* Haskell, 75 Maine, 140, 144), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson *v.* Otterbein University, 41 Ohio St. 527, 531. See Presbyterian Church of Albany *v.* Cooper, 112 N. Y. 517. Neither would it raise the question whether the promise to receive a gift was a consideration for a

promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Cottage Street Church *v.* Kendall, 121 Mass. 528; Sherwin *v.* Fletcher, 168 Mass. 413. Of course the mere fact that a promise relies upon a promise made without other consideration does not impart validity to what before was void. Bragg *v.* Danielson, 141 Mass. 195, 196. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin *v.* Fletcher, *ubi supra*.

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration (Williams *v.* Carwardine, 4 B. & Ad. 621; see Maine Central Institute *v.* Haskell, 75 Maine, 140, 145), or of fraud. Windram *v.* French, 151 Mass. 547, 553. In Cottage Street Church *v.* Kendall, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In Bridgewater Academy *v.* Gilbert, 2 Pick. 579, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Amherst Academy *v.* Cowls, 6 Pick. 427, 438; Ives *v.* Sterling, 6 Met. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it

seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the Court to leave things where it found them. *In re* Hudson, 54 L. J. Ch. 811; Presbyterian Church of Albany *v.* Cooper, 112 N. Y. 517. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Amherst Academy *v.* Cowls, 6 Pick. 427, 438. But if that were true, it would follow that as to the future conduct of the committee their promise, not their performance, was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the case where an order for work is countermanded at the moment when performance is about to begin under the contract (Davis *v.* Bronson, 2 No. Dak. 300), or when at a later moment the plaintiff was directed to stop (Clark *v.* Marsiglia, 1 Den. 317), followed by many later cases in this country. See Collins *v.* Delaporte, 115 Mass. 159, 162. We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place, if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election (Ballou *v.* Billings, 136 Mass. 307), it would not have been a breach of the contract (Daniels *v.* Newton, 114 Mass. 530), and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where

what had been done and what remained to do probably were to a large extent interdependent. Davis *v.* Campbell, 93 Ia. 524; Gibbons *v.* Bente, 51 Minn. 499; Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6. See Frost *v.* Knight, L. R. 7 Ex. 111, 112; Johnstone *v.* Milling, 16 Q. B. D. 460, 470, 473; Dalrymple *v.* Scott, 19 Ont. App. 477; John A. Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660, 666; Davis *v.* Bronson, 2 No. Dak. 300, 303.

Before leaving the case it is interesting to remark that the notion rightly exploded in Cottage Street Church *v.* Kendall, 121 Mass. 528, 530, 531, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of WELLS, J., in Perkins *v.* Lockwood, 100 Mass. 249, 250 (Farrington *v.* Hodgdon, 119 Mass. 453, 457; Trecy *v.* Jefts, 149 Mass. 211, 212; Emerson *v.* Gerber, 178 Mass. 130), with what he says in Athol Music Hall Co. *v.* Carey, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. Sherwin *v.* Fletcher, 168 Mass. 413.

Demurrer overruled; exceptions overruled.[1]

WHITE, EXECUTOR OF JOHN BLUETT *v.* WILLIAM BLUETT.

IN THE EXCHEQUER, NOVEMBER 21, 1853.

[*Reported in* 23 *Law Journal, New Series, Exchequer,* 36.]

THE declaration contained a count upon a promissory note made by the defendant payable to the testator, and a count for money lent.

Plea, as to the said first count, and as to so much of the residue of the declaration as relates to money payable by the defendant to the said J. Bluett for money lent to the defendant, that the said note in the said first count mentioned was delivered by him to the said J. Bluett as in the declaration supposed, and by the said J. Bluett taken and received from the defendant for and on account of the said money so payable to the said J. Bluett as in this plea mentioned, and the causes of action in respect thereof, and by way of securing the same, and for or on account of no other debt, claim, matter, or thing whatsoever. And the defendant further saith, that the said J. Bluett was the father of the defendant, and that afterwards, and after the accruing of the

[1] Instances of subscriptions for business purposes are Richelieu Hotel Co. *v.* International Co., 140 Ill. 248; Fort Wayne Co. *v.* Miller, 131 Ind. 499; Bryant's Pond Co. *v.* Felt, 87 Me. 234; Hudson Co. *v.* Tower, 156 Mass. 82, 161 Mass. 10; 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.

causes of action to which this plea is pleaded, and before this suit, and in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said J. Bluett, and certain controversies arose between the defendant and his said father concerning the premises, and the said J. Bluett afterwards admitted and declared to the defendant that his, the defendant's, said complaints were well founded, and, therefore, afterwards, &c., it was agreed by and between the said J. Bluett and the defendant, that the defendant should for ever cease to make such complaints, and that, in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's natural love and affection towards the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's, part in full satisfaction and discharge of the said last-mentioned causes of action; and the defendant further said, that afterwards, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid, in full satisfaction and discharge of such mentioned causes of action.

Demurrer and joinder.

Bavill, in support of the demurrer.

The plea is not good as to either count. There is no consideration for giving up the claim on the money count, and there is no discharge of the liability on the note.

[PARKE, B. By the law merchant the holder may discharge the acceptor of his liability, if he sufficiently expresses his intention not to insist upon payment; but there is no such intention here averred.]

T. J. Clark, in support of the plea.

The plea shows an agreement by the defendant, and that in consideration of such agreement the father agreed to forego the debt.

[PARKE, B. Is an agreement by a father, in consideration that his son will not bore him, a binding contract?]

The plea avers that the complaints were well founded. The adequacy of the consideration for a promise is not a matter of inquiry. A promise is a good consideration for a promise, if the promisee takes upon himself a liability which did not before attach to him. Here the son had a right to make the complaints mentioned, and his agreeing to forego that right and abstain from doing what he legally might do is a good consideration, because he would have been liable to an action if he had broken his promise. It falls exactly within the definition of a consideration in Chitty on Contracts, p. 28, as the defendant subjected himself to an obligation by his promise, and also to a detriment by not being able to continue his well-grounded complaints. A binding agreement with mutual promises is a good accord. He cited Com. Dig. tit. "Accord" (B) 4, and Haigh *v.* Brooks, 10 A. & E. 309.

POLLOCK, C. B. The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said, the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, "I will cease to complain if you will not sue upon this note." Whereupon the father said, "If you will promise me not to complain I will give up the note." If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, "Do not complain, and I will give you five pounds." It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, "Now, if you will not make any more complaints, I will not sue you," such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to can be no consideration.

PARKE, B. I am of the same opinion. The agreement could not be enforced against the defendant. It is not immaterial also to observe, that the testator did not give the note up. It was formerly doubted whether a simple agreement could be pleaded in bar, Lynn *v.* Bruce, 2 H. Bl. 317, but there have been many modern cases in which third persons have been parties to the agreement, and the agreement has been held to be an answer, and it may be that such an agreement would do, although third persons were not parties to it. But that question does not arise here, as there was no binding agreement at all by the defendant.

ALDERSON, B. If this agreement were good, there could be no such thing as a *nudum pactum*. There is a consideration on one side, and it is said the consideration on the other is the agreement itself: if that were so, there could never be a *nudum pactum*.

PLATT, B., concurred.

Judgment for the plaintiff.

HORACE S. WARREN *v.* AMASA S. HODGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 4, 1876.

[*Reported in* 121 *Massachusetts*, 106.]

CONTRACT to recover $184 for work and labor. Writ dated April 12, 1875.

At the trial in the Superior Court, before PUTNAM, J., the defend-

ant contended that the action was prematurely brought, and introduced evidence that, on or about March 17, 1875, being about two months after the plaintiff had left his employ, and after the time when the amount was due, the plaintiff called at his office and demanded the amount due him, and said that, if the defendant would give him $25 on account, he would wait until May 1 for the balance, and he thereupon paid him $25 on account, and the plaintiff then agreed to wait until May 1, 1875, for the balance due him.

The plaintiff asked the judge to rule that an agreement on his part to wait until some future day for his pay (the same being due and payable) would be null and void unless there was some consideration for the promise; and that a payment of $25 by the defendant to him on account (the whole amount being then due) would not constitute a consideration for such an agreement, and that, notwithstanding such an agreement, he could maintain his action brought before the future day. But the judge declined so to rule, and instructed the jury as follows: "If the jury find that the agreement was that, if the defendant would pay him $25 on the spot, he would wait for the balance of his pay till a day after the date of the writ, and the defendant made such payment and relied upon that agreement and neglected to pay the plaintiff in consequence, that, whether there was a consideration therefor or not, the action had been prematurely brought, and the plaintiff cannot recover." The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

By the Court. It is too well settled to require discussion or reference to authorities, that an agreement to forbear to sue upon a debt already due and payable, for no other consideration than the payment of part of the debt, is without legal consideration, and cannot be availed of by the debtor, either by way of contract or of estoppel.

Of the cases cited for the defendant, Harris *v.* Brooks, 21 Pick. 195, was a case of a surety, and Fleming *v.* Gilbert, 3 Johns. 528, a case of modification by agreement of the way of performing an obligation to discharge a mortgage.

Exceptions sustained.[1]

[1] "Liening *v.* Gould, 13 Cal. 598; Solary *v.* Stultz, 22 Fla. 263; Holliday *v.* Poole, 77 Ga. 159; Bush *v.* Rawlins, 89 Ga. 117; Phœnix Co. *v.* Rink, 110 Ill. 538; Shook *v.* State, 6 Ind. 461; Dare *v.* Hall, 70 Ind. 545; Davis *v.* Stout, 84 Ind. 12; Potter *v.* Green, 6 Allen, 442; Kern *v.* Andrews, 59 Miss. 39; Price *v.* Cannon, 3 Mo. 453; Tucker *v.* Bartle, 85 Mo. 114; Russ *v.* Hobbs, 61 N. H. 93; Parmalee *v.* Thompson, 45 N. Y. 58; Turnbull *v.* Brock, 31 Ohio St. 649; Yeary *v.* Smith, 45 Tex. 56, 72," *acc.* Professor Ames, 12 Harv. L. R. 526.

Common Law Everywhere (altered by Statute in places.)

JOHN WESTON FOAKES, APPELLANT, *v.* JULIA BEER, RESPONDENT.

IN THE HOUSE OF LORDS, MAY 16, 1884.

[*Reported in* 9 *Appeal Cases*, 605.]

APPEAL from an order of the Court of Appeal.

On the 11th of August, 1875, the respondent recovered judgment against the appellant for £2,077 17*s.* 2*d.* for debt and £13 1*s.* 10*d.* for costs. On the 21st of December, 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms: —

"Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of £2,090 19*s.* And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions: Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2,090 19*s.*, and on condition of his paying to her or her executors, administrators, assigns, or nominee the sum of £150 on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2,090 19*s.* shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators, or assigns, will not take any proceedings whatever on the said judgment."

The respondent having, in June, 1882, taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on the 1st of July, 1882, due upon the judgment.

At the trial of the issue before Cave, J., it was proved that the whole sum of £2,090 19*s.* had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of the 21st of December, 1876, he undertook to pay, and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin, Williams, and Mathew, JJ.,) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett, M. R., Lindley, and Fry, L. JJ.) re-

Part Payment of an old contract, is not good Consideration for a new one except in case of [illegible]

versed that decision and entered judgment for the respondent for the interest due, with costs.

W. H. Holl, Q. C., for the appellant.

Bombas, Q. C. (*Gaskell* with him), for the respondent.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed with costs, and I so move your Lordships.

Lord Blackburn.[1] My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on the 21st of December, 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after the 1st day of July and the first day of January in each ensuing year of £150, until the sum of £2,090 19*s.* was paid, the judgment for that sum and interest should be satisfied; for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19*s.* made within the next six months. This is the construction which all three courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2,090 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think that the words "till the said sum of £2,090 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

[1] The Earl of Selborne, L. C., and Lords Watson and Fitzgerald delivered concurring opinions.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2,090 19*s.*, subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton 212 b. Lord Coke says: "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. . . . If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is good satisfaction." For this he cites Pinnel's case, 5 Rep. 117 a. That was an action on a bond for £16, conditioned for the payment of £8 10*s.* on the 11th of November, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the £8 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money; in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved: First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was

his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a *dictum*, it seems to me clear that Lord Coke deliberately adopted the *dictum*, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake; and though I cannot find that in any subsequent case this *dictum* has been made the ground of the decision, except in Fitch *v.* Sutton, 5 East, 230, as to which I shall make some remarks later, and in Down *v.* Hatcher, 10 A. & E. 121, as to which Parke, B., in Cooper *v.* Parker, 15 C. B. 828, said, "Whenever the question may arise as to whether Down *v.* Hatcher, 10 A. & E. 121, is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the *dictum* in Pinnel's case, 5 Rep. 117 a, as good law.

For instance, in Sibree *v.* Tripp, 15 M. & W. 33, 37, Parke, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz., payment of part, and an agreement without consideration to give up the residue. The courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordship's House, to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and if the case was not defended get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying to lose an assize. If the replication was one to which he could demur he made

this sure. Strangely enough it seems long to have been thought that if the defendant kept within reasonable bounds neither he nor his lawyers were to blame in getting time in this way by a sham plea, — that a chattel was given and accepted in satisfaction of the debt. The recognized forms were giving and accepting in satisfaction a beaver hat. Young *v.* Rudd, 5 Mod. 86; or a pipe of wine, 3 Chit. Plead. 7th ed. 92. All this is now antiquated. But whilst it continued to be the practice, the pleas founded on the first part of the resolution in Pinnel's case, 5 Rep. 117 a., were very common, and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in Pinnel's case on what I have ventured to call the *dictum*, was certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might perhaps, as suggested by Holroyd, J., in Thomas *v.* Heathorn, 2 B. & C. 482, find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from Pinnel's case down to Cumber *v.* Wane, 5 Geo. 1, 1 Sm. L. C. 8th ed. 357, a period of 115 years.

In Adams *v.* Tapling, 4 Mod. 88, where the plea was bad for many other reasons, it is reported to have been said by the court that: "In covenant when the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt this was one of the cases in which Parke, B., would have cited in support of his opinion that Down *v.* Hatcher, 10 A. & E. 121, was not good law. The court are said to have gone on to recognize the dictum in Pinnel's case, 5 Rep. 117 a, or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or a dilatory plea.

Some doubt has been made as to what the pleadings in Cumber *v.* Wane really were. I have obtained the record. The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note' manu propria ipsius Georgii subscript pr.

solucōn eidem Edwardo Cumber vel ordiñi quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that "the said George did not give to him, Edward, any note in writing called a promissory note with the hand of him, George, subscribed for the payment to him, Edward, or his order of £5, fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence, namely, the giving in satisfaction; Young *v.* Rudd, 5 Mod. 86, and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt, C. J., prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict in Sibree *v.* Tripp, 15 M. & W. 23.

Two cases require to be carefully considered. The first is Heathcote *v.* Crookshanks, 2 T. R. 24. The plea there pleaded, would, I think, now be held perfectly good, see Norman *v.* Thompson, 4 Ex. 755; but Buller, J., seems to have thought otherwise. He says, "thirdly, it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a nudum pactum, unless they had afterwards accepted it. In the case in which Cumber *v.* Wane was denied to be law, Hardcastle *v.* Howard, 26 Geo. 3, B. R., the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that Buller, J., meant by saying "that is a nudum pactum, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In Fitch *v.* Sutton, 5 East, 230, not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in

Steinman *v.* Magnus, 11 East, 390, it was pretty well admitted by Lord Ellenborough that the decision in Fitch *v.* Sutton would have been the other way, if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of Fitch *v.* Sutton, still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of £17 10*s.* is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in Cumber *v.* Wane that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in Heathcote *v.* Crookshanks, 2 T. R. 24, to have been denied to be law, and in confirmation of that Buller, J., afterwards referred to a case (stated to be that of Hardcastle *v.* Howard, H. 26 Geo. 3), yet I cannot find any case of that sort, and none has been now referred to; on the contrary the decision in Cumber *v.* Wane is directly supported by the authority of Pinnel's case, 5 Rep. 117 a, which never appears to have been questioned."

I must observe that, whether Cumber *v.* Wane was or was not denied to be law in Hardcastle *v.* Howard, it certainly was denied to be law in Sibree *v.* Tripp, 15 M. & W. 23, and that, though it is quite true that Pinnel's case, as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before Fitch *v.* Sutton, 5 East, 230, unless it be Cumber *v.* Wane, has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in Fitch *v.* Sutton, whether the dictum in Pinnel's case was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority and the adhesion of Bayley, J., to it in Thomas *v.* Heathorn, 2 B. & C. 447, that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from Sibree *v.* Tripp, 15 M. & W. 23. And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to Cumber *v.* Wane, in the second edition of his "Leading Cases," that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think

that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Order appealed from affirmed, and appeal dismissed with costs.[1]

BIDDER *v.* BRIDGES.

IN THE CHANCERY DIVISION, NOVEMBER 18, 19, 1887.

[*Reported in* 37 *Chancery Division*, 406.]

THE action in this case was brought for the purpose of establishing certain rights of common.

The action was tried before Mr. Justice KAY, who gave judgment on the 27th of October, 1885, in favor of the defendants with costs. The

[1] The doctrine of Foakes *v.* Beer is criticised by Professor Ames in 12 Harv. L. Rev. 522 *seq.*, both on the strength of early authorities not cited by the court and on principle. It has been followed in this country, however, so widely that except where changed by statute the doctrine for which the case stands may be regarded as established. The authorities are fully collected in 20 L. R. A. 785 *n.*

"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; Carpenter *v.* Soule, 88 N. Y. 251; McKenzie *v.* Harrison, 120 N. Y. 260. 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, or even if he is honestly believed to be insolvent. Rice *v.* London Co., 70 Minn. 77." Professor Ames, 12 Harv. L. Rev. 525.

plaintiffs appealed from this judgment, and the appeal was dismissed with costs on the 2d of August, 1886.

The costs of the judgment and the appeal were taxed, and the certificates of the taxing master were given on the 27th of May, 1887, from which it appeared that the amount of the taxed costs of the judgment, payable to the defendant, H. Davis, was £465 17*s.* 10*d.*, and of the taxed costs of the appeal, £144 7*s.* 4*d.*

Mr. C. A. Russ was the solicitor acting for H. Davis in the action, and he was prepared to file the certificates when he received a letter from Messrs. Rooke & Sons, the solicitors for the plaintiffs, asking him to call on them to settle the costs, and not to put his clients to the expense of filing the certificates.

Mr. Norris, the managing clerk of Mr. Russ, accordingly called on Messrs. Rooke & Sons, on the 28th of May, 1887, when Mr. F. H. Rooke handed him a check for £609 5*s.* 2*d.*, being the amount of the taxed costs of the judgment and appeal, less £1, which was deducted on account of the certificates not being filed. Mr. Norris then signed receipts for the costs, which were indorsed upon the certificates, and he then handed over the certificates to Mr. F. H. Rooke. The form of the receipt on the certificate of the costs of the judgment was as follows: "Received by check the within-mentioned costs of £465 17*s.* 10*d.*, less 10*s.*, remitted. — Charles A. Russ. — H. G. N." And a similar receipt was given for the costs of the appeal. The check was drawn by Rooke & Sons in favor of C. A. Russ, Esq., or order, and was duly paid.

Mr. Rooke in his affidavit stated that he objected to pay for the filing of the certificates on the ground that they had been taken out without giving notice to his firm of the final appointment to dispose of certain outstanding queries and in their absence, and also on the ground that filing the certificates was an unnecessary expense; and that he gave the check in full satisfaction of all Davis's claims against the plaintiffs under the certificates. Mr. Norris, however, made a counter affidavit stating that all the queries were finally disposed of in the presence of a representative of Messrs. Rooke & Sons. Nothing was said at the time about interest on the costs; but on the 11th of July, 1887, Mr. Russ wrote a letter to Messrs. Rooke & Sons, in which he said: "When you handed me check for the amount of taxed costs you omitted to include interest on the respective certificates. This interest, calculated at 4 per cent from the respective dates of the judgment and appeal, must be paid in the usual way, and I should be obliged by your procuring and handing me a check for £33 16*s.* 7*d.*, the amount of interest as aforesaid." Messrs. Rooke & Sons having declined to pay the interest claimed, Mr. Russ wrote to them to return the certificates in order that they might take further proceedings on them; and inclosed in their place a separate receipt for the money which had been paid. Messrs. Rooke & Sons refused to give up the certificates, and the defendant Davis then moved before Mr. Justice Stirling that the

plaintiffs be ordered to file, or to attend before the proper officer of the court, and produce to such officer the certificates of the taxing master of the 27th of May, 1887, for the purpose of enabling the defendant Davis to issue a writ of *fi. fa.*, for the interest on the costs thereby certified and due from the plaintiffs to Davis.

The motion came on for hearing before Mr. Justice Stirling on the 18th of November, 1887.

H. Terrell, for the motion.

W. Person, Q. C., for plaintiffs.

Stirling, J. This is an application of a very unusual character. The notice of motion is [His Lordship read it and continued]: It appears that the action of Bidder *v.* Bridges was dismissed by Mr. Justice Kay, with costs to be paid to all the defendants, including Henry Davis. The decision was affirmed by the Court of Appeal, and again the plaintiffs were ordered to pay the costs. The costs have been taxed in pursuance of the orders. What has taken place since is in evidence in the affidavit of the clerk of the solicitor who acted for the defendant Davis, and who had the conduct of the taxation. It is to the effect that the costs were duly taxed at £465 17*s.* 10*d.*, and £144 7*s.* 4*d.*, making together £610 5*s.* 2*d.* [His Lordship read the letters which passed between the solicitors in May, 1887, and continued.] Upon the affidavits there is to a certain extent a conflict of evidence. Possibly, in one view, that conflict may be immaterial, but if there should be further litigation it may be material. It is plain, however, that there was a discussion about the amount to be paid. The solicitor for the plaintiffs insisted upon a reduction of £1 being made in reference to the filing of the certificates — it having been agreed that they should not be filed; and he also insisted that the clerk of the defendant's solicitor should take his check for the reduced amount; and to my mind, as the matter then stood, the meaning of both parties was that if the check should be honored it was to be taken in payment for the bills of costs. That is not in dispute, whatever may be the legal effect of the transaction. The check was honored. It has the indorsement of the defendant's solicitor upon it. Then according to the evidence of that solicitor's clerk he discovered a week or two afterwards that the interest had been omitted to be charged. That is an incorrect statement, because when he went to the plaintiffs' solicitors' office he knew that the interest was not included in the amount to be paid. What he did discover was a decision of the Court of Appeal showing that the defendant might claim interest; and hence this motion.

In the first place it was contended that I have no jurisdiction to make the order asked for. I do not think it necessary to go into that question, but I am not prepared to say that in a proper case I have not jurisdiction. If I found that one solicitor had by fraud or trickery got from another a document which ought to be filed, and if by its not being filed he might be deprived of his just rights, I would try to see whether it could not be placed upon the files of the court; but that is

not this case. This was a perfectly plain, honest, and honorable transaction upon both sides. In regard to it the plaintiffs have obtained an advantage honorably got, and why should I take it away from them? It is plain that the certificates were not to be filed, and as plain that it was competent to the parties to enter into such an arrangement; if any mistake was made, it was a mistake of law, and therefore I do not see why the advantage gained should be taken from the plaintiffs. The agreement being clear that the certificates should not be filed, I do not think that I ought to interfere. If there be any other remedy open to the defendant he can pursue it. Possibly that is enough to dispose of the motion. If, however, there be jurisdiction, and I am to exercise it, I must be clear that the law is in favor of the applicant. The object in view is to have the certificates filed so that the applicant may immediately afterwards proceed to obtain the interest. The dispute between the parties in regard to the check being given, is shown in the evidence, which is oath against oath and nothing more, and all that I could do, if I made an order, would be to put the matter in such a position as that the defendant should obtain a decision upon the conflict of evidence, but why should I put the plaintiffs, who have got an advantage, to a disadvantage, to which they ought not to be exposed? After the arguments I may be justified in seeing whether the authorities are in favor of the applicant. What was done by the applicant? He accepted, as it appears to me, in full satisfaction of the plaintiffs' liability for costs, the check of their solicitors payable to order, and that check was duly honored. What in law is the effect of that? The state of the law is very peculiar in regard to the acceptance of a smaller sum in satisfaction of a larger debt. The law has been recently discussed in the case of Foakes *v.* Beer, 9 App. Cas. 605, the head-note of which states that "an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole and costs from proceeding to enforce payment of the interest upon the judgment." That decision was founded upon the doctrine laid down so long ago as Pinnel's case, 5 Rep. 117 a; Co. Litt. 212 b, and it will be sufficient for my purpose here if I refer to what Lord Blackburn said in his speech as to that case: "That was an action on a bond for £16 conditioned for the payment of £8 10*s.* on the 11th of November, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the £8 10*s.* The plaintiff had judgment for the insufficient pleading," and his Lordship went on to state that Lord Coke reports that the court resolved "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole . . . but the gift of a horse, hawk,

or robe, &c., in satisfaction is good, for it shall be intended that" either "might be more beneficial to the plaintiff than the money;" and after referring further to that case Lord Blackburn said: "There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration." And secondly, "that payment of a lesser sum on the day cannot be any satisfaction of the whole." There were, therefore, two resolutions in Pinnel's case, and the decision of the House of Lords affirmed the second; but, as I understand that decision, it did not in any way disaffirm the other. Therefore the first resolution referred to by Lord Blackburn is just as much binding on me as the second. Then comes the question here — is a negotiable instrument such a matter as may be "paid and accepted in satisfaction of a debt certain?" The applicant accepted not a negotiable instrument of his debtors, but that of their solicitors. He took the check of different persons. Was that an accord and satisfaction according to the authorities? No doubt the case of Cumber *v.* Wane, 1 Str. 426; 1 Sm. L. C. 8th ed. p. 357, was one in reference to a promissory note. In Foakes *v.* Beer, 9 App. Cas. 605, the record of Cumber *v.* Wane is fully stated at page 619. The decision was that giving a promissory note for £5 cannot be pleaded as a satisfaction for £15, but this has been denied by a series of authorities to be law. Thus in Sibree *v.* Tripp, 15 M. & W. 23, it was held that a promissory note taken for a less sum than the demand was a good satisfaction — that a negotiable instrument for a smaller sum may be given in satisfaction of a larger debt. Then there is the case of Curlewis *v.* Clark, 3 Ex. 375, and also that of Goddard *v.* O'Brien, 9 Q. B. D. 37, which goes even further than I am required to go in this case. It was contended that these three authorities went upon the view that Cumber *v.* Wane was bad law, and that this was inconsistent with the decision in Foakes *v.* Beer. I do not, however, understand the House of Lords to approve of the application made in Cumber *v.* Wane of the doctrine laid down in Pinnel's case, 5 Rep. 117 a; Co. Litt. 212 b. In that case there was a qualification added that if a thing of a different kind be given that is a good satisfaction. That qualification was disregarded in Cumber *v.* Wane; and in Foakes *v.* Beer this circumstance is commented upon by both Earl Selborne and Lord Blackburn. If further authority is required I may refer to the notes of the late Mr. Justice Willes and Mr. Justice Keating to the case of Cumber *v.* Wane in Smith's Leading Cases, where they state the law to be that a demand may be discharged by payment of a thing different from that contracted to be paid though of less pecuniary value, and they give as an instance a negotiable instrument binding the debtor or a third person to pay a smaller sum. Under these circumstances, having regard to the current of authorities, which appear to me to be unaffected by the decision of the House of Lords, I hold that the check of a third party given as this check was, was a satis-

faction of the debt, and was a good payment. Therefore, both as to the form and upon the merits, the application fails and must be refused with costs.

From this decision the defendant Davis appealed.[1]

TANNER v. MERRILL.

MICHIGAN SUPREME COURT, NOVEMBER 22–DECEMBER 30, 1895.

[*Reported in* 108 *Michigan*, 58.]

HOOKER, J. The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare;" whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The plaintiff testified that they had no dispute, only he claimed the fare and the superintendent refused to allow it.

The most important question arises over a request to charge upon the part of the defendants, which reads as follows:

"The testimony of the plaintiff is that, at the time the receipt put in evidence in this case was signed by him, he claimed that his railroad fare should not be deducted from his wages; that this was denied by the agents and superintendent of defendants, and it was taken out of his wages; that he then signed the receipt with full knowledge of its contents, and of the fact that his railroad fare had been taken out of his wages. This being so, the receipt in this case, upon the plaintiff's own testimony, cannot be contradicted. While a receipt may be contradicted in certain cases, it must be in a case of mistake, ignorance of fact, fraud, or when some unconscionable advantage

[1] The opinions of Lord Justices Cotton, Lindley, and Lopes in the Court of Appeal, affirming the decision, are omitted.

A note or promise of one joint debtor to pay the whole or part of the debt may discharge the debt. Lyth *v.* Ault, 7 Ex. 669; Morris *v.* Van Vorst, 1 Zab. 100, 119; Thompson *v.* Percival, 5 B. & Ad. 925; 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 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.

has been taken of one by the other party. Therefore, the receipt, in this case, shows a full settlement of all claims plaintiff had against the defendants."

The only theory upon which it can be contended that this request should have been given is that the plaintiff accepted less than he claimed, but no more than defendants admitted, to be due, and gave a receipt in full when the defendants' superintendent refused to pay more. We do not discover any testimony tending to show an agreement to accept as payment, either in full or by way of compromise, except the receipt, and the question resolves itself into this: Whether a receipt in full is conclusive of the question of defendant's liability, when it is given upon payment of a portion of a claim admittedly due, accompanied by a refusal to pay more, in the absence of mistake, fraud, duress, or undue influence.

It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the parties or otherwise, which was not the case here. It was in dispute. In the case of St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, the opinion says that "it is a well-settled principle of law that the payment of a part of an ascertained, overdue, and undisputed debt, although accepted as full satisfaction, and a receipt in full is given, does not estop the creditor from recovering the balance. In such a case the agreement to accept a smaller sum is regarded to be without consideration." The case of Day *v.* Gardner, 42 N. J. Eq. 199, was one where the agreement was to *forgive* a debt, implying its existence. In Hasted *v.* Dodge (Iowa), 35 N. W. 462, the opinion of Mr. Justice Rothrock shows the debt not to have been in dispute. Moreover, the doctrine was not applicable to the case for reasons shown. See also American Bridge Co. *v.* Murphy, 13 Kan. 35. In Bailey *v.* Day, 26 Me. 88, the claim was liquidated by judgment. In Hayes *v.* Insurance Co., 125 Ill. 639, the court apply the doctrine relied upon, but expressly state that "this rule has no application where property other than money is taken in satisfaction, or where there is an honest compromise of unliquidated or disputed demands." See also Bish. Cont. § 50; 2 Pars. Cont. 618. In Marion *v.* Heimbach, 62 Minn. 215, the Court say: "But where the claim is unliquidated, it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." See also Fuller *v.* Kemp, 138 N. Y. 231, where the same doctrine is held; Fire Ins. Ass'n *v.* Wickham, 141 U. S.

577. The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the discharge. If not, the authorities are in substantial accord that part payment of the claim may discharge the debt, if it is so received. Upon the undisputed facts, the claim of the plaintiff, *as made*, was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendants claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. It so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and have considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction, so long as it is not a release under seal.

The general rule is a technical one, and there are many exceptions. It has been said that it "often fosters bad faith," and that "the history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice." Harper *v.* Graham, 20 Ohio, 105; Kellogg *v.* Richards, 14 Wend. 116; Brooks *v.* White, 2 Metc. (Mass.) 283 (37 Am. Dec. 95). Again, it is said to be "rigid and unreasonable," and "a rule that defeats the expressed intentions of the parties, and, therefore, should not be extended to embrace cases not within the letter of it." Wescott *v.* Waller, 47 Ala. 492; Johnston *v.* Brannan, 5 Johns. 268; Simmons *v.* Almy, 103 Mass. 35. See Milliken *v.* Brown, 1 Rawle, 391, where the rule is vigorously denounced. It has no application in cases of claims against the government. If one accepts the amount allowed, it is a discharge of the whole claim. U. S. *v.* Adams, 7 Wall. 463; U. S. *v.* Child, 12 Wall. 232. See also Wapello Co. *v.* Sinnaman, 1 G. Greene, 413; Brick *v.* County of Plymouth, 63 Iowa, 462; Perry *v.* Cheboygan, 55 Mich. 250; Calkins *v.* State, 13 Wis. 389. Again, it has been repeatedly held that part payment is a bar to a claim for interest. Another exception is found in composition with creditors.

It is believed that we may safely treat this claim as one claim, not as two, and as unliquidated, inasmuch as it was not admitted. In McGlynn *v.* Billings, 16 Vt. 329, the defendant, after an examina-

tion of accounts, claimed that he owed the plaintiff $82, and drew a check for that sum, and tendered it as payment in full. It was refused, and it was delivered to a third person, with directions to deliver it whenever the plaintiff would receive it as payment in full. This was done, and it was held to discharge the debt. In Hills v. Sommer, 53 Hun, 392, the plaintiffs shipped lemons to dealers in St. Joseph, Mo., and were notified that some were defective, with a claim of a specific rebate, which plaintiffs refused to allow. A draft was subsequently sent for the amount which the defendants had previously expressed their willingness to allow, with a letter stating that it was in payment of the invoice. The draft was cashed, and action brought for the remainder of the claim. Verdict was directed for the defendants. Pierce v. Pierce, 25 Barb. 243, seems to be a similar case. In Potter v. Douglass, 44 Conn. 541, plaintiff refused $45, which was tendered in full payment of a claim. He took it, however, on account, as he said, and wrote a receipt to that effect, which defendant refused, for the reason that it stated that the money was received on account. The plaintiff, however, kept the money. It does not appear that this amount of $45 was disputed. Apparently, it was not. Yet the court called the claim an unliquidated demand, and held it to have been discharged. In Perkins v. Headley, 49 Mo. App. 562, it is said: "But if there is a controversy between him [the creditor] and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on the condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law."

While no Michigan case decisive of this question is cited, and we recall none, it was held in Houghton v. Ross, 54 Mich. 335, that: —

"A receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equivalent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything."

And in Pratt v. Castle, 91 Mich. 84, it was said that: —

"1. Settlements are favored by the law, and will not be set aside, except for fraud, mistake, or duress.

"2. A settlement evidenced by the execution of mutual receipts of 'one dollar, in full for all debts, dues, and demands to this date,'" except as to certain specified items, is conclusive, in the absence of fraud or mistake, as to all prior dealings between the parties not covered by the excepted items."

See also Dowling v. Eggemann, 47 Mich. 171.

It therefore appears that such settlements should have weight, and it seems reasonable to hold that the rule contended for does not apply, for the reason that this was an unliquidated demand, although a certain portion of it was not questioned. Clearly, the claim was dis-

puted, and, so far as this record shows, the defendants' superintendent was given to understand that the money paid was accepted in full satisfaction, as plaintiff's own evidence shows that he gave the receipt without protest, and without stating to the defendants' superintendent what he said, aside, to his fellow laborers, that it would make no difference if they did give the receipts. To hold otherwise would be a recognition of the "mental reservation" more effective than just. Upon the plaintiff's own testimony, he accepted the money, with the knowledge that the defendants claimed that the amount paid was all that was his due, and gave a receipt in full. There is nothing in the case to negative the inference naturally to be drawn from this testimony, that there was an accord and satisfaction of an unliquidated demand.

The judgment must be reversed. No new trial should be ordered.[1]

H. L. BENSON *v.* L. PHIPPS.

TEXAS SUPREME COURT, MARCH 4, 1895.

[*Reported in* 87 *Texas*, 578.]

GAINES, Chief Justice. The plaintiff was a surety for one Hosack, the principal maker upon a promissory note payable to the defendant in error. Some days after the note fell due, Hosack wrote defendant in error requesting an extension, to which request defendant replied by letter as follows: "I will extend the time of payment one year, and look with confidence for the accrued interest within sixty days, hoping it will not inconvenience you. After that, if it is your pleasure to make the interest on the extension payable semi-annually, it will help me."

The defendant in error testified to having received the letter from Hosack requesting an extension, and that the foregoing was his reply, but the contents of Hosack's communication were not otherwise shown. He also testified, that he was paid nothing for the extension, and that Hosack never paid the accrued interest.

Suit having been brought on the note by the payee against all the makers, the plaintiff in error pleaded his suretyship; and the facts as stated above having been proved, the trial court gave judgment for the plaintiff in that court. That judgment upon appeal was affirmed by the Court of Civil Appeals.

It is the right of the surety at any time after the maturity of the debt to pay it and to proceed against the principal for indemnity.

[1] Chicago, &c. Ry. Co. *v.* Clark, 178 U. S. 353, 367; Ostrander *v.* Scott, 161 Ill. 339, *acc.* See also Fuller *v.* Kemp, 138 N. Y. 231; Nassoiy *v.* Tomlinson, 148 N. Y. 326. Miller *v.* Coates, 66 N. Y. 609, *contra*.

This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal by which his position is changed for the worse, discharges his liability. For this reason it is universally held, that a contract between the two, which is binding in law, by which the principal secures an extension of time, releases the surety, provided the surety has not become privy to the transaction by consenting thereto. If the creditor is not bound by his promise to extend, it is clear there is no release. In order to hold him bound by his promise, there must be a consideration. Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor, is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement was that the debtor should pay at the end of the period agreed upon for the extension precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is, that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question, why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate or at an increased but not usurious rate, is binding upon both, is held in many cases, some of which we here cite: Wood *v.* Newkirk, 15 Ohio St. 295; Fowler *v.* Brooks, 13 N. H. 240; Davis *v.* Lane, 10 N. H. 156; Stallings *v.* Johnson, 27 Ga. 564; Robinson *v.* Miller, 2 Bush (Ky.), 179; Reynolds *v.* Barnard, 36 Ill. App. 218; Chute *v.* Pattee, 37 Me. 102; Rees *v.* Barrington, 2 Ves. 540; see also Crossman *v.* Wohllebeu, 90 Ill. 537; McComb *v.* Kittredge, 14 Ohio, 348.[1]

[1] Royal *v.* Lindsay, 15 Kan. 591; Shepherd *v.* Thompson, 2 Bush, 176; Alley *v.* Hopkins, 98 Ky. 668; Simpson *v.* Evans, 44 Minn. 419; Moore *v.* Redding, 69 Miss.

In many cases which seemingly support the contrary doctrine, there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases, it is clear that there is no consideration for the promise. In others, where there was a mutual agreement for the extension, it may be that interest during the period of extension was not allowed by law, and the agreement did not provide for the payment of interest. The case of McLemore *v.* Powell, 12 Wheaton, 554, may have been of that character.

In this case, as we construe the correspondence between Hosack and the defendant in error, there was a request for an extension of the debt for twelve months on part of the former, and an unconditional acceptance on the part of the latter. We infer, that Hosack must have written something about the payment of accrued interest — probably that he hoped to be able to pay it in sixty days. The presumption is, that the letter was in the possession of the defendant in error at the time of the trial. He did not produce it. In any event, he should have known its contents, and if Hosack made his request for an extension conditional upon his payment of the accrued interest, he should have testified to the fact. We conclude, therefore, that there was a binding promise for an extension, and that the plaintiff in error was therefore released.[1]

There is error in the judgment, for which it must be reversed; and since it may be shown upon another trial that Hosack's offer contained a condition that he would pay the interest in sixty days, the cause is remanded.

Reversed and remanded.[2]

841 ; Fawcett *v.* Freshwater, 31 Ohio St. 637, *acc.;* 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.* Forbes, 3 Mont. 395; Grover *v.* Hoppock, 2 Dutch. 191 ; Kellogg *v.* Olmsted, 25 N. Y. 189 ; Parmelee *v.* Thompson, 45 N. Y. 58 ; Olmstead *v.* Latimer, 158 N. Y. 313, *contra.* See also Toplitz *v.* Baner, 161 N. Y. 325.

[1] An examination by the court of several Texas decisions is omitted.

[2] *Compare:* Hopkins *v.* Logan, 5 M. & W. 241 ; Vereycken *v.* Vandenbrooks, 102 Mich. 119 ; Stryker *v.* Vanderbilt, 3 Dutch. 68 ; 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.

THE AUSTIN REAL ESTATE AND ABSTRACT COMPANY *v.* G. A. BAHN.

TEXAS SUPREME COURT, MARCH 11, 1895.

[*Reported in* 87 *Texas*, 582.]

ON motion for rehearing.

GAINES, Chief Justice. — This is a motion for a rehearing of an application, based upon the ground that our ruling in this case is in conflict with that made in the case of Benson *v.* Phipps, recently decided in this court.

When the application now before us was filed, it was considered that it probably involved the same question which was raised in Benson *v.* Phipps, and upon which a writ of error had been granted. Action upon the application was accordingly suspended until that case was decided; and then it was discovered, that although the question of the validity of a promise for an extension of a contract of indebtedness was involved in each case, the two were clearly distinguishable. In this case, with reference to this question, the trial court found the facts as follows: "That [a few days after the note sued on became due, and just before it was assigned to the plaintiff, N. E. Fain presented same to the defendant for payment, when said Stacy, as president of defendant company, requested that an extension of one week from that date be given on said note, and that the same be not placed in the hands of attorney for collection until one week; and agreed, if this was done, that he would pay the note within that time, etc. Here the creditor agrees to extend for one week, and the debtor agrees to pay within the week. He does not agree that he will not pay until the end of the week, or that in case he does pay, he will pay interest for the entire period of the extension. Hence there was no consideration for the promise of the creditor. In Benson *v.* Phipps, the principal maker of the note and the payee agree upon an extension for twelve months; from which the promise was implied on part of the former not to sue, and upon the latter not to pay within the stipulated time. The promise of the debtor to forego his right to pay at any time after the note was originally due, secured to the creditor the absolute right to receive the interest for the entire time of the extension, and constituted the consideration for the creditor's promise.

In the case before us, it was the right of the company to pay at any time, notwithstanding Fain's promise, and hence there was no consideration to support that promise.

The motion for a rehearing is overruled.

Motion overruled.[1]

[1] McManus *v.* Bark, L. R. 5 Ex. 65, *acc.*

In order to have good consideration there must be legal detriment. Loss or bum-

LATTIMORE AND OTHERS *v.* HARSEN.

NEW YORK SUPREME COURT, AUGUST, 1817.

[*Reported in* 14 *Johnson*, 330.]

THIS was a motion to set aside the report of referees. It appeared from the affidavits which were read, that the plaintiffs entered into an agreement under seal, dated the 14th of November, 1815, with Jacob Harsen, and the defendant, Cornelius Harsen, by which the former, in consideration of the sum of nine hundred dollars, agreed to open a cartway in Seventieth Street, in the city of New York, the dimensions and manner of which were stated in the agreement, and bound themselves under the penalty of two hundred and fifty dollars to a performance on their part. Some time after the plaintiffs entered upon the performance, they became dissatisfied with their agreement, and determined to leave off the work, when the defendant, by parol, released them from their covenant, and promised them that if they would go on and complete the work, and find materials, he would pay them for their labor by the day. The plaintiffs had received more than the sum stipulated to be paid to them by the original agreement. The action was brought for the work and labor, and materials found by the plaintiffs, under the subsequent arrangement, and the referees reported the sum of four hundred dollars and five cents in favor of the plaintiffs.

The case was submitted to the court without argument.

PER CURIAM. The only question that can arise in the case is, whether there was evidence of a contract between the plaintiff and the present defendant to perform the services for which this suit is brought. From the evidence, it appears that a written contract had been entered into between the plaintiff and the defendant, together with his father Jacob Harsen, for the performance of the same work; and that, after some part of it was done, the plaintiffs became dissatisfied with their contract, and determined to abandon it. The defendant then agreed, if they would go on and complete the work, he would pay them by the day for such service, and the materials found, without reference to the written contract.

This is the allegation on the part of the plaintiffs, and which the evidence will very fairly support. If the contract is made out, there can be no reason why it should not be considered binding on the defendant. By the former contract, the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty they had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise; all payments made on the former contract have been allowed, and perfect

A man has no legal right to break his contract

justice appears to have been done by the referees, and no rules or principles of law have been infringed. The motion to set aside the report, therefore, ought to be denied.

Motion denied.

GEORGE MUNROE *v.* THOMAS H. PERKINS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1830.

[*Reported in* 9 *Pickering*, 298]

wrong.

INDEBITATUS assumpsit for work done, materials found, money paid, &c., brought against the defendant jointly with William Payne, who died after the action was commenced.

At the trial before the Chief Justice it appeared that in 1821 the plaintiff was employed by Perkins and Payne to build a hotel at Nahant, which was begun in that year and finished in 1823.

The general defence was, that there was a special contract, and that the work had been paid for according to the terms of that contract.

For the purposes of this case it was admitted that the amount of expenditures made and incurred by the plaintiff in and about the work, exceeded the amount of the payments made to him.

It appeared that in 1821 a number of persons associated themselves for the purpose of erecting a hotel at Nahant, and subscribed certain sums of money therefor; that Perkins and Payne were subscribers, and were the agents of the association, which was to be incorporated as soon as possible, and which was incorporated accordingly in February, 1822.

The defendant offered in evidence an agreement under seal, dated October 24, 1821, wherein the plaintiff engages to build the hotel according to a certain drawing and description, and the defendant and Payne, in behalf of their associates, agree to pay the plaintiff therefor $14,500 as the work advances.

T. W. Sumner, a witness called by the defendant, testified that the work was executed upon the basis of the drawing and description referred to in the sealed contract; that there were some deviations, consisting of additional work; that this was considered as extra work, not included in the contract, and was paid for separately according to its full cost and value.

To prove a waiver of the special contract, the plaintiff introduced several witnesses. J. Alley testified that in 1825 he said to the defendant, it was a pity Munroe had undertaken to build the hotel; to which the defendant replied, that Munroe would not lose anything by it, and that they had agreed to pay him for every minute's work and for all he had purchased. J. Mudge testified that in the spring of 1823 the plaintiff was indebted to the Lynn bank on a note for $1,100,

which he wished to have renewed, but that the directors were not satisfied of his solvency; that in April of that year the plaintiff came to the bank with Payne, who said he was the agent who attended to the business of the Nahant hotel in the absence of Perkins, who had gone to Europe; that he wanted to get from the bank some indulgence towards the plaintiff; that the corporation would leave the plaintiff as good as they found him; they would pay Munroe for all he should lay out; that Munroe should not stop for want of funds; that he (Payne) knew Perkins's mind upon the subject; that the bills would be paid, and the plaintiff should not suffer. W. Johnson testified that on the strength of this representation of Payne, the bank renewed the plaintiff's paper. W. Babb testified that in May, 1822, the defendant asked the plaintiff how he got on; that the plaintiff said, poorly enough; that the defendant told him he must persevere; the plaintiff said he could not without means; and the defendant repeated, "You must persevere," and added, "You shall not suffer, we shall leave you as we found you."

The defendant objected to this evidence that it was insufficient in law to set aside the special contract; that it did not amount to a waiver of the original contract, but so far as it proved anything, it was evidence of a new express promise, which was without consideration and from which no implied assumpsit could be raised. Also, that the conversation with Perkins at one time and with Payne at another were not joint promises and created no joint cause of action, but that the liability, if there was any, was several.

A verdict was taken by consent, subject to the opinion of the court.

S. Hubbard and *F. Dexter*, for the defendant.

Ward, contra.

Per Curiam. The verdict of the jury has established the fact, if the evidence was legally sufficient, that the defendant together with Payne, made the promise declared on. The defence set up was that the work was done and the materials were furnished on a special contract under seal, made by the defendant and Payne on behalf of themselves and other subscribers to the hotel; and such a contract was produced in evidence. The main question is, whether, there being this contract under seal for a stipulated sum, an action lies on a general assumpsit for the amount which the building actually cost; which is more than the sum specified in the contract. It is said on the part of the plaintiff that, having made a losing bargain and being unwilling and unable to go on with the work, Perkins and Payne assured him that he should not suffer; and that the work was carried on and finished upon their engagement and promise that he should have a reasonable compensation, without regard to the special contract. This engagement is to be considered as proved, if by law it was admissible to show a waiver of a special contract.

It is objected that, as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have

been cited to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, *Unumquodque dissolvitur eo ligamine quo ligatur.* But, like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times a bond, covenant, or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c.

It is a general principle that where there is an agreement in writing, it merges all previous conversations and parol agreements; but there are many cases in which a new parol contract has been admitted to be proved. And though when the suit is upon the written contract itself it has been held that parol evidence should not be received, yet when the suit has been brought on the ground of a new subsequent agreement not in writing, parol evidence has been admitted.

In Ratcliff *v.* Pemberton, 1 Esp. R. 35, Lord Kenyon decided that, to an action of covenant on a charter-party for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. He laid down a similar rule in Thresh *v.* Rake, ibid. 53; where, however, the contract does not appear to have been under seal.

In 2 T. R. 483, there were articles of partnership, containing a covenant to account at certain times; and upon a balance being struck, the defendant promised to pay the amount of the balance; and it was held that assumpsit would lie upon this promise.

The case of Lattimore *et al. v.* Harsen, 14 Johns. R. 330, comes nearer the case at bar. There the plaintiffs had agreed to perform certain work for a stipulated sum of money, under a penalty. After they had entered upon the performance of it, they determined to leave off, and the defendant, by parol, released them from their covenant, and promised them, if they would complete the work, that he would pay them by the day. The court held that if the plaintiffs chose to incur the penalty, they had a right to do so, and that the new contract was binding on the defendant.

In Dearborn *v.* Cross, 7 Cowen, 48, it is held that a bond or other specialty may be discharged or released by a parol agreement between the parties, especially where the parol agreement is executed; and the case of Lattimore *v.* Harsen is there cited and relied on.

There are other decisions of like nature in the same court; as Fleming *v.* Gilbert, 3 Johns. R. 528; Keating *v.* Price, 1 Johns. Cas. 22; Edwin *v.* Saunders, 1 Cowen, 250. In Ballard *v.* Walker, 3 Johns. Cas. 64, it was held that the lapse of time between the making of the contract and the attempt to enforce it was a waiver; which is going further than is necessary in the case before us, for here there is an express waiver.

In Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. In regard to the objection that this evidence was in direct contradiction to the deed, Duncan, J. remarks that "the evidence was not offered for that purpose, but to show a substitution of another spot. If this had not been carried into effect the evidence would not have been admissible; but where the situation of the parties is altered by acting upon the new agreement, the evidence is proper; for a party may be admitted to prove by parol evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party."

The distinction taken in the argument, between contracts in writing merely and contracts under seal, appears by these authorities not to be important as it respects the point under consideration, and justice required in the present case, that the parol evidence should be received.

It was said that the promise of Payne cannot affect Perkins, and *vice versâ*. But as they were joint actors, and as when one acted in the absence of the other, it was always with a joint view to the same object, they cannot be separated, but must be considered as joint promisors.

The parol promise, it is contended, was without consideration. This depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it.

Motion for new trial overruled.[1]

[1] Stoudenmeier *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.* Keteltas, 36 N. Y. 388, *acc.* See also Peck *v.* Requa, 13 Gray, 407; Hansen *v.* Gaar, 63 Minn. 94; Gaar *v.* Green, 6 N. Dak. 48; Dreifus *v.* Columbian Co., 194 Pa. 475.

LINGENFELDER ET. AL., EXECUTORS, *v.* THE WAINWRIGHT BREWING COMPANY, APPELLANT.

MISSOURI SUPREME COURT, OCTOBER TERM, 1890.

[*Reported in* 103 *Missouri*, 578.[1]]

GANTT, P. J. — The referee found that Jungenfeld, the plaintiffs' testator, was not entitled to the commission of five per cent on the cost of the refrigerator plant. He found that Jungenfeld's employment as architect was to design plans and make drawings and specifications for certain brewery buildings for the Wainwright Brewery Company and superintend their construction to completion for a commission of five per cent on the cost of the buildings. He found further that Jungenfeld's contract did not include the refrigerator plant that was to be constructed in these buildings. He further found, and the evidence does not seem to admit of a doubt as to the propriety of his finding, that this refrigerator plant was ordered not only without Mr. Jungenfeld's assistance, but against his wishes. He was in no way connected with its erection.

"Mr. Jungenfeld was president of the Empire Refrigerating Company and largely interested therein. . . . The De La Vergne Ice Machine Company was a competitor in business. . . . Against Mr. Jungenfeld's wishes Mr. Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. . . . The brewery was at that time in process of erection and most of the plans were made. When Mr. Jungenfeld heard that the contract was awarded he took his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect in Mr. Jungenfeld's place and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances Mr. Wainwright promised to give Jungenfeld five per cent on the cost of the De La Vergne ice machine if he would resume work. Jungenfeld accepted and fulfilled the duties of superintending architect till the completion of the brewery.

"As I understand the facts and as I accordingly formally find, defendant promised Jungenfeld a bonus to resume work and complete the original contract under the original terms.

"I accordingly submit that in my view defendant's promise to pay Jungenfeld five per cent on the cost of the refrigerating plant was without consideration, and recommend that the claim be not allowed."

[1] The statement of the case and a portion of the opinion is omitted.

Most jurisdictions hold the second contract

The referee also finds "that Mr. Jungenfeld never claimed that defendant had broken the contract or intended to do so, or that any of his legal rights had been violated."

The learned circuit judge, upon this state of facts, held that the defendant was liable on this promise of Wainwright to pay the additional five per cent on the refrigerator plant. The point was duly saved, and from the decision this appeal is taken.

Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the $3,449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract.

New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition that, "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company" of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. Harris *v.* Carter, 3 E. & B. 559; Stilk *v.* Myrick, 2 Camp. 317; 1 Chitty on Contracts [11 Amer. Ed.] 60; Bartlett *v.* Wyman, 14 Johns. 260; Reynolds *v.* Nugent, 25 Ind. 328; Ayres *v.* Railroad, 52 Iowa, 478; Festerman *v.* Parker, 10 Ind. 474; Eblin *v.* Miller, 78 Ky. 371; Sherwin & Co. *v.* Brigham, 39 Ohio St. 137; Overdeer *v.* Wiley, 30 Ala. 709; Jones *v.* Miller, 12 Mo. 408; Kick *v.* Merry, 23 Mo. 72; Laidlou *v.* Hatch, 75

Ill. 11; Wimer *v.* Overseers of Poor, 104 Penn. St. 317; Cobb *v.* Cowdery, 40 Vt. 25; Vanderbilt *v.* Schreyer, 91 N. Y. 392.

But "it is carrying coals to Newcastle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as Judge Cooley, in Goebel *v.* Linn, 47 Michigan, 489, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defence to a suit for the remainder is not the law of this State, nor do we think of any other where the common law prevails.

The case of Bishop *v.* Busse, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.[1]

[1] Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Camp. 317; Fraser *v.* Hatton, 2 C. B. N. S. 512; Jackson *v.* Cobbin, 8 M. & W. 790; Mallalieu *v.* Hodgson, 16 Q. B.

GEORGE R. KING *v.* DULUTH, MISSABE & NORTHERN RAILWAY COMPANY.

MINNESOTA SUPREME COURT, JUNE 28, 1895.

[*Reported in* 61 *Minnesota*, 482.]

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

1. The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than $40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go for-

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; 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.* Henschenheimer, 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, *acc.* 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.* Stilwell, 34 N. J. L. 54, 57.

Impossibility is one of the recognized defenses

ward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than $30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complaint shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. 1 Chitty, Cont. 60; Pollock, Cont. 176 (161); Leake, Cont. 621. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. Ayres *v.* Chicago, R. I. & P. R. Co., 52 Iowa, 478, 3 N. W. 522; McCarty *v.* Hampton B. Ass'n, 61 Iowa, 287, 16 N. W. 114; Lingenfelder *v.* Wainwright B. Co., 103 Mo. 578, 15 S. W. 844; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Reynolds *v.* Nugent, 25 Ind. 328; Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224; Wimer *v.* Worth Tp., 104 Pa. St. 317.

If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several States, and at least approved in our own, to the effect that if one party to a contract refuses

to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. Munroe *v.* Perkins, 9 Pick. 298; Bryant *v.* Lord, 19 Minn. 342 (396); Moore *v.* Detroit L. Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489, 11 N. W. 284; Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligation whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it won'd be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal

rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract.

But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it. This proposition, in our opinion, is correct on principle and supported by the weight of authority.

What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the

opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

The cases of Meech *v.* City of Buffalo, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud *v.* MacGregor, *supra*, p. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work.

2. The second cause of action is supported by a different and a valid consideration. It fairly appears from the allegations of the complaint as to this cause of action that the defendant, by changing its line and by its defaults, had so far delayed the work of construction as to legally excuse the contractors from their obligation to complete the work within the time originally agreed upon, and that to execute the work within such time would involve an additional expense. Thereupon, in consideration of their waiving the defaults and the delays occasioned by the defendant, and promising to complete the work in time, so that it could secure the bonds, it promised to pay or give to them the extra compensation. This was a legal consideration for such promise, and the allegations of the second general subdivision of the complaint state a cause of action.

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed, and as to so much of it as overruled the demurrer to the second cause of action it must be affirmed, and the case remanded to the district court of the county of St. Louis with the direction to modify the order appealed from so as to sustain the demurrer as to the first cause of action, with or without leave to the plaintiff to amend, as such court may deem to be just.

So ordered.

This may be relegated to the museum.

BAGGE *v.* SLADE.

IN THE KING'S BENCH, EASTER TERM, 1616.

[*Reported in* 3 *Bulstrode*, 162.]

IN a writ of error to reverse a judgment given against him in an action upon the case for a promise. In the town court of Yevell, in Commitatu Sommerset. The error assigned, and insisted upon, was this, because there wanted a good consideration to raise the promise, and so no cause of action.

COKE, C. J. The case was this: Two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this; the plaintiff here in this writ of error said to the other, pay you all the debt, and I will pay you the moity of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moity according to his promise, which to do he refused; upon this he brought his action upon the case against the plaintiff upon his promise; and upon non-assumpsit pleaded he had a verdict and judgment; and upon this judgment a Writ of Error was brought. In this case, and in the declaration, there is a good consideration set forth; the party's own contract here shall bind him; he hath no remedy for the money paid; but when this is paid, here is a good assumpsit, grounded upon a good consideration, for repayment of the moity by the plaintiff.

HAUGHTON, J. Notwithstanding this contract, he is still least in danger of the first bond.

COKE. I have never seen it otherwise, but when one draws money from another, that this should be a good consideration to raise a promise.

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.

COKE agreed with him herein. Also if a man be bound to another by a bill in 1000*l.* and he pays unto him 500*l.* in discharge of this

bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1000*l.*, this 500*l.* is no satisfaction of the 1000*l.*; but yet this is good, and sufficient to make a good promise, and upon a good consideration, because he hath paid money, *sc.* 500*l.*, and he hath no remedy for this again.

Another matter was moved, that the entry of the judgment was not good; the same being in this manner, *sc. Idco consideratum fuit, adtunc, & ibidem, hic ad eandem curiam, quod prædictus querens recuperet.*

The whole Court agreed this judgment to be well entered; and that the consideration here is good, and sufficient to raise the promise, and, accordingly, the rule of the Court was, *quod Judicium affirmetur.*[1]

Here it doesn't appear that they were asked to marry sooner than they otherwise would have

SHADWELL *v.* SHADWELL AND ANOTHER, EXECUTORS, &c.

IN THE COMMON PLEAS, NOVEMBER 26, 1860.

[*Reported in* 30 *Law Journal Reports, C. P.* 145.]

THE declaration stated that the testator in his lifetime, in consideration that the plaintiff would marry Ellen Nicholl, agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say: —

11TH AUGUST, 1838, GRAY'S INN.

MY DEAR LANCEY, — I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.

Your ever affectionate uncle,

CHARLES SHADWELL.

Averment: That the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150*l.* each respectively; and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator; and that the plaintiff's annual income derived from his profession of a chancery barrister never amounted to six hundred guineas, which he was always ready and willing to admit and state to the said testator; and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12*l.*,

[1] Moore *v.* Bray, 1 Vin. Ab. 310, pl. 31; Anon., Sheppard's Action on the case (2d ed.) 155, *acc.* Westbie *v.* Cockayne, 1 Vin. Ab. 312, pl. 36, *contra.*

of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea: That before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator, before and at the time of making the supposed agreement and promise, also had notice; and the said marriage was, after the making of the supposed agreement and promise, duly had and solemnized as in the declaration mentioned, at the request of the plaintiff and without the request of the testator. And the defendants further say that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea: To part of the claim of the plaintiff, to wit, so much thereof as accrued due in and after the year 1855, the defendants say that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such chancery barrister as aforesaid, and should not abandon the same; yet that, after the making of the said agreement and promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a chancery barrister, which before and at the time of the said making of the said supposed agreement and promise he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister appointed yearly to revise the list of voters for the year for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea: That the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other, that is to say (setting out the letter as in the declaration above). Averment: That the plaintiff afterwards married the said Ellen Nicholl,

relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked; and that he so married while his annual income derived from his profession of a chancery barrister did not amount, and was not by him admitted to amount, to six hundred guineas.

Second replication to the fifth plea: That the said agreement declared on was in writing, signed by the said testator, and was and is in the words, letters, and figures set out in the next preceding replication, and in none other; and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made, were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity.

Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Bullar, in support of the demurrers.

V. Harcourt, in support of the replications.

ERLE, C. J., now delivered the judgment of himself and KEATING, J The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of 150*l.* per annum. If there be such a consideration, it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise, that is, in the letter of the 11th of August, 1838, and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are, that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be, namely, 150*l.* per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed six hundred guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss, if the income which had been promised should

be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto: but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited; but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of Montefiori *v.* Montefiori and Bold *v.* Hutchinson are examples. I do not feel it necessary to add any thing about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff; and I should state that this is the judgment of my brother Keating and myself, my brother Byles differing with us.

Byles, J. I am of opinion that the defendant is entitled to the judgment of the court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea, that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question: Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words: [His Lordship read it.] It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be "at starting in the profession;" for it will be observed that these words are used by the testator in reciting a

prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration, that the annuity is not in terms made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which by law must be in writing; and the fourth plea shows that no consideration or request, *dehors* the letter, existed, and therefore that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration; but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be, a detriment to the plaintiff, but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you 500*l.* if you break your leg;" would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise, if the testator had said, "I will give you 100*l.* a year while you continue in your present chambers?" I conceive that the promise would not be binding for want of a previous request by the testator. Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point: Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea, that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them. And further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff, before the letter, had already bound himself to marry, by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position, that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is

not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person: see Herring *v.* Dorell and Atkinson *v.* Settree. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record, I agree with the rest of the Court.

Judgment for the plaintiff.[1]

SCOTSON AND OTHERS *v.* PEGG.

IN THE EXCHEQUER, JANUARY 28, 1861.

[*Reported in* 6 *Hurlstone & Norman*, 295.]

DECLARATION. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the

[1] Chichester *v.* Cobb, 14 L. T. Rep. 433; Skeete *v.* Silberberg, 11 Times L. R. 491, *acc.* Compare Wright *v.* Wright, 114 Ia. 748; Boord *v.* Boord, Pelham (So. Aust.) 58, 64; Usher's Ex. *v.* Flood, 83 Ky. 552; Caborne *v.* Godfrey, 3 Desaus. 514.

plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the said promise by the defendant, — yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship, &c.

Plea: That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence until and at the time of the making of the said promise and the delivery of said coals. And the defendant says that before the making of the said promise, and after the making of the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then further delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under, and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons, they, the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder.

Dowdeswell, in support of the demurrer.

The Court then called on

C. Pollock, to support the plea. There is no consideration to support the promise. The plea shows that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter-party only speci-

fies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [MARTIN, B. You must establish this, that, if a person says to another, "The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a *nudum pactum*. In Black. Com. vol. ii. p. 450, it is said: "If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale." [WILDE, B. That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner."] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration. Herring *v.* Dorell. So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B. in consideration of B.'s releasing A. out of custody, is void. Atkinson *v.* Settree. [WILDE, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. MARTIN, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you 1000*l.* a year." Could not the contract be enforced?] There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [MARTIN, B. That proceeds on the ground of public policy. WILDE, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you, if you will do it," the performance is a valid consideration for the payment. MARTIN, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B. I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant in answer says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

Judgment for the plaintiffs.[1]

[1] But see *contra*, Jones *v.* Waite, 5 Bing. N. C. 341, 351, 356, 358–359.

LEWIS F. F. ABBOTT *v.* VALENTINE DOANE, Jr.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 14–APRIL 6, 1895.

[*Reported in* 163 *Massachusetts*, 433.]

ALLEN, J. The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperilled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. Munroe *v.* Perkins, 9 Pick. 298. See also Holmes *v.* Doane, 9 Cush. 135; Peck *v.* Requa, 13 Gray, 407; Rogers *v.* Rogers, 139 Mass. 440; Hastings *v.* Lovejoy, 140 Mass. 261, 265; Thomas *v.* Barnes, 156 Mass. 581. In other States there is a difference of judicial opinion, but the following cases sanction a similar doctrine. Lattimore *v.* Harsen, 14 Johns, 330; Stewart *v.* Keteltas, 36 N. Y. 388; Lawrence *v.* Davey, 28 Vt. 264; Osborne *v.* O'Reilly, 15 Stew. 467; Goebel *v.* Linn, 47 Mich. 489; Cooke *v.* Murphy, 70 Ill. 96. In England and in others of the United States a different rule prevails.

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by

a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration. A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others; as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do.

This has been so held in England, and the view is supported by English text-writers, though not always for precisely the same reasons. Scotson *v.* Pegg, 6 H. & N. 295; Shadwell *v.* Shadwell, 30 L. J. (N. S.) C. P. 145; Pollock, Con. (6th ed.) 175–177; Anson, Con. (4th ed.) 87, 88; Leake, Con. (3d ed.) 540. In this country the courts of several States have taken the opposite view, though in some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief, and in Williston's discussion of the subject in 8 Harv. Law Rev. 27.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes

to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.

Exceptions overruled.[1]

H. B. SCHULER *v.* S. H. MYTON ET. AL.

KANSAS SUPREME COURT, JANUARY TERM, 1892.

[*Reported in* 8 *Kansas*, 282.]

JOHNSTON, J. This action was brought by S. H. Myton and A. J. Thompson to recover from H. B. Schuler a subscription of $500 alleged to have been made by him to reimburse Myton and Thompson for money guaranteed and paid by them to secure the location of a college at Winfield. In the early part of 1885, the southwestern Kansas conference of the Methodist Episcopal church determined to locate, build, and maintain a college under the auspices and protection of that denomination, for the education of the youth of both sexes, and proposed to locate the college at some city in southwestern Kansas whose citizens would agree by donations of land and money to contribute to the securing of suitable grounds for the college, and to the expense of erecting the same upon such grounds. The committee of the conference to whom was confided the duty of determining the location visited several of the cities, and determined that Winfield was a desirable place at which to locate the college, and invited the citizens to make known to the committee what assistance they would give to secure the location of the college at Winfield. Two sites were proposed, — one in the western part of Winfield, and the other in the northeastern portion of the city, — and a contest arose between the parties interested in the real estate surrounding each site to secure the location. In the northeast part of the city was a tract of land known as the Highland Park addition, which was owned by H. B. Schuler, S. H. Myton, and six other persons. These parties were anxious to secure the location upon or near their land, and proposed to contribute land and money for that purpose. Other parties purchased and platted the southeast quarter of section 22, township 32, range 4, which adjoined the Highland Park addition, and was known as the "Dr. W. R. Davis land," and proposed to aid in locating the college. A. J. Thompson, one of the defendants in error, also owned land in that vicinity, and was interested in having the college

[1] Champlain Co. *v.* O'Brien, 117 Fed. Rep. 271; Humes *v.* Decatur Co., 98 Ala. 461, 473; Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234; Donnelly *v.* Newbold, 94 Md. 220; Day *v.* Gardner, 42 N. J. Eq. 199, 203; Bradley *v.* Glenmary Co., 53 At. Rep. 49 (N. J. Eq.), *acc.* See also Green *v.* Kelley, 64 Vt. 309, and articles by Professor Ames, 12 Harv. L. Rev. 515; 13 ibid. 29.

located northeast of the city. The parties interested in this location held several meetings in order to determine the quantity of land and the amount of money which should be offered to the conference committee. The Highland Park Company, of which Myton and Schuler were members, proposed to give 20 acres of land and $2,800 in money toward securing the college. A definite proposition to the committee was required, and A. J. Thompson and S. H. Myton made a written proposition, as follows: —

WINFIELD, KAS., May 25, 1885.

We the undersigned, citizens of the city of Winfield, agree that we will pay to the college of the Southwestern Kansas Conference, if the same shall be located east of the city of Winfield, in Cowley County, Kansas, and on either the Highland Park addition to the city of Winfield in said county, or on the southeast quarter of section 22, township 32, range 4, in said county, the sum of $10,000 in money, and that we will procure and give to said college a good and sufficient deed of general warranty to 20 acres of land in said Highland Park addition, in a solid form and acceptable to the committee of said college whose business it is to locate said college.

The above proposition is made in consideration of the location of said college at the point above mentioned, and the benefit we derive thereby with this community in general.

Witness our hands, the day and year first above written.

A. J. THOMPSON.
S. H. MYTON.

In order to enable Thompson and Myton to carry out their proposition, the owners of the Highland Park addition made the following written subscription: —

"We the undersigned agree to pay S. H. Myton and A. J. Thompson the sums set opposite our respective names when the M. E. college is permanently located in the southwest quarter of the tract of land known as the Dr. W. R. Davis land.

"This subscription is made to enable said Myton and Thompson to make good their guarantee to $10,000 to said institution; payments to be made at such times and in such proportion of each subscription as will equal the one third thereon, as follows: one third when the foundation of said college building is completed, one third when the walls of the first story of said building are completed, and one third when the said building is completed and ready for occupancy. H. D. Gans, $250; Wm. Newton, $350; H. B. Schuler, $500; W. G. Graham, $500; A. B. Graham, $350; J. R. Clark, $100; E. S. Bedillion, $50; B. P. Wood, $100."

The conference determined to locate the college at Winfield, but upon the northwest quarter of the Davis tract of land. This location met the conditions of the proposal made by Thompson and Myton, as their subscription permitted a location on either the Highland Park addition or upon any part of the Davis tract; but the subscription of Schuler and

others, for some reason which is not fully explained, did not correspond with that of Thompson and Myton, but was made upon the express condition that the college should be located on the southwest quarter of that tract. There is considerable in the record which tends to show that the intention of all the parties interested must have been to make the subscriptions on exactly similar terms, and that the second subscription was made to reimburse Thompson and Myton for the obligation which they had assumed. The college was built in accordance with the proposition of Thompson and Myton, and they have paid the full amount of their subscription. All of the subscribers who joined with Schuler in the undertaking to reimburse Thompson and Myton have paid their subscriptions, and Schuler alone refuses. He claims that his subscription was reduced to writing, and definitely provides that the college shall be located on a certain 40 acres of land, and that, as it has been located elsewhere, there is no liability which can be enforced against him. Upon a trial had with a jury, a general verdict was returned against Schuler for the amount of his subscription, and with it answers to special questions submitted were made.

Schuler insists that he is not liable upon his subscription, and while we think there is a strong moral obligation resting upon him to contribute toward the donation, according to the understanding of all the parties, we are reluctantly compelled to sustain his claim, on the record as it now stands. At the numerous preliminary meetings held, the discussion related to securing the location of the college in the northeast part of the city, and there was apparently no contention as to the particular spot in that portion of the city on which it should be built. All the parties interested appeared to be satisfied that it should be built on any part of the Davis tract, or of the Highland Park addition. There was a small grove on the southwest quarter of the Davis tract, and most of the interested parties thought that this place was especially desirable as a location. And it was generally believed that if it was located in that part of the city it would be near this grove. This may account for the naming of the southwest 40 acres in the subscription made by Schuler and others. After it was found that the college had been located on the northwest 40, all appeared to be content, and the Highland Park Company, of which Schuler was a member, conveyed the 20 acres out of the Highland Park addition, as they had agreed to do. Soon a question arose as to the terms of the subscription that had been made, and when both were procured and examined the discrepancy between them was discovered. There is testimony tending to show that Thompson then visited Schuler, and called his attention to the fact that the location mentioned in his subscription was confined to the southwest 40 of the Davis tract, whereas the college had been located on the northwest 40, and requested that the subscription should be changed to correspond with that of Thompson and Myton and with the understanding of the parties. According to the testimony of Thompson and Myton, Schuler said there was no need to change the written subscrip-

tion, nor to make a new one; that he would pay the amount which he had subscribed, without reference to the location. It is also shown that it was more advantageous to Schuler and to the Highland Park Company to have it located where it was located than upon the southwest 40, and other testimony also shows that it would have been more advantageous to Thompson and Myton to have had it located on the southwest 40 than the site on which it was located. Schuler denies that there was any subsequent agreement to pay the subscription after the location had been made, and he testifies that he positively refused to pay the subscription from the first, because the location was not in accordance with the terms of the subscription which he had made. The jury found that there was a subsequent agreement, as claimed by Thompson and Myton, but they failed to find that there was any consideration to support that agreement.

If Schuler's liability is to be measured by the written subscription alone, no recovery can be had against him; but it was competent for him to modify that subscription by oral agreement, provided such oral agreement is based upon a sufficient consideration. The want of consideration for the subsequent promise alleged to have been made by him is the turning-point in the case, and that question was raised in the district court on the pleadings, the evidence, the charge of the court, and findings of the jury. If, by reason of the promise made by Schuler, Thompson and Myton did or undertook to do anything beyond what they were already bound to do, it would be a sufficient consideration to sustain the promise of Schuler. It is contended that the record discloses that no liability was incurred nor any act done by Thompson and Myton on the faith of Schuler's promise, and some of the testimony of Thompson himself tends to sustain this claim. It is true that it appears that the $10,000 subscription which they had made was all paid to the college authorities after the making of the subsequent promise by Schuler; and they testify that payment would not have been made except for the promise made by Schuler and his associates. They had, however, made a definite proposition to the committee of the Conference, and the acceptance of their offer constituted a binding contract and fixed their liability. They proposed to pay $10,000 in money and give to the college 20 acres of land when the college was located at any point within the Davis tract. When the permanent location was made their obligation was complete, and their liability determined. It is not clear from the record just when the location was made, nor whether the committee first made a temporary location, to enable these guarantors to obtain assistance from others who were supposed to be benefited by the location. If the first location was temporary and conditional, so that Thompson and Myton were not absolutely bound, and if their agreement was completed and carried out on the faith and credit of the subsequent promise of Schuler and his associates, there would be a valid consideration to support the promise of Schuler. On the other hand, if the undertaking of Thompson and Myton had become complete

and binding before the subsequent promise of Schuler was made, and no new liability was created, and they paid nothing more than what they had prior to that time contracted to pay, the promise would not be enforceable. It is well settled that an agreement to do or the doing of that which one is already bound to do does not constitute a consideration for a new promise. Vanderbilt *v.* Schreyer, 91 N. Y. 392; Geer *v.* Archer, 2 Barb. 420; Crosby *v.* Wood, 6 N. Y. 369; Bartlett *v.* Wyman, 14 Johns. 260; Ayres *v.* Railroad Co., 52 Iowa, 478; Reynolds *v.* Nugent, 25 Ind. 328; Deacon *v.* Gridley, 15 C. B. 295. See also University *v.* Livingston, 57 Iowa, 307; Hamilton College *v.* Stewart, 1 N. Y. 581; Trustees *v.* Gilbert, 2 Pick. 578; 2 Pars. Contr. 437; Pollock, Contr. 161; 3 Am. & Eng. Encyc. of Law, 834, and cases cited. In the present case, the jury found, as has been stated, that the subscription of Schuler was modified by a subsequent promise, whereby he orally agreed to pay the full amount of $500, but the following questions and answers show the consideration to be insufficient:

"What action, if any, did the plaintiffs take by reason of such subsequent promise of defendant which they would not have taken if such subsequent promise had not been made? A. Fulfilled their agreement.

"What liability, if any, did the plaintiffs incur by reason of such subsequent promise which they had not already incurred prior to the making of such subsequent promise? A. Plaintiffs advanced the subscription of defendant, $500."

The fulfilling of their agreement and the payment of the money which they had already contracted to pay would not constitute a legal consideration for the promise of Schuler. Although the testimony in regard to the consideration is not clear or satisfactory, there is sufficient upon which to base these findings. Thompson himself testifies that he would have been required to pay his subscription without reference to the subscription of Schuler or the carrying out of the subsequent promise which he had made. These findings are inconsistent with the general verdict; and for this reason, and the further one that the charge of the court did not fairly present to the jury the rule of law that the agreement to do or the doing of that which a person is under a legal obligation to do is not a sufficient consideration for a new promise, there must be a new trial.

For this purpose the judgment of the district court will be reversed.

All the justices concurring.[1]

[1] Johnson's Adm. *v.* Seller's Adm., 33 Ala. 265; Havana Press Drill Co. *v.* Ashurst, 148 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; Holloway's Assignee *v.* Rudy, 60 S. W. Rep. 650 (Ky.); Putnam *v.* Woodbury, 68 Me. 58; 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; Wimer *v.* Overseers, 104 Pa. 317; Hanks *v.* Barron, 95 Tenn. 275;

ENGLAND *v.* DAVIDSON.

IN THE QUEEN'S BENCH, MAY 5, 1840.

[*Reported in* 11 *Adolphus & Ellis,* 856.]

ASSUMPSIT. The declaration stated that heretofore, to wit, &c., the defendant caused to be published a certain hand-bill, placard, or advertisement, headed "Fifty pounds reward;" whereby, after reciting that, late on the night of, &c., the mansion-house of defendant, at, &c., was feloniously entered by three men, who effected their escape; that two men had been taken into custody on suspicion of having been concerned in the felony; and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, &c., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward: that plaintiff, confiding, &c., did afterwards, to wit, on, &c., give such information as led to the conviction of one of the said offenders, to wit, one David Robson; and that afterwards, to wit, at the Assizes for Northumberland, D. R., who was guilty of the said offence, to wit, the feloniously entering, &c., was in due course of law convicted of the said offence of feloniously entering, &c., in consequence of such information so given by plaintiff; of all which said several premises defendant afterwards, to wit, on, &c., had notice, and was then requested by plaintiff to pay him the said sum of 50*l.*; and defendant afterwards, to wit, on, &c., in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.* Breach: that, although defendant, in part performance of his said promise and undertaking, to wit, on, &c., did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet, &c. (breach: non-payment of the residue).

Third plea: That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate, and the said offence was committed; and it then was the duty of plaintiff, as such constable and police officer, to have given and to give every information which might lead to the conviction of the said offender, and to apprehend him and prosecute him to conviction, if guilty, with-

Kenigsberger *v.* Wingate, 31 Tex. 42; Davenport *v.* Congregational Soc. 33 Wis. 387, *acc.*

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.

out any payment or reward to him made in that behalf: that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer Hexham, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever: and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer: assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

Ingham now appeared for the plaintiff; but the Court called on

Martin, for the defendant. No consideration is shown on this record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons. Com. Dig., Leet (M. 9), (M. 10); Justices of Peace (B. 79). It has been laid down that a sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract. Harris *v.* Watson,[1] explained by Lord Ellenborough in Stilk *v.* Myrick.[2] The principle was recognized in Newman *v.* Walters,[3] where the case of a passenger was distinguished. [COLERIDGE, J. Those cases turn merely on the nature of the contract made by the sailor.] If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The cases on the subject of consideration are collected in note (*b*) to Barber *v.* Fox. [*Ingham.* The constable was not bound to procure evidence.] The contract here declared upon is against public policy.

LORD DENMAN, C. J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

LITTLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

Judgment for the plaintiff.[4]

[1] Peake, N. P. C. 72.
[2] 2 Camph. 317; s. c. 6 Esp. 129.
[3] 3 B. & P. 612.
[4] See Bent *v.* Wakefield Bank, 4 C. P. D. 1.

GEORGE F. POOL *v.* THE CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS,
NOVEMBER TERM, 1849.

[*Reported in* 5 *Cushing*, 219.]

THIS was an action of assumpsit brought in this court to recover the sum of $2000, as a reward to which the plaintiff alleged he was entitled, and was submitted to the court upon an agreed statement of facts, from which it appeared as follows: —

The city government of Boston having authorized the mayor to offer a reward "for the detection and conviction of any incendiary or incendiaries" who had set fire to any building in the city, or might do so, within a given period, the mayor accordingly offered the reward above mentioned "for the detection and conviction of said incendiary or incendiaries" within the time specified.

The plaintiff was a watchman of the city, duly appointed, and while in the performance of his duty as such watchman, discovered one Edmund Hollihan setting fire to a certain outhouse of one Chase, in the night of the 20th of September, 1845. The plaintiff thereupon made a complaint in the police court against Hollihan for burning a dwelling-house in the night time, upon which complaint he was committed for trial. He was afterwards indicted at the December term of the municipal court, 1845, for setting fire to the outhouse of Chase, in the night time following the 20th of September, 1845, and at the February term, 1846, was tried, found guilty, and sentenced to six months' imprisonment in the house of correction.

The plaintiff, thereupon, claimed the above reward of $2000, and brought this action to recover the same.

M. S. Clarke for the plaintiff.

P. W. Chandler, city solicitor, for the defendants.

WILDE, J. The defence to this action is, that the plaintiff has done no more than it was his duty as a watchman to do, and that a promise of a reward to a man for doing his duty is illegal, or void for want of consideration. The leading case in support of the defence is that of Stotesbury *v.* Smith, 2 Bur. 924, in which it was held, that it was illegal for the officer, in that case, to take money for doing his duty. He was a bailiff, and the defendant promised to pay him a sum of money, in case he would accept the defendant and another to be bail for a third person. It was decided, that no action could be maintained on such a promise. See also England *v.* Davidson, 3 P. & D. 594.

The same principle has been applied to promises made to persons not being public officers; such as promises to seamen to pay them extra wages for the performance of their duty.

"Every seaman," says Chancellor Kent, in his Commentaries (3 Kent, 185), "is bound, from the nature and terms of his contract, to do his duty in the service to the utmost of his ability, and, therefore, a promise made by the master when the ship is in distress to pay extra wages as an inducement to extraordinary exertion, is illegal and void." So it was held by Lord Kenyon, in the case of Harris *v.* Watson, Peake, 72. But it was held by Lord Ellenborough, that such a promise was not void on the ground of illegality, but on the ground of a want of consideration, which, as it seems to us, is better founded on general principles. Stilk *v.* Myrick, 2 Camp. 317; Bridge *v.* Cage, Cro. Jac. 103. But however this may be, it is well settled that such a promise is void.

So it has been decided, that a promise of extra compensation to a witness, in case he would attend court, and give testimony, at considerable expense and inconvenience to himself, was void, and that he could only recover his fees allowed by law, he having done no more than he was in duty bound to do.

These decisions, and the principles on which they are founded, are decisive against the plaintiff's claim in the present case; it was his duty, when on the watch he discovered Hollihan setting fire to the outhouse, to make complaint, and cause him to be arrested, or to give notice to the mayor, or some other city officer, that they might prosecute him. He preferred himself to prosecute rather than to give notice to the city authorities; doubtless with the hope of entitling himself thereby to the large reward offered. But this will not help him. The principal object of the reward offered was to obtain the detection of the offender; the conviction was required to ascertain who was the offender. But to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the detection as for the conviction of the offender. The reward cannot be apportioned. But the plaintiff is not entitled thereto for either service. He discovered the offender while he was on duty as a watchman, and was bound to give notice, or to cause him to be arrested; and he preferred the latter course; but he could not thereby subject the defendants to a liability, to which they would not be subject, if he had given notice to some one of the city officers.

For these reasons, briefly stated, and on principles well settled by the authorities, we are of opinion that this action cannot be maintained; and the plaintiff must become nonsuit.[1]

[1] 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; Davies *v.* Burns, 5 Allen, 349; Brophy *v.* Marble, 118 Mass. 548; Studley *v.* Bullard, 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* Gore, 57 Miss. 251; Kick *v.* Merry, 23 Mo. 72; Thornton *v.* Missouri, &c. Ry. Co., 42 Mo. App. 58; Hatch *v.* Mann, 15 Wend. 44; Gillmore *v.* Lewis, 12 Ohio, 281; Smith *v.* Whildin, 10 Pa. 39; Stamper *v.*

KEITH & HASTINGS, Admrs., &c. *v.* ALFRED MILES.

Mississippi Supreme Court, October Term, 1860.

[*Reported in* 39 *Mississippi*, 442.]

Error to the Probate Court of Panola County. Hon. J. T. M. Burbridge, judge.

H. A. Barr, for plaintiffs in error.

The item in the account for board ought to have been allowed. The guardian had a right to command the ward to board with him, and the ward was under obligation to obey him. There was therefore no consideration for the promise of the guardian to board him without charge.

If the master of a ship promise his crew an addition to their fixed wages in consideration of extraordinary exertions during a storm, this promise is *nudum pactum* — the performance of an act which it was before legally incumbent on the party to perform, being in law an insufficient consideration. Chitty on Con. 54.

And so it would be in any case where the only consideration of the defendant's promise was the promise of the plaintiff to do, or his actually doing, something which he was previously bound to do. Chitty on Con. 54.

No counsel offered for defendant in error.

Harris, J., delivered the opinion of the court:

The defendant in error, when about ten or twelve years old, left the house of his guardian, Alexander Miles, plaintiffs' intestate, and went to the house of his uncle by marriage, "and there in the neighborhood remained until his guardian persuaded him to go and live with him, making him the following promises: that he, the guardian, would not charge him, the said defendant, any board; that he would send him to school and make no charge for the same." The defendant went to live with plaintiffs' intestate, his said guardian, and remained there about twelve months.

On final settlement of the guardianship account, plaintiffs in error claimed allowance of sixty dollars for the board of defendant, and also amounts paid for tuition.

Exceptions were filed to these items in the court below, and sus-

Temple, 6 Humph. 113; Brown *v.* Godfrey, 33 Vt. 120, *acc.* If more is done than the legal duty requires there is sufficient consideration. Morrell *v.* Quarles, 35 Ala. 544; Hayden *v.* Souger, 56 Ind. 42; Trundle *v.* Riley, 17 B. Mon. 396; Pilie *v.* New Orleans, 19 La. Ann. 274; Gregg *v.* Pierce, 53 Barb. 387; McCandless *v.* Alleghany, &c. Co., 152 Pa. 139; Texas Cotton-Press Co. *v.* Mechanics' Co., 54 Tex. 319; Davis *v.* Munson, 43 Vt. 576; Reif *v.* Page, 55 Wis. 496. See also England *v.* Davidson, 11 A. & E. 856; Bent *v.* Wakefield Bank, 4 C. P. D. 1; Long *v.* Neville, 36 Cal. 455; Marsh *v.* Gold, 2 Pick. 289; Commonwealth *v.* Vandyke, 57 Pa. 34.

tained by the court. This writ of error is now prosecuted here to revise that judgment.

It appears in this record that the defendant paid no board at his uncle's house during his stay there; and upon this ground, we suppose, it was thought, in the court below, a sufficient consideration arose to sustain the promise of the guardian to board and school the defendant without charge.

Between adults, or where no duty of obedience existed, a promise made under these circumstances would doubtless be obligatory, upon the ground that injury and loss would otherwise be occasioned to defendant by his abandonment of his uncle's house, where he paid no board. But a different rule is held in cases where it is the legal duty of the promisee to do, without reward, the act induced by the promise sought to be enforced.

No action will lie to enforce a promise for doing that which it was the party's legal duty to do, without such promise or reward, "for this would be extortion and illegal." 2 Tucker's Lect. 137; 2 Burr. R. 924; 2 Black. R. 204; Chitty on Con. 54.

The ward in this case, being under the legal control of his guardian, had no right to rebel against his authority, leave his house, or refuse obedience to his lawful directions. It was his legal duty, as well as his highest interest, to submit himself cheerfully to the directions of his guardian; and he cannot be permitted to exact a reward for the performance of a duty so obviously incumbent on him. The law will not presume that injury or loss could arise to him in the discharge of that duty, and hence no consideration for the promise to board and school him could arise to support it, against his guardian.

The promise relied on to avoid the items of board and tuition claimed in the account of plaintiff's intestate being without consideration is void. The court therefore erred in rejecting these items on that ground.

Let the judgment and decree of the court below be reversed, and cause remanded for further proceedings in accordance with this opinion.[1]

WILLIAM McCLELLAN FINK *v.* H. S. SMITH, APPELLANT.

PENNSYLVANIA SUPREME COURT, MAY 22–JULY 18, 1895

[*Reported in* 170 *Pennsylvania*, 124.]

DEAN, J. Smith, the defendant, at a sheriff's sale of the personal property of one Sarah Hyde, wife of George Hyde, purchased a mare; then, as a mere act of kindness towards Mrs. Hyde, he left the animal temporarily with her; some months afterwards, George Hyde, the

[1] See also Orr *v.* Sanford, 74 Mo App. 187.

husband, sold the mare to Fink, the plaintiff, who took her into his possession; Smith, the owner, hearing of this, went to Fink and demanded his property, but he refused to surrender possession; then Smith informed Gallatin, the sheriff, who had sold her to him, of the wrong and threatened to replevy her; Gallatin replied that was not necessary as he would get her for him; Gallatin went to Fink, and obtained a promise from him to restore the mare to Smith without a replevin; then Smith again went to Fink, and the mare was delivered to him on the condition that, if on an indictment for larceny of the mare then pending against George Hyde there should be an acquittal, the mare should be returned, but if Hyde were convicted, Smith was to keep her. Hyde was acquitted of larceny. Thereupon, Fink replevied the mare. When the case came to trial, the facts turned out as we have stated them from the admissions of the parties and the findings of the jury. The verdict was for Fink, plaintiff, in damages to the value of the mare. Hence this appeal by Smith, defendant.

The controlling assignment of error and which in substance embraces all the error alleged is raised by the following excerpt from the charge of the learned judge of the court below: "The only question remaining in this case is whether the mare was, under this agreement, to be returned to Fink, if Hyde was acquitted of the charge in court of the larceny of the mare. If so, then we instruct you that there was sufficient consideration for that agreement at the time of the lawsuit in order to recover her, and at the time this mare was involved in the threatened lawsuit; and the only way that he could get her without a lawsuit was by making this agreement that it is alleged on the part of plaintiff was made between Fink and Smith. If you believe such an agreement was made then your verdict should be for the plaintiff for the value of the mare with interest from that time."

Was this correct instruction, as to the law applicable to the evidence? There was no dispute as to the ownership of the property; the mare, it was conceded, belonged to Smith; and although he testified no such conditional bargain was made, it was just as positively testified to, on the other side, that it was made, and the jury have found the fact against him. So, we have the unquestioned owner of the mare bargaining with one in wrongful possession for her surrender; the possession thereafter to be determined by the verdict in a criminal prosecution then pending. Was his possession, thus obtained, wrongful as against Fink, when the event of the prosecution was the acquittal of Hyde? That depends on the validity of the contract between them.

1. The contract was void, because based on a fact which did not exist, though both parties assumed it to be a fact. Fink purchased from George Hyde; both assumed that Hyde's title would necessarily be determined by his acquittal or conviction of larceny; but the event of the prosecution in no wise determined that; it determined

only that the evidence did not show, beyond a reasonable doubt, a felonious intent; what the weight of it showed, we do not know; but the admitted facts here, that the mare is Smith's, and that Hyde sold her, also show conclusively that Hyde was guilty of either larceny or trespass. So their assumption, that the criminal prosecution would determine Hyde's title, and necessarily theirs, was a mutual mistake of fact. "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative:" Horbach *v.* Gray, 8 W. 497; Miles *v.* Stevens, 3 Pa. 21; Willings *v.* Peters, 7 Pa. 287; Frevall *v.* Fitch, 5 Whart. 325.

2. There was no consideration to support Smith's promise. A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration: Chitty on Contracts, p. 51; Addison on Contracts, 13. This principle is conceded by the learned judge of the court below, and the undoubted wrongful possession by Fink of Smith's property is also conceded. But he assumes, there is no evidence that Fink knew this at the time he delivered it to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is, that Fink's wrongful possession did not depend on what he knew, but on the fact. Was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts, and they are not denied, then there was no consideration for Smith's promise, for no benefit passed to Smith, and Fink sustained no loss by the contract; to hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner is direct encouragement to the commission of wrong for profit, and for this very reason the law holds the contract to be without consideration. If Fink had been indicted for the larceny of the mare, his knowledge of the ownership would have been material in determining his guilt, but it is of no moment in determining the fact of ownership.

3. While we think it is of doubtful public policy to enforce a contract, where the right to property is made to turn on a verdict in a criminal prosecution, in which both parties to the contract are witnesses, we do not decide the case on that point.

We are of opinion, however, the contract was based on a mutual mistake of a fact, which had no existence, and further, was without consideration. Therefore the judgment is reversed.[1]

[1] Cowper *v.* Green, 7 M. & W. 633; Wendover *v.* Baker, 121 Mo. 273; Conover *v.* Stilwell, 34 N. J. L. 54; Crosby *v.* Wood, 6 N. Y. 369; Tolhurst *v.* Powers, 133 N. Y. 460; Martin *v.* Armstrong, 62 S. W. Rep. 83 (Tex. Civ. App.), *acc.*

LOUISA W. HAMER, Appellant, *v.* FRANKLIN SIDWAY, as Executor, Respondent.

New York Court of Appeals, February 24–April 14, 1891.

[*Reported in* 124 *New York*, 538.]

Parker, J.[1] The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday, in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "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." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him. Anson's Prin. of Con. 63.

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

[1] A portion of the opinion is omitted.

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting 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."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him five thousand dollars. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such preformance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.[1]

DUNTON *v.* DUNTON.

VICTORIA SUPREME COURT, MARCH 17, 31, 1892.

[*Reported in* 18 *Victorian Law Reports*, 114.]

HOOD, J. Louisa Dunton sued John Dunton in the County Court to recover the sum of 6*l.* as the amount agreed to be paid by the defendant under a written agreement for the maintenance of the plaintiff. At the trial a question was raised as to whether the alleged agreement was binding upon the defendant, and that question was reserved for the opinion of this Court.

The document is called a memorandum of agreement, and apparently was signed by both parties. It recites that they had been married, but that the marriage had been dissolved on the petition of the husband, and it then proceeds as follows: "And whereas, notwithstanding the said dissolution the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in consideration of the premises the said John Dunton agrees to

[1] Talbott *v.* Stemmons' Ex., 89 Ky. 222, *acc.* See also Lindell *v.* Rokes, 60 Mo. 249.

pay the said Louisa Dunton the sum of 6*l.* per month." It then contains a proviso that in the event of Louisa Dunton committing any act whereby she or the said John Dunton may be subjected to hate, contempt, or ridicule, or if she shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all respect to the said John Dunton, then he may put an end to the agreement.

The motive of the defendant in signing this document is clear. He desired to provide for the woman who had been his wife, and who was the mother of his children, in such a way as to induce her not to disgrace herself, him, or them. But the question we have to decide is whether this document constitutes a valid agreement, and we have nothing to do with the motives of the parties except so far as they are expressed in a binding legal document. (A man's motives cannot form any consideration for a contract.) If this document is to be held binding upon the defendant it must be because there is some legal consideration moving from the plaintiff upon which the defendant's promise is founded. In my opinion the only consideration expressed on the face of the document is the defendant's desire to make provision for the plaintiff, and that clearly would not be sufficient. It was, however, contended that the real consideration is an implied promise by her that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and that the benefit to the defendant would lie in the prevention of the annoyance and disgrace that might be caused to him and his children in the event of the plaintiff misbehaving herself. I cannot imply such a promise from the document, but even if it were expressed therein it would not, in my opinion, constitute a consideration for the defendant's agreement. A promise in order to be a good consideration must be such as may be enforced. It must, therefore, be not only lawful, and in itself possible, but it must also be reasonably definite. Now a promise by a woman that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, seems to me to be about as vague a promise as can be imagined. What are the acts which she is to do or to refrain from doing? What is the meaning to be attached to the words if looked at in the light of a definite promise? A promise by a woman that she will conduct herself with sobriety may mean that she will not drink intoxicating liquor at all, or that she will not get drunk, or it may mean that she may do either so long as she does not do so in public. So with conducting herself in a virtuous manner. Is that in public or in private, and does it include anything short of unchastity? As to respectability and order they are words of such varying meaning that I cannot understand any agreement about them. All this makes me unable to see any promise whatever made by the plaintiff in this document, and in any event forces me to the conclusion that such a promise is too uncertain to form the consideration of any legal agreement. A contract founded upon such an illusory consideration appears to me to be as invalid as a promise by a father made in consideration that his son would not bore him: White *v.*

Bluett;[1] and it is not nearly so certain as an agreement by a married woman that she would attend upon her aged father and mother as long as they lived, and provide them with necessary services, and in consideration thereof her father should, when requested, transfer to her his interest in certain land; an agreement which the late Mr. Justice Molesworth considered void for uncertainty: Shiels *v.* Drysdale.[2] It must be remembered that we have not here to consider a case of a plaintiff being induced to alter her position by reason of a promise made by the defendant. The plaintiff does not allege that she did, or refrained from doing, anything depending upon the defendant's promise. If she had stated that she did not get drunk, as she otherwise would have done, or that she remained chaste or orderly or respectable solely in consequence of the defendant's promise, and relying thereon she might, perhaps, have brought herself under a different rule, but the very suggestion of such a statement shows to my mind the impossibility of its ever forming the consideration for the contract upon which alone she sues.

For these reasons I find myself unable to concur in the judgment of the Court.

HIGINBOTHAM, C. J. I am of the opinion that this agreement is binding, and that it is not *nudum pactum*, or void for want of consideration. It has been contended for the defendant that the written agreement discloses no consideration for the defendant's promise to pay the plaintiff 6*l.* per month, that his promise therefore was a purely voluntary one, and performance of it cannot be enforced by action. The agreement was signed by the plaintiff: The terms of it clearly imply, in my opinion, a promise on her part that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. But it was said that this was only a promise to do that which the plaintiff was already bound to do, and that such a promise does not constitute a good consideration. It is true that if a person promises not to do something which he cannot lawfully do and which, if done, would be either a legal wrong to the pomisee or an act forbidden by law, such a promise is no consideration for the promise of the other party to the alleged contract founded on mutual promises. The case of Jamieson *v.* Renwick,[3] and the authorities there cited, support that rule. But they also show that a promise not to do or to do something which the promisor may lawfully and without wrong to the promisee do or abstain from doing, is a good consideration. In the present case the plaintiff was released by the decree for the dissolution of marriage from her conjugal obligation to the defendant to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner; and conduct of an opposite character would not necessarily involve a breach on her part of any human law other than the law of marriage, which had ceased to bind her. She was legally at liberty, so far as the defendant was concerned, to conduct herself

[1] 23 L. J. Ex. at p. 37, *per* Parke, B.
[2] 6 Vict. L. R. Eq. 126.
[3] 17 Vict. L. R. 124.

in these respects as she might think fit, and her promise to surrender her liberty and to conduct herself in the manner desired by the defendant constituted, in my opinion, a good consideration for his promise to pay her the stipulated amount. I am of opinion, for this reason, that there was a good legal consideration to support this agreement, and I answer the question accordingly. The proper order as to costs of the hearing of this case will be that they baide the event of the action.

WILLIAMS, J. In my opinion there is a consideration for the agreement upon which the plaintiff sues, and it is binding upon the defendant as long as the plaintiff observes her undertaking, necessarily implied in the agreement, that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. The plaintiff signs this agreement and she is bound by it, and the penalty upon her, if she fails to observe her undertaking, is that, immediately she does fail, all benefit to her under the agreement ceases. The defendant's promise to pay her the 6*l.* per month is stated in the agreement itself to be made "in consideration of the premises," and one of those premises is the plaintiff's undertaking to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Then, it is said, this undertaking of hers is nothing, as it only amounts to an undertaking by her to do that which she was under a legal obligation to do. From this proposition I dissent. She was under no legal obligation to the defendant, or to any one, not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant, or to any one, not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant, or to any one, not to allow a paramour to have sexual connection with her. She was entitled in these and other respects to pursue her own course of conduct. Now, turning to the facts as gathered from the agreement and evidence, it appears that the defendant had obtained a divorce from the plaintiff, and that the issue of their marriage had been five young children, all living at the time the agreement was made. It is true, and it is most important to bear in mind, that with the dissolution of the marriage her conjugal obligations to the defendant ceased. It was, perhaps, by reason of this consequence that the defendant entered into this agreement with the plaintiff and procured her to enter into it with him. It may have been, and probably was, of some moment to the defendant to hold out a substantial inducement to the plaintiff to agree to conduct herself, and to conduct herself in the manner stipulated by himself. She had been his wife, she was so no longer, but she still remained the mother of his five young children. Remaining under no conjugal obligations to him, he probably deemed it advantageous and desirable that she, who remained the mother of his chlidren, should conduct herself in such a way as not to bring discredit upon her offspring. In effect he says to her: "If you, who now owe me no duty as a wife, will agree to my stipulation, I will, so long as you observe that stipulation, pay you 6*l.* per month."

Thereupon she signifies her agreement and her assent to observe that stipulation by signing the agreement. The case of White *v.* Bluett[1] is, in my opinion, not an authority against the view I have taken. In that case, Pollock, C. B., came to the conclusion that the agreement set up by the son was *nudum pactum*, and so no answer to the father's cause of action upon the express ground that the son had no right to complain of the father's distribution of the property; for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do could be no consideration.

My answer to the question stated is that there is sufficient consideration to support the agreement sued on.[2]

[1] 23 L. J. Ex. 36.

[2] In Jamieson *v.* Renwick, 17 Vict. L. R. 124, 126; Higinbotham, C. J., delivering the opinion of the court, said:—

"The next ground of objection is that this promise is a voluntary one, a promise to make a gift; that, in fact, no consideration for making the promise is shown by the instrument, and that therefore the agreement is not one on which an action can be brought. The agreement is an extremely peculiar one, and not easy of comprehension. It opens with a recital that 'John Renwick, of his own free will, as and by way of gift, and subject to the proviso and agreement hereinafter contained, doth agree to pay to the said John Jamieson the annual sum of twenty-five pounds.' That promise is subject to this proviso: 'Provided, however, and it is hereby agreed that if the said John Jamieson shall reside, attempt, claim, or threaten to reside in Sandhurst aforesaid, or shall visit, annoy, or interfere in any way with the said John Renwick, either personally or by letter or messenger, or shall claim, or attempt to claim, any interest or right to the land of the said John Renwick, or to occupy the same, or shall, in the opinion of the said John Renwick, not conduct himself in a proper and becoming manner as a member of society, then the said John Renwick shall be entitled to put an end absolutely to this agreement, and shall be at liberty to refuse any further payment to the said John Jamieson.' This proviso constitutes a condition for the payment of money by the defendant; the fulfilment of the conditions of the proviso constitutes the promises made on his part by the plaintiff. Some of these promises constitute a good consideration for the promise of the defendant. The first condition or promise that Jamieson shall not reside, nor attempt, claim, or threaten to reside in Sandhurst, relates to an act or acts which the plaintiff is at liberty to do or not to do, and the performance of which would not amount to any wrong done to the defendant. The second condition, that the plaintiff shall not personally, or by letter or messenger, claim or attempt to claim any interest in defendant's land, relates to an act which the plaintiff is at perfect liberty to do without committing any wrong. The plaintiff can advance any legal claim which he is advised is a good one. The promise not to visit the defendant is a valid promise. To annoy or interfere with the defendant is an unlawful act, and therefore the promise to forbear from so doing is not one which constitutes a good consideration. The principles guiding the court in cases like this appear in Bracewell *v.* Williams, L. R. 2 C. P. 196. There it was held that a promise not to apply for costs under the Bankruptcy Act was a sufficient consideration to support a contract. Erle, C. J., says, at page 198: 'The second count is, I think, also bad; it really amounts to this: in consideration that I do not abuse the process of the court for a purpose other than that for which it was intended, viz., the recovery of my debt by using it as means of exposure of you, you will perform your promise. The consideration, therefore, is really the abstaining from an abuse of the process of the court.' A promise that a person will not do what he lawfully may is a good consideration. But a promise not to do what is unlawful does not constitute a good consideration. In the present case we think that there are sufficient promises constituting a good consideration to support the promise made by the defendant. A promise not to annoy is nugatory."

SEWARD & SCALES *v.* MITCHELL.

TENNESSEE SUPREME COURT, APRIL TERM, 1860.

[*Reported in* 1 *Coldwell*, 87.]

THIS cause was tried at the November Term, 1859, before Judge Williams. Verdict and judgment for plaintiff. Defendant appealed.

T. J. Freeman, for plaintiffs in error.

M. R. Hill, for defendant in error.

CARUTHERS, J., delivered the opinion of the court: —

On the 16th Oct., 1856, Mitchell sold to Seward & Scales, for the consideration of $8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5,000 acre tract granted to George Dougherty, and bounded as follows," &c.

The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement that it should be surveyed by Gillespie, and if there were more than five hundred and twenty-one acres, the vendees should pay for the excess at the rate of $16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of fifty-seven acres, and the tract embraced in the deed was five hundred and seventy-eight acres, instead of five hundred and twenty-one, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for $1,079.

It is objected here that the court below erred in refusing to charge, as requested, that the agreement sued upon was void for want of a writing, and because there was no consideration for the promise.

1. The contract, or promise sued upon, is not for the sale of land, so as to require a writing, under the Statute of Frauds.

The sale had already been reduced to writing. This was a subsequent collateral agreement in relation to the price, which was binding by parol, and to which the Statute can have no application whatever. This is too plain for argument.

2. There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is, that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise, that the party did not own before by a perfect legal right.

It is true, if the sale was by the tract and not by the acre, as

appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But if the sale was not in gross, but by the acre, and the recitation in the deed would not be conclusive in a court of equity on that point if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in Miller *v.* Bents, 4 Sneed, and a more recent case; but independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount, we see no good reason in law or morals why such an agreement should not be binding upon them. The case of Howe *v.* O'Malley, 1 Murphey's L. and Eq. R., 287, is precisely in point. The court there held that a promise to refund in case of deficiency is a good consideration for a purpose to pay for any excess over what is called for in the deed, — that such mutual promises are sufficient considerations for each other.

The case of Smith *v.* Ware, 13 Johns. Rep. 259, which is supposed to conflict with this, is entirely different; "there was no mutuality" because the promise sued upon was to pay for the deficiency, without any obligation on the other party to pay for an excess, if any there had been.

The principle of the North Carolina case commends itself to our approbation, because of its equity and justice.

Without further citation of authorities we are satisfied to hold that the promise in this case was binding upon the defendant, as his Honor charged, and therefore affirm the judgment.[1]

BARNARD *v.* SIMONS.

WRIT OF ERROR AT SERJEANTS' INN, MICHAELMAS TERM, 1616.

[*Reported in* 1 *Rolle's Abridgment*, 26, *placitum* 39.]

IF A. makes a void assumpsit to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish the assumpsit made to him by A., he promises to pay him 10*l.*, this is not a good consideration to charge him, because the first assumpsit was void.[2]

[1] March *v.* Pigott, 5 Burr. 2802; Barnum *v.* Barnum, 8 Conn. 469; Howe *v.* O'Mally, 1 Murphey, 287; Supreme Assembly *v.* Campbell, 17 R. I. 402, *acc.* See also Beckley *v.* Newland, 2 P. Wms. 182; McElvain *v.* Mudd, 44 Ala. 48; Curry *v.* Davis, 44 Ala. 171; Pool *v.* Docker, 92 Ill. 501. But see *contra* Smith *v.* Knight, 88 Ia. 257.

[2] Farnham *v* O'Brien, 22 Me. 475; Silvernail *v.* Cole, 12 Barb. 685; Hooker *v.* De Palos, 28 Ohio St. 257; Shuder *v.* Newby, 85 Tenn. 348, *acc.*

BIDWELL *v.* CATTON.

HILARY TERM, 1618.

[*Reported in Hobart*, 216.]

BIDWELL, an attorney, brought an action of the case against Catton, executor of Reve, and counted that, whereas he had in Michaelmas Term, 14 Jac., prosecuted an attachment of privilege against Reve the testator, returnable in Hil. Term, the testator knowing of it, in consideration that, at his request, the plaintiff would forbear to prosecute the said writ any further against the said testator, the testator did promise to pay him 50*l.*, and then avers, &c. And after a verdict it was excepted in arrest of judgment:

First, that it was not alleged that the plaintiff had any just cause of action.

Secondly, that this action still remains. . . .

But the Court nevertheless gave judgment: For first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. *Quære*, if the defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both benefit to the one, and loss to the other. . . .

LOYD *v.* LEE.

BEFORE PRATT, C. J., AT NISI PRIUS, 1718.

[*Reported in* 1 *Strange*, 94.]

A MARRIED woman gives a promissory note as a *feme sole*; and after her husband's death, in consideration of forbearance, promises to pay it. And now, in an action against her, it was insisted that, though, she being under coverture at the time of giving the note, it was voidable for that reason, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.[1]

[1] Other early English decisions holding forbearance of a groundless claim insufficient consideration are collected in 12 Harv. L. Rev. 517, n. 2.

ATKINSON *v.* SETTREE.

In the Common Pleas, May 7, 1744.

[*Reported in Willes*, 482.]

This was a special action on the case. The first count stated that on the 11th of December, in the 16th year, &c., at Westminster, and within the jurisdiction of the court of our Lord the King of his palace of Westminster, the plaintiff, in order to procure the payment of the sum 7*l.* 18*s.*, which Catharine Grimaldi then owed him, by a certain writ dated the 10th of December in the same year, duly issued out of the Court of Record of our said Lord the King of his palace of Westminster, at the plaintiff's request, and directed to the bearers of the verge of the household, &c., officers and ministers of the said court, commanding them to take the said Catharine by her body, if she should be found within the jurisdiction of that court, and have her at the then next court, to be holden on Friday the 17th of December then next, to answer, &c., procured the said Catharine to be arrested, &c., and to be there kept and detained in prison, &c.; that afterwards on the said 11th of December, in consideration that the plaintiff at request of the defendant undertook to release and discharge the said Catharine from her said imprisonment, the defendant promised to pay the plaintiff 7*l.* 18*s.*, and also the costs and charges by the plaintiff expended in that suit; with an averment that those costs amounted to 15*s.* 4*d.*, and that the plaintiff at the defendant's request discharged the said Catharine from her said imprisonment. There was a second count in the declaration, which, though it varied from the first in several particulars, was equally open to the objection afterwards made to the first. There was also a third count for money had and received.

The defendant pleaded the general issue, and at the trial the plaintiff obtained a verdict on all the counts, with 8*l.* 13*s.* 4*d.* damages.

A motion was made in Michaelmas Term, 1743, in arrest of judgment, which was opposed this day by *Prime*, King's Serjt., and *Wynne*, Serjt., and supported by *Skinner*, King's Serjt., and *Draper*, Serjt., and at a subsequent time *The rule was discharged.*[1]

[1] The grounds of the judgment do not appear in Lord Chief Justice Willes's books; but the following account is taken from Mr. J. Abuey's MS.: "*Skinner* and *Draper*, Serjeants, moved in arrest of judgment. First, it does not appear that any plaint was levied, and without that a *capias* ought not to issue. Secondly, it does not appear that the cause of action in the court below arose within the jurisdiction, and then the arrest was illegal, and there was no good consideration to support the promise. 1 Rol. Abr. 809; 2 Mod. 30, 197; 3 Lev. 23; 1 Saund. 74; 2 Ld. Raym. 1310. This is a void arrest, and therefore the discharge is no consideration. Godb. 358.

"*Prime* and *Wynne*, Serjts., for the plaintiffs, insisted that to support this action

JONES *v.* ASHBURNHAM AND NANCY, HIS WIFE.

IN THE KING'S BENCH, JANUARY 31, 1804.

[*Reported in* 4 *East*, 455.]

THE plaintiff declared that, whereas one S. F. Bancroft, since deceased, at the time of his death was indebted to him in 58*l.* for goods before that time sold and delivered to the deceased, whereof the defendant Nancy had notice; and thereupon, after the death of Bancroft, the defendant Nancy, before her intermarriage with the other defendant, Ashburnham, in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the defendant Nancy, would forbear and give day of payment of the said 58*l.* as aftermentioned, she the said Nancy, by a note in writing signed by her according to the form of the statute, &c., on the 20th of March, 1801, undertook and promised the plaintiff to discharge the said debt so due and owing to him in a reasonable time, and to send him 20*l.* in part payment in the July following; and although the same July is long since passed, during which the said Nancy continued sole, and a reasonable time elapsed for the payment of the whole 58*l.*, according to the tenor and effect of the said promise; and though the plaintiff has always, from the time of making the said promise, hitherto forborne and given day of payment of the said debt, whereof the defendant Nancy before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, &c., refused to pay, &c. There

in the superior court it was immaterial whether or not there were a cause of action in the inferior court, or whether or not the court below had a jurisdiction. The declaration sets out the writ duly issued, commanding the bearer of the virge to arrest the party if found within the jurisdiction, and there to detain her. Salk. 201, 2. And the case of Peacock *v.* Roll, in 1 Saund. 74, relates only to cases determined in the inferior court and brought up by error. The case of Randal *v.* Harvey is better reported in Palm. 394, than in Godb. 358. If the plaintiff's consent were necessary to release Grimaldi, and the officer could not discharge her without, then there is a good consideration to support the promise. They argued that it was not necessary that the arrest and detainer should be legal in order to make a good consideration; and for that purpose they cited 1 Rol. Abr. 12, pl. 12; 1 Rol. Abr. 19, pl. 6; Hob. 216; Sir T. Raym. 204; 1 Rol. Abr. 27, pl. 47; Sty. 459. Besides, this is after a verdict, it having been proved to the satisfaction of Mr. J. Abney, who tried the cause, that the arrest and promise were within the jurisdiction of the Palace Court. 1 Sid. 30. If a judgment be irregular or erroneous, to forbear to sue out execution is a good consideration to support an assumpsit. 2 Rol. Rep. 495; Yelv. 25; 1 Ventr. 120; 2 Lev. 3; 1 Lev. 257; 1 Sid. 392; Sir T. Raym. 211; Poph. 183; 1 Sid. 89; 1 Saund. 229; and 2 Ld. Raym. 795.

"THE COURT inclined to think that if the party were under an illegal arrest or imprisonment the promise was not good; but the question was whether, as this was after a verdict, it did not now sufficiently appear that the writ duly issued below, and consequently that the suit arose within the jurisdiction; and that this case greatly differed from writs of error on judgments in the inferior court where nothing shall be intended. But they ordered it to be spoken to again; and afterwards the plaintiff had judgment." — MS., Abney, J.

were other counts in substance the same; one alleging the forbearance to be till July, &c. To all which there was a demurrer, assigning for special causes that it is not alleged in the declaration from whom the said sum of 58*l.* therein mentioned was due and owing to the plaintiff at the time when the defendant Nancy is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said 58*l.*; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff has any good cause of action against the defendants, &c.

Marryat, in support of the demurrer.

Jervis, contra.

Lord Ellenborough, C. J. The way in which I am disposed to consider this case will break in upon no recognized rule of law, nor on the plain sense of what was laid down by Mr. Justice Yates in the case of Pillans *v.* Van Mierop. It is a known rule of law, that to make a promise obligatory there must be some benefit to the party making it, or some detriment to the party to whom it is made; otherwise it is considered as *nudum pactum* and cannot be enforced. I do not say that the opinion which I have formed will not break in on any of the cases which have been cited, but it entrenches on no general rule; and in order to show that, I will examine the rule referred to as laid down by Mr. Justice Yates, and see how it applies to the present case. He says that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," &c. Now how does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit; where it does not appear that any person *in rerum naturâ* was liable to be sued by him? No right can exist in this vague, abstract, and indefinite way. Right is a correlative term: there must be some object of right, some object of suit, some party who, in respect of some fund or some character known in the law, is liable; otherwise there cannot be said to be any right. Has there been then any suspension of the plaintiff's right? Now unless a right is capable of being exercised, unless it can be put in force, there can be no suspension of it. And that it could have been exercised or put in force but for the promise made by the defendant, is not shown. Then what forbearance is shown? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it; but it does not appear here that the forbearance could produce any detriment to the plaintiff. It does not therefore appear that Mr. Justice Yates laid down any doctrine which does not square with the general received rule of law, that to sustain a promise there must be a

benefit on the one hand or a detriment on the other. But here, whether there were any representative or any funds of the original debtor does not appear. Then, as to the cases cited, that of Rosyer *v.* Langdale is strong to the purpose; for it was there decided that a promise, in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration, was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined; for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by that of Hume *v.* Hinton in the same book, where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix *de son tort*, and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. But no such intendment can be made here. The case of Quick *v.* Copleton is also relied on. That, too, was after verdict; and it was moved in arrest of judgment for want of consideration. I think that even after verdict that declaration would be bad, being vicious on the face of it. It is stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character), about to come to London, and being in fear to be arrested by the plaintiff, promised, &c. Now an attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad) can never be a good consideration for a promise to pay; yet that ground is insisted on by the Chief Justice. And as to the case there cited by him, of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shown by him on the face of the declaration, and this coming on upon demurrer, where nothing can be intended as it may after verdict, I am clearly of opinion that the declaration is bad.

Judgment for the defendant.[1]

[1] Grose, Lawrence, and Le Blanc, JJ., delivered concurring opinions.

LONGRIDGE and Others *v.* DORVILLE and Another.

In the King's Bench, October 29, 1821.

[*Reported in* 5 *Barnewall & Alderson*, 117.]

Declaration alleged, "that before the making of the promise, &c., a certain ship called the Carolina Matilda had then lately in a certain place, to wit, in the river Thames, to wit, at, &c., run foul of a certain other ship called the Zenobia, whereby the said last-mentioned ship had received great damage. And the said last-mentioned ship having received such damage in consequence of being so run foul of as aforesaid, the plaintiffs being the agents in that behalf of one —— Symonds, the owner of the Zenobia, and the defendants being the agents in that behalf of the owners of the Carolina Matilda, the former, as such agents, detained the Carolina Matilda till the owners of the said last-mentioned ship should have made good to them the damage so done to the Zenobia." It then stated, "that in consequence of such detention, the defendants undertook that they would, on the plaintiffs' renouncing all claims on the Carolina Matilda, and on proving the amount of the damages sustained by the Zenobia, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;" and then alleged that, in consequence of such undertaking, the plaintiffs did renounce all claim on the Carolina Matilda, and did permit and allow her to proceed on her voyage, and that the Zenobia had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott, C. J., at the Sittings after Easter Term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case: —

The Norwegian ship, called the Carolina Matilda, on her voyage to Norway, in sailing down the river Thames in November last, ran foul of the ship called the Zenobia, then lying at anchor, and in consequence of which the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the Zenobia, instituted a proceeding in the High Court of Admiralty against the ship Carolina Matilda, to compel her owners to make good the damages sustained by the Zenobia in consequence of being so run foul of. Process was issued against the Carolina Matilda, under which she was arrested at Gravesend on the 22d November last, and on the twenty-fourth day of the same month the defendants wrote a letter to the plaintiffs, of which the following is a copy: —

Messrs. Longridge, Barnett, and Hodgson.

Gentlemen, — In consequence of your having detained the Norway ship Carolina Matilda till the owners make good to you the damage done to the

Zenobia, bound to Smyrna, we hereby engage, on your renouncing all claims on the said ship Carolina Matilda, and on proving the amount of damages sustained by the Zenobia, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the Zenobia is repaired.

The defendants were the agents of the owners of the Carolina Matilda; and upon the receipt of this letter the plaintiffs withdrew proceedings in the Admiralty Court, and the officer, then in possession of the Carolina Matilda, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The Zenobia had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the Carolina Matilda sailed, and while she was proceeeding down the river and ran foul of the Zenobia, she had the regular Trinity House pilot aboard, who had been placed there by the defendants.

Puller, for the plaintiff. It is not necessary to consider the question whether the owners of the Carolina are liable for the damage done to the Zenobia, under the circumstances of the case; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until bail was given; and the defendants agree to pay a stipulated sum by way of damage; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions.[1] The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for instituting the suit in the Admiralty Court against the Carolina. The question whether the defendants are liable upon their undertaking must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required by the act of parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court; and the forbearance of a suit, where a party is not liable, is not a good consideration. Tooley *v.* Windham[2] and King *v.* Hobbs[3] are authorities in point.

ABBOTT, C. J. I am of opinion that there is a sufficient consideration in this case to sustain the promise, without inquiring whether the owners of the ship are liable under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the Carolina Matilda, to compel her owners to make good the damage done by her running foul of another vessel. The ship might have been redeemed from that suit by the defendants' giving bail that proper care should be taken of the ship, and that those

[1] Neptune the Second, 1 Dodson, Adm. R. 467; Ritchie *v.* Bowsfield, 7 Taunt. 309.
[2] Cro. Eliz. 206. [3] Yelv. 25.

on board her should not leave the kingdom until means were taken to secure that evidence which would enable the judge to decide the suit; and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiffs' renouncing all claims on the ship, and on proving the amount of damages sustained by the Zenobia, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the Zenobia is repaired. Now the plain meaning of that engagement appears to me to be this: Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.*, if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion that the plaintiff is entitled to recover.

Bayley, J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to acknowledge his liability, and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they, the defendants, acknowledge the liability of the owners, and, in consideration of the plaintiffs releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l.* If it had appeared in this case that the owners of the Carolina could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means show that the owners would not have been liable; for by the pilot act the owners are only protected in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shows that the misconduct of the pilot was the cause of the injury.

Holroyd, J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here a suit actually commenced is given up, and a suit too the final success of which was involved in some doubt.

The plaintiff might sustain a detriment by giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit by having that suit put an end to, without further trouble or investigation. Now I am of opinion that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum by way of damage, in case the actual damage amount to that sum. In Com. Dig., tit. Action upon the Case upon Assumpsit (F. 8), it is laid down that an action does not lie if a party promise in consideration of a surrender of a lease at will, for the lessor might determine it; unless there was a doubt whether it was a lease at will or for years; and 1 Rol. 23, l. 25, 35, and 1 Brownlow, 6, are cited. That is an authority to show that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

BEST, J., concurred.

HERRING *v.* DORELL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1840.

[*Reported in* 8 *Dowling's Practice Cases*, 604.]

R. V. Richards showed cause against a rule *nisi*, obtained by *V. Williams* for arrest of judgment or a new trial in this case. The case had been tried before the sheriff of Brecon, and a verdict found in favor of the plaintiff for 2*l.* 10*s.* 1*d.* The ground of seeking to arrest the judgment was, that no sufficient consideration for the promise by the defendant was disclosed on the face of the declaration. The substance of the declaration was, that a person named Watkins and a person named Voss were joint debtors to the plaintiff. The plaintiff proceeded against them, and ultimately took Watkins and Voss in execution. An arrangement was made between Watkins and the plaintiff, and accordingly the former was discharged out of custody. Voss remained in custody, and in consideration of the discharge of Voss, the declaration alleged that the defendant undertook to pay the sum of 2*l.* 10*s.* 1*d.* due from Voss to the plaintiff, and Voss was accordingly discharged. It was contended in support of the rule that, the plaintiff having discharged Watkins, who was jointly liable with Voss, that had the effect of entitling Voss to his discharge. *Richards* submitted that, even after the discharge of Watkins, some step being necessary in order to obtain the discharge of Voss, some portion of his imprisonment, until that step could be taken, must be considered as lawful. Suppose the prisoners had been confined in two different

gaols, one in Cornwall and the other in Northumberland, and one of them was discharged in Cornwall, some time must be allowed in order to discharge the other defendant from the gaol in Northumberland. The detention of the second defendant until his discharge must be considered as lawful. The smallest consideration was sufficient to support the promise alleged in the declaration, and here was some consideration for that purpose. If the proceeding could be considered as a nullity then the plaintiff would be liable to an action of trespass; but in Crozer *v.* Pilling,[1] it appeared that an action on the case was the proper remedy, and not an action of trespass. There it was held that a plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs when tendered in satisfaction of the debt, and to sign an authority to the sheriff to discharge the defendant out of custody; and that an action on the case will lie against the plaintiff for maliciously refusing so to do. The case of Smith *v.* Eggington[2] was an authority to the same effect. The imprisonment was legal in its commencement, and therefore the sheriff could not be liable as a trespasser. It was not therefore a void imprisonment. The case of Atkinson *v.* Bayntun[3] was an authority to show that sufficient consideration was disclosed on the face of this declaration to support the defendant's promise. The marginal note was: "M. being in custody on execution pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution. Held, that defendant's was a valid contract." He cited Sturlyn *v.* Albany, and Pullin *v.* Stokes.[4] There, A. having recovered judgment against B., and a *fi. fa.* being delivered to the sheriff, in consideration that A. at the special request of C. had requested the sheriff not to execute the writ, C. promised to pay A. the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c., was, nor that the defendant had notice of such amount. In the present case, Voss was not taken in execution after the discharge of Watkins, but both were legally in custody at the time of Watkins's discharge. The detention of one prisoner in such a case could not be considered as a trespass. But suppose it should be said that the plaintiff was bound to take steps to discharge Voss; if he was, he was entitled to a reasonable time for that purpose. During the time that elapsed before his actual discharge, he was in legal custody. That custody furnished a sufficient consideration to support the defendant's promise.

V. Williams, in support of the rule.

[1] 4 B. & C. 26 [2] 6 Dowl. P. C. 38. [3] 1 B. N. C. 444. [4] 2 H. Bl. 312.

COLERIDGE, J. The question in this case, whether this was a good consideration or not, depends upon the situation of Voss at the time of his discharge. Both he and Watkins had been taken under a joint execution. Watkins made certain terms with the plaintiff, and the latter voluntarily discharged him. No terms were made as to the situation of Voss; his rights were, therefore, to be considered according to the situation in which the law had placed him. Suppose Watkins alone had been in custody, it is clear that the voluntary discharge of him would have been a discharge of the debt, and no other proceedings could have been taken to recover it. It seems to me, in the same way, that the discharge of Watkins operated to release Voss, his co-debtor. I think therefore, both on principle and authority, that this rule ought to be made absolute. *Rule absolute.*[1]

SMITH AND ANOTHER *v.* MONTEITH.

IN THE EXCHEQUER, NOVEMBER 18 & 20, 1844.

[*Reported in* 13 *Meeson & Welsby*, 427.]

ASSUMPSIT. The declaration stated that an action had been commenced by the plaintiffs against one Charles J. Dunlop, for the recovery of a certain sum of money, to wit, the sum of 83*l.* 6*s.* 11*d.*; that said Dunlop, being about to leave England, had been arrested and was in custody of the sheriff, under a writ of *capias* duly issued by the order of a judge in said action; that costs and charges to a certain amount, to wit, the amount of 20*l.* had been incurred by the plaintiffs in the prosecution of said action and the arrest of said Dunlop; and thereupon, in consideration that the plaintiffs, at the request of the defendant, would discharge the said Dunlop from said custody, the defendant undertook and promised the plaintiffs to pay to them the sum of 88*l.* for the debt, interest, costs and charges of the plaintiffs in said action, when he, the defendant, should be thereunto afterwards requested; that the plaintiffs, confiding in said promise, did discharge said Dunlop from said custody; (averment of notice and request to pay said sum of 88*l.* for debt, interest and costs). Breach: non-payment.

Plea: that there was not any claim or demand, or cause of action against said Dunlop, in respect whereof the plaintiffs could or were entitled to recover in the said action the said sum which the defendant so promised to pay, or any other sum or sums, matter or thing; and the plaintiffs did not, by discharging said Dunlop from custody, give up or part with any available remedy against the said Dunlop, as the plaintiffs at all times well knew, but which the defendant, at the time of making said promise, did not know; and the defendant says that

[1] Commonwealth *v.* Johnson, 3 Cush. 454, *acc.* See also Rood *v.* Jones, 1 Doug 192.

said arrest and detaining in custody, and the proceedings in said action were, on the part of the plaintiffs, colorable only, and the same were not procured, commenced, or prosecuted by the plaintiffs for the purpose or with the intent of trying any doubtful or contested question of law or fact. Verification.[1]

Special demurrer, assigning for causes, among others, that the plea does not in any manner answer the declaration; that it neither traverses any allegation therein, nor confesses and avoids the cause of action therein stated; that the contract of the defendant stated in the declaration is an original contract, founded on a new consideration, altogether distinct and different from the cause of action against the said C. J. Dunlop, such consideration for the defendant's promise being an act done by the plaintiffs for the benefit of the said C. J. Dunlop, at the request of the defendant, and such benefit to the said C. J. Dunlop being precisely the same whether the plaintiffs had or had not any cause of action against him; and therefore the question, whether the plaintiffs had any cause of action against the said C. J. Dunlop, is in this action wholly immaterial.

Crompton, in support of the demurrer.

Peacock, contra.

POLLOCK, C. B. I am of opinion that the plaintiffs are entitled to the judgment of the Court. This is an action against the defendant, founded on a promise by him to pay a sum of money, in consideration of the discharge out of custody of a defendant in a former action, who had been arrested at the suit of the plaintiffs. For aught that appears that arrest was legal, and the party was in lawful custody: this is not therefore a case of duress; neither can it be put as a case of fraud, for there is no sufficient allegation of fraud in any part of the plea. The substance of the plea is, that there was not any claim or demand, or cause of action, in respect of which the plaintiffs were entitled to sue the defendant in the former action; but there is no averment that the plaintiffs were aware of that; and, for any thing that is stated in the plea, the original inception of that action was perfectly *bona fide*, although the plaintiffs may have been mistaken as to their remedy, or the form of proceedings adopted by them. The plea goes on to state that the plaintiffs did not, by discharging Dunlop, give up or part with any available remedy against him. The words "available remedy" are rather loose and vague; they may mean several things; they would be satisfied by the fact of Dunlop being a mere pauper, for it is not stated that the plaintiffs had no legal right or remedy which they gave up, but merely that they had no available remedy. So, also, those words would be satisfied if there were some latent defect which might appear in pleading, or come out in evidence; yet the action might be honestly commenced, and the claim founded in justice; and it cannot be said that, because the proceedings were open to such latent defect

[1] In this and a few other cases the statement of the pleadings has been curtailed of some of its verbiage.

the defendant's promise would not be founded on a good consideration. And this is the only part of the plea as to which there is any averment of the plaintiff's knowledge. It then goes on to say, that the action against Dunlop was not brought for the purpose of trying any doubtful or contested right. It seems to me that the declaration in its form calls for an answer, and that this plea is no sufficient answer. I agree with the general scope of Mr. Peacock's argument. If a party does an illegal act, or if he abuses the process of the court, to make it the instrument of oppression or extortion, that is a fraud on the law; and if the original arrest, or the continuance of that arrest, were of that character, and were shown to be so by proper averments in the plea, that would very probably constitute a good defence to an action like the present. But this plea falls far short of that, the arrest being legal, and there being no averment of knowledge on the part of the plaintiffs, except that they knew they did not part with any available remedy by discharging Dunlop out of custody. It does not therefore contain a sufficient statement in fact to bring it within the scope of Mr. Peacock's argument, or the cases cited by him. The judgment must therefore be for the plaintiffs.

PARKE, B. I am also of opinion that the plaintiffs are entitled to judgment. In the first place, I think that the declaration is sufficient on general demurrer. It states that an action had been brought and was depending at the suit of the plaintiffs against a person of the name of Dunlop, and that he had been arrested and was in custody on a *capias* duly issued in that action. On such a statement it must be intended, *prima facie*, that the action was well founded, and the writ regularly and properly issued. That doctrine is laid down in the case of Bidwell *v.* Catton. That was an action of assumpsit on a promise by the defendant to pay 50*l.*, in consideration of the plaintiff's forbearing to prosecute a suit; and after verdict it was objected in arrest of judgment, first, that it was not alleged that the plaintiff had any just cause of action, and, secondly, that the action still remained. But the Court nevertheless gave judgment; "for, first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit; secondly, though this did not require a discharge of the action, yet it requires a loss of the writ and a delay of the suit, which was both benefit to the one and loss to the other." Therefore I think, *prima facie*, this declaration is sufficient, the former action being presumed to be for cause, and the *capias* being presumed to have been properly issued. There is another case which I may advert to, to the same effect, of Pooly *v.* Lady Gilberd.[1] There it is stated, that "the plaintiff had preferred a bill in chancery against the defendant for marriage money by her received. The defendant upon this, in consideration that the plaintiff would stay the suit there by him commenced, did assume to pay him 100*l.*, and also to deliver up a bond of 40*l.*, which she had. Upon this promise the plaintiff made stay of his suit,

[1] 2 Bulstr. 41.

but the defendant not performing the promise, upon this the action was brought, and a verdict found for the plaintiff. It was moved for the defendant, in arrest of judgment, that the declaration was not good, for that there was no good ground to raise the promise, there being no sufficient consideration for the same, for it doth not appear in the declaration that the suit in chancery was a lawful suit to be there determined, and so, if the suit was not lawful, the consideration to forbear such a suit was no good consideration to raise a promise." But the court say that, "if the plaintiff had only a *subpœna* out of chancery against the defendant, and did not make the cause thereof known to him, — if he, in consideration that he would not prosecute any farther against him, did assume to pay him so much, this clearly is a good consideration to raise a promise." Upon these authorities, and upon principle, this declaration is sufficient.

Then the question is, whether the plea, which must be construed most strongly against the defendant, discloses any answer. I agree with Mr. Crompton, that it is difficult to see upon what principle the plea is constructed. No doubt it shows a *prima facie* case of hardship and injustice upon the defendant in the former action; but the question is, whether it discloses a legal defence to this action. It does not show that the arrest was illegal; and it certainly is not sufficient on the ground of fraud, because there is no averment of any false statement or misrepresentation of fact in order to procure the arrest; still less does it disclose any ground of duress, since all the averments show that the imprisonment was lawful. If it be good at all, it must be on the ground of want of consideration for the defendant's promise. Now, it seems to me that the plea does not disclose sufficient matter to show a want of consideration. Taking it most strongly against the plaintiffs, in substance it is no more than this, that the plaintiffs had no claim or cause of action which could have been enforced against Dunlop; but it does not allege that the plaintiffs knew that fact. It must be taken, therefore, that the *capias* on which Dunlop was arrested was regularly and duly obtained; and the plea does not show that the plaintiffs were guilty of any illegal conduct, that they acted illegally in making the arrest, or from malicious motives, or that the arrest was without reasonable or probable cause. Dunlop, therefore, as it must be assumed, was in custody at the suit of the plaintiffs under process which was legal and regular; and that being so, the discharge from such an arrest is quite a sufficient consideration to support the promise laid in this declaration; and I entirely agree that we cannot inquire into the *quantum* or amount of consideration. Upon the face of the plea, therefore, there was a legal arrest; and the discharge from that arrest, under which the payment of the debt might have been obtained, was a benefit to Dunlop, quite sufficient to found a consideration for a promise to pay that debt. For these reasons I am of opinion that the plea furnishes no sufficient answer to the declaration, and that our judgment must be for the plaintiffs.

GURNEY, B. I am of the same opinion. To make the plea a sufficient answer, it ought to have shown, either that the plaintiffs acted illegally or fraudulently in making the arrest, or that they practised some fraud on the defendant. It shows neither, and therefore is not sufficient answer.

Judgment for the plaintiffs.

COOK AND OTHERS *v.* WRIGHT.

IN THE QUEEN'S BENCH, JULY 9, 1861.

[*Reported in* 1 *Best & Smith*, 559.]

BLACKBURN, J. (July 9th), delivered the judgment of COCKBURN, C. J., WIGHTMAN, J., and himself; CROMPTON, J., having left the court before the argument was concluded.

In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was a non-resident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that, if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments; he gave three promissory notes for the three instalments; the first was duly honored; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of

the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration, if it appears that there was a mistake in fact as to the existence of the debt; Bell *v.* Gardiner;[1] and, according to the cases of Southall *v.* Rigg and Forman *v.* Wright, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to compromise: and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In Longridge *v.* Dorville it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In Atlee *v.* Backhouse,[2] where the plaintiff's goods had been seized by the exeise, and he had afterwards entered into an agreement with the commissioners of exeise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment, p. 650, on the ground that this agreement of compromise honestly made was for consideration, and binding. In Cooper *v.* Parker[3] the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending, is void. Edwards *v.* Baugh was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pp. 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise

[1] 4 M. & Gr. 11. [2] 3 M. & W. 633. [3] 15 Com. B. 822.

of a real *bona fide* claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his litigation; he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defence had such proceedings been resorted to.

It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise.

In the present case we think there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

CALLISHER *v.* BISCHOFFSHEIM.

IN THE QUEEN'S BENCH, JUNE 6, 1870.

[*Reported in Law Reports, 5 Queen's Bench,* 449.]

DECLARATION that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the government of Honduras, and from Don Carlos Guttierez and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that

the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of 600*l.* immediately the bonds should be printed. Averment: that the plaintiff did not take any proceedings during the agreed period or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach: that the defendant had not delivered to the plaintiff the bonds or any of them.

Plea: That at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

James, Q. C. (*Rose* with him), in support of the demurrer.

Pollock, Q. C. (*Joyce* with him) contra.

COCKBURN, C. J. Our judgment must be for the plaintiff. No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it; and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage; and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and

the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by Cook *v.* Wright. In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say that "the real consideration depends on the reality of the claim made, and the *bona fides* of the compromise." If the plaintiff's claim against the Honduras government was not *bona fide*, this ought to have been alleged in the plea; but no such allegation appears.

MELLOR, J. I am of the same opinion. If the plaintiff's claim against the Honduras government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred. *Judgment for the plaintiff.*

MILES *v.* NEW ZEALAND ALFORD ESTATE COMPANY.

IN THE CHANCERY DIVISION, JUNE 22–24, 1885, FEBRUARY 4–6, 11, 1886.

[*Reported in* 32 *Chancery Division*, 266.]

THE plaintiff in 1882 accepted bills for £10,000 for the accommodation of Samuel Grant, one of the defendants in this suit, and to secure the plaintiff Grant had charged 125 shares which he owned in the defendant corporation with this sum. The plaintiff gave notice to the company of his interest in the shares.

Grant, besides being a promoter of the company and the holder of the above-mentioned shares, was the vendor to the company of the property in New Zealand known as the Alford estate, the acquisition and working of which was the substantial object of the formation of the company. He was also the chairman of the board of directors, and at a general meeting of the company held on the 15th of March, 1883, an angry discussion took place, at the close of which he gave to the company a written guarantee or warranty signed by himself in the following terms: —

"Gentlemen, I hereby guarantee that a dividend (duly earned during the year) of not less than £3 per centum per annum be paid to the shareholders for the year ending the 30th of June, 1883, and afterwards that there shall be paid to them a yearly dividend of not less than £5 per centum per annum (duly earned during the year) for a period of ninety years; and I undertake within three calendar months after the end of any and every year to pay to you any sum requisite to pay the agreed minimum dividend if the company has not earned it."

No resolution was passed at the general meeting with reference to the giving of the guarantee.

Grant was adjudicated a bankrupt on the 19th of February, 1884. In May, 1884, there being due to the plaintiff from Grant the sum of £7,885, he applied to the company to do and concur in all acts necessary for effecting a sale and transfer of the 125 shares.

The company, however, claimed a lien on the shares under the guarantee given to them by Grant and their articles of association, in priority to the plaintiff's charge; and they refused to permit any sale or transfer of the shares until their claim was satisfied. The plaintiff then brought this action against the company and Grant and his trustee in bankruptcy, and claimed a declaration that under the deed of the 19th of October, 1882, he was entitled to a first charge on the 125 shares for the principal and interest secured thereby; and he pleaded that the guarantee given by Grant was not under seal, that no consideration had been given for it, and that even if consideration had been given, the document did not comply with the requirements of the Statute of Frauds.

The evidence upon the question whether any consideration was in fact given for the guarantee was chiefly derived from an affidavit of Mr. J. Redmayne, the secretary of the company, the material paragraphs of which were as follows: —

"1. . . . The defendant Grant made many representations to the persons who originally formed the company, and to persons who became shareholders thereof, to the effect that the Alford estate was of great value, and to the effect that the labor expenses in working the said estate did not exceed a stated sum, and other representations calculated to induce such persons to find moneys to form and become shareholders in the company.

"3. It was subsequently and some time before the meeting hereinafter mentioned discovered that the statements made by the defendant Samuel Grant as to the value of the estate were untrue, and that the labor expenses greatly exceeded the amount stated by him as aforesaid.

"4. Claims were accordingly made on the defendant Samuel Grant by the defendant company and on behalf of the shareholders thereof, and it was intimated that proceedings would be taken to set aside the sale and recover the purchase-money from him.

"5. At the general meeting of the defendant company on the 15th day of March, 1883, . . . the threatened proceedings against the defendant Samuel Grant were the main subject discussed by the shareholders. The defendant Samuel Grant was told that it was the intention of the defendant company to take immediate proceedings against him, and he thereupon made two or three offers with a view to the settlement of the matter and to compromise the claim and escape legal proceedings, and eventually he offered to sign the guarantee in the said affidavits mentioned in consideration of the defendant company and the said shareholders agreeing to abandon the contemplated proceedings against him and agreeing to give up their claims against him which were the subject of the intended proceedings.

"6. The defendant company and the shareholders were advised that their claims were substantially of such a nature that if not enforced at once they could not be enforced at all, and such claims were, in fact, claims for rescission of contract which could not be equitably enforced if proceedings were not immediately taken; and the defendant company,

in pursuance of the said agreement under which the said guarantee was signed, and in consideration of the said guarantee, abandoned the intention of taking such proceedings and gave up such claims and did not commence any proceedings or assert any claim.

At the trial NORTH, J., held that the claim of the company was valid, the forbearance being a sufficient consideration under Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, and other recent decisions; but that the company could not by its by-law entitle itself to priority over the plaintiff.

From this judgment the company appealed.

Barber, Q. C., and *Blake Odgers*, in support of the appeal.

Davey, Q. C., and *Stirling*, for the plaintiff.

COTTON, L. J. . . . But then comes the question, had the company in fact any legal claim as against Grant? Their claim was under a letter signed by Grant which guarantees or undertakes that a certain yearly dividend shall be paid to the shareholders during a long period of years; and it is objected that no consideration appears upon the face of the letter, and that no consideration was in fact given to Grant for that promise (I call it "promise," because to call it "contract" would be to assume there was consideration) given by the shareholders.

Now there was much argument upon the question what is a good consideration for a compromise; and there are authorities which for a considerable time were considered as laying down the law upon the subject; but Lord Esher, the present Master of the Rolls, in *Ex parte Banner*, 17 Ch. D. 480, is supposed to have thrown doubts on these authorities; and what he said was in fact that if the question ever came before this court the authority of Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B. 449, Oekford *v.* Barelli, 20 W. R. 116, and Cook *v.* Wright, 1 B. & S. 559, would have to be considered.

Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee. I am not going into the question at present as to how far the Statute of Frauds will raise any difficulty in the way. And I think also that the mere fact of an action being brought is not material except as evidence that the claim was in fact made. That, I think, was laid down by Lord Blackburn in Cook *v.* Wright, and also in Callisher *v.* Bischoffsheim, and, subject to the question whether these cases are overruled, or ought to be considered as unsound, that, I think, is a correct statement of the law. Now, by "honest claim," I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one. Of course, if both parties know all

the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in Cook *v.* Wright, 1 B. & S. 559; and Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449; and Ockford *v.* Barelli, 20 W. R. 116. What was stated in Cook *v.* Wright, 1 B. & S. 569, by Lord Blackburn is this: "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Again, what his Lordship says in the subsequent case of Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 452, is this: "If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated." The doubt of the Master of the Rolls seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration if, on the facts being elicited and brought out, and on the decision of the court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual, because if it was afterwards disputed, it would be necessary to go into the question whether the claim was in fact a good one or not; and I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in Cook *v.* Wright and Callisher *v.* Bischoffsheim and Ockford *v.* Barelli is the law of this court.

Now, was there here any claim in fact made on behalf of the company against Grant, and was there, in fact, anything which would bind the company to abandon that claim? The conclusion at which I have arrived is, that there is no evidence on which we ought to rely that there was in fact a claim intended to be made against Grant, and, in my opinion, on the evidence before us, we ought not to arrive at the conclusion that there was ever intended to be any contract by the company, much less that there was in fact any contract binding the company that that claim should not be prosecuted, and should be given up. [His Lordship alluded shortly to the facts of the case, and continued:] Now, undoubtedly, on the evidence, several of the shareholders present at the general meeting of the 15th of March, 1883, expressed a very hostile feeling against Mr. Grant, who had sold the property to the company; that is admitted by him, and is in my opinion clear. But then what was done? There is nothing at all on the face of this letter of guarantee, as I have already stated, which says that it was given by Grant in consequence of the company giving up any claim they might have against him, and there is nothing whatever in the minutes of the board which states in fact that this was so, nor is there anything

after that time in the minutes of the board of directors which can be referred to as showing an agreement by them to give up any claim they otherwise intended to prosecute against him. What I should say was the state of the case was this: there was angry feeling, and Mr. Grant thought it might result in proceedings being taken against him; and, therefore, what he considered the wisest course was to make this offer in the hope and expectation that he would keep things quiet, and let things go on peaceably.

Now, in my opinion a simple expectation, even though realized, would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise there must be something binding done at the time by the other party, there must be something moving from the other party towards the person giving the promise. In my opinion to make a good consideration for this contract it must be shown that there was something which would bind the company not to institute proceedings, and shown also that in fact proceedings were intended on behalf of the company; and, in my opinion, I cannot come to the conclusion as a matter of fact that these two things existed. It is true that directors were present at the meeting, and that their guarantee was entered on the minutes, but although this was the case, it cannot in my opinion be considered that the directors by being there entered into any contract as directors not to enforce the claim of the company. The proper mode of proving any agreement made by the directors would be the production of evidence of its having been made at a meeting held by them as the persons having the conduct of the business of the society. No doubt they might, if they had been so minded, at a meeting of the board agree that they should not make any claim against him in consideration of this having taken place, but I find nothing of that kind.

Again, this is an incorporated company, and even if any statement had been made at this meeting that no proceedings should be taken, yet to bind the company there ought to be something done by way of a resolution, and mere statements by individual members that they were satisfied with this guarantee would not in any way bind the company so as to prevent them from taking proceedings if they ever intended to do so. In my opinion this promise was given in the expectation that this would be a sop to the angry shareholders, and that no proceedings would be taken. The mere fact that none have been taken will not in my opinion make that a consideration, unless (putting aside the question as to the company being bound) something was done or said in such a way as to be the action or saying of the company, that if this guarantee was given no proceedings would be taken. Of course if this company were an individual, and the individual made a representation that if this guarantee was given he would take no proceedings, that would be a contract binding him, but in my opinion if a company is to be bound it ought to be bound by some more formal proceedings, either by the action of the directors sitting as such, or by something equivalent to a resolution of the shareholders in general meeting.

BOWEN, L. J. Mr. Davey endeavored to support the decision appealed from on a question of fact by displacing upon the evidence the verdict passed by Mr. Justice North, which, so far as that question of fact is concerned, was against him. Therefore, we have to determine whether or no there was any consideration for this guarantee, and it is upon that point that I am, with great regret, obliged to state that my opinion is at variance with the view at which Lord Justice Cotton has arrived. The inquiry whether there was or was not consideration for this guarantee renders it necessary to say some words upon the law, and then to apply the law to the question of fact.

Speaking broadly, what has to be determined is, in my opinion, whether there was at a critical moment any forbearance to press a real claim on the part of the company, or of the directors of the company, who had ample powers under their articles of association to act for the company, and, if so, whether such forbearance was brought about by the express or implied request of Mr. Grant, and in consideration of his guarantee. A valuable consideration may, of course, either consist of some right, interest, profit, or benefit which accrues to one party, or some forbearance, or detriment, or loss, or responsibility, which is given to or undertaken by the other. We have to see here in the first place whether there was forbearance promised, in which case the promise would be the consideration for the guarantee; or whether there was an actual forbearance given at the request of the guarantor and in return for something. The two views run very close together. If the directors, in consideration of this guarantee, made an actual agreement to forbear, they really took the agreement in accord and satisfaction of any claims, if there were claims, and beyond that agreed not to prosecute the question whether there were any; but such an agreement as that need not be in writing. It seems to me there is no magic at all in formalities, and that there would be ample evidence of such an agreement, if this guarantee to the knowledge of both parties was given and accepted upon the understanding that no proceedings should be instituted. But I do not accept the proposition that this guarantee cannot be effectual and supported by consideration unless there is at the moment it was given something to bind the company. If the guarantee were given on the condition and on the contingency that there should be forbearance, and was taken upon that condition, and upon that contingency, and the contingency afterwards happened, then the forbearance when given, being at the request expressed or implied of the guarantor, would furnish an implied consideration for the guarantee which had already been given. That is, I think, no new law. In Oldershaw *v.* King, 2 H. & N. 399, 517, 520, there was a guarantee given to the following effect: "I am aware," said the guarantor, "that my uncles Messrs. J. & J. F. King, stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present; and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply

any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past and future transactions between you and my said uncles to a certain extent; and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1,000, whenever called upon by you to pay the same, and after twelve calendar months' previous notice." In that case Erle, J., expressed himself in the following language: "Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract." The same principle was applied in the case of the Alliance Bank *v.* Broom, 2 Dr. & Sm. 289. "It appears to me," said the Vice-Chancellor (2 Dr. & Sm. 292), "that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance, — not indeed for any definite time, but at all events some extent of forbearance." So it will be sufficient here that the directors did forbear, if their forbearance was at the request, expressed or implied, of the guarantor and in consequence of his guarantee being given; and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way, and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to show that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all. We were referred to the language of the Master of the Rolls in the case of *Ex parte* Banner, 17 Ch. D. 480,[1]

[1] "But then two cases were cited. Reliance is placed on Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B. 449, in which Lord Chief Justice Cockburn said: 'The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect to that claim is a good consideration.' But in a subsequent part of his judgment he said: 'When such a person forbears to sue he gives up what he believes to be a right of action.' Therefore it is not enough that the action is brought to settle a disputed claim; it must be a claim by a person who believes he has a right of action. But in the present case, I say that, although Mr. Sheil believed he would win the cause, he never did believe that he had a right of action; he knew that he had

which seems to throw doubt upon the doctrine which has more than once been laid down in the courts of common law, and finally in the well-known case of Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B. 449. It seems to me that if an intending litigant *bonâ 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. It is a mistake to suppose it is not an advantage which a suitor is capable of appreciating to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all. With regard to the observations of the Master of the Rolls in *Ex parte* Banner I should like to point out in respect to Callisher *v.* Bischoffsheim in the first place that whatever be the objection taken to the language of the court in that case, in any point of view the case was rightly decided. The plea there only denied the existence of the debt, and left it on the record undisputed that the debt might have been put forward reasonably as a substantial claim. But with regard to the language of the court in Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B.

none. Therefore, even if that, which was not a case in bankruptcy, could apply to a case in bankruptcy, it does not govern the present case.

But, whenever a similar case arises, I think it will have to be carefully considered whether the decision in Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B. 449, can be supported, and whether, in order to support a compromise of an action, it is not necessary to show, not only that the plaintiff believed that he had a good cause of action, but that the circumstances did in fact raise some doubt whether there was or was not a good cause of action; and I venture to doubt whether, if there was clearly and obviously no cause of action, the mere belief of the parties that there was would support the compromise. It is true that the subsequent case of Ockford *v.* Barelli, 20 W. R. 116 (if that be also held to be good law), is an authority against this view, because in it there could not possibly be a doubt that there was no cause of action. But I take it that Ockford *v.* Barelli was decided upon the authority of Callisher *v.* Bischoffsheim, adopting the view that the passage which I have read from the earlier part of the judgment of Lord Chief Justice Cockburn was the ground of the decision. Of course, if it were so taken, the court in the later case, being a court of co-ordinate jurisdiction, was bound by the decision in the earlier case; but then, if the first case falls, the second would fall with it. However, neither case seems to me to be very material in the present case, for neither of them was a case in bankruptcy. In my view the judgment in the present case was a dishonest judgment, obtained by dishonest pressure, not because there was any doubt about the cause of action, not even because either party believed that there was any doubt about the cause of action, but, both parties knowing that there was no real cause of action, the one endeavored to oppress the other by reason of that other's infamy known to him, and the other yielded, not because he believed there was, or doubted whether there was, a cause of action, but because he did not dare to face the consequences of his own infamy."

449, I confess it seems to me that the language of Lord Blackburn was correct, that the decision in Ockford *v.* Barelli, 20 W. R. 116, was right, and that the language in Cook *v.* Wright, 1 B. & S. 559, is equally unimpeachable. When the Master of the Rolls in *Ex parte* Banner, 17 Ch. D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action,— that is to say, one that is *bonâ fide*, and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case.

Now that being the law which I think has to be applied to the present case, I come next to the facts. Was there here forbearance of a *bonâ fide* claim? I cannot help beginning the observations which I make upon the facts by saying that it seems to me it is too late for the respondent to suggest that the claim put forward by the company is not *bonâ fide* when he deliberately abstains from cross-examining the secretary upon his affidavit. What are the alternative views between which we have to decide as to the consideration given for this document? A vendor and promoter, or alleged promoter of a company (Mr. Grant denies in his affidavit that he took an active part in the promotion of the company), the vendor at all events to a company which was formed for the purpose of purchasing from him, who is also a director and chairman of the company, at a stormy meeting gives a document by which he professes to incur serious liability to the company, and gives it for no consideration whatever except the hope of pacifying people who were at the meeting of the shareholders of the company. That is one view. The other is that he really gave this document as a business transaction. I read [Mr. Justice North's] judgment as finding that proceedings had been threatened, that Mr. Grant knew that they had been threatened, that he gave the guarantee in order to put an end to them, and that the proceedings were dropped in consequence of his giving that undertaking. If that is a true view of the finding of Mr. Justice North, I should say that I agree with it as far as I can upon these imperfect materials, although it is always difficult, if your materials are not complete, to come to a right conclusion. I should say I agree with him, but, at all events, if I did not agree with him I should feel myself unable to reverse his decision.

FRY, L. J. . . . The reply in the first place alleged that no consideration was given for the guarantee, and that was met by the rejoinder which stated with precision the consideration upon which the company relied. [His Lordship then read the rejoinder and continued:] Now it is to be observed the thing relied on is the abandonment and giving up, in fact the release of the claims of the company and of the individual shareholders. The case which was made was not one of a request for forbearance for a limited time or for any stated time, followed by actual

forbearance. In this case we are told, and no doubt accurately, that these pleadings were put in after litigation as to whether the point should be allowed to be raised. They were put in more than a year after the defence was put in, and therefore it is impossible to doubt that the statement in the rejoinder is the well-considered allegation of the company as to the consideration upon which they think themselves entitled to rely.

Now, the next inquiry which arises is this, what is the law which bears upon this question? and I am glad to think that whatever difference there may be between us upon other questions, there is no difference as to the general principle of law applicable to this case. In my opinion, when a real claim has been made and there is a *bonâ fide* compromise, that is sufficient consideration. I think the law was concisely stated in the case of Cook *v.* Wright, 1 B. & S. 559, 570, when the court, dealing with the case before them, said: "The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise." I am quite aware that the Master of the Rolls has expressed certain doubts as to whether there must not be in the mind — I suppose of the court which ultimately tries the question — a doubt as to the contest between the parties; but I cannot follow the learned Master of the Rolls in that view. I do not think the policy of the courts is to prevent real *bonâ fide* compromises of real and *bonâ fide* claims. When there is a pending action it is easy to suppose that the giving up of that action is the consideration for the compromise. Again, when there is a real cause of action slight evidence of the claim being made may be admissible; and again, when there is a real belief in a cause of action on both sides slight evidence of the claim being made may go in support of the reality of the claim. But in my judgment none of those circumstances can be laid down as absolutely essential to the validity of a compromise. Of course if neither party believes in the reality of the claim, it is obvious it is a sham. I do not desire to say anything more than that in my judgment when a real claim is made and is *bonâ fide* compromised, that is ample consideration.

Now in the present case was there any real cause of action or any evidence of belief on the part of the company that there was any cause of action? Or, again, was any claim really made against Mr. Grant by the company? [His Lordship then referred to the evidence on these points and came to the conclusion that there had been no misrepresentation by Grant, no real belief of the company or its officers of any real cause of action against him, and no *bonâ fide* claim on the 15th of March pending by the company against Grant. His Lordship then continued:] But was there any claim by a shareholder? There is not the slightest trace of that. It is not suggested that any shareholder had been advised to make any claim, or, except the angry words that passed at the meeting, that he had ever asserted a claim; and I am bound to say I do not look upon the angry words which passed upon that occasion as anything serious, as anything indicating a cause of

action, or the existence of a belief of a cause of action. But supposing there was this real claim, was there, to use the language of the pleadings, any agreement on the part of the company and the shareholders to put an end to the contemplated proceedings and to give up their claim? Now, if there was any such agreement it is very remarkable that the document is absolutely silent about it. It was suggested it would be unpleasant to Mr. Grant to insert words indicating that there was any such claim, but any such sensibility was out of place after the angry discussion which had occurred; and general words might have been inserted which would not wound the sensibility of the most sensitive man, and yet might have the effect of showing that the directors intended to insist upon their rights. But not only is there no mention of it in the agreement itself, there is no mention of it in the minute book which contains the angry discussion. Lastly, it seems to me strange if the company had intended to give up their claims, that no resolution was passed at the meeting to express the desire of the meeting that the company should give them up. I think, therefore, the circumstances of the case are very strong to show that there was no intention whatever on the part of the company to abandon any claim they might have. With regard to the individual shareholders, can it be said that they by being present at the meeting, some of them silent, not taking part in the discussion, were giving up their individual causes of action, supposing they existed? And observe, giving them up whilst the shareholders who were not at the meeting would retain their causes of action, if they had any. How can it be said, therefore, that there was any agreement to give up the claims of all the shareholders for whose benefit the agreement was entered into? It seems to me that there is strong evidence to show that there was no intention on the part of the shareholders to give up their rights. Therefore, looking at the circumstances of the case it appears to me impossible to conclude that the shareholders intended to give up anything, or that the company intended to give up anything. But then it it is said that Mr. Redmayne's affidavit is precise, and that as Mr. Redmayne was not cross-examined it is impossible for this court to come to a conclusion different from that of Mr. Justice North. Now I confess that has been to my mind the principal question of difficulty in this case, and I should have been better pleased if Mr. Redmayne had been cross-examined. At the same time it must be borne in mind that the onus of proof is on those who make an assertion. I do not impute bad faith to Mr. Redmayne, but his statements are not literally accurate. [His Lordship then referred to this affidavit and came to the conclusion that it did not contain statements of facts sufficient to support the contention that has been made. He then continued:]

Now another difficulty which must be referred to is this, that the abandonment of claims mentioned in the affidavit by the company is their abandonment, if any such there was, by any incorporated society, a body whose proceedings are regulated by the requirements of the

Companies Act, and who must proceed with a certain amount of regularity and formality. It is to be observed, as I have already said, there is no document on the part of the company indicating any intention to give up their claim. There appears to have been no resolution of the directors to give it up, there is no discussion as to whether they shall give it up, there is no resolution at the meeting of the 15th of March as to whether they shall give it up; and that to my mind is strong to show that there was no intention to give it up. I think, therefore, it is impossible that the company can be bound by such an irregular discussion as seems to have taken place on the 15th of March. Lastly, it has been urged upon us that the conduct of both the parties showed they thought that the consideration was sufficient. It is said that Mr. Grant treated his undertaking as serious. If he was a man of honor he would have treated it seriously; in all probability if his affairs had not gone into liquidation he intended to honor, and would have honored that undertaking, which, whatever its legal force, was binding upon him in honor. I think the true result of the evidence is to show that there was an expectation in the mind of Mr. Grant that if he gave this document no proceedings would be taken against him, that there was an expectation in the minds of many of those who were present, if they got this dividend they would take no proceedings; but it appears to me it is not right or competent for the court to turn an expectation into a contract, and that is what I think we should do if we gave effect to this as a valid contract.

The result is, the majority of the court, while differing from the judge on both the points, affirms the decree.

Their Lordships then made a declaration that the plaintiff was entitled to a charge upon the shares of Grant, free from any claim by the defendant company under the letter of guarantee of the 15th of March, 1883, and dismissed the appeal with costs.[1]

[1] Portions of the opinions in which the Statute of Frauds was held inapplicable, and in which it was held that if the company had a valid claim that claim was entitled to priority over the plaintiff's claim, are omitted. Some other abbreviations of the case have been made.

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, 67 Pac. Rep. (Col. App.); 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); Pront *v.* Pittsfield Fire District, 154 Mass. 450; Dunbar *v.* Dunbar, 180 Mass. 170; Dailey *v.* King, 79 Mich. 568; Leeson *v.* Anderson, 99 Mich. 247; Demars *v.* Musser-Sautry Co., 37 Minn. 418; Hansen *v.* Gaar, 63 Minn. 94; Grandin *v.* Grandin, 49 N. J. L. 508; Wahl *v.* Barnum, 116 N. Y. 87; Zoebisch *v.* Van Minden, 120 N. Y. 406; 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.*

BENJAMIN B. STRONG, Appellant, *v.* LOUISA A. SHEFFIELD, Respondent.

New York Court of Appeals, December 17, 1894–January 15, 1895.

[*Reported in* 144 *New York*, 392.]

Andrews, C. J. The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*. The law governing commercial paper which precludes an inquiry into the consideration as against *bona fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and indorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's indorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by perform-

Heasly, 13 Ind. App. 567 (compare Moon *v.* Martin, 122 Ind. 211); Tucker *v.* Ronk, 42 Ia. 80; Peterson *v.* Breitag, 88 Ia. 418; (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.); 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, 88 N. W. Rep. 466 (Mich.); 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).

ance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. Morton *v.* Burn, 7 A. &. E. 19; Wilby *v.* Elgee, L. R. 10 C. P. 497; King *v.* Upton, 4 Maine, 387; Leake on Con. p. 54; Am. Lead. Cas. vol. 2, p. 96 *et seq.* and cases cited.[1] The general rule is clearly, and in the main accurately, stated in the note to Forth *v.* Stanton (1 Saund. 210, note *b*). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. Oldershaw *v.* King, 2 H. & N. 517; Calkins *v.* Chandler, 36 Mich. 320.[2] The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. Merritt *v.* Todd, 23 N. Y. 28; Shutts *v.* Fingar, 100 id. 539.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant indorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what

[1] Crears *v.* Hunter, 19 Q. B. D. 341; Edgerton *v.* Weaver, 105 Ill. 43; Newton *v.* Carson, 80 Ky. 309; Home Ins. Co. *v.* Watson, 59 N. Y. 390, *acc.*; Mecorney *v.* Stanley, 8 Cush. 85; Manter *v.* Churchill, 127 Mass. 31; Shupe *v.* Galbraith, 32 Pa. 10, *contra*. See also Shadburne *v.* Daly, 76 Cal. 355; Lambert *v.* Clewley, 80 Me 480.

[2] 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 *v.* Meyer, 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, *acc.*

was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule.

The order of the general Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation, with costs in all courts.

All concur, except GRAY and BARTLETT, JJ., not voting, and HAIGHT, J., not sitting.

Ordered accordingly.

LYNN AND ANOTHER *v.* BRUCE.

IN THE COMMON PLEAS, JULY 1, 1794.

[*Reported in* 2 *Henry Blackstone,* 317.]

THIS was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for 200*l.* The second was as follows; "And whereas also, afterwards, &c., in consideration that the said Robert and Thomas (the plaintiffs), at the special instance and request of the said Charles (the defendant), had then and there consented and agreed to accept and receive of and from the said Charles a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and twopence, then due and owing from the said Charles to the said Robert and Thomas upon and by virtue of a certain other writing obligatory, bearing date, &c., made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them in the sum of two hundred pounds, in full satisfaction and discharge of the said last-mentioned writing obligatory, and all moneys due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred and five pounds five shillings and twopence, upon request; and the said Robert and Thomas in fact say that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred and five pounds five shillings and twopence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six

shillings, part of the said last-mentioned sum of seveny-three pounds thirteen shillings and sixpence, the amount of the said last-mentioned composition, yet the said Charles not regarding, &c., hath not yet paid the sum of three pounds seven shillings and sixpence, being the residue of the said sum of seventy-three pounds thirteen shillings and sixpence, the composition last aforesaid, or any part thereof," &c.

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count; and after argument the opinion of the Court was thus delivered by

Lord C. J. Eyre. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is that, in consideration that the plaintiff at the defendant's request had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105*l.* 5*s.* 2*d.* due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for 200*l.*, in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred that the composition amounted to 73*l.* 13*s.* 6*d.*, and that the defendant had paid the plaintiff 70*l.* 6*s.*, part thereof. The breach is, that he did not pay 3*l.* 7*s.* 6*d.*, the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration; if it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of Allen *v.* Harris, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, "overthrow all the books." It was added that, if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. *Interest reipublicæ 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. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Rol. Abr., tit. Accord, pl. 11, 12, 13, is because the plaintiff hath not any remedy for the whole, or where part has been performed, for that which is not performed, which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages for that part of the accord which has not been performed. But an accord must be so

completely executed in all its parts before it can produce legal obligation or legal effect, that in Peytoe's Case, 9 Co. 79 *b*, it was holden that, where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Rol. Abr. that an accord executory in any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument, to say that no remedy lies for it for the plaintiff, because it is no bar; but put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

CROWTHER AND OTHERS *v.* FARRER.

IN THE QUEEN'S BENCH, JUNE 10, 1850.

[*Reported in* 15 *Queen's Bench Reports*, 677.]

ASSUMPSIT. The declaration stated that at the time of the making of the promise two actions, one in trover and the other in trespass, both at the suit of the present plaintiffs against the present defendant, were pending in the Queen's Bench; and thereupon it was agreed by and between the plaintiffs and the defendant in manner following, that is to say: that the said actions should be settled, and all proceedings therein stayed, and that the defendant should pay to the plaintiffs 40*l.* in respect of the costs of the said two actions, and also 236*l.* 9*s.* in part of damages; and that the plaintiffs should receive from certain other persons, to wit, J. B. and J. P., 263*l.* 11*s.*; but in the event of J. B. and J. P. neglecting or refusing to pay to the plaintiffs that amount, or in the event of J. B. and J. P. giving up their contract with the defendant,[1] then, and in either of such cases, the defendant should pay to the plaintiffs what might remain unpaid to them of such sum of 263*l.* 11*s.*, in which case the defendant should be entitled to get the 1,506 square yards of stone[1] in the said agreement mentioned, or to sell it as he might think proper, in the same manner as though a certain agreement of 1835 had never been made.[1] Averment of mutual promises: "and, although the plaintiffs have always performed the said agreement on their part, and although they, confiding in the said promise of the defendant, did then, to wit, upon the making of the said promise, wholly cease to prosecute the said actions and each of them, and have thence continually hitherto stayed all proceedings therein,

[1] The declaration did not state anything further on this subject.

and although a reasonable time for the defendant to pay the said sums of 40*l.* and 236*l.* 9*s.* had elapsed long before the commencement of this suit." Breach: non-payment of these sums, or either of them, or any part thereof.

Plea: *Non assumpsit.* Issue thereon.

On the trial before Patteson, J., at the York Summer Assizes, 1849, it appeared that a contract to the effect set out in the count was made between the plaintiffs and the attorneys of the defendant. The main contest was, whether or not there was sufficient evidence of authority on their part to bind the defendant. The learned judge reserved leave to move to enter a nonsuit if there was no such evidence, and left the case to the jury. Verdict for plaintiffs.

Knowles, in Michaelmas Term last, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved, or to arrest the judgment. On this day cause was shown.

It appeared, by the judge's notes, that there was evidence of an express ratification of the contract by the defendant; and the rule to enter a nonsuit was discharged on that ground. The argument relating to that portion of the rule is omitted.

Martin and *Hugh Hill*, as to the rule for arresting judgment. The rule has been obtained on the supposition that this is an action on a mere accord. But it is an action on an agreement in consideration of forbearance of suit, which is more than a mere accord unexecuted. The reason why an action shall not lie on a mere executory accord (or, as it is there called, concord), is fully explained in Reniger *v.* Fogossa.[1] The mere executory concord which does not prevent the plaintiff from proceeding with his action is without consideration. But, when there is consideration for the agreement, an action will lie, though the agreement is an accord. In Com. Dig., Action on the Case upon Assumpsit (B. 1), it is said: "A promise in consideration of the forbearance of a suit is good; for that is for the benefit of the defendant, though the action is not discharged." In the present case there is much more consideration than in that put by Comyns; for the actions are by the agreement actually settled, so that the plaintiffs could not afterwards have proceeded with them. Cartwright *v.* Cooke,[2] Wilkinson *v.* Byers. It is sufficient, however, that there should be any consideration. Henderson *v.* Stobart is much in point.

Knowles and *Tomlinson*, contra. [Lord Campbell, C. J. If the plaintiffs, at the reqnest of the defendant, made a contract which they would break if they proceeded with the actions, is not that alone a consideration to support the defendant's promise?] Such is not the meaning of the agreement; the plaintiffs do not agree to stay the actions unless they are paid the money: it is a mere accord. And, if the construction of the agreement was that the actions should be stayed by a binding release on the plaintiffs' part, there is no averment of performance.

[1] Plowden, 1, 5, 6.

[2] 3 B. & Ad. 701.

Lord Campbell, C. J. The motion in arrest of judgment is made on two grounds: first, that the declaration discloses no consideration for the defendant's promise; secondly, that there are not proper averments of performance of conditions precedent. Now, as to the first objection, the count states that it was agreed between the plaintiffs and defendant that the two actions should be settled, and all proceedings therein stayed. The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement. Is it not an advantage to the promisor, and a disadvantage to the promisee, that two actions against the one at the suit of the other should be settled, and no proceedings taken therein? Then there is a general averment of performance, which after verdict is abundantly sufficient, though it might be bad on special demurrer; but the count goes farther, and alleges performance more particularly. I think, however, that the agreement does not contemplate that any further act should be done to settle these actions. It appears that, by those who framed the agreement, they were considered as settled by the agreement itself; and, I think, rightly; for they were so settled. I cannot entertain any doubt that, if, after such an agreement, an attempt were made to proceed in the actions, the court would interfere summarily if the defendant was not in default.

Patteson, J. The question is raised, whether on the face of this declaration there is any thing more than an accord. Now I own I think the meaning of what is stated in the declaration is that the actions are actually gone by the agreement, and that the plaintiff could not have gone on with them; but, even if it was no more than an agreement on the part of the plaintiffs to refrain from going on, I think that was a sufficient consideration to support the promise of the defendant.

Coleridge, J. It seems to me that the declaration discloses a mutual agreement, binding each party to the other, supposing that other to have performed his own part. I had more doubt as to the sufficiency of the averment of performance. Perhaps on a special demurrer it might not be sufficient: but this is after verdict; and then it is enough that there is an averment of the plaintiffs having always performed the agreement on their part.

Erle, J. I shall only add one word as to the averment of performance. I take it that, when the plaintiffs and the defendant agree that the actions are settled, the very agreement puts an end to the actions; that the court would interfere if they were afterwards proceeded with; and that consequently no further performance of the agreement is required. *Rule discharged.*

NASH, *Administrator with the Will annexed of* JOHN BEATSON, *deceased*, *v.* ARMSTRONG.

IN THE COMMON PLEAS, MAY 11, 1861.

[*Reported in* 10 *Common Bench Reports, New Series*, 259.]

THE declaration stated that, by deed dated the 29th of February, 1860, the said John Beatson, being then possessed thereof for a term which had not yet expired, let to the defendant certain rooms, part of a house of the said John Beatson, therein described, from the 1st of March in that year to the 24th of June in that year, at rent to be ascertained by two valuers, one on the part of the said John Beatson, and one on the part of the defendant, or an umpire to be agreed on by the said two valuers, such rent to include the use of the fixtures and fittings then in and upon the said demised premises, and which then belonged to the said John Beatson, the expense of the valuer to be employed by the said John Beatson to be paid in the first instance by the defendant, and retained by him out of the rent for the said demised premises accruing due from him on the said 24th of June, 1860; and afterwards the said valuers were respectively accordingly duly appointed, but did not, without any default of the said John Beatson or the plaintiff in that behalf, ascertain the rent so to be paid as aforesaid, or appoint any umpire; and the defendant nevertheless, at his request, occupied the said rooms under the said demise until the said 24th of June, and afterwards as tenant thereof to the plaintiff as administrator as aforesaid, for a long time, to wit, until the 1st of September, 1860, the said John Beatson having previously died; that afterwards, and whilst the amount of rent to be paid by the defendant for and in respect of his said occupation of the said rooms to the said 24th of June, and thence to the said 1st of September, was and remained unascertained and not agreed upon, and unpaid, it was, at the defendant's request, mutually agreed between the plaintiff as administrator as aforesaid and the defendant, that, if the plaintiff as administrator as aforesaid would not insist upon such valuation as aforesaid, and would not require that the said valuers should be called upon to appoint an umpire to ascertain the amount of the said rent to be paid for the defendant's said occupation until the said 24th of June, and the said valuers should be instructed not to appoint such umpire as aforesaid, the defendant would pay to the plaintiff as administrator as aforesaid, for and in respect of his occupation of the said rooms under the said deed, and for and in respect of the said subsequent occupation thereof as tenant to the plaintiff as administrator as aforesaid, a reasonable sum in that behalf, to wit, the sum of 70*l.*; and that neither the plaintiff as administrator as aforesaid, nor the defendant, should ever

call upon the other of them to carry out or perform or fulfil the terms of the said deed. Averment: that the plaintiff did every thing, and every thing existed and had before suit happened to entitle the plaintiff, as administrator as aforesaid, to payment of the said sum of money last mentioned, to wit, 70*l.* Breach: that no part thereof had been paid.

To this count the defendant demurred, the ground of demurrer stated in the margin being, "that a contract under seal cannot be varied or discharged by a parol agreement." Joinder.

R. G. Williams, in support of the demurrer.[1] There is no valid consideration for the promise stated in the declaration. [WILLIAMS, J. Why is it not a good consideration in assumpsit that the plaintiff foregoes his rights under the deed?] It is varying by parol the terms of a deed. [WILLIAMS, J. That is not so.] By the parol agreement, the defendant is to pay the rent ascertained in a way different from that provided by the deed. [WILLIAMS, J. The plaintiff is seeking to enforce an agreement founded upon a consideration that the plaintiff will not put in force his rights under the deed.] A deed can only be varied by deed. Would a recovery in this action be pleadable in bar to an action upon the deed? [WILLES, J. I should have thought it a good answer by way of equitable plea. The payment of the 70*l.* under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed.] The declaration, it is submitted, must be treated as it would have been before equitable pleas were known. Most of the cases upon this subject are cases where the parol agreement is set up as an answer to an action on the deed; but the grounds of the decision in White *v.* Parkin, 12 East, 578, are strongly in favor of the proposition contended for here.[2] . . . In the present case, it cannot be contended that the parol agreement does not conflict with the deed. There is an utter repugnance between the two instruments. In the course of the argument in White *v.* Parkin, a case of Leslie *v.* De la Torre was cited, where Lord Kenyon ruled that, the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter

[1] The points marked for argument on the part of the defendant were as follows: —

"1. That the plaintiff by the first count is seeking to recover upon a deed as varied by a parol agreement, whereas a deed can only be varied by a deed;

"2. That the alleged agreement could be carried out by deed only, and there is no allegation of the execution of any such deed;

"3. That the matters alleged in the first count disclose a claim which can be enforced only in equity, and not at law;

"4. That there is no consideration for the alleged agreement, if it is to be considered as independent of the deed;

"5. That the alleged agreement would afford no answer to an action upon the deed, or prevent the plaintiff from calling upon the valuers to appoint an umpire, or upon the defendant to carry out the terms of the deed, and the consideration for it is wholly nugatory;

"6. That the alleged agreement is in the nature of an accord only, and cannot be enforced or sued upon."

[2] The learned counsel here stated that case.

it. [WILLIAMS, J. The difficulty in your way is, that there is here an undertaking on the plaintiff's part to forbear from enforcing the payment of rent under the deed.] A rent would be payable under the deed, to which this agreement would be no answer. White *v.* Parkin [1] was cited and approved of in Thompson *v.* Brown, 7 Taunt. 656, 672.[2] . . . . A deed cannot be varied in any way by parol; and no action can be maintained on a parol agreement which varies the deed. In the case of a contract for the sale of goods within the 17th section of the Statute of Frauds, where another day for payment has been by parol substituted for that originally fixed by the contract, it has been held that the subsequent parol agreement cannot be made the foundation of an action. Marshall *v.* Lynn, 6 M. & W. 109; Mechelen *v.* Wallace, 7 Ad. & E. 49, 2 N. & P. 224; Stead *v.* Dawber, 10 Ad. & E. 57. In Chitty on Contracts, 6th edit. 55, it is said: "If there be an entire consideration for the defendant's promise, made up of several particulars, and one of these consist of an agreement by the defendant which the Statute of Frauds requires to be in writing, and which for want of such writing is void, the whole consideration is void, and the promise cannot be supported." Here, there would be nothing to prevent the plaintiff from bringing an action upon the deed, even after the money was paid under the agreement. To allow this declaration to be good would be promoting circuity of action.

Raymond, for the plaintiff, was not called upon.[3]

WILLIAMS, J. I am of opinion that there should be judgment for the plaintiff on this demurrer. I do not think it necessary to dispute the correctness of many of the doctrines contended for in the argument; for I do not consider that the conclusion we have arrived at in any degree conflicts with any of the rules of law adverted to. On the face of this declaration there is an admitted promise by the defendant to pay a certain sum of money at a stipulated time, and an admitted breach of that promise. That is a perfectly good promise if founded upon a sufficient legal consideration; and the simple question is, whether there is a sufficient legal consideration disclosed on the declaration. I am of opinion that there is. It appears upon the face of the declaration that the plaintiff, as the personal representative of the original contracting party, being in a condition to bring an action upon the

[1] Leslie *v.* De la Torre ?

[2] The learned counsel here stated the case of Gwynne *v.* Davy, 1 M. & G. 857, 2 Scott, N. R. 29, 9 Dowl. P. C. 1.

[3] The points marked for argument on the part of the plaintiff were as follows: —

"1. That the contract disclosed by the first count does not infringe upon the rule that a contract under seal cannot be varied by parol agreement;

"2. That, although a contract under seal cannot be varied by parol, yet it is competent to the parties to enter into a fresh agreement by parol, and for a good consideration, not to put in force the original contract;

"3. That the contract declared on is collateral to that entered into by the deed, and leaves the force of the deed itself intact, and amounts merely to an agreement not to enforce the performance of the original contract under seal;

"4. That such new contract is founded upon a good consideration, and is therefore valid."

original contract, or otherwise to put it in force, in consideration of his abstaining from enforcing the rights conferred on him by that contract, the defendant promised to pay in respect of the occupation of the premises under the deed referred to, and in respect of his subsequent occupation thereof as tenant to the plaintiff as administrator, a reasonable sum. It was not necessary, in order to make that a good consideration, that the mutual promises should amount to a release of the right of action flowing from the original contract. The plaintiff, having a right to enforce the benefits conferred on him by the contract, enters into an agreement not to do so, whereby he changes his situation to this extent, that, whereas before he had a right to sue upon the deed, if he now exercises that right he renders himself liable to an action. He has therefore plainly given a good consideration for the defendant's promise, and there is a complete cause of action disclosed on the face of the declaration. Upon principle, this is in truth nothing more than the ordinary case to be found in the old books, of an action against an heir whose ancestor has made a bond binding himself and his heirs, and who has assets by descent; if he contracts with the obligee of the bond that, if the latter will forbear to put the bond in suit, he will pay the sum secured by a given day, — that is a good assumpsit, and the forbearance till the day named is a good consideration to support the promise. The bond is not released by that. The only result is, to subject the obligee to an action if he puts the bond in suit before the expiration of the time agreed on. To that extent the terms of the bond are varied, and yet the bond remains unreleased; nevertheless, the consideration which flows from the agreement of the obligee not to put the bond in suit is good, and furnishes a ground of action if it be broken. That principle is applicable here.

WILLES, J. I am entirely of the same opinion. It appears to me that this declaration is neither open to the objection that it is an attempt to vary by parol the terms of a deed, nor to the objection that it is an action upon an accord.

BYLES, J. I had at first some doubt whether the maxim *unumquodque dissolvitur eodem ligamine quo ligatur* was not applicable here; for, till satisfaction, the plaintiff might always have an action upon the deed, and one cannot but see that this would lead to circuity of action. Further, whatever may be the value of the decision in Leslie *v.* De la Torre, the reported observations of Lord Kenyon are very much in favor of Mr. Williams's argument. But Gwynne *v.* Davy is not so. Three of the judges there intimate an opinion that an action might be maintained on the parol agreement. And no other authorities have been cited to show that the rule is applicable to a cross-action, and is not confined to an action on the deed.

KEATING, J. I concur with the rest of the Court in thinking that the declaration discloses a promise founded on a good consideration, and that it is not open to the objection that the plaintiff is seeking by parol to vary the terms of an instrument under seal.

Judgment for the plaintiff.

JOHN SCHWEIDER *v.* GEORGE LANG.

MINNESOTA SUPREME COURT, JULY 3, 1882.

[*Reported in* 29 *Minnesota*, 254.]

BERRY, J. On September 27, 1881, defendant, as payee, holding plaintiff's promissory note, upon which there was an unpaid balance of $1,850, falling due November 10, 1882, with interest to accrue, they agreed as follows: Defendant agreed to accept $1,750 in full satisfaction of the balance of principal and interest called for by the note; $150 to be paid by plaintiff within one week, and $1,600 within two weeks from said September 27; the note to be thereupon delivered up, and a mortgage securing the same to be cancelled. Plaintiff agreed to raise the $1,750 and pay the same to defendant as above specified. It was subsequently mutually agreed that defendant should call upon plaintiff at his residence, within a week from September 27, to receive the $150 payment, plaintiff to have the same there in readiness. Plaintiff had and kept the $150 in readiness during the week; but defendant failed to call for it at any time, and plaintiff was unable to find him during the week mentioned. Within two weeks from September 27, plaintiff, after much expense and trouble, procured the sum of $1,600, and on October 10, 1881, duly tendered the sum of $1,750 to the defendant in fulfilment of his (plaintiff's) agreement, and requested defendant to fulfil on his part. Defendant refused to receive the money or to perform his part of the agreement, having on October 1, without plaintiff's knowledge, sold and transferred the note and mortgage to a third party, to whom plaintiff became thereby bound to pay the full unpaid amount called for by the note. Plaintiff brings this action for damages for defendant's breach of contract.

The agreement between the parties was not for the sale of the note and mortgage, but one by which the maker of these instruments was to be discharged from liability thereon by the payee. The agreement is, therefore, not within the statute of frauds, so as to be required to be in writing. The agreement is what is known as an accord executory; that is to say, it is an agreement upon the sum to be paid and received at a future day in satisfaction of the note. If the accord had been executed, there would have been a satisfaction extinguishing the note, the case being taken out of the rule by which payment of a part is held insufficient to satisfy the whole of a liquidated indebtedness by the fact that the payment was to be made before the indebtedness fell due. Sonnenberg *v.* Riedel, 16 Minn. 83; Brooks *v.* White, 2 Met. 283.

The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties.

The plaintiff has duly offered to perform on his part. The defendant has refused to accept the proffered performance, as also to perform on his part at plaintiff's request, and has moreover disabled himself from performing by disposing of the note. The plaintiff is, therefore, in accordance with the general rule which gives damages for breach of contract, entitled to recover the damages which have resulted to him from this breach by defendant. Billings *v.* Vanderbeck, 23 Barb. 546; Scott *v.* Frink, 53 Barb. 533; Very *v.* Levy, 13 How. 345.

Order affirmed.

C. — Executed Consideration and Moral Consideration.

RIGGS *v.* BULLINGHAM.

In the Queen's Bench, Michaelmas Term, 1599.

[*Reported in Croke Elizabeth*, 715.]

Assumpsit. Whereas he was seised in fee of the advowson of Beckingham, in the county of Lincoln; in consideration that he at the defendant's request, by his deed, *dedisset et concessisset* to the defendant the first and next avoidance of the said church, the defendant, 22 August, 37 Eliz., assumed to pay to the plaintiff 100*l.*, &c. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to an 100*l.* And after verdict it was moved in arrest of judgment that this consideration is past, and therefore not sufficient to ground an assumpsit; for there is not any time of the grant alleged; and it might have been divers years before the assumpsit made; and being a thing executed and past, no assumpsit afterwards can be good: and in proof thereof Dyer, 272, Hunt *v.* Bate was cited. But all the Court resolved to the contrary; for the grant being made at his request, it is a sufficient consideration, although it were divers years before; especially being to the defendant himself, the consideration shall be taken to continue. But if the grant had been to a stranger, and not at the defendant's request, it had peradventure been otherwise. . . . Wherefore it was adjudged for the plaintiff.

BOSDEN *v.* SIR JOHN THINNE.

In the King's Bench, Michaelmas Term, 1603.

[*Reported in Yelverton*, 40.]

The plaintiff declared, *quod cum ad specialem instantiam* of the defendant, he had procured credit for one Flud for two pipes of wine amount-

ing to 51*l.*, and Flud, *super credentiam* and *per medium* of the plaintiff at the request of the defendant, *emisset* of one Roberts two pipes of wine for 51*l.*, and *superinde* the plaintiff with Flud entered into bond of 100*l.* to Roberts for payment of the said 51*l.* at a day to come, which was not paid at the day; and thereupon Roberts sued the plaintiff upon the bond, and recovered, and had a *capias* against him, whereby he *fuit coactus* to pay Roberts 67*l.*, *de solutione* of which 67*l.* *causa præallegata* he notified to the defendant, who *in consideratione præmissorum* promised to pay the plaintiff the 67*l.* at Michaelmas; and showed the failure of payment of the 67*l.* at the day, &c. And upon *non assumpsit* pleaded, it was found against the defendant. And *Yelverton* moved in arrest of judgment, that the action upon the matter shown does not lie, because the consideration was past and executed before the promise, and the defendant had no profit by it, but all the benefit was to Flud, a stranger; like the case 10 Eliz., Dy. 272, where J. S. was bail for the servant upon an arrest, and signified all to the master after the bail entered into, who promised to save him harmless; and although the bail was condemned, yet no assumpsit lay against the master, because the consideration was past before the promise: and it seems that upon the first request only to give credit to Flud for two pipes of wine, no assumpsit lies; for a bare request does not imply any promise; as if I say to a merchant, I pray trust J. S. with 100*l.*, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid or the like. And it seems likewise that the promise shall not have relation to the first request of giving credit to Flud, because the entreaty for the credit was but for two pipes of wine amounting to 51*l.*, and the promise is for 67*l.*, and so they differ in the sums; as if I request J. S. to enter into bond for J. D. for 10*l.*, and I will see him paid; now if J. S. enters into bond of 20*l.* for the payment of 10*l.* for J. D., which 20*l.* is recovered against him, he shall not charge me on my promise but 10*l.* But *non allocatur per* Fenner, Gawdy, and Popham; for although upon the first request only assumpsit does not lie, yet the promise coming after shall have reference to the first request; and although the request was but for two pipes of wine amounting to 51*l.*, that Flud might have credit for that; yet when Roberts, who sold the wine, would not take (as appears) security but by bond of 100*l.* for payment of 51*l.*, and all this matter is signified afterwards to the defendant, who agrees to it, and promises to pay the 67*l.*, this shall charge him; because it has its essence and commencement from the first request made by the defendant. As (*per* Gawdy) if I request one to marry my cousin, who does so, and afterwards tells me of it, and thereupon I promise him 100*l.*, this is a good promise to charge me, although the marriage was past, which is the consideration; because now the promise shall have reference to the request, which was before the marriage. *Vide* this case, Dy. 272 *b.* The same law (by him) if I entreat one to be bail for my servant, and he thereupon becomes bail, and is condemned, and afterwards tells me of it, and I promise him to save

him harmless, it is good, and he shall recover his damage *in toto*. Wherefore judgment was given for the plaintiff. But YELVERTON, J., was *contra* clearly.[1]

ROSCORLA *v.* THOMAS.

IN THE QUEEN'S BENCH, MAY 30, 1842.

[*Reported in* 3 *Queen's Bench Reports*, 234,]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff at the request of defendant had bought of defendant a certain horse, at and for a certain price, &c., to wit, &c., defendant promised plaintiff that the horse did not exceed five years old, and was sound, &c., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse at the time of the making of the said promise was not free from vice; but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, &c.

Pleas. 1. *Non assumpsit.* Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable, or ferocious, in manner, &c.; conclusion to the country. Issue thereon.

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, *Bompas*, Serjt., obtained a rule *nisi* for arresting the judgment on the first count. In last Term

Erle and *Butt* shewed cause. The objection is, that the first count states only a *nudum pactum*. But there is an executed consideration, which with a request will support a promise. Now the request need not be express; wherever the law will raise a promise, a request by the party promising will be implied; note (*c*) to Osborne *v.* Rogers.[2] Payne *v.* Wilson was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is practically executory because the sale and warranty would be coincident. In Thornton *v.* Jenyns[3] the declaration charged that, in consideration that plaintiff had promised to defendant, defendant then promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and Brown *v.* Crump[4] was cited; but the

[1] Lampleigh *v.* Brathwait, Hobart, 105, and other decisions, *acc.* See Langdell, Summary of Contracts, §§ 92–94.

[2] 1 Wms. Saund. 264 *a*. [3] 1 Man. & G. 166. [4] 1 Marsh. 567.

Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained.[1]

Bompas, Serjt., and *Slade*, contra. The warranty ought to be given at the time of the sale: if made after, it is without consideration. 3 Blackst. Com. 166; Com. Dig., Action upon the Case for a Deceipt (A. 11); Roswel *v.* Vaughan,[2] Pope *v.* Lewyns.[3] Thornton *v.* Jenyns was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by the law upon a sale. Parkinson *v.* Lee.[4] Even an express promise without a legal consideration is invalid. Collins *v.* Godefroy.[5] In Hopkins *v.* Logan there was an executed consideration from which a promise to pay on request would have arisen; and it was holden that this did not support a promise to pay on a future day named. [PATTESON, J., referred to Hunt *v.* Bate, as cited in Eastwood *v.* Kenyon, and to Lampleigh *v.* Brathwait.] *Cur. adv. vult.*

LORD DENMAN, C. J., in this Term (May 30) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff at the request of the defendant had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coëxtensive with the consideration. In the present case, the only promise that would result from the consideration as stated, and be coëxtensive with it, would be to deliver the horse upon request. The precedent sale without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless

[1] It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that if it were so, the evidence negatived the declaration.

[2] Cro. Jac. 196.

[3] Cro. Jac. 630.

[4] 2 East. 314.

[5] 1 B. & Ad. 950.

support an express one, will be found collected and reviewed in the note (*a*) to Wennall *v.* Adney,[1] and in the case of Eastwood *v.* Kenyon. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute. *Rule absolute.*[2]

JOSEPHINE L. MOORE *v.* NELSON L. ELMER & ANOTHER, ADMINISTRATORS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 24–OCTOBER 18, 1901.

[*Reported in* 180 *Massachusetts*, 15.]

BILL IN EQUITY by the owner of certain land subject to a mortgage assumed by her, to restrain the administrators of Willard Elmer, the holders of the mortgage, from foreclosing it, or disposing of it and the note secured thereby, and for an order to the defendants to discharge the mortgage and cancel the note, filed July 7, 1900.

The bill alleged that the plaintiff was the owner of a tract of land to which she derived title by a deed of one Herman E. Bogardus, by which deed she assumed and agreed to pay a certain mortgage of the premises given by Bogardus, which mortgage and the note for $1,300 thereby secured had been assigned to Willard Elmer, the defendants' intestate, that the defendants' intestate on or about January 11, 1898, executed and delivered to the plaintiff the following agreement: "Springfield, Mass., Jan. 11, 1898. In Consideration of Business and Test Sittings Reseived from Mme Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned do hear by agree to give the above naned Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch is the Herman E. Bogardus Mortgage note of

[1] 3 Bos. & Pul. 249.

[2] "In Lampleigh *v.* Brathwait, it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount." — Erle, C. J., Kennedy *v.* Broun, 13 C. B. N. S. 677, 740. See also Stewart *v.* Casey, [1892] 1 Ch. 104, 115.

Jan. 5, 1893, and the Interest on same on or after the last day of Jan. 1900, if my Death occurs before then whitch she has this day Predicted and Claims to be the truth, and whitch I the undersighned Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer."

The bill alleged, that by the foregoing instrument the premises were released and discharged from the operation of the mortgage deed, and the note secured thereby was paid in full and became null and void, upon the death of Willard Elmer, which occurred before the year 1900, to wit, on September 15, 1899.

The bill also alleged, that before the execution of the above agreement, at the request of Willard Elmer, the plaintiff gave to Elmer the business and test sittings referred to in the agreement as the consideration for the agreement, and at his request devoted much time and labor thereto.

The defendants demurred, and among the causes of demurrer alleged, that the above agreement annexed to the bill was a wagering contract and against public policy and void, and that it was without consideration.

In the Superior Court the case was heard by LAWTON, J., who made a decree sustaining the demurrer and dismissing the bill. The plaintiff appealed; and, at the request of the plaintiff, the judge reported the case for the determination of this court. If the demurrer was sustained rightly, the bill was to be dismissed; otherwise, the demurrer was to be overruled and the defendants were to answer to the plaintiff's bill.

W. H. McClintock (*J. B. Carroll* with him) for the plaintiff.

C. W. Bosworth, for the defendants.

HOLMES, C. J. It is hard to take any view of the supposed contract in which, if it were made upon consideration, it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. 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 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.

It may be added that even if Elmer was under a previous liability

to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. It is not necessary to consider what further difficulties there might be in the way of granting relief.

Bill dismissed.[1]

EDMONDS' CASE.

In the Common Pleas, Michaelmas Term, 1586.

[*Reported in* 3 *Leonard,* 164.]

In an action upon the case against Edmonds, the case was, that the defendant, being within age, requested the plaintiff to be bounden for him to another for the payment of 30*l.*, which he was to borrow for his own use; to which the plaintiff agreed, and was bounden, *ut supra.* Afterwards the plaintiff was sued for the said debt, and paid it. And afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed that he might not be damnified so to pay 30*l.*, it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff: upon which promise the action was brought. And it was holden by the Court that, although here was no present consideration upon which the assumpsit could arise, yet the court was clear that upon the whole matter the action did lie; and judgment was given for the plaintiff.[2]

[1] Walker *v.* Brown, 104 Ga. 357; Allen *v.* Bryson, 67 Ia. 591; Walker *v.* Irwin, 94 Ia. 448; Holloway *v.* Rudy, 60 S. W. Rep. 650 (Ky.); Cleaver *v.* Lenhart, 182 Pa. 285; Stoneburner *v.* Motley, 95 Va. 784, *acc.* See also Marsh *v.* Chown, 104 Ia. 556; Beaty *v.* Carr, 109 Ia. 183; Shepard *v.* Rhodes, 7 R. I. 470.

Bradford *v.* Roulston, 8 Ir. C. L. 468; Lonsdale *v.* Brown, 4 Wash. C. C. 148, 150; Viley *v.* Pettit, 96 Ky. 578; Pool *v.* Horner, 64 Md. 131; Stuht *v.* Sweesy, 48 Neb. 767; Wilson *v.* Edmonds, 24 N. H. 502; Hicks *v.* Burhans, 10 Johns. 243; Oatfield *v.* Waring, 14 Johns. 188; Greeves *v.* M'Allister, 2 Binn. 592; Landis *v.* Royer, 59 Pa. 95; Sutch's Estate, 201 Pa. 305; Silverthorn *v.* Wylie, 96 Wis. 69; Raife *v.* Gorrell, 105 Wis. 636, *contra.* See also Carson *v.* Clark, 2 Ill. 113; Montgomery *v.* Downey, 88 N. W. Rep. 810 (Ia.); Freeman *v.* Robinson, 38 N. J. L. 383; Chaffee *v.* Thomas, 7 Cow. 358; Comstock *v.* Smith, 7 Johns. 87; Boothe *v.* Fitzpatrick, 36 Vt. 681; Seymour *v.* Marlboro, 40 Vt. 171.

[2] In the report of the same case in Godb. 138, *nom.* Barton and Edmonds' Case, it is said: "But if a *feme covert* and another at her request had been bounden in such a bond, and after the death of her husband she had assumed to have saved the other harmless against such bond, such assumpsit should not have bound the wife."

Many cases in accord with Edmonds' Case are collected in 16 A. & E. Encyc. of Law (2d ed.), 300 *seq.* See also a note to Craig *v.* Van Bebber, 100 Mo. 584, in 18 Am. St. Rep. 569. Since the Infants Relief Act, 37 & 38 Vict. c. 62, in England, however, all contracts of infants except for necessaries are absolutely void and cannot be ratified.

WATSON *v.* TURNER ET AL.

IN THE EXCHEQUER, TRINITY TERM, 1767.

[*Reported in Buller's Nisi Prius*, 129.]

AN action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant Turner, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff, who had attended her for four months, and cured her. After the cure Turner was applied to, and promised to pay the plaintiff's bill. It was held, that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the Statute of Frauds; for overseers are under a moral obligation to provide for the poor. Secondly, that as Turner was the only acting overseer, the other was bound by his promise.[1]

ATKINS ET UXOR *v.* HILL.

IN THE KING'S BENCH, EASTER TERM, 1775.

[*Reported in Cowper*, 284.]

IN assumpsit the plaintiffs declared against Charles Hill, being in the custody, &c.: For that whereas James Clarke, &c., by his last will, &c., did give and bequeath to the plaintiff's wife the sum of 60*l.*, &c., and of his last will and testament made the said Charles Hill sole executor, &c., and the said Charles Hill took upon himself the burthen and execution of the said will: And the said N. and A. further say that divers goods and chattels, &c., afterwards, &c., came to the hands of the said Charles Hill as executor of the said J. C., which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said J. C., &c., of which the said C. H. then and there had notice: By reason of which said premises, the said Charles Hill became liable to pay to the said N. and A. the said sum of 60*l.*; and, being so liable, he, the said C., in consideration thereof, afterwards, &c., undertook and faithfully promised to pay to them the said sum of 60*l.*, whenever, &c.

To this declaration the defendant demurred generally.

Mr. *Le Blanc*, in support of the demurrer.[2]

Mr. *Buller*, contra, for the plaintiff. The question is, whether the facts stated in this declaration, namely, that the defendant was execu-

[1] See Paynter *v.* Williams, 1 Cr. & M. 810. — ED.

[2] Only so much of the arguments and decision is here given as relates to the question of "Consideration." — ED.

tor and had assets, &c., are a sufficient consideration for a promise. As to that question, it is a settled point that, wherever an express promise is made upon a good consideration, an action lies. And the slightest ground is sufficient to maintain a promise. 1 Vent. 40, 41, Wells *v.* Wells; 1 Lev. 273, s. c.; Stone *v.* Withipool, Latch, 21, in which latter case it is laid down, "that it is an usual allegation for a rule, that any thing which is a ground for equity is a sufficient consideration."

But here an express promise is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expenses are paid. The answer is, it is averred that he had assets to pay, which is alone sufficient, and so it was expressly held by Lord King, in the case of Camden *v.* Turner, Sittings after Tr., 5 Geo. I., C. B.; Select Cases of Evidence by Sir John Strange.

Lord Mansfield. This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken upon the pleadings that there was sufficient to discharge the funeral expenses, because they are payable first; consequently, if there was less than the amount of them, there could not be sufficient to discharge the debts and legacies. The declaration then goes on to state that, in consideration of there being full sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt then but, at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in chancery against an executor, one part of the prayer of it was, that he should assent to the bequests in his testator's will. If he had assets, he was bound to assent. And when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But, in the present case, there is not only an assent to the legacy, but an actual promise and undertaking to pay it; and that promise founded on a good consideration in law, as appears from the cases cited by Mr. Buller, particularly the case of Camden *v.* Turner,[1] where acknowledgment by an executor, "that he had enough to pay," was held a sufficient ground to support an assumpsit. Here the defendant, by his demurrer, admits he had sufficient to pay; therefore this is not the case that Mr. Le Blanc has been arguing upon; but it is the case of a promise made upon a good and valuable consideration, which, in all cases, is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority; if after he comes of age he consents to pay them, an action lies. So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. Co. Lit., Attornment, 315 *a*. In this case the promise is grounded upon a reasonable and conscientious consideration; namely, that the defendant had assets to

[1] Sittings after Trinity Term, 5 Geo. I., C. B., *coram* King, C. J.

discharge the legacy. If so, he was compellable in a court of equity, or in the ecclesiastical court, to pay it. I give my opinion upon this case as it stands; that is, that it is an express promise made upon a good and sufficient consideration.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.[1]

Mr. *Le Blanc* then moved for liberty to withdraw the demurrer, and plead the general issue; but the Court refused it.

TRUEMAN *v.* FENTON.

In the King's Bench, January 28, 1777.

[*Reported in Cowper*, 544.]

This was an action on a promissory note, bearing date the 11th February, 1775, payable to one Joseph Trueman (the plaintiff's brother), three months after date, for 67*l.*, and indorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated. The defendant pleaded, first, *non assumpsit;* secondly, "that on the 19th January, 1775, he became bankrupt, and that the debt for which the said note was given was due to the plaintiff before such time as he, the defendant, became bankrupt, and that the note was given to Joseph Trueman for the use of, and for securing to, the said plaintiff his debt so due." The cause was tried before Lord Mansfield at the Sittings after Michaelmas Term, 1776, when the jury found a verdict for the plaintiff, damages 72*l.* 12*s.*, costs 40*s.*, subject to the opinion of the Court upon a special case, stating the answer of the plaintiff in this action to a bill filed against him in the Exchequer by the present defendant for a discovery of the consideration of the note; the substance of which was as follows: "That on the 15th of December, 1774, the defendant, Fenton, purchased a quantity of linen of the plaintiff, Trueman; and it being usual to abate 5*l.* per cent to persons of the defendant's trade, the price, after such abatement made, amounted to 126*l.* 18*s.* That at the time of the sale it was agreed that one-half of the purchase-money should be paid at the end of six weeks, and the other half at the end of two months: And in consideration thereof, the plaintiff, Trueman, drew two notes on the defendant for 63*l.* 9*s.* each, payable to his own order, at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission; but set forth that he acquainted the defendant he was surprised at his ungenerous behavior in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed

[1] Hawkes *v.* Saunders, Cowp. 289, *acc.* But see Smith *v.* Carroll, 112 Pa. 390; Dunham *v.* Elford, 13 Rich. Eq. 190.

him he had paid away the above two notes: upon which the defendant pressed him to take up the two notes, and proposed to give him a security for part of the debt. That afterwards, on the 11th February, 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother, Joseph Trueman, or order, three months after date. That he took up the two acceptances and delivered them to the defendant to be cancelled, and accepted the above note for 67*l.* in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on the 19th of January, 1775, and that the bankrupt obtained his certificate on the 17th of April following." The question reserved was, Whether the facts above stated supported the merits of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue; but if the merits of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller*, for the plaintiff.

Mr. *Davenport*, contra.

Lord Mansfield. The plea put in, in this case, is that the debt was due at the time of the act of bankruptcy committed; and on that plea, in point of form, there was a strong objection made at the trial that the allegation was not strictly true; because at the time of the sale, credit was given to a future day; which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure, on the form of the plea, the defendant must fail. But I never like to entangle justice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both. I put it therefore to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the Court, whether, according to the facts and truth of the case, the defendant could have pleaded his certificate in bar of the debt in question; and in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form. The question, therefore, upon the case reserved, is worded thus: Whether the facts support the merits of the defendant's plea? That is, Whether, on the merits of the case, properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action? Now, in this case there is no fraud, no oppression, no scheme whatsoever on the part of the plaintiff to deceive or impose on the defendant; and as to collusion with respect to the certificate, where a creditor exacts terms of his debtor as the consideration for signing his certificate, and obtains money or a part of his debt for so doing, the assignees may recover it back in an action. But that is not the case here. So far from it, the transaction itself excluded the plaintiff from having any thing to do with the certificate. No man

can vote for or against the certificate till he has proved his debt. Here the plaintiff delivers up the two drafts bearing date prior to the act of bankruptcy, and by agreement accepts one for little more than half their amount, bearing date after the commission of bankruptcy sued out. Most clearly, therefore, he could not have proved that note under the commission; and if not, he could have nothing to do with the certificate. That brings it to the general question, Whether a bankrupt, after a commission of bankruptcy sued out, may not, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of equity gone upon these principles? Where a man devises his estate for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same): All debts barred by the Statute of Limitations shall come in and share the benefit of the devise, because they are due in conscience. Therefore, though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the Statute of Limitations, is very true. The slightest acknowledgment has been held sufficient; as saying, "Prove your debt, and I will pay you," — "I am ready to account, but nothing is due to you." And much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man, who after he comes of age promises to pay for goods or other things, which during his minority one cannot say he has contracted for, because the law disables him from making any such contract, but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good. Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt, at a time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit from a dividend under the commission, by forbearing to prove his debt; gives up the securities he had received from the

bankrupt, and accepts of a note, amounting to little more than half the real debt, in full satisfaction of his whole demand. Is that against conscience? Is it not on the contrary a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence; but the proposal first moves from, and is the bankrupt's own voluntary request. The single question then is, Whether it is possible for the bankrupt, in part or for the whole, to revive the old debt? As to that, Mr. Justice Aston has suggested to me the authority of Bailey *v.* Dillon, where the Court would not hold to special bail, but thought reviving the old debt was a good consideration. The two cases cited by Mr. Buller are very material. Lewis *v.* Chase, 1 P. Wms. 620, is much stronger than this; for that smelt of the certificate; and the Lord Chancellor's reasoning goes fully to the present question. Then the case of Barnardiston *v.* Coupland, in C. B., is in point. Lord Chief Justice Willes there says, "that the revival of an old debt is a sufficient consideration." That determines the whole case. Therefore I am of opinion that, if the plea put in had been formally pleaded, the merits of the case would not have been sufficient to bar the plaintiff's demand.

Aston, J. As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waives his right to come in under the commission, it is a benefit to the rest of the creditors. In the case of Bailey *v.* Dillon, the Court on the last day of the Term were of opinion, "that the defendant could not be held to special bail, yet they would not say that he might [not?] revive the old debt which was clearly due in conscience." A bankrupt may be and is held to be discharged by his certificate from all debts due at the time of the commission; but still he may make himself liable by a new promise. If he could not, the provision in the Stat. 5 Geo. II., c. 30, sect. 11, by which every security for the payment of any debt due before the party became bankrupt, as a consideration to a creditor to sign his certificate, is made void, would be totally nugatory. — Lord Mansfield added that this observation was extremely forcible and strong.

Per Cur. Judgment for the plaintiff.[1]

GRANT *v.* PORTER.

New Hampshire Supreme Court, June, 1884.

[*Reported in* 63 *New Hampshire*, 229.]

Allen, J. The plaintiff and the other creditors of Porter Brothers (of which firm the defendant is sued as surviving partner) each ac-

[1] The cases on promises to pay debts discharged by bankruptcy are collected in Williston's Cases on Bankruptcy, p. 640.

cepted an offer of forty-five *per centum* of his claim in full settlement, and Hodgdon, who received all the debtors' property for the purpose of paying the amount agreed upon as a compromise and obtaining from the creditors a discharge of the indebtedness, gave each creditor a note or forty-five *per centum* of his claim, and at the same time took an assignment from each, under seal, of his demand and of the right to prosecute it to final judgment. These notes, including the plaintiff's, were subsequently paid by Hodgdon, and Porter Brothers gave the plaintiff the note in suit for the balance of his demand.

Ordinarily, payment and acceptance of a smaller sum for a larger one due is no discharge of the larger. Blanchard *v.* Noyes, 3 N. H. 519; Mathewson *v.* Bank, 45 N. H. 104, 107. But payment by a third person at the request of the debtor, either in money or by a note, accepted by the creditor in full satisfaction and discharge of the debt, is an exception to the rule, and extinguishes the debt. Brooks *v.* White, 2 Met. 283. The assignee of the defendant's firm received their property for the express purpose and on the express consideration of obtaining a discharge of their indebtedness by the payment of forty-five *per centum* of the same; and when the plaintiff accepted from the assignee that sum in full satisfaction, his demand against the defendant was extinguished. His debt being satisfied and extinguished, there was no consideration for the note in suit. It is not the case of a debt discharged by the order of a court in bankruptcy proceedings. In a case of that kind a new promise to pay the debt, made after discharge, revives the debt which is not extinguished by the discharge, and the consideration for the original demand is a good consideration for a new promise. Bank *v.* Wood, 59 N. H. 407; Wiggin *v.* Hodgdon, 63 N. H. 39.

The assignment of the plaintiff's demand to the assignee was in writing, under seal; and if, as the plaintiff claims, this was only formal and intended as a receipt to the defendant and a voucher for the assignee, it was certainly a valid as well as formal transfer of the claim, with all rights of action upon it, to the assignee. The plaintiff, having parted with all interest in the claim and all right of action upon it, nothing remained to him which could be treated as a consideration for the note in suit, and there can be no recovery upon it.

Judgment for the defendant.

CARPENTER, J., did not sit: the others concurred.[1]

[1] 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; Callahan *v.* Ackley, 9 Phila. 99, *acc.* Similarly in case of a voluntary release or accord and satisfaction. 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; Zoebisch *v.* Von Minden, 47 Hun, 213 (see s. c. 120 N. Y. 406); Snevily *v.* Read, 9 Watts, 396; Shepard *v.* Rhodes, 7 R. I. 470; 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.

BARNES, DOWDING, AND BARTLEY, *v.* HEDLEY AND CONWAY.

IN THE COMMON PLEAS, NOVEMBER 24, 1809.

[*Reported in* 2 *Taunton*, 184.]

THIS was an issue between the plaintiffs, who were the executors of William Webb, deceased, and the defendants, who were assignees under a commission of bankrupt which issued against William Harrè and Henry Suthmier, directed by order of the Lord Chancellor, in order to try whether the bankrupts on the 13th of August, 1802, were indebted to Webb in any and what sum of money. The trial came on at the Sittings in London, Mich. Term, 1808, before Mansfield, C. J., when a verdict was found for the plaintiffs for the sum of 11,672*l.* 4*s.* 2*d.* subject to the opinion of the Court on the following case: By a written agreement made on the 15th of May, 1800, between Webb and the bankrupts, the former agreed to advance money from time to time upon interest at 5 per cent. to Harrè and Suthmier, who carried on the business of sugar bakers in copartnership, in order to enable them to purchase raw sugars; and in consideration of such advances the bankrupts were also to pay to Webb a commission of 5 per cent. for all sugars which were to be bought of him, or provided for Messrs. Harrè and Suthmier; and in order to secure to Webb the balance which might become due to him on these transactions, Harrè and Suthmier executed and gave to him certain deeds and securities. Webb made out four several successive half-yearly accounts between him and Harrè and Suthmier, on the footing of this agreement, and various sums of money were paid to Webb on these accounts from time to time by the bankrupts; these accounts closed on the 10th of August, 1802, when a considerable balance was due from the bankrupts to Webb. These accounts comprised the principal moneys actually advanced, and interest at 5 per cent.; and also 5 per cent. on all sugars purchased by the bankrupts. Webb never purchased or procured any sugars for the bankrupts; but the same were always purchased by the bankrupts themselves in their own names. It was admitted on the trial that the original agreement of the 15th of May, 1800, was illegal and usurious, and that no part of the balance could have been recovered by Webb from Harrè and Suthmier, if they had set up the usury; and Webb was informed by the attorney of Harrè and Suthmier in July, 1802, that these transactions were usurious, and that his whole debt was in danger of being lost, and a writ of *latitat* was actually sued out by the bankrupts' attorney upon the Statute of Usury; but this fact was unknown to Webb. In consequence of this intimation, it was agreed between Harrè and Suthmier and Webb, that Webb should make out fresh accounts, leaving out all the charges for commission; and should only charge them with the principal money, together with legal interest; and that the original deeds and articles in the possession of Webb should be given up by him and cancelled accordingly. Webb accordingly made out such fresh account, in which he omitted

the whole charge for commission; and the balance due to him amounted to the sum of 11,672*l.* 4*s.* 2*d.*, which balance was composed of principal moneys actually advanced under the agreement of 15th May, 1800, and of interest at 5 per cent. fairly and legally calculated; the whole commission and every objectionable charge being omitted. This account, so corrected, was, on the 12th of August, 1802, delivered to the agent of Harrè and Suthmier, and on the following day they acknowledged this balance to be due to Webb, and promised to pay the same; whereupon the deeds and securities executed to Webb by Harrè and Suthmier, when the original agreement was entered into, were produced by Webb or his agent, in the presence of Harrè and Suthmier, and were then cancelled and burnt. The question for the opinion of the Court was, whether, under the circumstances of this case, the plaintiffs were entitled to recover the above balance of 11,672*l.* 4*s.* 2*d.* If the Court should be of that opinion, a verdict for such sum was to be entered for the plaintiffs; if otherwise, the verdict to be entered for the defendants.

This cause was twice argued: first, in Easter Term, 1809, by *Best*, Serjt., for the plaintiffs, and *Vaughan*, Serjt., for the defendants; and again in Trinity Term, 1809, by *Shepherd*, Serjt., for the plaintiffs, and *Lens*, Serjt., for the defendants.

In the course of the present Term the judges of the court sent to the Lord Chancellor the following certificate of their opinion: —

"This case has been argued before us by counsel, and we are of opinion that under the circumstances the plaintiffs are entitled to recover the above balance of 11,672*l.* 4*s.* 6*d.*" [1]

LEE *v.* MUGGERIDGE and Another, *Executors of* Mary Muggeridge, *deceased.*

In the Common Pleas, Trinity Term, June 29, 1813.

[*Reported in* 5 *Taunton*, 36.]

This was an action of assumpsit, brought under the following circumstances: In 1799, Joseph Hiller, the son of Mrs. Muggeridge, the defendants' testatrix, by a former husband, falling into embarrassed circumstances, she, in order to induce the plaintiff, his father-in-law, to relieve him, proposed by letter to become security to the extent of 2000*l.* by a bond payable at her death. The plaintiff accordingly advanced the money to Joseph Hiller; and Mrs. Muggeridge by her bond, dated the 4th of August, 1799, became bound to the plaintiff in the penal sum of 4000*l.*, with condition that the heirs, executors, or administrators of Mrs. Muggeridge should, within six months after her decease, pay to

[1] Flight *v.* Reed, 1 H. & C. 703; Garvin *v.* Linton, 62 Ark. 370; Kilbourn *v.* Bradley, 3 Day, 356; Early *v.* Mahon, 19 Johns. 147; Hammond *v.* Hopping, 13 Wend. 505; Sheldon *v.* Haxtun, 91 N. Y. 124, *acc.* See also Tucker *v.* West, 29 Ark. 386; Gwinn *v.* Simes, 61 Mo. 335; Melchoir *v.* McCarty, 31 Wis. 252.

the plaintiff 1999*l.* 19*s.*, with such part of the interest as Joseph Hiller should omit to pay; it being agreed that he should pay the interest half yearly. Joseph Hiller having neglected to pay the interest, the plaintiff in the year 1804 wrote to Mrs. Muggeridge, requesting payment of the arrears; to which she, after her husband's death, returned an answer by letter, stating "that it was not in her power to pay the bond off, her time here was but short, and that would be settled by her executors."

It appeared that Mrs. Muggeridge had a considerable separate estate when the bond was given, which she acquired from the father of Joseph Hiller, and the bulk of which she gave by her will to the defendant, Nathaniel Muggeridge. After an ineffectual attempt to establish that the bond constituted an equitable lien or charge upon the separate estate of Mrs. Muggeridge (see 1 V. & B. 118), the plaintiff brought the present action, founded upon the promise contained in the letter above referred to. The declaration stated (*inter alia*) that the testatrix, after the death of her husband, and whilst she was sole, to wit, on the 11th of July, 1804, "in consideration of the premises undertook to the plaintiff that the bond, that is to say, the principal money and interest secured by the bond, should be settled, that is to say, paid, by her executors." The defendants pleaded the general issue; and upon the trial of the cause at the Sittings after Hilary Term, 1813, at Guildhall, before Gibbs, J., the jury found a verdict for the plaintiff.[1]

Shepherd, Serjt., in Easter Term last, moved in arrest of judgment, on the ground that no sufficient consideration was shewn for the promise of the deceased. The Court granted a rule *nisi*.

Lens and *Best*, Serjts., in this term shewed cause.

Shepherd and *Vaughan*, Serjts., contra.

MANSFIELD, C. J. The counsel for the plaintiffs need not trouble themselves to reply to these cases: it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, Whether upon this declaration there appears a good moral obligation! Now I cannot conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of 2,000*l.* created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After her husband's death, she, knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it, knowing all this, she promises that her executors shall pay; if, then, it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay, this declaration is clearly good. This case is not distinguishable in principle from Barnes *v.* Hedley; there, not only the securities were void, but the contract was void; but the money had

[1] In the original report the declaration is set forth with much fulness; but as it is exceedingly prolix, and most of it is wholly irrelevant to the one question argued and decided in the case, it is here omitted, and a statement of the material facts is substituted in its place. Some of the facts stated have been obtained from the report in 1 V. & B. 118.

been lent, and, therefore, when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of Doe on the demise of Carter *v.* Straphan is extremely applicable. Here, in like manner, the wife would have been grossly dishonest, if she had scrupled to give a security for the money advanced at her request. As to the cases cited of Lloyd *v.* Lee and Barber *v.* Fox, there was no forbearance, and those cases proceeded on the ground that no good cause of action was shown on the pleadings.

HEATH, J. I am of the same opinion. Promises without consideration are not enforced, because they are gratuitous, and the law leaves the performance to the liberality of the makers. The notion that a promise may be supported by a moral obligation is not modern; in Charles the Second's time it was said, if there be an iota of equity, it is enough consideration for the promise.

CHAMBRE, J. There cannot be a stronger or clearer case of moral obligation than this. The gentleman has done this lady a great favor, in going to this expense, and accepting an invalid security; and when she could give a better security, it became her duty so to do, and she has done it. In the cases cited it was the plaintiff's fault if, having it in his power to state a good consideration on the record, he neglected so to do.

GIBBS, J. I agree in this case the plaintiff is entitled to recover. It cannot, I think, be disputed now, that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty, or pay that debt, will be supported by the previous moral obligation. There cannot be a stronger case than this of moral obligation. The counsel for the defendant did not dare to grapple with this position, but endeavored to show that there was no case in which a subsequent promise had been supported, where there had not been an antecedent legal obligation at some time or other; from whence he wished it to be inferred that, unless there had been the antecedent legal obligation, the mere moral obligation would not be a sufficient consideration to support the promise. But in Barnes *v.* Hedley certainly Hedley never was for a moment legally bound to pay a farthing of that money for which he was sued; for it appears to have been advanced upon a previously existing usurious contract; and whatever was advanced upon such a contract, certainly could not be recovered at any one moment. The borrower, availing himself of the law so far as he honestly might, and no further, reducing it to mere principal and interest, does that which every honest man ought to do in like circumstances, promises to pay it, and that promise was held binding As to the cases of Lloyd *v.* Lee and Barber *v.* Fox, they have sufficiently been answered by my Lord and my brother Chambre; that if a man will state on his declaration a consideration which is no consideration, and shows no other consideration on his declaration, although another good consideration may exist, when that which he does show fails, he cannot succeed upon the proof of the other which he has not alleged. Now in the first of those cases there was clearly no forbearance, because

forbearance must be a deferring to prosecute a legal right; but no legal right to recover previously existed. Whatever other consideration might exist for the promise, it was not stated in the declaration; it is, therefore, clear that this rule must be discharged, upon the ground that wherever there is an antecedent moral obligation, and a subsequent promise given to perform it, it is of sufficient validity for the plaintiff to be able to enforce it. *Rule discharged.*[1]

BINNINGTON *v.* WALLIS.

IN THE KING'S BENCH, JUNE 29, 1821.

[*Reported in* 4 *Barnewall & Alderson*, 650.]

DECLARATION stated that, before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress, and an immoral connection and intercourse had existed between them for a long space of time, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of January, 1816, at, &c., the plaintiff wholly ceased to cohabit with the said defendant as his mistress, and to have any immoral intercourse with him; and thereupon it was determined and agreed between them that no immoral intercourse or connection should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff the quarterly sum of 10*l.*, while she should be and continue of good and virtuous life, conversation, and demeanor; and thereupon, in consideration of the premises, and that the plaintiff at the request of the defendant would resign and give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined; and

[1] 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, *acc.*; Dixie *v.* Worthy, 11 U. C. Q. B. 328; 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 S. W. Rep. 650 (Ky.); Porterfield *v.* Butler, 47 Miss. 165; Musick *v.* Dodson, 76 Mo. 624; Bragg *v.* Israel, 86 Mo. App. 338; Kent *v.* Rand, 64 N. H. 45; 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, *contra*. See also Parker *v.* Cowan, 1 Heisk. 518.

that she had always, from the time of the cessation of the immoral connection, lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanor. It then averred that the quarterly sum was reasonably worth 400*l.*; and then alleged as a breach non-payment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration there was a general demurrer.

Parke, in support of the demurrer.

Holt, contra.

Per Curiam. The declaration is insufficient. It is not averred that the defendant was the seducer, and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited [1] are distinguishable from this, because they are all cases of deeds; and it is a very different question whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant. *Judgment for defendant.*[2]

LITTLEFIELD, *Executrix of* John Littlefield *v.* ELIZABETH SHEE.

In the King's Bench, November 4, 1831.

[*Reported in* 2 *Barnewall & Adolphus*, 811.]

Assumpsit for goods sold and delivered. The fourth count stated that John Littlefield in his lifetime, at the special instance and request of the defendant, had supplied and delivered to her divers goods and chattels for the sum of 16*l.*; and thereupon, in consideration of the premises, and of the said sum of money being due and unpaid, the defendant, after the death of the said John Littlefield, undertook and promised the plaintiff as executrix of J. L. to pay her the said sum of money as soon as it was in her (the defendant's) power so to do. And although afterwards, to wit, on, &c., at, &c., it was in her power to pay the said sum, yet she did not do so. Plea: the general issue. At the trial before Gaselee, J., at the last Assizes for Sussex, it appeared that the action was brought to recover 15*l.* for butcher's meat supplied by the testator to the defendant, for her own use, between September, 1825,

[1] Annandale *v.* Harris, 2 Peere W. 433; Turner *v.* Vaughan, 2 Wils. 339. See also Nye *v.* Moseley, 6 B. & C. 133; Massey *v.* Wallace, 32 S. C. 149.

[2] In Beaumont *v.* Reeve, 8 Q. B. 483, it was held that even though the defendant was the seducer, a subsequent promise was not binding. Wallace *v.* Rappleye, 103 Ill. 229, 250, *acc.* See also Wiggins *v.* Keizer, 6 Ind. 252. Shenk *v.* Mingle, 13 Serg. & R. 29, *contra*. See also Jennings *v.* Brown, 9 M. & W. 496; Wyant *v.* Lesher, 23 Pa. 338.

and March, 1826. During that time the defendant was a married woman, but her husband was abroad. After his death she promised to pay the debt when it should be in her power, and her ability to pay was proved at the trial. The learned judge held that, the defendant having been a *feme covert* at the time when the goods were supplied, her husband was originally liable, and consequently there was no consideration for the promise declared upon. The plaintiff was therefore nonsuited. *Hutchinson*, on a former day in this Term, moved to set aside the nonsuit, and to enter a verdict for the plaintiff on the fourth count; on the ground that, the goods having been supplied to the defendant while she was living separate from her husband, she was under a moral obligation to pay for them, and such obligation was a sufficient consideration for a subsequent promise. It was not necessary that there should have been an antecedent legal obligation. Barnes *v.* Hedley, Lee *v.* Muggeridge. *Cur. adv. vult.*

Lord Tenterden, C. J., now delivered the judgment of the Court. The fourth count of the declaration states that the testator had at the request of the defendant supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, the defendant promised. Now, that is in substance an allegation that those sums were due from her, and the plaintiff failed in proof of that allegation, because it appeared that the goods were supplied to her whilst her husband was living, so that the price constituted a debt due from him. We are therefore of opinion that the declaration was not supported by the proof, and that the nonsuit was right. In Lee *v.* Muggeridge all the circumstances which showed that the money was in conscience due from the defendant were correctly set forth in the declaration. It there appeared upon the record that the money was lent to her, though paid to her son-in-law, while she was a married woman; and that after her husband's death, she, knowing all the circumstances, promised that her executor should pay the sum due on the bond. I must also observe that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. *Rule refused.*[1]

[1] Meyer *v.* Haworth, 8 A. & E. 467, presented similar facts except that the defendant was living in open adultery (which exempted her husband from liability for her necessary expenses) and the plaintiff was ignorant when he furnished the goods of both the defendant's marriage and her adultery. The court held the plaintiff could not recover.

EASTWOOD *v.* KENYON.

In the Queen's Bench, January 16, 1840.

[*Reported in* 11 *Adolphus & Ellis*, 438.]

Assumpsit. The declaration stated that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned; that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child, and heiress at law, surviving; that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased; that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff executor as aforesaid "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon, and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof; that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own moneys, and did advance, a large sum, to wit, 140*l.* for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and as security made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield, as

her agent, the control and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of 140*l.* to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the control and management of the property to the said agent on behalf of the said Sarah Sutcliffe; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe and for her benefit gratuitously, and without any fee, benefit, or reward whatsoever; and the said services and expenditures were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said 140*l.* That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises; and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, &c., for moneys so expended and borrowed by him as aforesaid; and it also then appeared that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon, in consideration of the premises, defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed, and A. Blackburn, the holder thereof, was willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not nor would, then or at any other time, pay or discharge the amount, &c., but wholly refused, &c.

Plea: *non assumpsit.*

On the trial before Patteson, J., at the York Spring Assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another, within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and ought to have been in writing; on the other hand, it was contended that such defence, if available at all, was not admissible under the plea of *non assumpsit.*[1] The learned judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following Term, obtained a rule *nisi* according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In Trinity Vacation, 1839,

Alexander and *W. H. Watson* shewed cause. . . . It has been distinctly held that a moral obligation will support an express promise. There must be something done by the plaintiff at the defendant's request, or an act done for the defendant's benefit must be ratified by

[1] The arguments and decision upon these points are omitted.

an express promise to pay: in either case an action will lie. [COLERIDGE, J. How are we to know the difference between an express promise and an implied promise on the pleadings?] After verdict an express promise must be presumed. [COLERIDGE, J. The same question may arise on demurrer.] In Lee *v.* Muggeridge executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. The same doctrine was upheld in Seago *v.* Deane,[1] Atkins *v.* Hill, and in several other cases cited in the note to Wennall *v.* Adney.[2] A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant while she was under age, and where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

Cresswell, contra. . . . What is it that constitutes the moral obligation here? Not the expenditure on the estate, for no duty was cast on the plaintiff to lay out any thing on it, nor had he any right to interfere with the management; and if he had, the defendant had at that time no interest in it at all. If the honesty of the outlay causes the moral obligation, then it is indifferent whether it turned out profitable or not to the defendant or his wife. It would support a promise, though the property had been damnified by it. If the benefit constitutes the consideration, then whenever a party benefits another against his will, a subsequent promise will be a ground of action. If it had appeared that the wife was liable at the time of her marriage, then the consequent liability of the defendant might have supported his promise; but no liability of the wife is stated, nor is it said that she promised in consideration of the premises. As to the agreement of the plaintiff to give up the control and management of the property, he had no right to either, and therefore nothing to give up; and if he had, it is not alleged to have been the consideration of the wife's promise. The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy, bankruptcy, and the Statute of Limitations; and these were the cases referred to by Lord Mansfield when he laid down the above doctrine. As a general rule, it cannot be supported. Littlefield *v.* Shee. The law is correctly laid down and the cases explained in the note to Wennall *v.* Adney.[3]

In this Term (January 16th) the judgment of the Court was delivered by

[1] 4 Bing. 459. [2] 3 B. & P. 247.

[3] 3 B. & P. 247. See also the argument of the Attorney-General in Haigh *v.* Brooks, 10 A. & E. 315, 316.

Lord Denman, C. J. . . . The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated in effect that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and after she came of age assented and promised to pay the note, and did pay a year's interest; that, after the marriage, the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant, in right of his wife, had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of Wennall *v.* Adney,[1] and the conclusion there

[1] 3 B. & P. 249. [The note referred to, which was first published in 1804, is as follows: —

"An idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord Mansfield and Mr. Justice Buller, which, if construed with the qualifications fairly belonging to them, do not warrant the conclusion which appears to have been rather hastily drawn from thence. In Atkins *v.* Hill, Cowp. 288, which was assumpsit against an executor on a promise by him to pay a legacy in consideration of assets, Lord Mansfield said: 'It is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise he could not be compelled to pay.' And in Hawkes *v.* Saunders, Cowp. 290, which was a similar case with Atkins *v.* Hill, Lord Mansfield said that the rule laid down at the bar 'that to make a consideration to support an assumpsit there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made,' was too narrow, and observed 'that a legal or equitable duty is a sufficient consideration for an actual promise; that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.' His Lordship then instanced the several cases of a promise to pay a debt barred by the Statute of Limitations, a promise by a bankrupt after his certificate to pay an antecedent debt, and a promise by a person of full age to pay a debt contracted during his infancy. The opinion of Mr. Justice Buller in the last case was to the same effect, and the same law was again laid down by Lord Mansfield in Trueman *v.* Fenton, Cowp. 544. Of the two former cases it may be observed that the particular point

arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been

decided in them has been overruled by the subsequent case of Deeks *v.* Strutt, 5 T. R. 690. And it may further be observed, that however general the expressions used by Lord Mansfield may at first sight appear, yet the instances adduced by him as illustrative of the rule of law do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Lord Mansfield will an express promise have any operation, and there it only becomes necessary because, though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not, as in ordinary cases, imply an assumpsit against him. The same observation is applicable to Trueman *v.* Fenton, that being an action against a bankrupt on a promise made by him subsequent to his certificate respecting a debt due before the certificate. There is however, rather a loose note of a case of Scott *v.* Nelson, Westminster Sittings, 4 Geo. 3, *cor.* Ld. Mansfield (see Esp. N. P. 945), in which his Lordship is said to have held a father bound by his promise to pay for the previous maintenance of a bastard child. And there is also an anonymous case, 2 Show. 184, where Lord C. J. Pemberton ruled that 'for meat and drink for a bastard child an *indebitatus assumpsit* will lie.' Although the latter case does not expressly say that there was a previous request by the defendant, yet that seems to have been the fact, for Lord Hale's opinion is cited to show 'that where there is common charity and a charge,' the action will lie; which seems to imply that if a charge be imposed upon one person by the charitable conduct of another, the latter shall pay; and though he adds, 'and undoubtedly a special promise would reach it,' that expression does not necessarily import a promise subsequent to the charge being sustained, but may be supposed to mean that, where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable, even though he should not be so where the charge was only induced by his conduct without such engagement. The case of Watson *v.* Turner, Bull. N. P. 147, has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord Mansfield, because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed that 'this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor;' which obligation, being a legal obligation, distinguishes the case. Indeed, in a late case of Atkins *v.* Banwell, 2 East, 505, that distinction does not seem to have been sufficiently adverted to; for Watson *v.* Turner was cited to show that a mere moral obligation is sufficient to raise an implied assumpsit, and though the Court denied that proposition, yet Lord Ellenborough observed that the promise given in the case of Watson *v.* Turner made all the difference between the two cases, without alluding to another distinction which might have been taken; viz., that though the parish officers were bound by law in Watson *v.* Turner, the defendants in the principal case were not so bound, because the pauper had been relieved by the plaintiffs as overseers of another parish, though belonging to the parish of which the defendants were overseers. In the older cases no mention is made of moral obligation; but it seems to have been much doubted whether mere natural affection was a sufficient consideration to support an assumpsit, though coupled with a subsequent express promise. Indeed Lord Mansfield appears to have used the term 'moral obligation,' not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because, if it were not for the exemption, they would be enforced

enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original

at law through the medium of an implied promise. In several of the cases it is laid down, that to support an assumpsit the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the defendant. *Per* Coke and all the Justices, Hatch and Capel's Case, Godb. 202; *per* Reeve, J., Mar. 203; *per* Coke, C. J., and Dodderidge, J., 3 Bulst. 162; and *per* Coke, C. J., 1 Roll. Rep. 61, pl. 4. And in Lampleigh *v.* Brathwait, Hob. 105, it was resolved 'that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit.' And in Bret *v.* J. S. and his Wife, Cro. Eliz. 756, where the first husband of the wife sent his son to table with the plaintiff for three years at 8*l.* per annum, and died within the year, and the wife during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the plaintiff 6*l.* 13*s.* 4*d.* for the time past, and 8*l.* for every year after, and upon which promise the plaintiff brought his action; the court held that natural affection was not of itself a sufficient ground for an assumpsit; for although it was sufficient to raise an use, yet it was not sufficient to ground an action without an express *quid pro quo;* but that as the promise was not only in consideration of affection, but that the son should afterwards continue at the plaintiff's table, it was sufficient to support a promise. In Harford *v.* Gardiner, 2 Leo. 30, it was said by the Court, that love and friendship are not considerations to found actions upon; and in Best *v.* Jolly, 1 Sid. 38, where a father was held liable for his own and his son's debt, because he had promised to pay them if the plaintiff would forbear to sue for them, yet the Court said 'he was not liable for his son's debt,' but having induced forbearance, which is a damage to the plaintiff, he was held liable, 'though as to the son's debt it was no benefit to the defendant.' So in Besfich *v.* Coggil, Palm. 559, it was debated whether the defendant was liable upon an express promise to repay the plaintiff money laid out by him in Spain for the defendant's son, and the charges of his funeral; Hyde, C. J., and Whitelocke being of opinion that the action could not be maintained; Jones and Dodderidge *e contra* that it could. The former of which, it should seem, was the better opinion; for in Butcher *v.* Andrews, Carth. 446, on assumpsit for money lent by the plaintiff to the defendant's son at his instance and request, and verdict for the plaintiff, the judgment was arrested, Holt, C. J., saying, 'If it had been an *indebitatus* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not the son's; but when the money is lent to the son, it is his proper debt, and not the father's.' But in Church *v.* Church, B. R. 1656, cit. Sir T. Ray. 260, where defendant promised to repay the plaintiff the charges of his son's funeral, the latter was held entitled to recover, though no request was laid in the declaration. Of which case it may be observed, that possibly after verdict the Court presumed a request proved; for in Hayes *v.* Warren, 2 Str. 933, though the Court would not presume a request after judgment by default, yet they said they would have presumed it after verdict. However, in Style *v.* Smith, cited by Popham, J., 2 Leon. 111, it was determined that if a physician in the absence of a father give his son medicine, and the father in consideration promise to pay him, an action will lie for the money. But the case of Style *v.* Smith, if closely examined, will not perhaps be found so discordant with the principle laid down in Bret *v.* J. S. and his Wife, as may be supposed. From the expression 'in the absence of a father,' used in that case, it may be inferred that the son lived with the father, and that the medicine was administered to the son in the house of the father while the latter was absent, from whence it results that the physician's debt, though not founded on any immediate benefit to the father, or on his request, was most probably founded on his credit; which credit, if fairly inferred from circumstances by the

right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows: Lloyd *v.* Lee; debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. Barnes *v.* Hedley decided that a promise to repay a sum of money with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. Lee *v.* Muggeridge upheld an assumpsit by a widow that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this court in Cooper *v.* Martin,[1] where a stepfather was permitted to recover from

physician, might operate to charge the father in the same way as his request would operate, the physician having sustained a loss in consequence of that credit. Indeed, if any of the cases could be sustained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his son, because he has subsequently promised to pay it, by the same rule the son should be liable for the debt of the father upon a similar promise; for the same moral obligation exists in both cases. Yet in Barber *v.* Fox, 2 Saund. 136, the Court arrested the judgment in an action of assumpsit on a promise made by the defendant to avoid being sued on a bond of his father, it not being alleged that the defendant's father had bound himself and his heirs; for they refused to intend even after verdict that the bond was in the usual form, and consequently held the promise of the defendant *nudum pactum*, he not appearing to have been liable to be sued upon the bond. And this last case was confirmed in Hunt *v.* Swain, 1 Lev. 165, Sir T. Ray. 127, 1 Sid. 248. See note 2 to Barber *v.* Fox, by Mr. Serjt. Williams. Indeed it is clear from Lloyd *v.* Lee, 1 Str. 94, and Cockshott *v.* Bennett, 2 T. R. 763, that if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract Yet according to the commonly received notion respecting moral obligations and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. In addition to the cases already collected upon this subject, it may be observed that in Mitchinson *v.* Hewson, 7 T. R. 348, the Court of King's Bench, upon the authority of Drue *v.* Thorne, All. 72, held a husband not liable to be sued alone for the debt of his wife contracted before marriage, though the objection was only taken in arrest of judgment, and consequently a promise by him to pay the debt appeared upon the record. From whence this principle may be extracted: that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an assumpsit to pay in another right." — ED.]

[1] 4 East, 76.

the son of his wife, after he had attained his full age, upon a declaration for necessaries furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these was there any allusion made to the learned note in 3 Bosanquet and Puller, above referred to, and which has been very generally thought to contain a correct statement of the law. The case of Barnes *v.* Hedley is fully consistent with the doctrine in that note laid down. Cooper *v.* Martin, also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough, in giving his judgment, says: "The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury." And undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessaries furnished at his request, in regard to which the law raises an implied promise. The case of Lee *v.* Muggeridge must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to Littlefield *v.* Shee, tried by Gaselee, J., at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promise declared upon." After time taken for deliberation, this Court refused even a rule to show cause why the nonsuit should not be set aside. Lee *v.* Muggeridge was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record; but in Littlefield *v.* Shee the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of Lee *v.* Muggeridge, where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in Lee *v.* Muggeridge spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately

made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to Wennall *v.* Adney shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in Littlefield *v.* Shee. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before; and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of Mitchinson *v.* Hewson [1] shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of *non assumpsit*.

In holding this declaration bad, because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh *v.* Brathwait is selected by Mr. Smith [2] as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C. J., lays it down that a "mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if

[1] 7 T. R. 348. [2] 1 Smith's Leading Cases, 67.

that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by Hunt *v.* Bate, there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in Townsend *v.* Hunt, and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

Rule to arrest judgment, absolute.[1]

DANIEL MILLS *v.* SETH WYMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1825.

[*Reported in* 3 *Pickering*, 207.]

THIS was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this State. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being

[1] 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. See 53 L. R. A. 353 *n.* In a few jurisdictions, however, the doctrine that moral obligation may support a promise is still in force. Ga. Code, § 2741; McElven *v.* Sloan, 56 Ga. 208, 209; Gray *v.* Hamil, 82 Ga. 375; Brown *v.* Latham, 92 Ga. 280; 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 Appeal, 201 Pa. 305; State *v.* Butler, 11 Lea, 418. See also Ferguson *v.* Harris, 39 S. C. 323.

suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant; and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and *Allen*, in support of the exceptions. The moral obligation of a parent to support his child is a sufficient consideration for an express promise. Andover, &c. Turnpike Corp. *v.* Gould, 6 Mass. 40; Andover *v.* Salem, 3 Mass. 438; Davenport *v.* Mason, 15 Mass. 94; 1 Bl. Comm. 446; Reeve's Dom. Rel. 283. The arbitrary rule of law, fixing the age of twenty-one years for the period of emancipation, does not interfere with this moral obligation, in case a child of full age shall be unable to support himself. Our Statute of 1793, c. 59, requiring the kindred of a poor person to support him, proceeds upon the ground of a moral obligation.

But if there was no moral obligation on the part of the defendant, it is sufficient that his promise was in writing, and was made deliberately, with a knowledge of all the circumstances. A man has a right to give away his property. [PARKER, C. J. There is a distinction between giving and promising.] The case of Bowers *v.* Hurd, 10 Mass. 427, does not take that distinction. [PARKER, C. J. That case has been doubted.] Neither does the case of Packard *v.* Richardson, 17 Mass. 122; and in this last case (p. 130) the want of consideration is treated as a technical objection.

Brigham, for the defendant, furnished in vacation a written argument, in which he cited Fowler *v.* Shearer, 7 Mass. 22; Rann *v.* Hughes, 7 T. R. 350, note; Jones *v.* Ashburnham, 4 East, 463; Pearson *v.* Pearson, 7 Johns. 26; Schoonmaker *v.* Roosa, 17 Johns. 301; the note to Wennall *v.* Adney, 3 Bos. & Pul. 249; Fink *v.* Cox, 18 Johns. 145; Barnes *v.* Hedley, 2 Taunt. 184; Lee *v.* Muggeridge, 5 Taunt. 36. He said the case of Bowers *v.* Hurd was upon a promissory note, where the receipt of value is acknowledged; which is a privileged contract. Livingston *v.* Hastie, 2 Caines, 246; Bishop *v.* Young, 2 Bos. & Pul. 79, 80; Pillans *v.* Mierop, 3 Burr. 1670; 1 Wms. Saund. 211, note 2.

The opinion of the Court was read, as drawn up by

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound *in foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application,

and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promised in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*, and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the

education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this Commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.[1]

[1] Loomis *v.* Newhall, 15 Pick. 159; Dodge *v.* Adams, 19 Pick. 429; Kelley *v.* Davis, 49 N. H. 187; Freeman *v.* Robinson, 38 N. J. L. 383; Nine *v.* Starr, 8 Oreg. 49; Valentine *v.* Bell, 66 Vt. 280, *acc.* Similarly, the promise of a child to pay for past support of an indigent parent has been held invalid. Cook *v.* Bradley, 7 Conn. 57; Parker *v.* Carter, 4 Munf. 273; Davis *v.* Anderson, 99 Va. 625. See also Ellicott *v.* Turner, 4 M. 476; Hook *v.* Pratt, 78 N. Y. 371.

SAMUEL B. RINDGE *v.* WILLIAM H. KIMBALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 6, 1878.

[*Reported in* 124 *Massachusetts*, 209.]

CONTRACT upon a promissory note for $500, payable to the order of the defendant, and indorsed by him to the plaintiff.

At the trial in the Superior Court, before PITMAN, J., without a jury, it appeared that no demand had been made on the note or notice of non-payment given to the defendant; but it was admitted that the defendant wrote on the back of the note the words, "Waive demand and notice." The evidence was conflicting upon the question whether these words were written before or after the note was due.

The defendant testified that he wrote these words upon the note intelligently and intentionally, with a full knowledge of all the material facts. The judge ruled that such a waiver of demand and notice was as effectual after as before the maturity of the note, and ordered judgment for the plaintiff. The defendant alleged exceptions.

R. Lund, for the defendant.

J. Cutler, for the plaintiff, was not called upon.

BY THE COURT. This point has been repeatedly determined by recent decisions of this court, and should not have been brought up again. Matthews *v.* Allen, 16 Gray, 594; Harrison *v.* Bailey, 99 Mass. 620; Third National Bank *v.* Ashworth, 105 Mass. 503.

Exceptions overruled.[1]

BENJAMIN G. DUSENBURY *v.* MARK HOYT.

NEW YORK COURT OF APPEALS, SEPTEMBER 29, OCTOBER 7, 1873.

[*Reported in* 53 *New York*, 521.]

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant entered upon a verdict, and affirming order denying motion for a new trial. (Reported below, 45 How. Pr. 147.)

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove a subsequent promise of the defendant to pay

[1] The numerous decisions in accord are collected in Ames's Cases on Bills and Notes, vol. ii. p. 504 *n*. Decisions in which a surety, who had been discharged by lack of notice of acceptance or dishonor, was held bound by a promise to pay, are collected in Ames's Cases on Suretyship, 227, *n*.

the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The Court sustained the objection, and directed a verdict for defendant, which was rendered accordingly.

D. M. Porter, for the appellant.

Cephas Brainerd, for the respondent.

ANDREWS, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in Shippey *v.* Henderson (14 J. R. 178), that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The Court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defence of infancy or the Statute of Limitations[1] was relied upon. The case of Shippey *v.* Henderson was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. McNair *v.* Gilbert, 3 Wend. 344; Wait *v.* Morris, 6 id. 394; Fitzgerald *v.* Alexander, 19 id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defence which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by MARCY, J., in Depuy *v.* Swart (3 Wend. 139), and is probably the one best supported by authority. But, after as before the decision in that case, the Court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable

[1] See Encyc. of Pleading and Practice, vol. 13, p. 247.

where a new promise is relied upon to avoid the defence of infancy or the Statute of Limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. (Esselstyn *v.* Weeks, 12 N. Y. 635.)

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except FOLGER, J., not voting. *Judgment reversed.*[1]

DAVID ILSLEY *v.* JOHN JEWETT AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1841.

[*Reported in* 3 *Metcalf*, 439.]

THIS was an action of debt on a bond for the liberty of the prison limits, and was submitted to the Court on the following facts agreed by the parties: —

In 1814, the plaintiff paid money as surety for John Jewett, one of the defendants, and in 1840 brought a suit against him to recover back the money so paid. Said Jewett, among other defences, relied on the Statute of Limitations. The plaintiff, to meet this part of the defence, proved a part payment by the defendant, in 1839, and by reason thereof recovered judgment against him at November Term, 1840, as stated and shown in the report of the case of Ilsley *v.* Jewett, 2 Met. 168, which is to be considered as part of this case. Said judgment was for the sum of $349.89 damages, and $44.95 costs of suit, and the plaintiff took out execution thereon, and caused the defendant to be committed, on said execution, to the jail in Ipswich. Said defendant, and his co-defendants in this suit, as his sureties, thereupon gave bond for the liberty of the prison limits, conditioned (as is required by the Rev. Stats., c. 97, § 63), that he would not go without the exterior limits of the prison until he should be lawfully discharged, &c. But after the giving of said bond, and before the commencement of this suit, and also before he was discharged, he went, several times, without the boundaries of the town of Ipswich.

Defendants to be defaulted, if such going without the boundaries of the town of Ipswich was a breach of the condition of said bond; if not, the plaintiff to become nonsuit.

O. P. Lord, for the plaintiff. By the Rev. Stats., c. 14, § 14, a debtor, committed on execution issuing upon a judgment recovered on a contract made before the 2d of April, 1834, is entitled only to the

[1] See Lowell on Bankruptcy, § 248.

limits of the jail yard as established by Stat. 1834, c. 201; viz., the boundaries of the city or town in which the jail to which he is committed is situated. The single question presented by the facts agreed is, therefore, this: Was the judgment recovered by the plaintiff against John Jewett, in 1840, recovered on a contract made in 1814 or in 1839? on the old contract, which arose upon the plaintiff's paying money for him, as his surety, or on the new promise made by him, in 1839, by his making part payment?

The Statute of Limitations bars only the remedy on a contract, and does not discharge the contract itself. Unless a new promise or acknowledgment is made, the remedy is barred from considerations of public policy, laying out of the question any consideration whether the debt be or be not paid. *Per* Sedgwick, J., 7 Mass. 517; S. P. 13 Mass. 203. But when a new promise or acknowledgment is made, "the contract is not within the intent of the statute." Baxter *v.* Penniman, 8 Mass. 134; Fiske *v.* Needham, 11 Mass. 453. See also Newlin *v.* Duncan, 1 Harring. 204.

A judgment on a demand which is taken out of the operation of the Statute of Limitations by a new promise is recovered on the original contract, and not on the new promise. This appears from various considerations. Thus: In Cogswell *v.* Dolliver, 2 Mass. 223, it was said by Sedgwick, J., that if any articles charged in an account were sold and delivered within six years next before action brought, "they will draw after them the articles beyond six years, and exempt them from the operation of the statute."

An acknowledgment made after action brought will support the action on the original contract. Yea *v.* Fouraker, 2 Bur. 1099. So an acknowledgment by an executor, administrator, or guardian, will bind the estate of the deceased or the ward. Brown *v.* Anderson, 13 Mass. 203; Emerson *v.* Thompson, 16 Mass. 429; Manson *v.* Felton, 16 Pick. 206. So an acknowledgment made to a stranger will prevent the operation of the statute. Richardson *v.* Fen, Lofft, 86; Mountstephen *v.* Brooke, 3 Barn. & Ald. 141; Peters *v.* Brown, 4 Esp. 46; Harvey *v.* Tobey, 15 Pick. 99. And a parol acknowledgment of a contract, required by the Statute of Frauds to be in writing, has the same effect. Gibbons *v.* M'Casland, 1 Barn. & Ald. 690. So an acknowledgment by one joint debtor will bind the others. Whitcomb *v.* Whiting, 2 Doug. 652; Perham *v.* Raynal, 2 Bing. 306; Johnson *v.* Beardslee, 15 Johns. 3; White *v.* Hale, 3 Pick. 291. Even by one partner after a dissolution of the partnership. Wood *v.* Braddick, 1 Taunt. 104; Simpson *v.* Geddes, 2 Bay, 533.

In addition to all these proofs that the original contract has always been regarded as the cause of action, is the universal practice of declaring on the original contract, and the established doctrine that proof of a new promise supports such declaration. Leaper *v.* Tatton, 16 East, 423; Upton *v.* Else, 12 Moore, 304.

Perkins (*Ward* was with him), for the defendants. John Jewett, by

giving the plaintiff a negotiable note in part payment (2 Met. 169), entered into a new contract, and gave the plaintiff a new remedy. "The reason," say Lord Ellenborough and Parke, J., "why a part payment takes a case out of the statute is, that it is evidence of a fresh promise." 1 Barn. & Ald. 93; 3 Barn. & Adolph. 511; S. P. Sigourney *v.* Drury, 14 Pick. 390, 391; Clark *v.* Hooper, 10 Bing. 481. A new promise subjects a defendant to the remedy applicable to a new contract. In Presbrey *v.* Williams, 15 Mass. 194, where part payment had been made on a note, Jackson, J., said, the plaintiff "might have brought his action" on the day of such payment, "as upon the new promise then made." In Little *v.* Blunt, 9 Pick. 494, Wilde, J., says: "the new promise actually gives the remedy, and is substantially the cause of action." And Richardson, C. J., in Exeter Bank *v.* Sullivan, 6 N. H. 136, says, "the new promise is not deemed to be a continuance of the original promise, but a new contract supported by the original consideration." S. P. 3 Bing. 643, *per* Gaselee, J., Pittam *v.* Foster, 1 Barn. & Cres. 250; Tanner *v.* Smart, 6 Barn. & Cres. 606; Jones *v.* Moore, 5 Binn. 577; 4 Phil. Ev. (4th Amer. ed.) 138; Bell *v.* Morrison, 1 Pet. 371. Acknowledgment of a promise by a party, and that he has not performed it, "creates a debt," says Bayley, J., 16 East, 423. These authorities show that a new promise does not operate by way of reviving the old promise or waiving the statute bar, but by creating a fresh contract. There is, at the present day, no difference between promises to pay debts barred by the Statute of Limitations and debts discharged under a bankrupt or insolvent act, or debts contracted during infancy. An express promise is necessary to remove either of these bars. Robarts *v.* Robarts, 3 Car. & P. 296; Oakes *v.* Mitchell, 3 Shepley, 360; Moore *v.* Bank of Columbia, 6 Pet. 86; Sands *v.* Gelston, 15 Johns. 519. As it regards the Statute of Limitations, there must be a cause of action within six years; and that cause accrues upon the making of a new express promise. The old promise — as in case of a bankrupt or infant — is merely a basis or consideration for the new one. Lonsdale *v.* Brown, 4 Wash. C. C. 150; Searight *v.* Craighead, 1 Pennsyl. 138; Mills *v.* Wyman, 3 Pick. 209, 210. The new promise may be declared on (1 Selw. N. Prius, 4th Amer. ed., 49), which shows that it is a new cause of action. It is, indeed, the common practice, as Lord Ellenborough says, 16 East, 423, to declare on the original contract. "Probably," says Best, C. J., 12 Moore, 304, "the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way." In 3 Bing. 332, he expressed a still stronger opinion. But this practice is anomalous, and is not allowed in suits by executors or administrators. In England, and perhaps in all the States of the Union except Massachusetts and New Hampshire, if an executor or administrator sues for a debt of the deceased, and relies on a new promise to himself to take it out of the Statute of Limitations, he must declare specially on the new promise, or the evidence of such promise will not support the declara-

tion. Stephen Pl. 405, 406; Gould Pl. 453, 454; 2 Stark. Ev. 552, and American cases cited in the notes; 1 Chitty Pl. (6th Amer. ed.) 294, 392. See also Pittam *v.* Foster, 1 Barn. & Cres. 248; Lawes Pl. in Assump. 730–732. In Baxter *v.* Penniman, 8 Mass. 133, and in Buswell *v.* Roby, 3 N. H. 467, it was held, however, that an administrator need not declare on the new promise; and thus the anomaly has been extended further, in this Commonwealth and in New Hampshire, than is known to have been done elsewhere. But whether the one or the other form of declaring is adopted, yet, as said by Wilde, J., "the new promise gives the remedy, and is substantially the cause of action; for without it there was no cause of action." 9 Pick. 492, 494. The statute bar is removed by a new promise, either because the presumption of payment is thereby removed; or because the defendant thereby waives the benefit of the statute; or because a new contract is thereby made, which is supported by the old consideration. The cases that have been cited show that the latter is the only reason which courts now recognize; and therefore, as the new contract gives the remedy, and is the contract on which in effect the judgment is recovered, the defendant, if committed in execution on the judgment, is entitled to the enlarged jail limits; viz., the whole county. Rev. Stats., c. 14, § 13.

SHAW, C. J. In debt on a prison bond given July 14, 1841, the question is, whether the bond was broken by the escape of the prisoner; and this again depends upon the question, what were the prison limits of Ipswich jail, for this prisoner, in 1841? This depends upon Rev. Stats., c. 14, §§ 13, 14, prescribing different limits in different cases. "On executions issuing upon judgments, recovered upon contracts made before the 2d of April, 1834, the limits of each jail shall remain as the same were established previously to that day." § 14. It is conceded that, prior to 1834, the jail limits included a space much less than the bounds of the town of Ipswich. If, then, the contract on which the plaintiff recovered his former judgment, in pursuance of which the defendant was committed, was made prior to the 2d of April, 1834, so that the limits for him were those which existed in 1834, then the defendant made an escape, and the bond was forfeited.

It appears that Adams and Ilsley were sureties for John Jewett on a promissory note; that Adams paid the whole in the first instance; that afterwards Adams demanded of the plaintiff one-half, by way of contribution, as he had a right to do; and the plaintiff paid the same, as he was bound to do. On that payment, the defendant, John Jewett, as principal promisor, became indebted to the plaintiff, and liable to pay him the same amount on demand. This liability arose from the implied promise of the principal, made at the time of the plaintiff's becoming his surety, that, in case the plaintiff should be called on to pay any thing in consequence of such suretyship, the principal would repay the same on demand. [See Appleton *v.* Bascom, 3 Met. 171.]

Afterwards, in 1839, the transaction took place, as stated in 2 Met. 168, which was held by the Court sufficient evidence of part payment

to take the case out of the Statute of Limitations, and the plaintiff had judgment; and the question is, whether this is a judgment recovered on a contract made before April, 1834. The case has been very well argued on both sides, and all the authorities, we believe, fully cited. The Court are of opinion that the judgment must be considered as rendered on the old contract; that a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the Statute of Limitations, so as to enable the creditor to recover notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment. We are therefore of opinion that the facts show a breach of this bond, and that the plaintiff is entitled to recover. *Defendants defaulted.*[1]

LORIN WAY *v.* CHARLES SPERRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1850.

[*Reported in* 6 *Cushing*, 238.]

THIS was an action of assumpsit, commenced on the 12th of July, 1848, to recover the amount of three promissory notes, signed by the defendant, and indorsed by the several payees thereof to the plaintiff on the day of the commencement of the action. These notes were described in the plaintiff's bill of particulars, as follows: "One dated February 23, 1836, for $18, payable to Ebenezer Watson, or order, in one year, with interest; one dated March 2, 1838, for $7.36, payable to Ebenezer Watson and one Flanders, or order, on demand, with interest; and one dated March 14, 1839, for $18.30, payable to Ebenezer Watson, or order, on demand, with interest."

The defendant pleaded the general issue, and in defence relied on the Statute of Limitations, and a discharge in bankruptcy, dated January 9, 1843, which was duly proved, and by its terms embraced the note in question.

At the trial in the Court of Common Pleas, before *Mellen*, J., it was in evidence, that the defendant, in May, 1843, left Columbia, in the State of New Hampshire, where the notes were dated, and became an inhabitant of Lowell.

It was also testified by Watson, the payee of the notes, that the defendant, in the year 1845, being then at Claremont, in New Hampshire, said he would pay Watson the notes as soon as he possibly could; that he was not then in a situation to pay them, but that Watson need

[1] Cases involving the effect of new promises upon the Statute of Limitations are so numerous that reference must be made to the treatises on the subject.

not give himself any uneasiness, the notes should be paid as soon as possible; that in January, 1846, he again saw the defendant in Lowell, who said, that he was then engaged upon a job of stone-work, and should have the money in April, and that if Watson would come or send down then, he would pay one half of the notes; but the defendant declined taking up the notes and giving a new one for them.

There was also evidence that the defendant was of ability to pay the notes, but no evidence of any new consideration for his promises to pay them.

The defendant, upon this evidence, contended, that the first described note was barred by the Statute of Limitations; that no action could be maintained on the notes, or on the defendant's new promises, without showing a consideration for the latter; that the promise of the defendant to pay the notes, made subsequently to his discharge in bankruptcy, if available at all, could only support an action in favor of the promisee, and did not revive the negotiable quality of the notes, so as to entitle a subsequent indorsee to maintain an action, either upon the notes or upon the new promise.

But the presiding judge was of opinion, that the action could be maintained upon the evidence, and directed the jury accordingly, who returned a verdict for the plaintiff, whereupon the defendant excepted.

T. Wentworth, for the defendant.

J. G. Abbott, for the plaintiff.

The opinion of the Court was delivered at the October Term, 1851.

METCALF, J. The case of Bulger *v.* Roche, 11 Pick. 36, is a decisive answer to the defence set up by the defendant, under the Statute of Limitations, against the first note specified in the plaintiff's bill of particulars; and the only other point to be decided is, whether the defendant's discharge in bankruptcy is a defence to that and the two other notes in suit.

The plaintiff relies on a promise made to the payee of the notes, by the defendant, since his discharge. And it is well settled, that a distinct and unequivocal promise to pay a debt so discharged, or a promise to pay it on a condition which is afterwards fulfilled, is binding on the promisor, and may be enforced by action. Upon these exceptions, it must be taken that a binding promise by the defendant was proved at the trial. No new consideration was necessary to the validity of the promise; Chit. Con. (5th Amer. ed.) 190; Penn *v.* Bennett, 4 Campb. 205; and no statute requires it to be in writing.

But the defendant contends that if he is bound at all by his promise, he is bound only to the payee of the notes, to whom he made it, and that it did not revive or restore the negotiability of the notes. And his counsel cited Depuy *v.* Swart, 3 Wend. 135; Moore *v.* Viele, 4 Wend. 420, and Walbridge *v.* Harroon, 18 Verm. 448, where it was so decided. Since the argument, a similar decision of the court of Maine has been published. White *v.* Cushing, 17 Shepley, 267. The grounds of these decisions, as stated in the report of the first of them,

were, that "the new promise is the contract upon which the action must rest;" that "the new promise does not renew the old contract, and renovate the note given on that contract;" that "the existence of the note is destroyed by the discharge, and cannot be revived and restored to all its former properties by the maker's entering into a new contract, by which he becomes liable to pay what was due on the old contract;" and that "the defendant's liability, therefore, is on the new contract, and that the suit should be in the name of him with whom such contract is made."

We are not satisfied with these grounds of decision. For we take it to be well established that, in actions brought on promises made by infants, and ratified after they come of age; on promises which have been renewed after the Statute of Limitations has furnished a bar; and on unconditional promises by discharged insolvent debtors and bankrupts, to pay debts from which they have been discharged, the plaintiff may declare on the original promise; and that when infancy, the Statute of Limitations, or a discharge in insolvency or bankruptcy, is pleaded or given in evidence, as a defence, the new promise may be replied or given in evidence, in support of the promise declared on; that a replication, alleging such new promise, is not a departure, and that evidence thereof is not irrelevant. And we do not hold that a note, promise, or debt, is "destroyed" by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but it could not be a consideration for a new promise. Yet nothing is clearer, on authority, than that the old debt is a sufficient consideration for such promise. In all the cases above mentioned, the new promise operates as a waiver, by the promisor, of a defence with which the law has furnished him against an action on the old promise or demand. Maxim *v.* Morse, 8 Mass. 127; Foster *v.* Valentine, 1 Met. 522, 523.

We cannot perceive any legal difference, as to the point now in question, between the case of a debt that has been discharged by a process in bankruptcy, and a claim voidable on the ground of infancy, or barred by the Statute of Limitations. In the latter case, it has been decided that a new promise removes the statute bar, but does not create a new and substantive cause of action which is the basis of a judgment; and that the judgment must be considered as rendered on the old contract. Ilsley *v.* Jewett, 3 Met. 439. And where an infant gave a negotiable note, which he ratified by a new promise after he was of age, it was decided that he was liable on it to an indorsee to whom the payee negotiated it after the ratification. The Court said the ratification gave the contract "the same effect as if the promisor had been of legal capacity to make the note when he made it. This made it a good negotiable note from that time, according to its tenor; of course, when transferred to the plaintiff, he took it as a negotiable note, and may maintain an action on it." Reed *v.* Batchelder, 1 Met. 559. And the indorsement of a note, after a new promise to the payee has taken it out of the Statute of Limitations, enables the indorsee to

sue the maker. Little *v.* Blunt, 9 Pick. 488, and 16 Pick. 359. The same rule is applicable to the case at bar. A new promise made to the payee of a negotiable note is a promise to pay him or order, or bearer, according to its tenor. *Exceptions overruled.*[1]

STATE TRUST COMPANY *v.* JOHN A. SHELDON ET ALS.

VERMONT SUPREME COURT, OCTOBER TERM, 1895.

[*Reported in* 68 *Vermont*, 259.]

THOMPSON, J. As a part of the promises and undertaking in the declaration mentioned, and at the time of making the same, the defendants agreed in writing to waive the Statute of Limitations in respect to such promises and undertaking. Relying upon this agreement the plaintiff did not bring its action until more than six years from the time that it accrued. The question presented by the pleadings is whether the defendants are estopped by the agreement from pleading the Statute of Limitations in bar of plaintiff's action.

It is urged that the agreement to waive the statute is void because by private agreement it seeks to avoid a statute, and is against public policy.

The general rule is, that no contract or agreement can modify a law, but the exception is, that where no principle or public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute. Sedgw. Stat. and Const. Law (2d ed.), 86–87; Quick *v.* Corliss, 39 N. J. L. 11; Burton *v.* Stevens, 24 Vt. 131; Gay *v.* Hassom, 64 Vt. 495; Random *v.* Tobey, 11 How. (U. S. 493). When such waiver is made it is continuous, unless by its terms it is limited to a specified time. There was no such limitation in the waiver of the defendants. We, therefore, hold that they are estopped from the pleading the statute of limitations in bar of plaintiff's actions.

Judgment affirmed and cause remanded for assessment of damages.[2]

[1] Bird *v.* Adams, 7 Ga. 505; Soulden *v.* Van Rensselaer, 9 Wend. 293; Clark *v.* Atkinson, 2 E. D. Smith, 112, *acc.*; Thompson *v.* Gilreath, 3 Jones L. 493, *contra*.

[2] As to the time when a new promise must be made to be effectual, see 19 Am. & Eng. Encyc. of Law (2d ed.), 318.

ARMSTRONG *v.* LEVAN.

PENNSYLVANIA SUPREME COURT, MARCH 2, 1885.

[*Reported in* 109 *Pennsylvania*, 177.]

Mr. Justice PAXSON delivered the opinion of the court, October 5, 1885.

The defendant below was sued for breach of official duty as prothonotary in not properly entering a judgment, by means whereof its lien was postponed and the plaintiff suffered a loss.

The defendant pleaded the general issue and the Statute of Limitations. To meet the plea of the statute the plaintiff called a witness, who testified as follows: "After I discovered that there was no judgment in favor of Hannah Levan against Enoch Rohrbach, but there was one against Enoch Rothenberger, which I knew from the number to be meant as the one against Rohrbach, I went to see Mr. Armstrong in reference to the matter. I said to him that he had made this mistake, or if not he, his clerk, and that unless this matter was fixed up, I would be obliged to sue. He then made the remark that he would have to see his lawyer first, Mr. Reber. On the afternoon of the same day, I think it was, he came to my office, alone that time, and he said that I should see Mr. Reber; and I said to him again what I said in the morning in reference to suing. He said that I should not sue; that if Mrs. Levan suffered any loss by reason of this mistake, he would make it good to her; that she should not lose anything through his mistake. That was in the spring of 1879, I think during the first days of April."

The court below held that this evidence, if believed by the jury, was sufficient to bar the running of the statute; and that the six years would only commence to run from the date of such promise.

The plaintiff in error has given us an elaborate argument to show that a promise to pay after the statute has run will not revive a tort, and has cited numerous authorities in support of this proposition. We concede his law to be sound; his authorities fully sustain his point.[1] The difficulty in his way is they do not meet his case. It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus

[1] See Wood on Limitations (3d ed.), § 66. A new promise can only revive from the bar of the Statute of Limitations a right of action in assumpsit, *ibid.* Indeed, according to the English authorities only a right of action in general or *indebitatus* assumpsit. Darley & Bosanquet's Statutes of Limitations (2d ed.), 105. See Wetzell *v.* Bussard, 11 Wheat. 309, 316.

allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired. We think the learned judge below was right in holding that the six years would only commence to run from the date of the promise.

The defendant's fourth point called upon the court to instruct the jury that under the pleadings and the evidence in this case the verdict should be for the defendant. This the court declined to do. It was urged in support of this point that the record testimony established the fact that the plaintiff's judgment was properly entered in the judgment docket although erroneously indexed in the judgment index; and that the subsequent Singmaster judgment, therefore, acquired no prior lien, notwithstanding the finding and decision of the auditor.

This is to ask us to overrule the auditor and court below upon the question of distribution, arising in another and distinct proceeding. We find no trace in this record that any such question was made in the court below. The learned judge makes no reference to it, and no such specific point was put to the court. That question has been settled by a court of competent jurisdiction, and it shows that the plaintiff has lost a portion of her money by reason of the defendant's mistake. This is sufficient to entitle her to recover.

Judgment affirmed.

MERCUR, C. J., and GORDON, J., dissented.[1]

THOMAS C. GILLINGHAM *v.* THOMAS W. BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 14, 1900–APRIL 3, 1901.

[*Reported in* 178 *Massachusetts*, 417.]

HAMMOND, J. This is an action upon a demand note dated October 22, 1872. At the trial, the plaintiff, in order to meet the defence of the Statute of Limitations, proved that the defendant delivered to the agent of the plaintiff in April, 1898, $5; and the chief question was whether this money was delivered in part payment of the note, and, if so, whether under the circumstances it had the effect of mak-

[1] Renackowsky *v.* Board of Water Commissioners, 122 Mich. 613, *acc.* See further, 19 Am. & Eng. Encyc. of Law (2d ed.), 288.

ing the defendant liable to pay the remainder of the note at once, or only by instalments.

The plaintiff's evidence tended to show that in February, 1898, the defendant orally agreed to pay the note in monthly instalments of $10 each, the first instalment to be paid on the first of the following month; that, the defendant failing to pay as promised, the plaintiff's sister as his agent called upon the defendant and demanded payment "of the ten dollars," or a payment "on account of the note"; that the defendant said he could not pay $10, but would pay her $5, and did so, and the payment was indorsed on the note.

The defendant admitted giving the agent the $5, but testified that "it was an act of charity" and that it was done "to get rid of her," and that in giving it he stated that it was not on account of the note; and he denied that he ever agreed to pay in monthly instalments.

In this state of the evidence the defendant asked the court to rule that if the jury should find that the defendant agreed to pay the note only in instalments of $10 per month, and that the payment of the $5 was given and taken in pursuance thereof, the plaintiff could only recover the instalments due to the date of the writ. The court declined so to rule, and instructed the jury in substance that if the defendant made this payment on account of the note their verdict should be for the plaintiff for the amount of the note and interest from the date of demand, after deducting the payments indorsed on the note. To the refusal to rule as above requested and to the ruling given the defendant excepted. The jury found for the plaintiff in the sum of $1,049.40.

The verdict shows that the jury found that the $5 was paid by the defendant on account of the note and not as an act of charity as he contended. But it does not settle the question whether it was paid in pursuance of an agreement to pay on instalments, or upon the note generally without reference to that agreement; and, since the evidence would warrant a finding either way on that question, it is plain that if it was material it should have been submitted to the jury.

The St. 21 Jac. I. c. 16, in which first appears a limitation as to the time of bringing personal actions, and upon which are modelled the various Statutes of Limitation in the United States, expressly provides that all such actions should be brought within the times therein prescribed; and it makes no mention of the effect of a new promise, acknowledgment or part payment. In every form of action but that of assumpsit, the construction has been in unison with the express words of the statute, but, as to that action, the statute has had a varied experience in running the gauntlet of judicial exposition. There was early read into it a provision that in an action of assumpsit a promise of payment within six years prior to the action would avoid the statute, but that a confession, or simple acknowledgment by the debtor that he owed the debt would not be sufficient. Dickson *v.* Thomson, 2 Show. 126. At a later period, however, it

was held that an acknowledgment was evidence from which a jury might properly find a new promise to pay. Heyling *v.* Hastings, 1 Ld. Raym. 421; S. C. Comyns, 54. Still later, Lord Mansfield said in Quantock *v.* England, Burr. 2628, that the statute did not destroy the debt, but only took away the remedy; and that if the debt be older than the time limited for bringing the action the debtor may waive this advantage, and in honesty he ought not to defend by such a plea, "and the slightest word of acknowledgment will take it out of the statute." In Tanner *v.* Smart, 6 B. & C. 603, however, the pendulum swung the other way, and Lord Tenterden, C. J., after saying that there were undoubtedly authorities to the effect that the statute is founded on a presumption of payment, that whatever repels that presumption is an answer to the statute, that any acknowledgment which repels that presumption is in legal effect a promise to pay the debt, and that, though such acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself an unconditional answer to the statute, proceeds in an able opinion to say in substance that these cases are unsatisfactory and in conflict with some others, and that the true doctrine is that an acknowledgment can be an answer to the statute only upon the ground that it is an evidence of a new promise, and that, while, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied, yet, where a debtor guards his acknowledgment and accompanies it with a declaration to prevent any such implication, a promise to pay could not be raised by implication. This is a leading case in England on this subject.

In this country, it has very generally been held that the Statute of Limitations is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten, or may be incapable of explanation by reason of the loss of evidence, that if a new express promise be set up in answer to the statute, its terms ought to be clearly proved, and that, if there be no express promise, but a promise is to be raised in law from the acknowledgment of the debtor, such an acknowledgment ought to contain an unqualified admission of a previous subsisting debt for which the party is liable and which he is willing to pay. It follows that if the acknowledgment be accompanied by circumstances, or words, which repel the idea of an intention to pay, no promise can be implied. Bell *v.* Morrison, 1 Pet. 351; Jones *v.* Moore, 5 Binn. 573; Berghaus *v.* Calhoun, 6 Watts, 219; Sands *v.* Gelston, 15 Johns. 511; Danforth *v.* Culver, 11 Johns. 146; Purdy *v.* Austin, 3 Wend. 187. In this last case the court say that the statute is one of repose and should be maintained as such; that, while the unqualified and unconditional acknowledgment of a debt is

adjudged in law to imply a promise to pay, the acknowledgment of the original justice of the claim without recognizing its present existence is not sufficient; and that anything going to negative a promise or intention to pay must be regarded as qualifying the language used.

This doctrine was approved by this court in the leading case of Bangs *v.* Hall, 2 Pick. 368, in which Putnam, J., after a review of the authorities, says: "On the whole, we are satisfied that there must be an unqualified acknowledgment, not only that the debt was just originally, but that it continues to be so, . . . or that there has been a conditional promise which has been performed, as is before explained."

To answer the statute there must be a promise express or implied from an acknowledgment of the debt as a present existing debt. If the promise whether express or implied be conditional, it must be shown that the conditions have been fulfilled. Cambridge *v.* Hobart, 10 Pick. 232; Sigourney *v.* Drury, 14 Pick. 387; Krebs *v.* Olmstead, 137 Mass. 504.

While the original debt is the cause of action, Ilsley *v.* Jewett, 3 Met. 439, the liability of the debtor is determined not by the terms of the old but by those of the new promise. As stated by Vice Chancellor Wigram in Phillips *v.* Phillips, 3 Hare, 281, 300, "The new promise, and not the old debt, is the measure of the creditor's right. . . . If the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." Custy *v.* Donlan, 159 Mass. 245; Boynton *v.* Moulton, 159 Mass. 248.

Pub. Sts. c. 197, § 15, provides that no acknowledgment or promise shall be evidence of a new or continuing contract to take the case out of the operation of the statute, unless contained in some writing signed by the debtor, and in § 16,[1] that nothing in this provision shall be taken to alter, take away or lessen the effect of a part payment of principal or interest; and it may be contended that the effect of these two sections is to exclude all parol evidence whatever bearing upon an acknowledgment or new promise by part payment or otherwise, whether the creditor be attempting to avail himself of it for attack, or the debtor for defence. But that does not seem to us to be the result. The language is that the provision of the fifteenth section shall not be taken to alter, take away or lessen the effect of part payment. But what was the effect of part payment before this statute requiring the promise or acknowledgment to be in writing? Its effect depended upon the circumstances. If a debtor made a part payment as such, it was considered as an acknowledgment that the whole debt was due, otherwise it could not be a part payment; and

[1] As to the statutes requiring a writing to make valid a new promise to pay a debt barred by the Statute of Limitations, see 19 Am. & Eng. Encyc. of Law (2d ed.), 320.

so it stood upon the same footing as any other unconditional acknowledgment, and from it the law, in the absence of anything to the contrary, implied a promise to pay the whole. It had no validity to answer the statute except as an acknowledgment of the debt. In the language of Tindal, C. J. in Clark *v.* Hooper, 10 Bing. 480, in the mind of the party paying such a payment must be "a direct acknowledgment and admission of the debt, and is the same thing in effect as if he had written in a letter to a third person that he still owed the sum in question."

But suppose a debtor says to his creditor "I acknowledge the debt to be just, that it never has been paid, and that I have no defence except the Statute of Limitations. I am willing to pay and I do hereby pay to you one-half of the debt, but I do not intend to waive the statute as to the rest. On the contrary I insist on my defence as to that, and I never will pay any more." Can it be said that from such a part payment, accompanied by such a distinct affirmation of the debtor's intention not to pay more but to insist upon his defence under the statute, the law would have implied a promise to pay the remaining half?

Again, suppose a debtor says to his creditor, "Your claim against me is just, it never has been paid, and my only defence to it is the Statute of Limitations. I am not able to pay it now, but I will pay it when and as fast as I am able, but I will not pay in any other way, and I insist upon my defence under the statute except so far as I now waive it. I am able to pay and I do now pay you ten dollars with this understanding." Can it be said that from such a part payment the law would have implied a promise to pay the debt according to its original terms?

To come a little more closely to what the jury might have found the facts to be in this case, suppose the debtor agrees to pay in instalments and in no other way, and clearly declares his intention to pay in no other way, and then makes a payment in compliance with the new promise. Can it be said that from such a part payment the law would have implied a promise to pay the debt in any other way? Such an interpretation of the words and act of the debtor would be inconsistent with the understanding of both parties, and would be unreasonable and unjust.

Such a partial payment as that named in either of the three cases above supposed must be construed as a conditional and not an absolute waiver. The waiver must be taken as it is, absolute if absolute, conditional if conditional. And on principle that must be so, whether it be found in a verbal promise or in a payment. There is no ground for a satisfactory distinction between a waiver by word and a waiver by an act. Each is evidence of a new promise and operative only as such; and while the cause of action is the old promise, the measure of the liability is determined by the new one.

Now it is expressly declared in Pub. Sts. c. 197, § 16, that the pro-

visions of the preceding section shall not be taken to alter, take away or lessen the effect of a part payment. There can be no doubt that prior to the passage of the law contained in § 15 a partial payment made in pursuance of an agreement to pay by instalments did not have the effect of making the debtor liable in any other way. To say that the provisions of § 15 do have that effect is to alter the effect of such a part payment, and so is inconsistent with § 16. The law with respect to part payment is to remain as before, and the language accompanying the payment is admissible to show the intent with which the payment is made, just as it was admissible before, and that is so whether or not it contains a promise to pay upon which the creditor could have maintained an action prior to the requirement that it should be in writing.

In the case at bar there was evidence tending to show that the defendant had orally agreed to pay in monthly instalments of $10 each, and if such an agreement had been in writing it could have been enforced according to its terms, but the right of the creditor as against a plea of the statute would have been measured by this new promise; and, even if the debtor had failed to pay, the creditor could recover only the instalment due under the terms of the agreement; and that would be so even if the defendant had made several of the payments. The creditor could take the money under the terms which the debtor had prescribed, and upon no other.

And by the reason of the thing the same principle must apply where the payment is made upon an agreement which, not being in writing, could not be enforced. If this $5 was paid in part performance of his agreement to pay by instalments, then it cannot be inferred that he intended to recognize the existence of the old debt as an actual subsisting obligation in any other way. The nature of the act is to be determined by the intention of the debtor as shown by the act, his words, and the circumstances accompanying and explaining it. Taylor *v.* Foster, 132 Mass. 30; Roscoe *v.* Hale, 7 Gray, 274. See also 13 Am. & Eng. Encyc. of Law, 750 *et seq.*, for a good collection of the cases.

While in this case the evidence is conflicting, we think it would warrant a finding that the only express promise made by the defendant was to pay in monthly instalments of $10 each, and that he paid the $5 solely under that agreement. If that was so, then no other promise can be inferred from this payment, and the instruction requested should have been given.

Exceptions sustained.

CHAPTER II.

FORMATION OF CONTRACTS UNDER SEAL.

SECTION I.

FORMALITIES OF EXECUTION.

TAUNTON *v.* PEPLER.

In Chancery, 1820.

[*Reported in* 6 *Maddock*, 166.]

The bill was filed by the next of kin, against the defendant, as administrator of the intestate, for an account.

The defendant pleaded a release.

Mr. *Phillimore* objected to the plea of the release; first, because it was founded only on the receipts of the administrator, as they then stood; and, secondly, because the release was only said to be "sealed and delivered," without also saying "signed;" and cited Blackstone,[1] who says a deed must be signed as well as sealed and delivered.

Mr. *Koe*, contra.

The Vice-Chancellor. The release states that the administrator had received *all* the property belonging to the intestate; I cannot therefore assume that he has received anything since. There is no authority for saying that a release, to be effectual, must be signed as well as sealed and delivered. *The plea must be allowed.*[2]

STONE *v.* BALE.

Common Pleas, 1693.

[*Reported in* 3 *Levinz*, 348.]

Debt on obligation, and declares, that March 20, 34 Car. 2, the defendant by obligation dated October 10, 33 Car. 2, *sed primo deliberat'* 20 March, 34 Car. 2, became bound, etc. The defendant

[1] Blackstone's Com. 305; Blackstone's words are: "It is requisite that the party whose deed it is should *seal; and now, in most cases, I apprehend, should sign it also.*"

[2] Cromwell *v.* Grunsden, 2 Salk. 462; Jeffery *v.* Underwood, 1 Ark, 108, *acc.* See also Cooch *v.* Goodman, 2 Q. B. 597; Shepp. Touch. (Preston's ed.), 56 *b.*

pleads, that upon the said tenth of October, when the obligation bears date, there was no such person *in rerum natura* as the plaintiff. To which the plaintiff demurs: and now upon argument it was adjudged by the whole court for the plaintiff: they agreed where the plaintiff declares on a date he cannot afterward reply that it was *primo deliberat'* at another day; for that would be a departure, and so are the books to be intended, Co. 2 Rep. 4 b, and 1 H. 6, 1 b, there cited; for *prima facie* every deed is supposed to be made the same day that it bears date. But where the date is mistaken, the party may declare, or in his first plea plead, that by a deed bearing date such a day, but *prima deliberat'* at another day, the party granted, or became bound, etc. For God forbid, when a deed is duly made that by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed, and be without remedy; and so are Dy. 307 a, 315 a; Cro. Eliz. 773, 890; 5 H. 7, 27 a, to be understood upon this difference. *Levinz* of the counsel with the plaintiff.[1]

WARREN *v.* LYNCH.

NEW YORK SUPREME COURT OF JUDICATURE, 1810.

[*Reported in* 5 *Johnson*, 239.]

KENT, C. J., delivered the opinion of the Court. The two questions made upon this case are: 1. What is the legal import of the instrument upon which the suit is brought? and, 2. Was the evidence sufficient to entitle the plaintiff to recover?[2]

1. The note was given in Virginia, and by the laws of that state it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this state. 4 Johns. Rep. 285. Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a speciality. We have never adopted the usage prevailing in Virginia and in some other states, of submitting a scrawl for a seal; and what

[1] Osbourn *v.* Rider, Cro. Jac. 135; Cromwell *v.* Grunsden, 2 Salk. 462; Goddard's Case, 2 Coke, 4 *b*; Hall *v.* Cazenove, 4 East, 477; Thompson *v.* Thompson, 9 Ind. 323; Lee *v.* Mass. Ins. Co., 6 Mass. 208, 219; Banning *v.* Edes, 6 Minn. 402; Jackson *v.* Schoonmaker, 2 Johns. 230; Geiss *v.* Odenheimer, 4 Yeates, 278; Swan *v.* Hodges, 3 Head, 251; McMichael *v.* Carlyle, 53 Wis. 504, *acc.*

But the execution is presumed in the absence of evidence to the contrary to have taken place on the day a deed is dated. Oshey *v.* Hicks, Cro Jac. 264; Savery *v.* Browing, 18 Ia. 246; Lyon *v.* McIlvaine, 24 Ia. 9; McConnell *v.* Brown, Litt. Sel. Cas. 459; Banning *v.* Edes, 6 Minn. 402; Colquhoun *v.* Atkinsons, 6 Munf. 550; Raines *v.* Walker, 77 Va. 92; Wheeler *v.* Single, 62 Wis. 380. See also Anderson *v.* Weston, 6 Bing. N. C. 296.

[2] Only so much of the opinion as relates to the first question is reprinted.

was said by Mr. Justice Livingston, in the case of Meridith *v.* Hinsdale (2 Caines, 362), in favor of such a substitute, was his own opinion, and not that of the Court. A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.* A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago.* To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one, if it want the requisite formalities. "Notwithstanding," says Perkins (sect. 129), "that words obligatory are written on parchment or paper, and the obligator delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an *escrowl*, though the name of the obligator be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience, before we, at one stroke, annihilate so well established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton, and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii* (says Vinnius, in Inst. 2, 10, 5) *nam et alieno annullo signare licet.* Seals were never introduced or tolerated in any code of law, because of any family impression, or image, or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practised upon the unwary. President Pendleton, in the case of Jones and Temple *v.* Logwood (1 Wash. Rep. 42), which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (sect. 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors, if every one put his seal upon the same piece of wax." And Brooke (tit. Faits, 30 and 17) uses the same lan-

guage. In Lightfoot and Butler's case, which was in the Exchequer, 29 Eliz. (2 Leon, 21) the Barons were equally explicit, as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Selden's "Notes to Fortescue" (De Land, p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall, upon this subject; for in the late case of Adam *v.* Keer (1 Bos. and Puller, 360), it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptione testium, et ex edicto prætoris, signacula testamentis imponerentur* (Inst. 2, 10, 3). The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius (Elementa juris civilis secundum ord. Inst. 497), with any other instrument, which would make an impression, and this, he says, is the law to this day throughout Germany. And let me add, that we have the highest and purest classical authority for Lord Coke's definition of a seal; *Quid si in ejusmodi cera centum sigilla hoc annulo impressero?* (Cicero, Academ. Quæst. Lucul. 4, 26).

[1] In National Provincial Bank *v.* Jackson, 33 Ch. D. 1, 11, Cotton, L. J., said: "Although these instruments are expressed to be signed, sealed, and delivered in the presence of the attesting witness, who was one of R. Jackson's clerks, there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. In my opinion the only conclusion we can come to is that these instruments were never in fact sealed at all. They were somehow or other prepared by R. Jackson, but never in fact executed by him in such a way as to reconvey the legal estate. It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and *In re* Sandilands, Law Rep. 6 C. P. 411 was referred to, where an instrument had been forwarded from the colonies together with an official certificate of its having been duly acknowledged, and this was recognized by the Court as a deed, although there was no seal but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right there to hold that the deed had been sealed, here in my opinion it would be wrong to do so. It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here

LORAH, Appellant, *v.* NISSLEY.

Pennsylvania Supreme Court, 1893.

[*Reported in* 156 *Pennsylvania*, 329.]

Rule to open judgment entered on note alleged to be under seal. The note was in the following form:

"$200.00. "Mount Joy, Pa., August the 22, 1881.

"Five months after date I promise to pay to Jacob E. Lorah or order, at the First National Bank of Mount Joy, Two Hundred Dollars and without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, costs of suit and release of all errors, waiving inquisition and confess condemnation of real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

"Witness : Henry B. Nissley, Seal.
"George Shiers. Seal."

The word "seal" following the signature of the maker was printed. The Court held that the note was not under seal, and made absolute the rule to open the judgment, so as to permit defendant to plead the statute of limitations, in an opinion by McMullen, J., 1 Dist. R. 410.

Error assigned was above order.

A. S. Hershey and *B. F. Davis*, for appellant.

J. Hay Brown, *W. U. Hensel* with him, for appellee.

Mr. Justice Mitchell. The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, Alexander *v.* Jameson, 5 Bin. 238, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely and even of wafers very largely ceased. In short sealing has become constructive rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in McDill's Lessee *v.* McDill, 1 Dal. 63, that "the signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good;" and in Long *v.* Ramsay, 1 S. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of the pen "is not now

where the attesting witness who has given evidence recollects nothing of the sort, and when Jackson had already committed one fraud in the matter and perhaps then intended another. The question is merely one of fact, and upon the evidence it is impossible to conclude that these instruments were ever executed as deeds so as to reconvey the estate." Lindley, L. J., in the same case said : "*In re* Sandilands was, I think, a good-natured decision, in which I am not sure that I could have concurred."

American decisions sustaining the common-law definition of a seal are Bates *v.* Boston, &c. R. Co., 10 Allen, 251 ; Hendee *v.* Pinkerton, 14 Allen, 381 ; Perrine *v.* Cheeseman, 6 Halst. 174.

to be questioned." Any kind of flourish or mark will be sufficient if it be intended as a seal. "The usual mode," said Tilghman, C. J., in Taylor *v.* Glaser, 2 S. & R. 502, "is to make a circular, oval, or square mark, opposite to the name of the signer; but the shape is immaterial." Accordingly it was held in Hacker's Appeal, 121 Pa. 192, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand in Taylor *v.* Glaser, *supra*, a flourish was held not a seal, because it was put under and apparently intended merely as a part of the signature. So in Duncan *v.* Duncan, 1 Watts, 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and *a fortiori* the same result must be produced by writing the word "seal," or the letters "L. S.," meaning originally *locus sigilli*, but now having acquired the popular force of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin "et."

If therefore the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be cancelled before signing. The pressure of business life and the subdivision of labor in our day, have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century, the act of sealing was commonly done by adoption and ratification rather than as a personal act, as we are told by a very learned and experienced, though eccentric predecessor, in language that is worth quoting for its quaintness: "*Illi robur et aes triplex.* He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the ad-

judication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. . . . How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex *is usually made by the scrivener drawing the instrument*, and the word seal inscribed within it." Brackenridge, J., in Alexander *v.* Jameson, 5 Bin. 238, 244.

We are of opinion that the note in suit was duly sealed.

We have not derived much light from the decisions in other states, but so far as we have found any analogous cases they are in harmony with the views herein expressed. In Whitney *v.* Davis, 1 Swan (Tenn.), 333, the word "seal" without any scroll, was held to be a good seal even to a public deed by the clerk of a court, he stating in the certificate that no seal of office had been provided. And in Lewis *v.* Overby, 28 Gratt. (Va.) 627, the word "seal" without any scroll was held a good seal within a statute enacting that "any writing to which the person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed."

The learned Court below, and the counsel for appellee placed much reliance on the decision in Bennett *v.* Allen, 10 Pa. C. C. R. 256. In that case the signature was placed to the left but below the printed letters "L. S.," and it is said in the opinion that there was a space of half an inch between. The decision might possibly be sustained on the ground that the position and distance showed that the signer did not intend to adopt the letters "L. S." as part of his act, but unless distinguished on that special ground the decision is contrary to the settled trend of our cases, and cannot be approved.

Order opening judgment is reversed and judgment reinstated.[1]

[1] Bertrand *v.* Byrd, 4 Ark. 195; Hastings *v.* Vaughan, 5 Cal. 315; Trasher *v.* Everhart, 3 G. & J. 234; Underwood *v.* Dollins, 47 Mo. 259; Groner *v.* Smith, 49 Mo. 318; English *v.* Helms, 4 Tex. 228; Green *v.* Lake, 2 Mackey, 162, *acc.*

In many other states statutes have enlarged the legal conception of what constitutes a seal.

Alabama, Code (1896), § 1036. An instrument purporting to be under seal has the same effect as if a seal were affixed.

California, Civ. Code, § 193. A scroll or the word seal after the signature is sufficient.

Colorado, Mills Stat. (1891), § 440. A scroll is enough.

Connecticut, Gen. Stat. (1888), § 1085. The word seal or the letters L. S. are sufficient.

Georgia, Code (1895), § 5. A scrawl or any other mark intended as a seal shall be held as such.

Idaho, Rev. Stat. (1887), §§ 13, 5989. Impression on the paper is enough, or a scroll or the word seal.

Illinois, Starr & Curtis Stat. (1895), p. 904. A scrawl, affixed by way of a seal, has the same effect as a seal.

Michigan, Comp. Laws (1897), § 9005. A scroll or device used as a seal has the same effect as a seal.

Minnesota, Stat. (1894), § 4190. Like Michigan.

New Jersey, Gen. Stat. (1895), p. 884, § 154; p. 1413, § 72; p. 2336, § 1. A scroll or other device is sufficient.

New Mexico, Comp. Laws (1897), § 3932. A scroll is sufficient.

New York, Birdseye's Rev. Stat. (1896), p. 2967, § 13. A seal shall consist of a

ANONYMOUS.

COMMON PLEAS, 1536.

[*Reported in* 1 *Dyer*, 19 *a.*]

AN obligation was thus, "for the well and faithful payment of which I bind myself by these presents, dated, &c.," and not said "sealed with my seal," nor "in witness whereof:" wherefore it was asked of the Court, if such an obligation be good or not? And it seemed to SHELLEY and FITZHERBERT, that the obligation is well enough, if a seal be put to the deed, etc.[1]

AUSTIN'S ADMINISTRATRIX *v.* WHITLOCK'S EXECUTORS.

SUPREME COURT OF APPEALS OF VIRGINIA, 1810.

[*Reported in* 1 *Munf.* 487.]

To an action of covenant the defendants, without craving oyer, pleaded conditions performed, and issue was joined. At the trial the plaintiff produced a writing which concluded "As witness my

wafer, wax, or other similar adhesive substance or of paper or other similar substance, affixed thereto by mucilage or other adhesive substance, or of the word seal or the letters L. S. opposite the signature.

Oregon, Hill's Annot. Laws, § 752. Impression, wafer, wax, paper, scroll, or other sign made with a pen, constitutes a seal.

Rhode Island, General Laws (1896), c. 26, § 14. An impression is sufficient.

South Dakota, Annot. Stat. (1901), § 5963. Like Rhode Island.

Utah, Comp. Laws (1888), §§ 2645, 2994, 3903. A scroll, printed or written, or the word seal is sufficient.

Virginia, Code (1887), §§ 5 (12), 2841. A scroll is sufficient.

West Virginia, Code (1899), c. 13, § 15. A scroll written or printed is sufficient.

Wisconsin, Annot. Stat. (1889), § 2215. A scroll or device as a seal is sufficient.

[1] "For there are but three things of the essence and substance of a deed; that is to say writing in paper or parchment, sealing, and delivery, and if it hath these three, although it wanted, *in cujus rei testimonium sigillum suum apposuit*, yet the deed is sufficient, for the delivery is as necessary to the essence of a deed, as the putting of the seal to it, and yet it need not be contained in the deed that it was delivered." Goddard's Case, 2 Coke, 4 *b*, 5 *a*. Bedow's Case, 1 Leon. 25; Peters *v.* Field, Hetly, 75; Thompson *v.* Butcher, 3 Bulstr. 300, 302 (but see Clement *v.* Gunhouse, 5 Esp. 83); Burton *v.* LeRoy, 5 Sawy. 510; Jeffery *v.* Underwood, 1 Ark. 108; Bertrand *v.* Byrd, 4 Ark. 195; Cummins *v.* Woodruff, 5 Ark. 116; Conine *v.* Junction R. Co., 3 Houst. 288; Eames *v.* Preston, 20 Ill. 389; Hubbard *v.* Beckwith, 1 Bibb, 492; Wing *v.* Chase, 35 Me. 260; Trasher *v.* Everhart, 3 G. & J. 234, 246; Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 428. Sticknoth's Est., 7 Nev. 223, 234; Ingram *v.* Hall, 1 Hayw. 193, 209; Osborn *v.* Kistler, 35 Ohio St. 99; Taylor *v.* Glaser, 2 S. & R. 502; Frevall *v.* Fitch, 5 Whart. 325; Biery *v.* Haines, 5 Whart. 563; Hopkins *v.* Cumberland R. Co., 3 W. & S. 410; Lorah *v.* Nissley, 156 Pa. 329; Relph *v.* Gist, 4 McCord, 267; McKain *v.* Miller, 1 McMull, 313; Scruggs *v.* Brackin, 4 Yerg. 528, *acc.* See also McRaven *v.* McGuire, 17 Miss. 34; Hudson *v.* Poindexter, 42 Miss. 304.

hand this 22d day of February, 1791. D. Whitlock," with a written scroll annexed to the signature. The defendants moved the Court to exclude this evidence, but the Court overruled the motion and a verdict and judgment for the plaintiff followed. On appeal the judgment was reversed, whereupon the plaintiff appealed to this Court.

Peyton Randolph, for the appellant.

Wickham, *contra*.

Judge TUCKER, after stating the case. That a covenant is a deed, and that a seal is one of the essential parts of a deed, is evident from the authorities generally, and especially Co. Litt. 6 a, 35 b, 175 b, 225 a and b, 229 b., and Litt. s. 371, 372. From several of which, and particularly the two last, it is apparent that the clause of *in cujus rei testimonium* ought to recite that the maker of the deed hath thereunto put his seal for, otherwise, a supposititious seal may be affixed to any instrument of writing, without proof of the acknowledgment thereof by the maker of the instrument, and a mere parol promise or agreement may be converted into a covenant, which is an instrument of a much higher nature; insomuch, that what might be considered as mere *nudum pactum*, as in the case of Hite, Ex'r of Smith, *v.* Fielding Lewis's Ex'rs, in this Court, October 29, 1804 (MS.) may, by the subsequent addition of a seal or scroll, be converted into an obligation which should not only bind the maker and his executors, but his heirs also. For such would have been the effect of the writing signed by Fielding Lewis, in that case, "whereby he obliged himself, his heirs, executors, and administrators to indemnify Mrs. Smith," as executrix of Charles Smith, for the latter having become security for his son, if there had been a seal, or scroll, added to that instrument, and acknowledged by the maker, in the clause of attestation. But if such mention be unnecessary in the body of the instrument, how easily may any instrument of the same kind be converted into one very different from it? The omission of the word "seal" in the clause of attestation, according to the maxim of law, "*expressum facit cessare tacitum*," does, in my opinion, preclude all evidence, dehors the instrument, of the execution of it in any other manner than is expressed in the body of the instrument. One of the reasons which are given why a deed must be pleaded with a *profert in curia* is, that the deed must be brought into court for the purpose of inspection; and if (as is said in 10 Co. 92 b) the judges found that it had been raised or interlined in any material part, they adjudged it to be void. Now, suppose the word seal had been found interlined in such an instrument as this, and no notice taken by the witnesses that such an interlineation had been made before the execution thereof, and nothing farther said about the seal; would not this have avoided the deed? I presume it would. So deeds, in which were erasures, have been held void, because they appeared, on the face of them, to be suspicious. Now what can be more suspicious than the apparent addition of a seal to an instrument, which the maker ac-

knowledges under this hand only? Judge Buller, in the case of Master *v.* Miller, 4 Term Rep. 339, speaking on the subject, says, "When there is a profert of a deed, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails. But the profert of a deed without a seal will not support the allegation of a deed with a seal." Neither, as I conceive, will the profert of an instrument, importing, in the body of it, to be executed under the hand of the party only, support the allegation of a deed sealed with the seal of the party, although a seal be to that instrument in reality affixed; inasmuch as that may be done without the party's knowledge or intention.

But here an objection arises upon the pleading. It may be said, the defendants have, by their plea of "covenants performed," admitted the execution of the covenant set forth in the declaration. This is certainly correct: but, inasmuch as oyer was not asked of that covenant, it cannot be alleged that this identical instrument is the deed declared upon, and admitted by the plea. Every objection to the instrument on the ground of variance between the deed alleged in the declaration, and that which was offered in evidence, appears to me to have been still open to the defendant. I am, therefore, of opinion, that the judgment of the District Court was correct, and ought to be affirmed.[1]

EAMES *v.* PRESTON.

Illinois Supreme Court, 1858.

[*Reported in* 20 *Illinois*, 389.]

Caton, C. J. This was an action of assumpsit brought against Eames, Burlingame and Gray, upon a note thus executed, "Eames, Gray & Co. [ ]," and the only question is, whether assumpsit

[1] The statement of the case has been abbreviated and concurring opinions of Roane and Fleming, JJ., omitted.

The doctrine of this case has been frequently followed in Virginia, and is applied where the seal attached to the instrument is an actual seal, as well as where it is a scroll. Bradley Salt Co. *v.* Norfolk Importing Co., 95 Va. 461 and cases cited. A similar rule prevails in a few other states. Lee *v.* Adkins, Minor, 187; Carter *v.* Penn. 4 Ala. 140; Moore *v.* Leseur, 18 Ala. 606; Blackwell *v.* Hamilton, 47 Ala. 470; McDonald *v.* Bear River Co., 13 Cal. 220; Bohannon *v.* Hough, 1 Miss. 461 (but see McRaven *v.* McGuire, 17 Miss. 34); Keller *v.* McHuffman, 15 W. Va. 64, 85. See also Buckingham *v.* Orr, 6 Col. 587.

In several other states a recital is necessary to give a scroll the effect of a seal, but a real seal is effectual without recital: Alt *v.* Stoker, 127 Mo. 466, and cases cited; Newbold *v.* Lamb, 2 South. (N. J.) 516; Corliss *v.* Van Note, 1 Harr. (N. J.) 324; Flemming *v.* Powell, 2 Tex. 225 (compare English *v.* Helms, 4 Tex. 228; Muckleroy *v.* Bethany, 23 Tex. 163). See also Brown *v.* Jordhal, 32 Minn. 135; Merritt *v.* Cornell, 1 E. D. Smith, 335.

can be maintained on this note. If this be a sealed instrument, then assumpsit cannot be maintained upon it (1 Chit. Pl., title Assumpsit, p. 99), and this would seem to settle the question, for this is certainly an instrument under seal. If the member of the firm who executed the note had authority under seal to add the seals of all, then the seal attached is the seal of all; if he had not, then it is his seal only. In any event it is, as to him, a sealed instrument. If, as to the others, it is a simple instrument, that would not remove his seal. If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and, as to all, it is a sealed instrument.[1] If, however, the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it.[2] Nor would this prevent it from being a sealed instrument as to those who deliberately attached their seals. As to one of the makers of this note, it was a sealed instrument, and assumpsit could not be maintained upon it.

The judgment must be reversed. *Judgment reversed.*

HANNAH F. SAUNDERS *v.* CHARLES F. SAUNDERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 21, 1891–SEPTEMBER 3, 1891.

[*Reported in* 154 *Massachusetts*, 337.]

MORTON, J. This action is brought by the plaintiff upon an instrument under seal to which she is not a party, and of which none of the consideration moved from her. The instrument is signed by Charles F. Saunders, the defendant, and is between him and George M. Saunders, who together, and the survivor of them, were entitled

[1] Biery *v.* Haines, 5 Whart. 563; Hess's Estate, 150 Pa. 346, *contra*. Where the instrument recited that the parties had sealed it, the presumption was held applicable in Davis *v.* Burton, 4 Ill. 41; McLean *v.* Wilson, 4 Ill. 50; Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Ryan *v.* Cooke, 152 Ill. 302; Tasker *v.* Bartlett, 5 Cush. 359; Lunsford *v.* La Motte Lead Co., 54 Mo. 426; Burnett *v.* McCluey, 78 Mo. 676, 688; Pequawkett Bridge *v.* Mathes, 7 N. H. 230; Tenney *v.* East Warren Lumber Co., 43 N. H. 343; Bowman *v.* Robb, 6 Pa. 302. See also Yarborough *v.* Monday, 3 Dev. 420; Hollis *v.* Pond, 7 Humph. 222; Lamhden *v.* Sharp, 9 Humph. 224. But see Stabler *v.* Cowman, 7 G. & J. 284; State *v.* Humbird, 54 Md. 327, *contra*. In Cooch *v.* Goodman, 2 Q. B. 580, 598, Lord Denman, C. J., said: "It is true that one piece of wax may serve as a seal for several persons if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, as was held in Ball *v.* Dunsterville, 4 T. R. 313, following Lord Lovelace's case, 5 B. & C. 355, but then it must appear by the deed, and profess to be the seal of each."

[2] Rankin *v.* Roler, 8 Gratt. 63, *acc.*

to the income of a trust fund. The consideration is one dollar paid by said George M. Saunders, and like covenants on the part of said George with said Charles to those contained in the instrument declared on. The covenants or agreements in the instrument relied on are as follows: "I, the said Charles F. Saunders, do hereby covenant and agree to and with the said George M. Saunders, and to and with such person as may be the wife of said George M. Saunders at the time of his decease, that if the said George M. shall die in my lifetime, leaving a widow living, I will, from and after the decease of said George M., and during my lifetime, pay over to such person as may be the widow of said George M., one third of the entire income aforesaid to which I may be entitled as such survivor." The plaintiff is the widow of George, and it is clear that, so far as she relies upon the covenants and agreements made between her husband and the defendant for her benefit, they will not support this action. It is well settled in this State, in regard to simple contracts, that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." Exchange Bank *v.* Rice, 107 Mass. 37, and cases cited. Rogers *v.* Union Stone Co., 130 Mass. 581; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Marston *v.* Bigelow, 150 Mass. 45. In regard to contracts under seal, the law has always been that only those who were parties to them could sue upon them. Sanders *v.* Filley, 12 Pick. 554; Johnson *v.* Foster, 12 Met. 167; Northampton *v.* Elwell, 4 Gray, 81; Flynn *v.* North American Ins. Co., 115 Mass. 449; Flynn *v.* Massachusetts Benefit Association, 152 Mass. 288. The case of Felton *v.* Dickinson, 10 Mass. 287, to which this case would seem to be somewhat analagous, is fully explained in Marston *v.* Bigelow, *ubi supra*, and is authority only to the extent there indicated.

It is suggested, however, that, somewhat after the analogy furnished by letters of credit, the plaintiff may avail herself of so much of the covenants and agreements as purports to be made "to and with such person as may be the wife of said George M. Saunders at the time of his decease;" that is, that this covenant amounts to a promise on the part of the defendant to whomsoever may be the wife of George M. Saunders at his death, that he will pay her annually thereafter a certain sum so long as he shall live, and that the plaintiff, being the wife of said George, may therefore maintain an action upon it. But it is to be observed that the covenant did not purport to create a present agreement with the person who was the wife of George at the time the agreement between him and the defendant was executed; neither does it purport to be a continuing offer or promise on the part of the defendant, as in the case of a letter of credit or an offer of reward, that, if the person who shall be the wife of George at the time of his decease shall do certain things, then the defendant will

pay her a certain sum. On the contrary, it was an attempt to create a covenant to arise wholly in the future between the defendant and a party who at the time was unascertained, and from whom no consideration was to move, and who was not in any way privy to the contract between the defendant and said George. We do not think this can be done.

The question whether the administrator or executor of the husband of the plaintiff may not maintain an action on the agreement for her benefit, or whether she may not herself bring suit in the name of the executor or administrator, has not been argued to us, and we have not therefore considered it. For these reasons, a majority of the Court think that, according to the agreement, the entry must be,

Judgment for the defendant.

SECTION II.

DELIVERY.

From BUTLER and BAKER'S CASE.

King's Bench, 1591.

[*Reported in* 3 *Coke*, 25 *a*, 26 *b*.]

If A makes an obligation to B and delivers it to C to the use of B, this is the deed of A presently; but if C offers it to B, there B may refuse it *in pais*, and thereby the obligation will lose its force (but perhaps in such case A in an action brought on this obligation cannot plead *non est factum*, because it was once his deed).

ROBERTS *v.* SECURITY COMPANY, LIMITED.

Court of Appeal, 1896.

[*Reported in* [1897] 1 *Q. B.* 111.]

Appeal by the defendants from the judgment of a Divisional Court (Grantham and Wright, JJ.) affirming the decision of the judge of the Leeds County Court.

The action was brought upon a policy of insurance against loss by burglary or housebreaking.

The plaintiff on December 14, 1895, signed and sent to the defendants a proposal for an insurance to the amount of 167*l.* upon furniture and other chattels in a dwelling-house against loss by burglary or housebreaking. The proposal, which was made upon a printed form, stated that the proposer agreed to accept a policy subject to

the usual conditions prescribed by the company and indorsed on that policy. It was stated by the form that the policy was renewable on the 1st of the month, and the premium for the odd time over twelve months was to be added to the first year's premium; and that no insurance would be considered in force until the premium had been paid. The proposal stated that the annual premium was to be 9*s.* 9*d.*, and the first premium 9*s.* 11*d.*, 2*d.* being the addition in respect of the odd time.

On December 18 a document called a protection-note was signed by the defendants' agent in which it was stated that the plaintiff, having made a proposal to the company for insurance against loss arising from burglary or housebreaking for the sum of 167*l.* on property described in the proposal, and having paid to the agent the sum of £—— (the blank not being filled up), was thereby declared to be provisionally protected against that risk (subject to the conditions contained in and indorsed on the form of policy used by the company) for seven days from the date thereof, or until the proposal should be in the meantime rejected. The protection-note contained a note that, in the event of the proposal being declined, the deposit paid would be refunded less the proportion of the premium for the period covered. The protection-note was sent by the defendants' agent to the plaintiff in a letter stating that a policy would be sent in due course. No sum of money ever was paid by way of premium. On the night of December 26, or early in the morning of December 27, a burglary was committed on the plaintiff's premises and a loss of some of the property alleged by the plaintiff to be insured was thereby occasioned. Upon December 27, at a meeting of directors of the defendants' company, who were then ignorant of the fact that the loss had taken place, the seal of the company was affixed to a policy of insurance in conformity with the proposal; and the policy was signed by two of the directors of the company and their secretary. The policy recited that the plaintiff had made a proposal dated December 14, 1895, to the company for an assurance of the property thereinafter described for the sum thereinafter appearing, and had paid to the company the sum called in the margin thereof the first premium, being the premium required by the company for the assurance of the said property from noon of December 14, 1895, to noon of January 1, 1897, and purported to insure the property described accordingly. In the margin were notes stating that 9*s.* 11*d.* was the sum paid for the first premium, that the renewal date was January 1, annually, and that the renewal premium was 9*s.* 9*d.* It was provided by the policy that no assurance by way of renewal or otherwise should be held to be affected until the premium due thereon should have been paid. The policy was not delivered to the plaintiff, but remained at the company's office. The plaintiff stated in evidence that he had never paid the premium, because he had never been asked for it. The defendants denied liability on the ground that, when the burglary took place, no contract for insurance had been concluded.

Channell, Q. C., and *G. M. Cohen*, for the defendants.

Longstaffe, for the plaintiff.

The county court judge gave judgment for the plaintiff.

LORD ESHER, M.R. In my opinion this appeal fails. In this case there was a proposal for insurance which was accepted. It does not appear to me material to consider what would have been the effect of the proposal and the acceptance of it, if the matter had rested there. The transaction had gone beyond that stage; for a policy was executed under the seal of the company; and the effect of that is what we have to consider. The question raised is whether an insurance was effected by the sealing and signing of the policy, or the execution of the policy was only intended to be conditional. I do not see any evidence of a conditional delivery, or that this document was intended not to be a policy unless certain conditions were fulfilled. The document states that in witness thereof the company have caused their common seal to be affixed, and that the undersigned, being two directors and the secretary of the company, have thereunto set their hands. It is urged that the document was still in the hands of the company or of their officers on their behalf. There is no suggestion that it was delivered to any one as an escrow. If it was in the hands of the company itself, it could not be delivered as an escrow. The proper inference appears to me to be that the directors simply executed the policy, and the fact that it remained in their hands, or I should suppose in the hands of their secretary on their behalf, does not seem to me material. The company might have delivered the policy to some one to hold as an escrow, but they did not and never intended to do so. The policy was in my opinion executed by the company and was not executed conditionally. Therefore we must take it that there is an existing policy, and all we have to do is to construe it. It is a contract to insure the plaintiff against loss of the property insured by burglary or housebreaking from December 14, 1895, to January 1, 1897, and it recites that the assured has paid the premium for that insurance. It was said that that recital was incorrect, and that the premium so stated to have been paid never was in fact paid. I do not think the defendants are for the present purpose at liberty to show that in contradiction of the terms of their own deed. They have treated the premium as paid, and, if it has not been paid, I think they have thereby waived the previous payment as a condition of the existence of an insurance. With regard to the alleged custom in the case of marine insurance, which has been referred to, it is rather a practice than a custom properly so called. It is not confined to any particular place, but is a general practice for the convenience of trade. If, as I think, the company have by the terms of the policy which they have executed waived the previous payment of the premium as a condition of the insurance, what is the result? It appears to me that they may claim payment of the premium at any time, or, if there is a loss before it is paid, it may be

deducted from the amount payable in respect of that loss, but they cannot, after they have executed a deed in these terms, get rid of liability merely on the ground that the premium has not been previously paid. For these reasons I think the appeal must be dismissed.[1]

MARY MEIGS *v.* MARY J. DEXTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 18–NOVEMBER 23, 1898.

[*Reported in* 172 *Massachusetts*, 217.[2]]

KNOWLTON, J. On the question whether there was a delivery of the deed, the judge instructed the jury that if Hannah Hall, "after signing the deed, placed it upon the table, or placed it in Captain Macomber's hands with the intention that it should become effective and operative, then there was a good delivery of the deed. The petitioner excepted to this instruction. The testimony tended to show that Captain Macomber was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away and left it there, not representing the grantee in any way.

We are of opinion that the instruction was erroneous in omitting to embody the requirement that there should be an acceptance of the deed by some one representing the grantee. 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, or who assumes to represent him, and whose act of acceptance is afterwards ratified. Hawkes *v.* Pike, 105 Mass. 560; Commonwealth *v.* Cutler, 153 Mass. 252; Barnes *v.* Barnes, 161 Mass. 381.

[1] LOPES, L. J., and RIGBY, L. J., delivered concurring opinions. The decision follows Xenos *v.* Wickham, L. R. 2 H. L. 296. In that case the House of Lords, reversing the decision of the Exchequer Chamber, held a policy of insurance had become operative though still in the possession of the company. The judges were called upon for their opinions and Mellor and Blackburn, JJ., and Pigott, B., were of opinion that the policy had been delivered; Smith and Willes, JJ., were of a contrary opinion. The Lord Chancellor (Chelmsford) shared the opinion of the minority of the Judges and Lord Cranworth that of the majority. Doe *v.* Knight, 5 B. & C. 671; Hall *v.* Palmer, 3 Hare, 532; Fletcher *v.* Fletcher, 4 Hare, 67; Dillon *v.* Coffin, 4 M. & Cr. 647; Exton *v.* Scott, 6 Sim. 31; Jeffries *v.* Alexander, 8 H. L. C. 594; Bonfield *v.* Hassell, 32 Beav. 217, *acc.* *Conf.* Cracknall *v.* Janson, 11 Ch. D. 1.

[2] A portion of the case is omitted.

Almost all of the numerous cases on delivery of sealed instruments have arisen in regard to conveyances, and the subject is generally treated in connection with the law of conveyancing. See Gray's cases on Property, Vol. III. pp. 633–735; Devlin on Deeds, § 260 *et seq.*

SECTION III.

CONSIDERATION.

WATHAM, ARGUENDO, IN ANONYMOUS, 1385.

[*Reported in Bellewe*, 111.]

IN debt on contract the plaintiff shall show in his count for what cause the defendant became his debtor. Otherwise in debt on obligation, for the obligation is contract in itself.[1]

BROMLEY, ARGUENDO, IN SHARINGTON *v.* STROTTON.

KING'S BENCH, 1565.

[*Reported in* 1 *Plowden*, 298, 308 *a*.]

AND, Sir, by the law of this land there are two ways of making contracts or agreements for lands or chattles. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give you 20*l*. to make your sale *de novo*, here you shall not have an action against me for the 20*l*., as it is affirmed in the said case in 17 Ed. 4, for it is a nude pact, *et ex nudo pacto non oritur actio*. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. 4, put it thus, that I by deed promise to give you 20*l*.

[1] Also reported in Bellewe, 32; Fitz. Ab. Annuitie, pl. 54.

to make your sale *de novo*, here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, *viz.* the will of the party that made the deed. And so where a carpenter, by parol without writing, undertook to build a new house, and for the not doing of it the party in 11 H. 4, brought an action of covenant against the carpenter, there it does not appear that he should have anything for building the house, and it was adjudged that the plaintiff should take nothing by his writ: but if it had been by specialty, it would have been otherwise; and so it is there held by Thirning, *causa qua supra*. So in 45 Ed. 3, in debt, the plaintiff counted that a covenant was made between him and the defendant, that the plaintiff should marry the defendant's daughter, and that the defendant should be bound to him in 100*l.*, and he said that he had married his daughter; and the count was challenged, because this debt is demanded upon a contract touching matrimony, which ought to be in Court Christian; but notwithstanding this, forasmuch as he demanded a debt upon a deed, whereby it was become a lay-contract, he was put to answer: but otherwise it would have been if it had been without deed, as it is there put; and 14 Ed. 4, and also 17 Ed. 4, are, that if it be without deed the action does not lie, because the marriage, which is the consideration, is a thing spiritual: which books are contrary to the opinion of Thorp in the said case in 22 Ass. fol. 305. So that where it is by deed, the cause or consideration is not enquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, *viz.*, the will of him that made it, and therefore where the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be enquired, for it is sufficient to say that it was his will to make the deed.[1]

PAUL K. L. E. KRELL AND ANOTHER *v.* ROBERT CODMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 12, 13, 1890–OCTOBER 24, 1891.

[*Reported in* 154 *Massachusetts*, 454.]

HOLMES, J. This is an action on a voluntary covenant in an indenture under seal, executed by the defendant's testatrix in England, that her executors, within six months after her death, should

[1] "I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it." Bacon on Uses, 13 (about 1602).

pay to the plaintiffs, upon certain trusts, the sum of 2,500*l.*, with interest at four per cent from the day of her death.

It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. But it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover, and in the view which we take on that question it is needless to examine with nicety how far the case can be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. Parker *v.* Coburn, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. Parish *v.* Stone, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant in all other respects unquestionably valid and binding (Comstock *v.* Son, 154 Mass. 389, and Mather *v.* Corliss, 103 Mass. 568, 571) was void as contravening the policy of our statute of wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid. Wellington *v.* Apthorp, 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. St. 1888, c. 372. Again, it would be going a good way to say by construction that a covenant did not satisfy this statute.

The truth is, that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See Perry *v.* Cross, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law, is less likely to be

a vehicle for fraud than a parol contract based on a technical detriment to the promisee. Of course, we are not now speaking of the rank of such contracts *inter sese.* Stone *v.* Gerrish, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument did not purport to be and was not a contract. Cover *v.* Stem, 67 Md. 449, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which if she had gone into bankruptcy would have been provable against her. *Ex parte* Tindal, 8 Bing. 402; s. c. 1 D. & Ch. 291, and Mont. 375, 462; Robson, Bankruptcy (5th ed.), 274. The cases of Parish *v.* Stone, 14 Pick. 198, and Warren *v.* Durfee, 126 Mass. 338, were actions on promissory notes, and we decided on the ground of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, — if such intent could be material when an otherwise binding contract was made. See Stone *v.* Hackett, 12 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.[1]

[1] 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 (1901), § 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.

CHAPTER III.

PARTIES AFFECTED BY CONTRACTS.

SECTION I.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS.[1]

BOURNE *v.* MASON AND ANOTHER.

IN THE KING'S BENCH, HILARY TERM, 1669.

[*Reported in* 1 *Ventris*, 6.]

IN an assumpsit, the plaintiff declares, that, whereas one Parrie was indebted to the plaintiff and defendants in two several sums of money, and that a stranger was indebted in another sum to Parrie; that there being a communication between them, the defendants, in consideration that Parrie would permit them to sue, in his name, the stranger, for the sum due to him, promised that they would pay the sum which Parrie owed to the plaintiff; and alleged that Parrie permitted them to sue, and that they recovered. After non-assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff could not bring his action, for he was a stranger to the consideration.

But in maintenance thereof, a judgment was cited in 1658, between Sprat and Agar, in the King's Bench, where one promised to the father, in consideration that he would give his daughter in marriage with his son, he would settle so much land. After the marriage the son brought the action; and it was adjudged maintainable. And another case was cited of a promise to a physician, that if he did such a cure he would give such a sum of money to himself and another to his daughter; and it was resolved the daughter might bring an assumpsit. Which cases the court agreed: for in the one case the parties that brought the assumpsit did the meritorious act, though the promise was made to another; and in the other case, the nearness of the relation gives the daughter the benefit of the consideration performed by her father; but here the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration; wherefore it was adjudged *quod nil capiat per billam*.

[1] The cases on this subject are collected and discussed in 15 Harv. L. Rev. 767. The rules of the Roman Law and the provisions of modern European Codes may be found in 16 Harv. L. Rev. 43.

DUTTON AND WIFE *v.* POOLE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1677.

[*Reported in* 2 *Levinz*, 210.]

ASSUMPSIT, and declares that, the father of the plaintiff's wife being seised of a wood, which he intended to fell to raise portions for younger children, the defendant, being his heir, in consideration the father would forbear to fell it at his request, promised the father to pay his daughter, now the plaintiff's wife, 1000*l.*, and avers that the father at his request forbore; but the defendant had not paid the 1000*l.* After verdict for the plaintiff upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or, if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise. . . . On the other side it was said, if a man deliver goods or money to A. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son 10*l.*, the son may bring the action, because the gift was upon consideration of a profit to the son, and the father is obliged by natural affection to provide for his children; for which cause, affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father. . . . Upon the first argument, Wilde and Jones, Justices, seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise nor consideration. Twysden and Rainsford seemed *contra*; and afterwards, two new judges being made, *scil.*, Scroggs, Chief Justice, in lieu of Rainsford, and Dolben, in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, Chief Justice, said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children. . . . Dolben, Justice, concurred with him that the daughter might bring the action; Jones and Wylde *hæsitabant*. But next day they also agreed to the opinion of the Chief Justice and Dolben; and so

judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. . . . And *nota*, upon this judgment error was immediately brought; and Trin., 31 Car. 2, it was affirmed in the Exchequer Chamber.

TWEDDLE *v.* ATKINSON, Executor of GUY, Deceased.

In the Queen's Bench, June 7, 1861.

[*Reported in* 1 *Best & Smith*, 393.]

The declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed, and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following, that is to say:

High Coniscliffe, July 11, 1855.

Memorandum of an agreement made this day between William Guy, of, &c., of the one part, and John Tweddle, of, &c., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* 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 sum hereby promised and specified.

And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said twenty-first day of August, A. D. 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said William Guy or his executors: yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.

Demurrer and joinder therein.

Edward James, for the defendant. The plaintiff is a stranger to the agreement and to the consideration as stated in the declaration, and therefore cannot sue upon the contract. It is now settled that an action for breach of contract must be brought by the person from whom the consideration moved: Price *v.* Easton. (He was then stopped.)

Mellish, for the plaintiff. Admitting the general rule as stated by the other side, there is an exception in the case of contracts made by parents for the purpose of providing for their children. In Dutton and Wife *v.* Poole, affirmed in the Exchequer Chamber, a tenant in fee-simple being about to cut down timber to raise a portion for his daughter, the defendant, his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the daughter, and an action of assumpsit by the daughter and her husband was held to be well brought. [WIGHTMAN, J. In that case the promise was made before marriage. In this case the promise is post nuptial, and the whole consideration on both sides is between the two fathers.] The natural relationship between the father and the son constituted the father an agent for the son, in whose behalf and for whose benefit the contract was made; and therefore the latter may maintain an action upon it. [CROMPTON, J. Is the son so far a party to the contract that he may be sued as well as sue upon it? Where a consideration is required there must be mutuality. WIGHTMAN, J. This contract, so far as the son is concerned, is one-sided.] The object of the contract, which was that the children should be provided for, will be accomplished if this action is maintainable: whereas if the right of action remains in the father it will be defeated, because the damages recovered in that action will be his assets. [CROMPTON, J. Your argument will lead to this, that the son might bring an action against the father on the ground of natural love and affection.] In Bourne *v.* Mason two cases are cited which support this action. In Sprat *v.* Agar, in the King's Bench in 1658, one promised the father that, in consideration that he would give his daughter in marriage with his son, he would settle so much land; after the marriage the son brought an action, and it was held maintainable. The other was the case of a promise to a physician that if he did such a cure he would give such a sum of money to himself and another to his daughter, and it was resolved the daughter

might bring assumpsit, "which cases," says the report, "the Court agreed;" and the reason assigned as to the latter is, "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." There is no modern case in which the question has been raised upon a contract between two fathers for the benefit of their children. [WIGHTMAN, J. If the father of the plaintiff had paid the 100*l.* which he promised, might not he have sued the father of the plaintiff's wife on his express promise?] According to the old cases he could not. When a father makes a contract for the benefit of his child, the law vests the contract in the child. In Thomas *v.* ——,[1] the defendant promised to a father that, in consideration that he would surrender a copyhold to the defendant, the defendant would give unto his two daughters 20*l.* apiece; and after verdict in an action upon the case brought by one of the daughters for breach of that promise, on motion for arresting the judgment on the ground that the two ought to have joined, it was held that the parties had distinct interests, and so each might bring an action.

Edward James was not called upon to reply.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in Bourne *v.* Mason, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and

[1] Sty. 461.

to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And Dutton and Wife *v.* Poole was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that one cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for the defendant.

NATIONAL BANK *v.* GRAND LODGE.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1878.

[*Reported in* 98 *United States*, 123.]

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action by the Second National Bank of St. Louis, Missouri, against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, Oct. 14, 1869, adopted the following resolution: —

"*Resolved*, That this Grand Lodge assume the payment of the two hundred thousand dollars bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid."

The court below instructed the jury, that, independently of the question of the power of the Grand Lodge to pass the resolution, it was

no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the court; and judgment having been entered thereon, the plaintiff sued out this writ of error.

Mr. *John C. Orrick*, for the plaintiff in error.

Mr. *John D. S. Dryden*, *contra.*

Mr. JUSTICE STRONG delivered the opinion of the court: —

It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge, — made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor

is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the two hundred thousand dollar bonds, issued by the association, "*Provided*, that stock is issued to the Grand Lodge by said association to the amount of said assumption," . . . "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract, as to warrant their bringing suit in their own names.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

Judgment affirmed.

CLARA H. BORDEN *v.* JOHN W. BOARDMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 24 — NOVEMBER 25, 1892.

[*Reported in* 157 *Massachusetts*, 410.]

CONTRACT. Trial in the Superior Court, before Braley, J., who reported the case for the determination of this court, in substance as follows: —

On July 24, 1890, Daniel J. Collins, a contractor, made a contract in writing with the defendant to build him a house in New Bedford, for the sum of twenty-six hundred and fifty dollars, payable one half when the house was ready for plastering, the balance when finished. The defendant advanced to Collins two hundred dollars before the first payment was due, taking his receipt therefor. During the progress of the work, and before the first payment became due according to the terms of the contract, the building was blown off the foundation. Collins

employed the plaintiffs, who were building movers, to put the building back, under an agreement that it should not cost more than one hundred and fifty dollars; the plaintiffs put the building back, finishing the moving a month or six weeks prior to the first payment. Collins then proceeded with the work, and got the building ready to plaster. When the time for the first payment arrived the defendant told Collins he would like to have all persons who had lienable bills against the house present to see that they were paid. The plaintiffs were not present, so the defendant asked Collins how much was due them, and was told one hundred and fifty dollars. The defendant thereupon, at the request and with the consent of Collins, reserved two hundred dollars for the plaintiffs, saying he would hold this money to pay them with, and would pay them himself. Collins thereupon gave the defendant a receipt for eleven hundred and twenty-five dollars, as first payment on the house. Neither Collins nor the defendant informed the plaintiffs of the holding of this money; but in consequence of what a third person told Manchester, one of the plaintiffs, Manchester called upon the defendant, and said to him, "I understand that you are holding my money for me for moving that building back. Is that so?" Boardman replied that it was. Manchester then said, "I am glad that you have got it and will pay it." Boardman said, "I don't know as I will now; I have been advised not to." No other interview was had between the plaintiffs and the defendant.

The defendant claimed that, upon this evidence, the action could not be maintained, and offered to show, in bar of the action, that, a day or so after the time of the first payment, Collins abandoned and broke his said contract, and the defendant was obliged to finish the building at a loss, and that at the time of refusing to pay Manchester, he, Manchester, was told by the defendant that Collins had broken his contract; and that on December 9, 1890, after refusal to pay them by the defendant, the plaintiffs commenced an action against said Collins for the recovery of the claim now in suit. The evidence was excluded. The judge directed a verdict for the plaintiffs for one hundred and fifty dollars, and interest from the date of the writ. If the ruling was right, then judgment was to be entered on the verdict; otherwise, judgment for the defendant.

F. A. Milliken, for the defendant.

E. L. Barney, for the plaintiffs.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. Cook *v.* Wolfendale, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation; for there was no agreement among the plaintiffs,

Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. Lazarus *v.* Swan, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. Exchange Bank *v.* Rice, 107 Mass. 37, and cases cited; Rogers *v.* Union Stone Co., 130 Mass. 581; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Marston *v.* Bigelow, 150 Mass. 45; Saunders *v.* Saunders, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. Exchange Bank *v.* Rice, and Marston *v.* Bigelow, *ubi supra*.

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than one hundred and fifty dollars to put the building back. Collins told the defendant that that sum was due to the plaintiffs. The defendant reserved two hundred dollars. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover.

Judgment for the defendant.

LAWRENCE *v.* FOX.

NEW YORK COURT OF APPEALS DECEMBER, 1859.

[*Reported in* 20 *New York*, 268.]

APPEAL from the Superior Court of the City of Buffalo. On the trial before Mr. Justice Masten it appeared by the evidence of a bystander that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds, viz.: that there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration; and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at General Term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

I. S. Torrance, for the appellant.

E. P. Chapin, for the plaintiff.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant was mere hearsay, and therefore not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground, and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State — in an able and pains-taking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed —

that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the Court for the Correction of Errors (Farley *v.* Cleaveland, 4 Cow. 432; same case in error, 9 id. 639). In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise, although made for the benefit of the plaintiff, could not enure to his benefit. The hay which Moon delivered to Cleaveland was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. Barker *v.* Bucklin, 2 Denio, 45; Hudson Canal Company *v.* The Westchester Bank, 4 id. 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon, but to the plaintiff Farley. In this case the promise was made to Holly, and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schermerhorn *v.* Vanderheyden, 1 John. R. 140, has often been reasserted by our courts and never departed from. The case of Seaman *v.* White has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in Schermerhorn *v.* Vanderheyden. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured, and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant Whitney his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands

of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay; and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank, who then owned the note; although, in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schermerhorn *v.* Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. The Delaware and Hudson Canal Company *v.* The Westchester County Bank, 4 Denio, 97. The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them, — Arnold *v.* Lyman, 17 Mass. 400; Hall *v.* Marston, id. 575; Brewer *v.* Dyer, 7 Cush. 337, 340. In Hall *v.* Marston the court say: "It seems to have been well settled that, if A. promises B. for a favorable consideration to pay C., the latter may maintain assumpsit for the money;" and in Brewer *v.* Dyer the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen *v.* Whipple, 1 Gray, 317. In that case one Rollins made his note for $500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a

certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant by deed, in which it was stated that the "granted premises were subject to a mortgage for $500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterwards duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security; and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering. But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton *v.* Dickinson, 10 Mass. 287, 290, and others that might be cited, are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff

was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit, and in accordance with legal presumption accepted by him (Berly *v.* Taylor, 5 Hill, 577–584, *et seq.*), until his dissent was shown? The cases cited, and especially that of Farley *v.* Cleaveland, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note, in which, for value received of Holly, he had promised to pay the plaintiff, and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C. J., DENIO, SELDEN, ALLEN, and STRONG, JJ., concurred. JOHNSON, C. J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J., dissenting: The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other par-

ties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed that in a case thus situated the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on this question are quite numerous. In some of them the dicta of judges delivered upon very slight consideration have been referred to as the decisions of the courts. Thus, in Schermerhorn *v.* Vanderheyden, 1 Johns. 140, the court is reported as saying, "We are of opinion that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of Dutton *v.* Poole, Vent. 318, 332, decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases.

In another class of cases, which have been sometimes supposed to favor the doctrine, the promise was made to the person who brought the suit, while the consideration proceeded from another; the question considered being whether the promise was void by the Statute of Frauds. Thus, in Gold *v.* Phillips, 10 Johns. 412, one Wood was indebted to the plaintiffs for services as attorneys and counsel, and he conveyed a farm to the defendants, who, as part of the consideration, were to pay that debt. Accordingly the defendants wrote to the plaintiffs informing them that an arrangement had been made by which they were to pay the demand. The defence was that the promise was void within the statute, because, although in writing, it did not express the consideration. But the action was sustained on the ground that the undertaking was original, and not collateral. So in the case of Farley *v.* Cleaveland, 4 Cow. 432, 9 id. 639, the facts proved or offered to be proved were that the plaintiff held a note against one Moon; that Moon sold hay to the defendant, who in consideration of that sale promised the plaintiff by parol to pay the note. The only question was whether the Statute of Frauds applied to the case. It was held by the Supreme Court, and afterwards by the Court of Errors, that it did not. Such is also precisely the doctrine of Ellwood *v.* Monk, 5 Wend. 235, where it was held that a plea of the Statute of Frauds to a count upon a promise of the defendant to the plaintiff to pay the latter a debt owing to him by another person, the promise being founded on a sale of property to the defendant by the other person, was bad.

The cases mentioned, and others of a like character, were referred to by Mr. Justice Jewett in Barker *v.* Bucklin, 2 Denio, 45. In that case the learned justice considered at some length the question now before

us. The authorities referred to were mainly those which I have cited, and others, upon the Statute of Frauds. The case decided nothing on the present subject, because it was determined against the plaintiff on a ground not involved in this discussion. The doctrine was certainly advanced which the plaintiff now contends for, but among all the decisions which were cited, I do not think there is one standing directly upon it. The case of Arnold *v.* Lyman, 17 Mass. 400, might perhaps be regarded as an exception to this remark, if a different interpretation had not been given to that decision in the Supreme Court of the same State where it was pronounced. In the recent case of Mellen, Administratrix, *v.* Whipple, 1 Gray, 317, that decision is understood as belonging to a class where the defendant has in his hands a trust fund, which was the foundation of the duty or promise on which the suit is brought.

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose (Berly *v.* Taylor, 5 Hill, 577). If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator of the trust. Thus, in Comyn's Digest (Action on the case upon Assumpsit, B. 15), it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an assumpsit lies by A. against him. The case of The Delaware and Hudson Canal Company *v.* The Westchester County Bank, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made, and not in favor of any one else.

I have referred to the dictum in Schermerhorn *v.* Vanderheyden, 1 Johns. 140, as favoring the doctrine contended for. It was the earliest

in this State, and was founded, as already observed, on the old English case of Dutton v. Poole, in Ventris. That case has always been referred to as the ultimate authority whenever the rule in question has been mentioned, and it deserves, therefore, some further notice. The father of the plaintiff's wife being seized of certain lands, which afterwards on his death descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised the father, in consideration of his forbearing to cut the timber, that he would pay the said daughter the £1,000. After verdict for the plaintiff, upon the issue of non-assumpsit, it was urged in arrest of judgment that the father ought to have brought the action, and not the husband and wife. It was held, after much discussion, that the action would lie. The court said, "It might be another case if the money had been to have been paid to a stranger; but there is such a manner of relation between the father and the child, and it is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." We need not criticise the reason given for this decision. It is enough for the present purpose that the case is no authority for the general doctrine to sustain which it has been so frequently cited. It belongs to a class of cases somewhat peculiar and anomalous, in which promises have been made to a parent or person standing in a near relationship to the person for whose benefit it was made, and in which, on account of that relationship, the beneficiary has been allowed to maintain the action. Regarded as standing on any other ground, they have long since ceased to be the law in England. Thus, in Crow v. Rogers, 1 Strange, 592, one Hardy was indebted to the plaintiff in the sum of £70, and upon a discourse between Hardy and the defendant, it was agreed that the defendant should pay that debt in consideration of a house, to be conveyed by Hardy to him. The plaintiff brought the action on that promise, and Dutton v. Poole was cited in support of it. But it was held that the action would not lie, because the plaintiff was a stranger to the transaction. Again, in Price v. Easton, 4 Barn. & Adolph. 433, one William Price was indebted to the plaintiff in £13. The declaration averred a promise of the defendant to pay the debt, in consideration that William Price should work for him, and leave the wages in his hands; and that Price did work accordingly, and earned a large sum of money, which he left in the defendant's hands. After verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that the plaintiff was a stranger to the consideration. Dutton v. Poole, and other cases of that class were cited in opposition to the motion, but the judgment was arrested. Lord Denman said, "I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant." Littledale, J., said, "No privity is shown between the plaintiff and the defendant. The case is precisely like Crow v. Rogers, and must be governed by it." Taunton, J., said, "It is consistent with all the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the

arrangement between William Price and the defendant." Patterson, J., observed, "It is clear that the allegations do not show a right of action in the plaintiff. There is no promise to the plaintiff alleged." The same doctrine is recognized in Lilly *v.* Hays, 5 Ad. & Ellis, 548, and such is now the settled rule in England, although at an early day there was some obscurity arising out of the case of Dutton *v.* Poole, and others of that peculiar class.

The question was also involved in some confusion by the earlier cases in Massachusetts. Indeed, the Supreme Court of that State seem at one time to have made a nearer approach to the doctrine on which this action must rest than the courts of this State have ever done (10 Mass. 287; 17 id. 400). But in the recent case of Mellen, Administratrix, *v.* Whipple, 1 Gray, 317, the subject was carefully reviewed, and the doctrine utterly overthrown. One Rollin was indebted to the plaintiff's testator, and had secured the debt by a mortgage on his land. He then conveyed the equity of redemption to the defendant, by a deed which contained a clause declaring that the defendant was to assume and pay the mortgage. It was conceded that the acceptance of the deed with such a clause in it was equivalent to an express promise to pay the mortgage debt; and the question was whether the mortgagee or his representative could sue on that undertaking. It was held that the suit could not be maintained; and in the course of a very careful and discriminating opinion by Judge Metcalf, it was shown that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple case of an attempt by one person to enforce a promise made to another, from whom the consideration wholly proceeded. I am of that opinion.

The judgment of the court below should therefore be reversed, and a new trial granted.

GROVER, J., also dissented.

Judgment affirmed.

SILAS D. GIFFORD, AS RECEIVER, ETC., RESPONDENT, *v.* MICHAEL AUGUSTINE CORRIGAN, ETC., APPELLANT.

NEW YORK COURT OF APPEALS, OCTOBER 16 — NOVEMBER 26, 1889.

[*Reported in* 117 *New York*, 257.]

APPEAL by defendant Corrigan, as executor of Cardinal John McCloskey, deceased, from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant, The Father Matthew Temperance Society. Defendant Corrigan,

as executor, was sought to be charged for any deficiency on sale upon a covenant in a deed of the mortgaged premises executed to his testator by John McEvoy, by the terms of which the grantee assumed and agreed to pay the mortgage.

The facts, so far as material to the questions discussed, are stated in the opinion.

Edward C. Boardman, for appellant.

Ralph E. Prime, for respondents.

FINCH, J. On a previous appeal we determined in this case that the record of the deed to the defendant's testator, McCloskey, by which the grantee assumed the payment of plaintiff's mortgage, was not, under the circumstances, sufficient proof of the delivery and acceptance of the deed. As the case now stands the effect of that record is fortified by direct proof of the delivery and strong circumstantial evidence of the acceptance. Both facts are now explicitly found by the trial court, but the appellant again denies the sufficiency of the proof.

The mortgage was executed in 1869. The land which it covered was sold and conveyed to McEvoy in 1870. McEvoy was a parish priest, and held the title until 1878, when he conveyed to McCloskey, the defendant's testator, who in and by the deed assumed the payment of the outstanding mortgage. Two things occurred the next year: McCloskey was informed by letter that upon the premises owned by him, describing those conveyed by McEvoy, there was a mortgage to Masterton, payment of which was requested, and a few days after, in a personal interview with the attorney acting for the mortgagee, was told of the deed and its record, and the assumption clause was read to him and his liability under it asserted. McCloskey answered that he would communicate with Father Keogh; that he had referred the matter to him, and that the witness would hear from Keogh. The latter was the successor of McEvoy as parish priest, and owed his appointment to the cardinal. The second thing was that the account for the rents of the property collected by Keogh were by him returned once a year to the chancery office which managed the cardinal's business affairs relating to the church. Within one year, therefore, after the record of the deed McCloskey knew all about it, and instead of repudiating it and refusing acceptance, simply referred the creditor to the parish priest who began a uniform system of collecting the rents of the property and returning the facts to the cardinal's business office, which was their proper repository. Keogh not only remained in possession under McCloskey, but insured the premises in the name of the cardinal. For some time after its record the deed remained in the custody of McEvoy, but as early as 1882 he delivered it to O'Connor, who was a clerk in the chancery office. The superintendent of that office was Preston. He is called in the record vicar-general and chancellor and monseigneur. Whatever his ecclesiastical title, his own evidence shows that he was merely a subordinate or secretary of the cardinal, with no authority of his own, and depended wholly upon the directions of his superior, either gen-

eral or specific. His attention was called to the deed after its delivery at the chancery office by O'Connor, who delivered it. Preston says that the next time he saw Keogh he "positively forbade him to have anything to do with that hall or to accept any rent for it." This is said to have occurred in 1882. It does not appear that Preston had any authority from the cardinal to issue this order to Keogh, or any general direction which covered it. It is certain that Keogh did not obey it, for he continued to collect the rents and report them as part of his parish accounts to the chancery office. Preston was either ignorant of the current transactions which it was his duty to supervise, or he had withdrawn his command, or the parish priest was deliberately defying his superiors and they were patiently submitting to it. At all events, the deed rested in the chancery office, the priest kept possession of the property, and accounted for its rents to McCloskey; no offer of a reconveyance has been made, and the record is searched in vain for any word or act of refusal or repudiation by McCloskey. On such a state of facts the finding of the Special Term that there was a delivery and acceptance may easily stand, and must conclude us on this appeal.

But another circumstance introduces an additional defence and raises a further question. Just after the issue of a summons in this action and the filing of a *lis pendens*, the executor of McEvoy formally released McCloskey from his covenant, and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then in further consideration of $1 formally releases the cardinal from his covenant. This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for foreclosure by the issue of a summons and filing of a *lis pendens*, at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defence to this action? I shall not undertake to decide, if, indeed, the question is open (Knickerbocker Life Ins. Co. *v.* Nelson, 78 N. Y. 137; Comley *v.* Dazian, 114 id. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course it is difficult, if not impossible, to reason about it without

recurring to Lawrence *v.* Fox (20 N. Y. 268), and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he *may* sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not obtained earlier it must have vested in him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of Lawrence *v.* Fox stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant as agent of the mortgagee, who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee, through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable, how-

ever, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor. In Burr *v.* Beers, 24 N. Y. 179, and again in Garnsey *v.* Rogers, 47 N. Y. 242, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before Lawrence *v.* Fox made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might, in equity, be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in Halsey *v.* Reed, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well so long as there was supposed to be no equivalent remedy at law, but after the decision of Lawrence *v.* Fox that remedy existed. And so in Thorp *v.* Keokuk Coal Company, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so I think the suggestion is well founded. But if I am wrong about that, as, perhaps, I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it and notifies the other party of his intention to rely upon it. As a right, founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced; for the permission reads, "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or, at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion respecting the basis of these rights of action which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory

of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received is a familiar illustration. May we not deem this another? If we do, and the door is thus opened wide to equitable considerations, I am quite sure it will follow that while no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet to permit a change thereafter, while the creditor is relying upon it, would be grossly inequitable and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed, with costs.

All concur except DANFORTH and PECKHAM, JJ., dissenting.

Judgment affirmed.

BENEDICTA DURNHERR, APPELLANT, *v.* JOSEPH RAU, RESPONDENT.

NEW YORK COURT OF APPEALS, JUNE 3 — OCTOBER 4, 1892.

[*Reported in* 135 *New York*, 219.]

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made June 2, 1891, which affirmed an order entered upon the minutes, setting aside a verdict in favor of plaintiff and granting a new trial.

This was an action to recover damages for an alleged breach of covenant in a deed from Emanuel Durnherr, plaintiff's husband, to defendant.

The facts, so far as material, are stated in the opinion.

Theodore Bacon, for appellant.

William E. Edmonds, for respondent.

ANDREWS, J. The deed from Emanuel Durnherr to the defendant recited that it was given in payment of a debt owing by the grantor to the grantee of $660, " and the further considerations expressed herein." The grantee covenanted in the deed to pay all incumbrances on the premises " by mortgage or otherwise." This constitutes the only " further consideration " on his part expressed therein. The deed also declared that the wife of the grantor (the plaintiff) reserved her right of dower in the premises. The conveyance contained a covenant

of general warranty by the grantor, and the only legal operation of the clause respecting the dower of the wife was to limit the scope of the warranty by excluding therefrom her dower right. By the foreclosure of the mortgages on the premises existing at the time of the conveyance, in which (as is assumed) the wife joined, the title has passed to purchasers on the foreclosure, and the inchoate right of dower in the wife has been extinguished. This action is brought by the wife on the defendant's covenant in the deed, and she seeks to recover as damages the value of her inchoate right of dower, which was cut off by the foreclosure.

The courts below denied relief, and we concur in their conclusion. The covenant was with the husband alone. He had an interest in obtaining indemnity against his personal liability for the mortgage debts, and this, presumably, was his primary purpose in exacting from the grantee a covenant to pay the mortgages. The cases also attribute to the parties to such a covenant the further purpose of benefiting the holder of the securities, and the natural scope of the covenant is extended so as to give them a right of action at law on the covenant, in case of breach, as though expressly named as covenantees. Burr *v.* Beers, 24 N. Y. 178. But the wife was not a party to the mortgages, and in no way bound to pay them. She had an interest that they should be paid without resort to the land, so that her inchoate right of dower might be freed therefrom. The husband, however, owed her no duty enforceable in law or equity to pay the mortgages to relieve her dower. The most that can be claimed is that the mortgages having (as is assumed) been executed to secure his debts, and he having procured the wife to join in them and pledge her right for their payment, he owed her a moral duty to pay the mortgages, and thereby restore her to her original situation. But according to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances. She was not in the position of a surety for her husband. Her joinder in the mortgages was a voluntary surrender of her right for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. Manhattan Co. *v.* Everston, 6 Pai. 467; Hawley *v.* Bradford, 9 id. 200. There is lacking in this case the essential relation of debtor and creditor between the grantor and a third person seeking to enforce such a covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor to such person which must exist according to the cases in order to entitle a stranger to the covenant to enforce it. It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance. Garnsey *v.* Rogers, 47 N. Y. 233; Vrooman *v.* Turner, 69 id. 280; Lorillard *v.*

Clyde, 122 id. 498. The application of the doctrine of Lawrence *v.* Fox (20 N. Y. 268), to this case would extend it much further than hitherto, and this cannot be permitted in view of the repeated declarations of the court that it should be confined to its original limits.

The order should be affirmed, and judgment absolute ordered for the defendant with costs.

All concur. *Order affirmed and judgment accordingly.*

BASSET AND ANOTHER *v.* HUGHES.

WISCONSIN SUPREME COURT, AUGUST TERM, 1877.

[*Reported in* 43 *Wisconsin*, 319.]

APPEAL from the Circuit Court for Dodge County.

Action for the balance of an indebtedness due originally from Hugh W. Hughes (defendant's father) to the plaintiffs.

In April, 1870, Hugh W. Hughes conveyed to the defendant certain real estate and all of his personal property, in consideration whereof defendant covenanted, among other things, to pay all debts of the former. This covenant is contained in a bond executed by defendant to said Hugh W. Hughes. When the bond was executed the covenantee owed plaintiffs the demand in suit, for which they held this note. The defendant knew of the existence of this note when he covenanted to pay his father's debts, and afterwards made a payment of $300 upon it, leaving unpaid the balance claimed in this action. These facts appear from the pleadings and proofs, and the findings of fact by the court.

On the trial defendant offered testimony in various forms for the purpose of showing that his covenant to pay his father's debts was rescinded in 1873, by an agreement to that effect between him and his father; but the court refused to admit the testimony.

The cause was tried by the court without a jury, and resulted in a judgment for the plaintiffs for the unpaid balance due them on the note of Hugh W. Hughes. Defendant appealed from the judgment.

The cause was submitted on the brief of *James J. Dick* for the appellant, and that of *Hazelton & Dering* for the respondents.

LYON, J. 1. It is settled in this State that when one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the former for a breach of such engagement. This rule applies as well to covenants under seal as to simple contracts. McDowell *v.* Laev, 35 Wis., 181, and cases cited. In the present case the defendant, for a valuable consideration, engaged with his father to pay the debt which

the latter owed the plaintiffs, and, within the above rule, the plaintiffs may maintain this action to recover the unpaid balance of such debt.[1]

2. It is quite immaterial if the defendant's covenant to pay his father's debts was afterwards rescinded by mutual agreement between the parties to it. Before that was done the plaintiffs had been informed of the covenant, and made no objection thereto; indeed, the fair inference from the testimony is that the plaintiffs fully assented thereto. Whether it was or was not competent for the parties to the covenant to rescind it before such notice to and assent by the plaintiffs, we need not here determine. Certainly, after such notice and assent, the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent.

To support the position that it was competent for the defendant and his father to rescind the contract, and thus defeat the plaintiffs' right of action against the defendant, the learned counsel for the defendant cites two New York cases: Kelly *v.* Roberts, 40 N. Y., 432, and Kelly *v.* Babcock, 49 id., 318. These cases do not sustain the position. In the first, it was held that an agreement, *upon no new consideration*, between debtor and creditor, that the debtor shall pay the amount of his debt to a third person, to whom the creditor is indebted, is not, in the absence of any notice or acceptance of or assent to the arrangement by such third person, irrevocable by the creditor. In the latter case it was held that "an agreement in a bill of sale or instrument of transfer of personal property that a portion of the purchase money of the goods sold may be paid to and among the creditors of the

[1] 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; 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. 181; Houghton *v.* Milburn, 54 Wis. 554; Stites *v.* Thompson, 98 Wis. 329, 331, *acc.* 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.

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; 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, *contra*.

vendor, without a consent or agreement on the part of the vendee thus to pay, creates no trust; the balance unpaid is a debt due the vendor, and can be reached by and held under an attachment against his property." In this case, the defendant covenanted to pay his father's debts; there was a new and valid consideration for such covenant; and the plaintiffs were notified that it had been made, and gave their assent thereto. Thus we find here all the conditions essential to the plaintiffs' right of action, which were wanting in those cases. We conclude that the testimony offered to show a rescission of the covenant was properly rejected.[1]

By the COURT, *Judgment affirmed.*[2]

[1] A portion of the opinion is omitted.

[2] 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. *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, *acc.*; Stephens *v.* Casbacker, 8 Hun, 116, *contra*. See also Hartley *v.* Harrison, 24 N. Y. 170.

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."

In a few cases, it has been held that though there has been no expression of assent by the third person no effective rescission or release can be made. Starbird *v.* Cranston, 24 Col. 20; Bay *v.* Williams, 112 Ill. 91; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Rogers *v.* Gosnell, 58 Mo. 587; Thompson *v.* Gordon, 3 Strobh. 196. See also Knowles *v.* Erwin, 43 Hun, 150 affd. 124 N. Y. 623.

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. Encyc. (2d ed.), 980.

In Trustees *v.* Anderson, 30 N. J. Eq. 365, 368, the Court say, "That the releases were executed and delivered merely in view of this suit, and for the purpose of preventing the complainants from having recourse in equity to Youngs, is proved, and, indeed, is admitted. That the grantor may, before suit brought against his grantee by the mortgagee to obtain the benefit of such a covenant of assumption, release or discharge it, and so prevent the mortgagee from obtaining any benefit of it, is established. Crowell *v.* Hospital of St. Barnabas, 12 C. E. Gr. 650. But the act of release or discharge, to be effectual, must be done *bona fide*, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person, in consideration of a debt due from him, agrees with his creditor that he will, in discharge of it, pay the amount to the creditor of the latter, in discharge or on ac-

JONES A. BOHANAN *v.* S. W. POPE, ET AL.

SUPREME JUDICIAL COURT OF MAINE, 1856.

[*Reported in* 42 *Maine*, 93.]

ON facts agreed from *Nisi Prius*.

This was an action of assumpsit brought upon a contract. The general issue was pleaded and joined, with a brief statement, setting forth that the plaintiff had been paid for the labor named in his writ by one Henry P. Whitney, or by reason of the judgment hereinafter mentioned, for whom he worked, and that said plaintiff recovered judgment against said Whitney in a suit for the same labor, and enforced his lien for said labor upon the logs he worked upon, by a sale of the same by D. G. Wilson, deputy sheriff, on the execution, at public auction.

It was agreed that the plaintiff was hired by Henry P. Whitney and worked upon said logs in hauling and cutting them. That before hiring him, Whitney showed him said contract, and plaintiff read it, and Whitney told him he had no other way of paying except through the contract; that there was due from Whitney to plaintiff for his labor $50.85, for which Whitney gave plaintiff an order on defendants; that plaintiff presented the order soon after to defendants, who refused to accept or pay it, and said order has never since been paid, unless by reason of a sale of said logs upon execution. Whitney put a four-ox team into the woods, and hauled logs in accordance with the contract. He did not drive the logs, but the defendants drove them and charged Whitney for the same in account. There has been no settlement between Whitney and defendants for the operation. Defendants have an account against Whitney for supplies, etc., under said contract, amounting to $1160.29, and a credit of $1020.73 in his favor, and there was a balance of account against Whitney at the date of the writ.

On May 22, 1853, plaintiff sued said Whitney for said sum of $50.85, claiming a lien for labor on the logs marked five notches and a cross, on which writ, the said mark of logs then in the boom, were attached May 27, 1853; the action was defaulted October term, 1853; and the execution duly issued, was seasonably put into the hands of D. G. Wilson, a deputy sheriff, who seized the said mark of logs, and duly advertised and sold the same at public auction, Nov. 3,

count of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for considerations or reasons satisfactory to themselves, and without account or liability to the creditor who is not a party to it, yet, if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee, or protecting the promiser against his liability, the rescission will not avail in equity." See also Youngs *v.* Trustees, 31 N. J. Eq. 290; Willard *v.* Worsham, 76 Va. 392.

1853, for the sum of five dollars, to one Folsom, and discharged upon said execution the sum of ninety-six cents, and returned the execution satisfied for that amount and no more. And the same has never been satisfied or paid, except so far as may be by said sale of logs.

If, upon the above statement of facts, the full Court should be of opinion that the plaintiff can maintain his action, the defendants are to be defaulted; otherwise, the plaintiff is to become nonsuit.

George W. Dyer, for plaintiff.

George Walker, for defendants.

MAY, J. It is undoubtedly true, as a general proposition, that no action can be maintained upon a contract, except by some person who is a party to it. But this rule of law, like most others, has its exceptions; as, for instance, where money has been paid by one party, to a second, for the benefit of a third, in which case the latter may maintain an action against the first for the money. So, too, where a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement. This principle of law is now well established both in this State and Massachusetts. Hinckley *& al. v.* Fowler, 15 Maine, 285; Felton *v.* Dickinson, 10 Mass. 287; Arnold *& al. v.* Lyman, 17 Mass. 400; Hall *v.* Marston. 17 Mass. 575; Carnegie *v.* Morrison, 2 Met. 381; and Brewer *v.* Dyer, 7 Cush. 337.

In this last case, it is said by Bigelow, J., as the opinion of the full Court, that the rule "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; nor upon the reason, that the defendant by entering into such an agreement, has impliedly made himself the agent of the plaintiff; but upon the broader and more satisfactory basis, that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

But while the law does this in favor of a third person, beneficially interested in the contract, it does not confine such person to the remedy which it so provides; he may, as the authority last cited shows, if he choose, disregard it and seek his remedy directly against the party with whom his contract primarily exists. But if he does so, then such party may recover against the party contracting with him, in the same manner as if the stipulation in the contract had been made directly with him and not for the benefit of a third person. The two remedies are not concurrent but elective, and an election of the latter implies an abandonment of the former.

Applying these principles to the facts in the present case, it appears that the plaintiff, he being one of "the hired men" whom the

defendant by the terms of his contract with Whitney was to pay, might, if he had chosen so to do, have brought his action in the first instance against the defendant, relying upon the beneficial interest secured to him in said contract; or, disregarding this remedy, he might have elected to rely upon the original undertaking of Whitney, and therefore have proceeded against him. The facts show that he elected the latter mode, and having done so, he must be regarded as having thereby consented that Whitney should be at liberty to avail himself of the funds, which he had set apart in the contract for the payment of the plaintiff, (if any such there were,) in order that he might be able by means of such funds, if necessary, to satisfy such judgment as the plaintiff might recover against him. By such election the plaintiff relinquished all claim upon the particular funds appropriated for his benefit and gave to Whitney the control and disposition thereof.

This defence, avoiding and repelling, as it does, the promise declared on, may properly be shown under the general issue. Gould's Pleading c. 6, §§ 47, 48. *Plaintiff nonsuit.*[1]

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, JJ., concurred.

JOHN H. ARNOLD ET AL., EXRS., ETC., APPELLANTS, *v.* CHARLES H. NICHOLS, IMPLEADED, ETC., RESPONDENT.

NEW YORK COURT OF APPEALS, JANUARY 24–FEBRUARY 1, 1876.

[*Reported in* 64 *New York*, 117.]

EARL, J. For some years prior to the 15th day of August, 1867, the defendant Bowen had been engaged in the city of New York in the business of importing and dealing in fancy goods, and on that day the plaintiff's testator, Hinman, loaned to him to be used in his business the sum of $2,000. Bowen continued in business alone until January, 1868, when he formed a copartnership with the defendant Nichols, and Bowen and Nichols, under the firm name of J. M. Bowen & Co., continued to carry on the business until May, 1869, when they dissolved. At the time of the formation of the copartnership, the evidence tends to show, and we must assume that the jury found, that Bowen transferred his business assets to the firm of J. M. Bowen & Co., and that in consideration thereof, the firm

[1] 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, *acc.*; 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, *contra*. Compare Kansas Pac. Ry. Co. *v.* Hopkins, 18 Kan. 499; Plano Mfg. Co. *v.* Burrows, 40 Kan. 361.

assumed and agreed to pay certain specified debts of Bowen, among which was Hinman's debt for the money loaned as above stated. It was expected at the time that the assets would exceed the debts assumed by the firm by at least $30,000; and this excess of $30,000 was to be credited to Bowen on the books of the firm as his share of capital to be distributed. The assets were not as large as expected, but were shown to be more than sufficient to pay all the debts assumed. They were first to be used to pay the debts, and the balance whatever it might be, was to be credited to Bowen.

Bowen transferred to the firm the assets to which his creditors had the right to look for the payment of their claims, and hence the promise of the firm to pay such claims must be deemed to have been made for their benefit. It was not made to exonerate Bowen from the payment of his debts, and not primarily nor directly for his benefit, as his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them. This case is, therefore, unlike the case of Merrill *v.* Green, 55 N. Y. 270, and the action is maintainable upon the principles laid down in the case of Lawrence *v.* Fox, 20 N. Y. 268, and also recognized in Burr *v.* Beers, 24 N. Y. 178; Thorp *v.* Keokuk Coal Company, 48 N. Y. 253, and Claflin *v.* Ostrom, 54 N. Y. 581. Hinman had the right to adopt the promise made expressly for his benefit.

The defendant Nichols alleged in his answer that he was induced to enter into the alleged agreement by the fraud of Bowen, but he did not allege that he had rescinded the agreement on that account, or that he had ever suffered any damage on account thereof. Upon the trial he offered to prove that he was induced to enter into the agreement by fraud, and the Court excluded the evidence. This ruling was right. When Nichols discovered that he had been defrauded into making the agreement, he could have repudiated the agreement on that ground, given up his interest in the assets transferred to the firm and placed them again in the hands of Bowen. A creditor could not adopt the agreement which Bowen had made for his benefit, without taking it subject to any infirmity which attached to it, and subject to any assault which Nichols could make upon its validity.[1] But Nichols could not retain the fruits of the agreement

[1] 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 Mo. 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; Moore *v.* Ryder, 65 N. Y. 438; Trimble *v.* Strother, 25 Ohio St. 378; Osborne *v.* Cabell, 77 Va. 462, *acc.* But see Fitzgerald *v.* Barker, 96 Mo. 661; Klein *v.* Isaacs, 8 Mo. App. 568.

Similarly mistake of the contracting parties is a defence against the third person. 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, or failure of consideration. Clay *v.* Woodrum, 45

and refuse on account of fraud to bear its burdens. Again, fraud could, in no aspect of the case, furnish a total or partial defence to the action, as the firm had more than sufficient assets transferred to it by Bowen, to pay all the debts assumed. Hence there was no fraud affecting Hinman's claim or right of recovery.

The charge of the judge at the trial was free from any just criticism. It was, that if the jury found that there was an agreement between Bowen and Nichols in entering into copartnership, that J. M. Bowen & Co., the new firm, should take the business assets of Bowen, and in consideration thereof pay the specified liabilities of Bowen, the plaintiffs were entitled to recover, and that if they found there was not such an agreement, they were not entitled to recover. This charge fairly covered the law of the case.

We have considered the other exceptions to which our attention was called upon the argument, and they are so clearly without foundation as to require no particular notice.

The order of the General Term must be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur. *Order reversed and judgment accordingly.*

SCHOOL DISTRICT OF KANSAS CITY ex rel. KOKEN IRON WORKS, *v.* LIVERS et al., Appellants.

Missouri Supreme Court, February 7, 1899.

[*Reported in* 147 *Missouri*, 580.]

Burgess, J. Upon the trial of this cause in the Circuit Court there was judgment for plaintiffs, from which defendant sureties appealed to the Kansas City Court of Appeals, where the judgment of the Circuit Court was reversed.

Plaintiffs then filed motion for rehearing which was overruled, and the cause certified to this Court because one of the judges of that Court was of the opinion that the decision rendered is in conflict with Board of President and Directors of the St. Louis Public Schools *v.* Woods *et al.*, 77 Mo. 197.

The facts are as follows: —

Defendants Livers and Pullman having acquired the contract at the price of $72,500 for erecting an addition to the Central High School in Kansas City, Missouri, were required to give and did execute bond in the sum of $54,000, conditioned that the bond was

Kan. 116; Amonett *v.* Montague, 75 Mo. 43; Judson *v.* Dada, 79 N. Y. 373, 379; Dunning *v.* Leavitt, 85 N. Y. 30; Crow *v.* Lewis, 95 N. Y. 423; Gifford *v.* Father Matthew Soc., 104 N. Y. 139; Osborne *v.* Cabell, 77 Va. 462. But see Hayden *v.* Snow, 9 Biss. 511; 14 Fed. Rep. 70; s. c. *sub nom.*; Hayden *v.* Devery, 3 Fed. Rep. 782; Blood *v.* Crew Levick Co., 177 Pa. 606.

executed not only for the protection of the school district, but also for the benefit of all parties who might furnish materials used in the building, and that any such party, having unpaid bills therefor, might, in the name of the school district, maintain an action upon the bond to recover the amount of such bills.

Schmidt & Wible and David Pullman were securities on the bond. Pullman has since deceased and Anna A. Pullman, administratrix, represents his estate.

The decision rendered by the court of appeals is not only in conflict with the Board of President and Directors of the St. Louis Public Schools *v.* Woods *et al.*, 77 Mo. 197, but is in conflict with the more recent decisions of this Court in City of St. Louis to use of Glencoe Lime and Cement Co. *v.* Von Phul *et al.*, 133 Mo. 561, and Devers *v.* Howard, 144 Mo. 671, in which it is held that a contract between persons made upon a valid consideration may be enforced by a third person, though not named in the contract, when the obligee owes to him some duty, legal or equitable, which would give him a just claim, and must therefore be overruled.

It is contended by defendants that the evidence showed that the school district paid Livers and Pullman, the contractors, in excess of eighty per cent of the amount due them on their contract, which was in violation of its terms, and as such payment was without the knowledge or consent of the securities, that the defendants, Anna Pullman, administratrix, and Schmidt and Wible, were thereby released. Defendants asked a declaration of law presenting this theory of the case which was refused, and as there was evidence tending to show such payment, we take it for granted that it was refused upon the ground, that, even if true, it did not have the effect to release defendants upon the bond, for causes of action, if there were such, which had accrued upon the bond before that time.

Plaintiff's rights are original and independent of the school district, the board being constituted under the bond the trustee of an express trust. Board *v.* Woods, *supra*. The bond is dual in its nature, being for the benefit and protection of the school district against loss or damage for the non-fulfilment of their contract by the contractors, and the payment by them of laborers for work done, and of material-men for material furnished, rights which when once fixed could not be destroyed or taken away by any act of the school district.

In Doll *v.* Crume, 41 Neb. 655, a city let a contract for grading its streets to one Davis which McGavock and Doll signed as his securities. The contract provided among other things that Davis should be paid forty-five per cent of the cost of the work when two-thirds of it was completed; that he would pay for all labor and material furnished him in executing the contract, and complete the work in one hundred and eighty days. The contract recited that "said parties of the third part (McGavock and Doll) hereby guaranty that

said party of the second part (Davis) will well and truly perform the covenant hereinbefore contained to pay all laborers employed on said work; and if said laborers are not paid in full by said party of the second part, that said party of the third part hereby agrees to pay for said labor, or any part thereof, which shall not be paid by said second party within ten days after the money for said labor becomes due and payable." On completion of two-thirds of the work the city paid Davis ninety per cent of the estimated cost thereof. It also granted Davis an extention of time for the completion of his contract beyond the time fixed thereby. It was held "(1) That the contract between the city and Davis and his sureties and the promises and liabilities of the latter thereon, were of a dual nature, — a promise to the city that Davis should perform the work in the time and manner he had agreed, and a promise, in effect, to Crume to pay him for the labor he should perform for Davis; (2) that the city's overpaying Davis and extending the time of performance of his contract did not release the sureties from the contract to pay Davis' laborers; (3) that if the city had precluded itself from calling on the sureties to make good to it any default of Davis, its acts did not estop the laborers of Davis from enforcing against the sureties their contracts and promises."

Paraphrasing what is said in that case, the case stands just as if Livers and Pullman and their sureties had made the written promise directly to the Koken Iron Works instead of to the school district. Then how can it be said that any act of the school district in overpaying Livers and Pullman can release them or their sureties from their contract with the Koken Iron Works. It may be that the school district by its actions has precluded itself from recovering from the sureties of the contractors for any default of theirs in the premises, but it by no means follows that the school district's action estops the Koken Iron Works. In other words, there were two contracts with one consideration to support both. To the same effect is Lyman *v.* Lincoln, 38 Neb. 794.[1]

Henricus *v.* Englert, 137 N. Y. 488, was an action upon a bond executed by defendant as surety for one Leonard Vogel. Plaintiffs were the original contractors. Thereafter they sub-let the carpenter's work upon the building to Vogel, who thereupon executed to them a bond in the penal sum of $5,000, conditioned that Vogel, "shall perform all the obligations and agreements made and entered into with the said Henricus & Son, agents, and shall erect, work, make and complete a certain town hall and fire department building for the village of Bockport, New York, agreeable to the plans, and in perfect keeping with the revised carpenter's specifications prepared for the same by H. B. Gleason, architect." After the completion of the building the village claimed that it had not been erected according to contract, and claimed damages on account of defects in the work

[1] Kaufmann *v.* Cooper, 46 Neb. 644; King *v.* Murphy, 49 Neb. 670, *acc.*

which were thereafter adjusted with Vogel at the sum of $550, which amount was deducted from the contract price payable to plaintiffs. Thereafter plaintiffs began suit on the bond, alleging breaches thereof and claiming damages in the sum of $5,000 the penalty of the bond. The defence was that at the time of the execution of the bond there was an arrangement between plaintiffs and Vogel by which he, Vogel, was to become the original contractor for the work done by him, and that thereupon his bond was assigned and delivered to the village as security for the work by him, and that after the work was completed all matters of difference between the plantiffs and Vogel, and between Vogel and the village, or in any way growing out of his contract, or connected therewith, were adjusted and settled. It appeared that some changes and alterations were made in the plans between the architect, Vogel, and the village, without the consent of plaintiffs. It was held that the changes did not release defendant from, or affect his liability upon, the bond.

At the time of the payment of the eighty per cent the Koken Iron Works had already complied with its contract, and its right of action accrued, which the school district could by no act of its board take away, or deprive it of.

We therefore reverse the judgment of the Kansas City Court of Appeals, with directions to affirm the judgment of the Circuit Court.

GANTT, P. J., and SHERWOOD, J., concur.[1]

THE NEW ORLEANS ST. JOSEPH'S ASSOCIATION *v.* A. MAGNIER.

LOUISIANA SUPREME COURT, MAY, 1861.

[*Reported in* 16 *Louisiana Annual*, 338.]

VOORHIES, J. The defendant, Magnier, and several other hatters in the city of New Orleans, entered into a contract to close their respective stores on Sundays. They stipulated, in express terms, that those who would violate this obligation, would become subject, for each infraction, to a fine of one hundred dollars for the benefit of the asylum of the St. Joseph's Orphans.

A. Magnier having, on several Sundays, opened his store, the present suit was brought to recover the stipulated fine.

To the general rule that parties to a contract cannot stipulate but

[1] Non-performance of his promise by the promisee was held a defence to an action by the third person in 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.

for themselves, there is an exception when one makes, in his own name, some advantage for a third person the condition or consideration of a commutative contract, or onerous donation. C. C. 1884, 1896. He, for whose benefit this advantage is stipulated, has an equitable action to enforce the stipulation, when he has signified his assent in the premises. C. P. 35.

The text is clear that the advantage must be the condition or consideration of the contract: hence it is that a penal obligation cannot be stipulated for the benefit of third persons. 6 Toullier, No. 846; Rolland de Villargues, 2 Dict. Not. No. 50; C. N. 1121.

A penal clause, being a secondary obligation having for its object the enforcement of a primary obligation, cannot be assimilated to a condition or consideration. C. C. 2113.

"The penal obligation, says C. C. 2115, has this in common with a conditional obligation, that the penalty is due only on condition that the first part of the contract be not performed. But it differs from it in this, that in penal contracts there must be always a principal obligation, independent of the penalty; while in conditional contracts, there is no obligation, unless the condition happens."

The stipulation to pay a fine of one hundred dollars for each violation of the contract, is, in the very language of the parties, a penal obligation. Its very object and purpose is to enforce the primary obligation, which each of the contracting parties assumed, to close his respective store on Sundays. It is a strained and unnatural construction to say that the contract was entered into with the view of making a donation to the plaintiffs, dependent upon the condition that any of the parties would not close their stores. This was a commutative contract with a penal clause, not a conditional donation.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that the plaintiffs' demand be rejected, with costs in both courts.

Land, J., absent, concurring.

SECTION II.

ASSIGNMENT OF CONTRACTS.

MOWSE *v.* EDNEY.

In the Queen's Bench, Easter Term, 1600.

[*Reported in Rolle's Abridgment*, 20 *placitum*, 12.]

If A is indebted to B by bill and B indebted to C, and B in payment of his debt to C assigns A's bill to him, and before the day for the payment of the money A comes to C and promises him that if

he will forbear to enforce the payment of the money then he, A, will pay him; upon which C forbears. Still there is no consideration to maintain any action on this promise, because notwithstanding the assignment of the bill, still the property of the debt remains always in the assignor.

PENSON AND HIGBED'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1588.

[*Reported in* 4 *Leonard*, 99.]

IN assumpsit, the plaintiff declared that in consideration that he by his servant had delivered to the defendant two bills of debt amounting to the sum of 80*l. solubiles eidem querenti* to be received by the defendant at Roan in Normandy, to his own use, the defendant promised to pay to the plaintiff 60*l.*, and upon this matter, judgment was given; and now a writ of error was brought and assigned for error, because it is not shewed in the declaration that the bills were sealed or that they were made to the plaintiff, and here is not any consideration, for the defendant hath not any remedy to compel the parties to pay the said debts if they refuse. *Godfrey:* If the money be not paid at Roan to the defendant, he shall have an action upon the case, for this is an assumpsit in law, which WRAY *concessit*, for it is a mutual promise and agreement: and it was argued to the contrary that here is not any different consideration, for it doth not appear that the defendant hath any recovery for to recover the money. And, 13 Eliz., it was holden, that where the plaintiff declared, in an action upon the case, that in consideration that he had delivered a bill of debt to the defendant, and hath made a letter of attorney upon it, etc., the defendant promised to pay to the plaintiff 20*l.*, and because that the plaintiff (notwithstanding that) might release the debt, or revoke the letter of attorney, and so defeat the defendant of the whole profit, etc., that the action upon the matter did not lye. Also for another cause the consideration is not sufficient, for it is illegal because maintenance, but if it was upon the consideration precedent it had been good enough. As, if I be indebted to A, and B is indebted to me, I may assign to A the debt which B oweth me. *Golding:* Although the consideration be but of small value, yet it is good enough. And if A, in consideration B will assure to him the manor of D, promise to pay to B 100*l.*, although the party hath not any interest or title to it, yet it is good, and also though the consideration be executory, yet it is valuable; for if the money be not paid at Roan, the defendant shall have an action upon the case against the plaintiff. It was also objected that upon the declaration it doth not appear that the defendant, if the two bills be not paid, may have an action upon

the case against the plaintiff, for there is not any express assumpsit, on the plaintiff's part, that the monies due by the bills to the plaintiff shall be paid to the defendant; for if it had been so, then it had been good, for then there had been a reciprocal promise which is not here, nor can be collected by any words in the declaration. *Cook:* It doth not appear upon the declaration by whom nor to whom the money due by the two bills shall be paid, for it may be that they are due to the defendant, and then the delivery of the two bills is not any consideration. *Quod* CLENCH and GAWDY, *concesserunt.* The case was adjourned.

ALLEN'S CASE, 1584.

[*Reported in Owen*, 113.]

A *scire facias* issued out in the name of the Queen to shew cause why execution of a debt which is come to the Queen by the attainder of J. S. should not be had. The defendant pleaded that the Queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions and demands, etc., upon which the plaintiff demurred. And the question was, if the patentee might sue for this in the name of the Queen, without speciall words. And two precedents were cited that he may, 1 Pasch., 30 Eliz. rot. 191, in the Exchequer, where Greene, to whom a debt was due, was attainted, and the Queen granted over this debt, and all actions and demands, and a *scire facias* was sued for him in the name of the Queen, also in the 32 Eliz. rot. 219.

Mabb of London was indebted by bond, and the debt came to the Queen by the attainder, and she granted it to Bones, and all actions and demands, and a *scire facias* was issued out in the name of the Queen. And the principal case was adjourned. But the patentee had express words to sue in the name of the Queen, although it was not so pleaded.[1]

[1] "Where a bond is assigned over with a letter of attorney therein to sue, and a covenant not to revoke, but that the money shall come to the use of the assignee, although the obligee be dead, yet the court will not stay proceedings in a suit upon the bond in the obligee's administrator's name, though prosecuted without his consent; for that those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all courts, that the grantee hath such an interest that he may sue in the name of the party, his executors or administrators." Lilly's Practical Register, 48 (1710).

HARVEY *v.* BATEMAN, 1596.

[*Reported in Noy*, 52.]

If a man assign an obligation to another for a preccdent debt due by him to the assignee, there, that is not maintenance; but if he assign it for a consideration then given by way of contract, that is maintenance.[1]

BACKWELL *v.* LITCOTT.

In the King's Bench, Hilary Term, 1669.

[*Reported in* 2 *Keble*, 331.]

Nota, On motion of Jones to stay a trial of bankrupsie of one Colonell, it was said, that if J. be obliged to J. S. and he before bankrupsie assign the bond, this is liable to after-bankrupsie of J. S. being onely suable in his name, *per* Keeling and Twisden.

FASHION *v.* ATWOOD.

In Chancery, July 19, 1680.

[*Reported in* 2 *Cases in Chancery*, 36.]

Pearson, living in London, was agent and factor for Atwood, now deceased, to sell Norwich stuffs in London, which Atwood sent him from Norwich: and in the management of this trade, Atwood charged Pearson with bills of exchange; and it so fell out that Pearson had sold in Atwood's name divers clothes for money, payable at future days; and doubting he had not goods in his hands to make good what he had undertaken by accepting Atwood's bills, informs Atwood of it, and Atwood agrees, that Pearson secure himself out of what effects, etc., he had. At this time Atwood was indebted to Eborne and others by bond; and Pearson was likewise indebted to others on his own account; Pearson by word assigns to his creditors the debts which were due to Atwood; Atwood and Pearson both die: the administrators of Pearson, and the assignees of the debts due to Atwood, but assigned by Pearson to his creditors, sue the executrix of Atwood for to have the benefit of the debts due to Atwood for his goods sold by Pearson but assigned by Pearson to his own creditors.

[1] See for further early authorities on the assignment of choses in action, 3 Harv. L. Rev. 336, by Professor Ames.

The question was, whether the assignees of the debts by parol made by Pearson and the parol agreement by Atwood, that the goods and debts which Pearson had and contracted for would be his security for his undertaking for Atwood, would prevail against the creditors of Atwood, especially such creditors of Atwood as had bonds; for the persons who had bought Atwood's goods of Pearson did know that the goods were Atwood's and not Pearson's, and entered in Pearson's books as debts due to Atwood, not to Pearson; and thereupon we of counsel, with the executor of Atwood and the creditor of Atwood by bond, insisted: —

1st. That the goods were sold as Atwood's goods, and the buyers entered in Pearson's books as a debt to Atwood, Pearson had no remedy on the contract; but Atwood was solely owner of the debt.

2d. That the debt being a thing in action, is not transferable by law; so as notwithstanding the agreement of Atwood, he still in law remained creditor; and this is a case between actors and transactors in England, not of merchants, who by law-merchant may assign debts.

3d. That though in equity Pearson might retain, or be entitled in equity to the debt against Atwood himself; yet now the case is changed by the death of Atwood, for now the creditors of Atwood by bond are in a better case than Pearson, who had no title but by parol; and if Pearson would sue the executrix of Atwood, she could not pay him; but if she did, she would commit a devastavit, and break her oath as executrix, and the assignees of Pearson could be in no better case than Pearson and his executors were.

4th. The creditors of Atwood by bond had a good title in law, to be satisfied out of his estate and debts, and they had done nothing to prejudice their title: and the case is not the same, for the goods remaining unsold as for debts.

The Lord Chancellor. By the agreement Pearson had a good title in equity to the debts, which in equity are become his, and are no longer Atwood's; and therefore decreed for the creditors of Pearson.[1]

Methinks there was another equity for Pearson, but was not mentioned or insisted on, viz.; that in case of merchant and factor, the merchant would not have account from the factor; but if the factor were out more than could be demanded from his factor (as in this case it happened), the merchant would first make even.

[1] See also s. c. 2 Ch. Cas. 6. Compare Mitchell *v.* Edes, 2 Vern. 391.

CROUCH *v.* MARTIN & HARRIS, ET AL.

IN CHANCERY, MICHAELMAS TERM, 1707.

[*Reported in* 2 *Vernon*, 595.]

THE plaintiff lent Arthur Harris, late husband of the defendant, 100*l.* on Bottom-Rhea; and as a farther security assigned to the plaintiff the wages that would become due to him in the voyage to the Indies, as chirurgeon of the ship at 4*l.* 10*s.* per month; the ship returned safe to London, and 145*l.* became due on the Bottom-Rhea bond. Arthur Harris died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her 400*l.* if she survived him, she confessed judgment thereon, and insisted that judgment ought to be first paid, and the wages due to the husband applied to that purpose.

Per cur. Seamen's wages are assignable, and the assignment specifically binds the wages; and in truth the advancing the 100*l.* on the credit of the wages is, as it were, paying the wages beforehand; and the seaman or his widow must not have his wages twice.

It is a *chose en action*, being due by contract, although the service not then done, and a *chose en action* is assignable in equity upon a consideration paid.

ROW *v.* DAWSON.

IN CHANCERY, NOVEMBER 27, 1749.

[*Reported in* 1 *Vesey, Senior*, 331.]

TONSON and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz. "Out of the money due from Horace Walpole out of the Exchequer, and what will be due at Michaelmas pay to Tonson 400*l.*, and to Cowdery 200*l.* value received."

Gibson became bankrupt: and the question was, whether the defendants Tonson and the executors of Cowdery were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, are entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity.

LORD CHANCELLOR. At first I a little doubted about my own jurisdiction: and whether the plaintiffs ought not to have gone into the

Exchequer, as being a court of revenue; for this is not a personal credit given to, or demand upon the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the crown for public services. But there is something in the present case delivering it from that; the officer admits, he has received a sum of money applicable to this demand, which brings it to the old case of a liberate, which a person has under the great seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand; therefore not a draft on personal credit to go in the common course of negociation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistance. Then what is it, for it must amount to something? It is an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action, this Court does; and any words will do; no particular words being necessary thereto. In the case of a bond it may be assigned in equity for valuable consideration, and good although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him;" this is just that case; only it is not a debt arising from specialty: therefore like an assignment of rent by direction to a tenant or steward to pay so much of a year's rent to a third person. The case of Ryal *v.* Rowles, *post*, now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission: and it is clear, that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause in the statute, J. 1. But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which

amounts to an assignment, is deposited with the officer Swinburn, and therefore is attached immediately upon it: so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.[1]

WINCH *v.* KEELEY.

In the King's Bench, Hilary Term, 1787.

[*Reported in* 1 *Term Reports*, 619.]

Indebitatus assumpsit for work and labor, money paid, laid out, and expended, money lent, and on an account stated.

Pleas, 1st, Non assumpsit. 2d, That after the day of making the promises, etc., the plaintiff became a bankrupt, etc., and that his commissioners assigned over his effects to the assignees, etc., by virtue of which he the defendant is chargeable to pay the sums of money mentioned in the declaration to the assignees, etc. 3d, Set off for goods sold and delivered, money paid, laid out, and expended, money lent, and for money due on an account stated.

The replication admitted the matters contained in the second plea to be true; and as to all the promises in the declaration mentioned, and all the sums therein contained, except as to 73*l.* 12*s.* 9*d.* parcel, etc., the plaintiff acknowledged that he would not further prosecute. Then the replication proceeded as follows; and as to that sum, he says that, before the time that the plaintiff became a bankrupt in manner and form as the defendant hath in his said plea alleged, the said defendant was indebted to him the said plaintiff in the several sums of money in the said declaration mentioned, and that he the said plaintiff was also indebted to the said defendant in certain other large sums of money; and that upon an account fairly and justly taken between the said plaintiff and the said defendant there was then due and owing from the defendant to him the said plaintiff, on the balance of such account, the sum of 73*l.* 12*s.* 9*d.* for and on account of the several sums of money in the third and fourth counts of the said declaration mentioned, over and above all sums of money whatsoever due and owing from the said plaintiff to the said defendant, that is to say, at Westminster aforesaid; and the said plaintiff farther saith, that he the said plaintiff, before the time that he became and was a bankrupt in manner and form as in the said plea mentioned, to wit on the 20th of October, 1785, at Westminster

[1] See also Squib *v.* Wyn, 1 P. Wms. 378; Chandos *v.* Talbot, 2 P. Wms. 601, 607; Carteret *v.* Paschal, 3 P. Wms. 197; Tourville *v.* Naish, 3 P. Wms. 307; *Ex parte* Byas, 1 Atk. 124; Brown *v.* Roger Williams, 1 Atk. 160; Unwin *v.* Oliver, 1 Burr. 481; Sullivan *v.* Visconti (N. J.), 53 At. Rep. 598.

aforesaid, in the said county, became and was justly indebted to one Joseph Searle in a large sum of money, to wit, in the sum of 73*l.* 12*s.* 9*d.* And, being so indebted, he the said plaintiff afterwards, to wit, on the day and year last aforesaid, and before he became a bankrupt, to wit, at Westminster aforesaid, in the county aforesaid, by his certain deed poll, sealed with the seal of him the said plaintiff, which said deed he the said plaintiff brings here into court, the date whereof, etc., in consideration of the said sum of money so as aforesaid due and owing from him the said plaintiff to the said Joseph Searle, did bargain, sell, assign, and transfer to the said Joseph Searle the said sum of 73*l.* 12*s.* 9*d.* parcel of the money in the said declaration mentioned; to hold the same to the said Joseph Searle from thenceforth to his own proper use, under a certain proviso therein and hereinafter mentioned; and did thereby constitute and appoint the said Joseph Searle his true and lawful attorney irrevocably, and did give and grant unto him, his executors and administrators, full power and authority in his name, to the only proper use and behoof of the said Joseph, to ask, demand, and sue for, the aforesaid sum of 73*l.* 12*s.* 9*d.* Provided always, that if he the said plaintiff, his executors or administrators, should well and truly pay, or cause to be paid, unto the said Joseph the said sum of 73*l.* 12*s.* 9*d.* so due and owing to him as aforesaid, within two calendar months after the date of those presents, then the said deed poll, and every article and clause therein contained, should be void; as by the said deed poll, relation being thereunto had, may more fully appear. And the said plaintiff further saith, that he did not, at any time within the space of two calendar months after the date of the said deed, pay to the said Joseph the said sum of 73*l.* 12*s.* 9*d.* so due and owing to him as aforesaid, but that the same hath from thence hitherto remained due and unpaid from the said plaintiff to the said Joseph; and that the original writ in this suit was sued out in the name of him the said plaintiff for and on the behalf of the said Joseph Searle, and for the purpose of enabling the said Joseph Searle to receive the said sum of 73*l.* 12*s.* 9*d.* parcel of the said sums in the said declaration mentioned, according to the form and effect of the said deed poll, and not for the benefit, use, or behoof, of the said plaintiff, that is to say, at Westminster aforesaid, in the county aforesaid; and this he is ready to verify, wherefore he prays judgment, etc., as to the said 73*l.* 12*s.* 9*d.* To this replication there was a general demurrer and joinder.

Morgan, in support of the demurrer, contended that this debt, being a chose in action, could not be assigned. Co. Litt. 214 a, 2 Rol. Abr. 45 F. 6. Although the king by his prerogative may assign a chose in action, yet his grantee cannot. Cro. Eliz. 180. Bills of exchange are assignable by the law of merchants: but promissory notes can only be assigned under the 3 & 4 Ann. c. 9, which shews that at common law they could not. That being the

law generally, that inconvenience will result from permitting persons subject to the bankrupt laws to assign over their effects to particular creditors on the eve of a bankruptcy.

Lawrence, contra, did not dispute the general principle; and admitted that if the action had been brought in the name of Searle, those cases would have applied; and that this assignment could not have been supported if it had been fraudulent. But he observed that the question here was, whether a chose in action can be assigned for an antecedent debt, so that the assignee may recover on it in the name of the assignor. The cases cited only prove that the action cannot be maintained by the assignee. It cannot now be disputed that courts of equity will protect a chose in action when assigned; and courts of law have frequently permitted the assignee to sue in the name of the assignor. A court of equity has held such an assignment to be good, even though the assignor afterwards became a bankrupt. Unwin *v.* Oliver, cited by Lord Mansfield, in 1 Burr. 481; *Ex parte* Byas, 1 Atk. 124. If then such an assignment be good in a court of equity, the only question is, whether or not this Court will take notice of such a trust. Now courts of law have taken notice of trusts in many instances. In the case of Bottomley *v.* Brooke, which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.* lent to the defendant by one E. Chancellor, and was given by her direction to the plaintiff in trust of her, and that E. Chancellor, before the action brought, was indebted to the defendant in more money than the amount of the bond: to this there was a demurrer, which was withdrawn by the advice of the Court. So that the Court there did not look to the person legally entitled, but to her who was beneficially interested in the bond. The authority of this case was afterwards recognized in that of Rudge *v.* Birch in this Court, where, to debt on bond the defendant pleaded, that the bond was given to the plaintiff in trust for A for a debt due from the defendant to A; and that A at the time of exhibiting the plaintiff's bill was indebted to the defendant in more money. The plaintiff demurred, and the Court, on the authority of the case of Bottomly *v.* Brooke, held this to be a good plea. It has likewise been since recognized in Webster *v.* Scales, where it was held by the Court that a bankrupt's interest as a trustee was not assignable by the commissioners. Immediately on his assignment the plaintiff became a mere trustee; if so, this case falls within the principle of that of Webster *v.* Scales. For by the 1 Jac. 1, c. 15, s. 15, the commissioners are only empowered to assign those things which are for the benefit of the bankurpt. Therefore this debt could not pass under the assignment from the bankrupt's commissioners to his assignees; because, when recovered, it cannot be applied to the bankrupt's benefit.

Morgan in reply. There is no doubt but a chose in action may be assigned in equity; but the question here is, whether it can be so

assigned in a court of law. In Bottomley *v.* Brooke, the parties had only done what they lawfully might; the bond was originally given to the plaintiff for the benefit of Mrs. Chancellor; and on an account between her and the defendant she would have been found indebted to him: but no question there arose concerning the assignment of a chose in action. In the case of Rudge and Birch the plaintiff was a trustee: but here the plaintiff is not to be considered in that light; because he was the original debtor, and unless he could assign a chose in action, his interest in the bond is now vested in his assignees.

Ashhurst, J. The cases which have been cited by the plaintiff's counsel go a great way in determining this question. It is true that formerly the courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a court of equity: but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this Court will take notice of a trust, and consider who is beneficially interested, as in Bottomley *v.* Brooke, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her. The only difference between that case and this is, that there the plaintiff himself was not originally interested in the debt, but this plaintiff was: but that does not make any essential difference; because if it be once established that this Court will take notice of trusts, it is immaterial whether the person who sues were originally a trustee or afterwards becomes so. Nor is it material at what time they became a trustee; for whether he became such by the assignment, or was so originally, it is sufficient to say that he is a trustee now, and as such has a right to maintain this action. If this had been a fraudulent assignment, it would have raised a different question: but on these pleadings it must be taken to have been assigned for a valuable consideration. The case of Webster and Scales is in point; and on the authority of that and on the other cases cited, I am of opinion that the plaintiff may recover.

Buller, J. This action is brought in the name of the assignor of this bond; and therefore it does not involve in it the question whether a chose in action may be so assigned as to give a legal title to the assignee. The plea only says, that the plaintiff is become a bankrupt, and that this debt is transferred to his assignees; the answer to that is, that this is a debt due in form to the plaintiff, but in substance to a third person; and therefore it is not such a debt as passed under the commission; if not, it is still in the plaintiff, and he is entitled to maintain this action. The statute of the 1 Jac. 1, c. 15, only says that such debts are to be assigned as are for the

benefit of the bankrupt. This construction was put upon the statute soon after it passed in a case in March, 38; where it was held that such things as the bankrupt held as trustee did not pass under the commission. Here it must be taken on these pleadings that this debt did not pass under the commission; therefore it remained in the bankrupt, and he may maintain this action.

Judgment for the plaintiff.

CATOR *v.* BURKES AND OTHERS.

IN CHANCERY, 1785.

[*Reported in* 1 *Brown's Chancery Cases*, 434.]

DEFENDANTS Edmund and Richard Burke had entered into a bond of 500*l.* to the other defendant Hargrave, for securing 250*l.* dated 5th September, 1777 (together with other bonds, amounting to 1050*l.*), and had taken from him a counter-bond for securing the said sum of 1050*l.* Afterwards the defendant Hargrave borrowed of the plaintiff Cator 100*l.* on his own promissory note, and deposited defendant Burke's bond with plaintiff as a security. The 100*l.* not being paid, the plaintiff filed this bill praying the defendants Burkes might pay to the plaintiff what should be found due on account of the 100*l.* and interest, out of the money secured by their bond. The bond appeared to be given for the purpose of satisfying creditors of William Burke, a relation of the defendants Burkes, between whom and Hargrave there was matter of account, on which William Burke was debtor; and that there was also a matter of account outstanding between Edmund Burke and the defendant Hargrave.

Mr. Madocks and *Mr. Hollist*, for the plaintiff, argued (upon Lord LOUGHBOROUGH's expressing a doubt what remedy the plaintiff could have in equity), that the relief was by preventing the defendants Burkes from setting up the counter-bond, as a defence against any action which might be brought against them at law, in the name of Hargrave. That the bond here, being lent for the purpose of raising money, and a counter-bond taken, was a fraud, and the holder of the bond ought to be protected against the counter-bond so taken being used as a defence.

Mr. Hollist cited the case of Lord Shelburne *v.* Tierney, in the Exchequer, where, in the action at law, Lord Shelburne pleaded the counter-bond, and the plaintiff filed a bill to restrain him from setting it up: Lord Shelburne submitted.

LORD LOUGHBOROUGH. Then the Court did not decree that he should not set up the counter-bond.

Mr. Kenyon, for defendants Burkes. Whoever takes a security,

which, at law, is unassignable, must take it subject to every defence which can be made against it.

Mr. Arden, for defendant Hargrave. The question for your Lordships to decide is, whether the holder of the bond, using it with the consent of the obligor, the obligor can contend at law, to set off against it, as an unassignable security. An unassignable security at law, if assigned by the consent of the obligor, will be held in equity to be the same as an assignable security.

Lord Loughborough. Suppose the bond had been paid off, but had continued in Cator's hands, the argument will go to this, that Burke could not set off the payment, unless indorsed upon the bond. It is turning an unassignable into an assignable security. It is a very different case from a bond given to be deposited with Cator. The whole question is between the co-defendants. The bond can never be considered in any other light than as an unassignable security; to consider it otherwise, would bring all the causes on bonds in Westminster Hall into this Court. The plaintiff has mistaken both the law and equity; for first, he has supposed that the holder of a bond might, where there was no discovery to be made, come hither, and have a different relief from what he could have at law; and secondly, that if there was fraud in giving the counter-bond, it could not be made use of at law. When this bill is dismissed with costs, you may bring your action in the name of Hargrave. If this bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that is given.

Ordered the bill to be dismissed with costs.[1]

DEERING *v.* FARRINGTON.

In the King's Bench, Easter Term, 1674.

[*Reported in* 1 *Modern*, 113.]

An action of covenant, declaring upon a deed by which the defendant *assignavit et transposuit* all the money that should be allowed by any order of a foreign State to come to him in lieu of his share in a ship.

Tompson moved, that an action of covenant would not lie, for it was neither an express nor an implied covenant. 1 Leon. 179.

Hale, C. J. You should rather have applied yourself to this, viz.: Whether it would not be a good covenant against the party? As if a man doth demise, that is an implied covenant; but if there be a particular express covenant, that he shall quietly enjoy against all claiming under him, that restrains the general implied covenant; but it is a good covenant against the party himself. If I make a lease for years reserving rent to a stranger, an action of covenant will lie

[1] See Ames's Cas. on Trusts (2d ed.), 59, 60 *n.*

by the party to pay the rent to the stranger. Then it was said, it was an assignment for maintenance.

HALE, C. J. That ought to have been averred.

Then it was further said, That an assignment transferring when it cannot transfer, signifies nothing. — HALE, C. J. But it is a covenant, and then it is all one as if he had covenanted that he should have all the money that he should recover for his loss in such a ship. — TWISDEN, J., seemed to doubt. — But judgment.[1]

HARDING *v.* HARDING AND ANOTHER.

IN THE QUEEN'S BENCH DIVISION, JULY 13, 15, 1886.

[*Reported in* 17 *Queen's Bench Division*, 442.]

APPEAL from the judgment of the judge of the county court of Loughborough.

The facts were as follows: —

The defendants were the executors of James Harding, and one of the residuary legatees under James Harding's will was George Harding, the father of the plaintiff. George Harding lived in Australia, and the defendants, after realizing the estate, sent him an account headed, "Estate of the late James Harding, deceased, in account with George Harding," in which, after crediting him with his share of the estate and debiting him with sums of money paid to him on account, a balance of 28*l.* 19*s.* 3*d.* was shown to be due to him from the estate. George Harding received the account, and on the 4th of September, 1884, wrote at the foot of it words which, so far as is material to the present case, were as follows: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shown in the above statement, less the ten pounds received by me in Australia. George Harding, Sydney."

The account, with this writing at the foot of it, was sent home by George Harding to his daughter Laura, the plaintiff, who kept it for some time, but in the month of October, 1885, communicated it to the defendants. At that time George Harding could not be, nor has he since been, heard of, and the defendants wrote two letters to the plaintiff's solicitors, the effect of which was that they would comply with the direction as to the payment of the money if they were satisfied that the plaintiff could give them a proper receipt. Eventually,

[1] In a report of the same case in 3 Keb. 304, Lord Hale is reported as saying: "Though assign, set over and transpose, do not amount to covenant against an eign title, yet against the covenantor himself it will amount to a covenant, as a covenant against all claiming by and under me . . . and this is no maintenance unless it be specially awarded to be so within the statute, for it doth not transfer the duty, but is a contract to transfer the benefit, as covenant to transfer."

however, they declined to pay her the money, and the plaintiff brought an action in the county court for the amount and recovered judgment. The defendants appealed.

Sills, for the defendants.

Toller, for the plaintiff.

WILLS, J. I am of opinion that the decision of the county court judge was right. It was argued for the defendants that this was a mere equitable assignment, and that having been made in favor of a volunteer without consideration, equity would not enforce it. But I think that a misapprehension of the rules of Courts of Equity is involved in that proposition. The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favor of the object of his bounty, equity will interfere to enforce it. The reason why equity will not interfere in favor of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his mind and withholding from the object of his liberality the contemplated benefit. But if there is value given on the one side in exchange for the donor's intention, then there is a contract, or something approaching to a contract, between the parties, and the donor cannot withdraw from his expressed intention. We were much pressed with the authority of Holroyd *v.* Marshall, 10 H. L. C. 191, 33 L. J. (Ch.) 193, but we think that the doctrine there laid down does not apply to a case like the present. In that case the goods which were the subject of the transaction were things capable of being conveyed by a legal title, things as to which the grantor was competent to do something further to complete the legal title of the grantee; and it was held that he was bound to do so, as he had had consideration. When, however, the subject-matter of the transaction is an equitable right or estate, and a legal title cannot be given; then if the settlor has done all in his power and nothing remains to be done by him, equity regards it as though he had completed the legal title, and gives effect to his intention.

In the present case it was proposed to assign a sum of money due from the trustees, the defendants; and probably before the Judicature Act it would have been impossible to give a legal title to Laura Harding, so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done; and it seems to me that the legal title has been so completed by the notice signed by George Harding and sent by him to the plaintiff. If it is to be regarded as an equitable assignment, he has done all that he could to make it complete; if, as a legal assignment,

he has completed it; and under s. 25, sub-s. 6 of the Judicature Act, 1873, the assignee of a chose in action may sue in his own name, the law as to the necessity for a consideration not applying, as it seems to me, if the assignment is completely made. If the assignment had been made by deed, the question of consideration could not arise; and in my opinion the question of want of consideration has no application to such a case as the present. But there is a further fact in the present case; George Harding authorized his daughter to communicate his letter to the trustees; she did so, and the trustees assented to the assignment. It seems to me that that fact carries us a step further, and imports into the case another doctrine of equity; that under such circumstances the assignee is regarded as the *cestui que trust* of the debtor, if the debtor has assented to the obligation. The correspondence shows that the trustees assented to take the plaintiff as their *cestui que trust*, and the facts ought to have satisfied them that she had the power to give them a proper receipt. The authority given by George Harding to receive the money was unrevoked, and the plaintiff was competent to give an effectual discharge. I think that even without the assent of the trustees there was a good and valid assignment to the plaintiff; but with such assent arises the second doctrine that I have referred to, which settles any possible question as to her right to maintain this action.

It is further objected that the action cannot be maintained against the defendants personally, but should have been brought against them as executors; that objection I think untenable. The defendants had stated an account acknowledging the debt, and there is ample authority for saying that they can be sued in their personal capacity.

Appeal dismissed.[1]

[1] GRANTHAM, J., delivered a concurring opinion. Walker *v.* Bradford Bank, 12 Q. B. D. 511; Moore *v.* Waddle, 34 Cal. 145; Welch *v.* Mayer, 4 Col. App. 440; Morrison *v.* Ross, 113 Ind. 186; Pugh *v.* Miller, 126 Ind. 189; Wardner *v.* Jack, 82 Ia. 435; Jones *v.* Moore, 102 Ky. 591; Norris *v.* Hall, 18 Me. 332; Briscoe *v.* Eckley, 35 Mich. 112; Coe *v.* Hinckley, 109 Mich. 608; Wolff *v.* Matthews, 39 Mo. App. 376; Clark *v.* Downing, 1 E. D. Smith, 406; Beach *v.* Raymond, 2 E. D. Smith, 496; Mills *v.* Fox, 4 E. D. Smith, 220; Burtnett *v.* Gwynne, 2 Abb. Pr. 79; Moore *v.* Robertson, 25 Abb. N. C. 173; Richardson *v.* Mead, 27 Barb. 178; Merrick *v.* Brainard, 38 Barb. 574; Allen *v.* Brown, 51 Barb. 86, affd. 44 N. Y. 228; Dawson *v.* Pogue, 18 Oreg. 94; Gregoire *v.* Rourke, 28 Oreg. 275; Buxton *v.* Barrett, 14 R. I. 40, *acc.* See also Caulfield *v.* Sanders, 17 Cal. 569; Young *v.* Hudson, 99 Mo. 102; Stone *v.* Frost, 61 N. Y. 614. But see *contra*, note, Brownlow, 40; Patterson *v.* Williams, Ll. & G. t. Pl. 95. See also Jackson *v.* Sessions, 109 Mich. 216.

ELLEN G. COOK *v.* CHARLES M. LUM, Administrator.

New Jersey Supreme Court, June Term, 1893.

[*Reported in* 55 *New Jersey Law*, 373.]

Beasley, C. J. This case stands before the court on a special verdict, and the problem to be solved involves the legal efficacy of a gift of money.

The circumtances were these: The deceased, Ellen G. Green, who is here represented by her administrator, who is the defendant on this record, deposited with one Kase the sum of $2,316, who thereupon gave to the said Ellen a paper containing in column eight several sums in figures, which were footed up and amounted to the sum just specified. The paper was dated "July 26th, 1890," and there was no other writing upon it.

After finding the foregoing facts, the special verdict proceeds as follows: "And the jurors aforesaid further say that except said paper, said John H. Kase never gave to said Ellen Green any evidence of indebtedness from himself to her for said deposit. . . . That said Ellen Green did actually deliver said paper into the hands of said Ellen G. Cook shortly before her, said Ellen Green's, death. That said Ellen Green delivered said paper into the hands of said Ellen G. Cook, with the intention of thereby giving to said Ellen G. Cook, for herself, the money in the hands of said John H. Kase." It was further found that Kase was not informed of the gift until several weeks after the death of the donor.

The general legal principle regulating the subject of gifts of choses in action has long been established. It is to the effect that with respect to things both tangible and intangible, mere words of donation will not suffice. With regard to the former class — that is, things corporeal — there must be, in addition to the expression of a donative purpose, an actual tradition of the *corpus* of the gift whenever, considering the nature of the property and the circumstances of the actors, such a formality is reasonably practicable. In some instances, when the situation is incompatible with the performance of such ceremony, resort may be had to what has been called a symbolical delivery of the subject.

Touching things in action, as there can be no actual delivery of them, the legal requirement is, that the donor's voucher of right or title must be surrendered to the donee. Such surrender is deemed equivalent to an actual handing over of things corporeal.

To this extent the law of the subject is neither doubtful nor obscure. The difficulty supervenes as soon as the attempt is made to apply these rules to the ever-variant conditions of the cases that are being presented for judicial examination. Even when the thing given has been

a personal chattel, whether certain acts show a purpose to give consummated by a delivery of it, has often been, and doubtless will be, a vexed question. The uncertainty in construing the circumstances is even greater than we have rights of action to deal with. There are a multitude of decisions which demonstrate the embarrassment inherent in this class of cases; but as these decisions, while all acknowledging the rules just indicated, are in truth nothing more than interpretations, respectively, of the facts of the particular case, and as such facts are unlike the juncture now present, it would serve no useful purpose to review or cite them in detail. There is no observed precedent, so far as circumstances are concerned, for the matter now before us. Many of these decisions may be found in the Encyclopædia of English and American Law, tit. "Gifts," and any person who will examine this long train of cases will at once perceive that the principal difficulty has been to decide whether the evidence in hand in the given case showed a delivery of the subject of the gift in a legal point of view.

But this was a maze not without its clue, for the cardinal principle as to what constituted a delivery that would legalize a gift was on all sides admitted and was generally applied. The test was this, that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action. The rule does not require that the title of the donee should be formally perfect, although in the earliest decisions this appears to have been indispensable, but now the law is otherwise settled. Thus, the delivery, with donative intention, of non-negotiable notes or bonds affords an apt illustration of the rule in both of its aspects. Such gifts are admittedly valid, although the title of the donee is not ceremoniously perfect, as it wants the finishing touch of a written assignment; but the transaction is validated on the ground that it is possessed of the all-important quality of depriving the donor of all control over the property. After the delivery of such bond or note, the donor can exercise not a single act of ownership with respect to it; he cannot sue upon it nor collect it, nor regain its possession. And it is this absolute abnegation of power that, in a legal point of view, makes the transaction enforceable.

This is the crucial test, and if it be applied to the case in hand this donation is not to be sustained. The reason is that the donor parted with nothing that was essential to his own dominion over the moneys in question. After she had transferred the slip of paper in question her dominion over her deposits remained plainly intact. The paper was in no sense a voucher of the receipt of the moneys; they could have been collected without its production; nor was it necessary to a suit for their recovery. It is impossible to believe that the parties intended this slip of paper, which contained nothing but a line of figures and an addition of them, as a testimonial showing the transaction to which it immediately appertained. It does not appear how the donor became possessed of this paper, but construed intrinsically it has the

appearance of having been used for the temporary purpose of showing the aggregate of the several sums on deposit, and it carries on its face no indication whatever that it was drawn or given as a voucher of the indebtedness of the person making it. The delivery of so insignificant a paper as this cannot, in our opinion, operate to legalize the transaction in question.

The defendant is entitled to judgment.[1]

EDWARD HERBERT *v.* GEORGE W. BRONSON & TRUSTEE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 25, 1878.

[*Reported in* 125 *Massachusetts*, 475.]

TRUSTEE PROCESS. Writ dated December 31, 1877, and served on January 1, 1878. The city of Fall River, summoned as trustee, answered that at the date of service upon it, it had in its hands belonging to the defendant the sum of $248. James Murphy, Jr., appeared as claimant of the funds in the hands of the trustee by virtue of an assignment, dated April 9, 1877, to him from the defendant, of "all claims and demands I now have, and all which, at any time between the date hereof and the ninth day of April next, I may and shall have against the city of Fall River, for all sums of money due and for all sums of money and demand which, at any time between the date hereof and the said ninth day of April next, may and shall become due to me, for services as school teacher."

At the trial in the Superior Court, before GARDNER, J., without a jury, it appeared that, at the date of the assignment, the defendant was employed as a school teacher by the city, under a contract, from September, 1876, to June 30, 1877; that on September 1, 1877, the defendant was hired by a new contract from that date until June 30, 1878; and that nothing was due the defendant on September 1, 1877, upon his prior contract, but that he had then been paid in full. It was admitted by the plaintiff that the assignment was founded on a valid consideration; that it was duly recorded; and that there was due the assignee from the defendant a larger sum than was in the hands of the trustee. The claimant contended that he was entitled to all sums earned

[1] Compare Sewell *v.* Moxsy, 2 Sim. N. S. 189; Airey *v.* Hall, 3 Sm. & G. 315; Walker *v.* Bradford Bank, 12 Q. B. D. 511; *Re* Richardson, 30 Ch. D. 396; Jackson *v.* Sessions, 109 Mich. 216; Murphy *v.* Bordwell, 83 Minn. 54; Smither *v.* Smither, 30 Hun, 632; De Caumont *v.* Bogert, 36 Hun, 382; Matson *v.* Abbey, 70 Hun, 475, 141 N. Y. 179; *Re* Huggins' Est. (Pa.), 53 At. Rep. 746 Read *v.* Long, 4 Yerg. 68; Cowen *v.* First Nat. Bank, 94 Tex. 547.

As to gifts of choses in action, having tangible form as bonds, policies of insurance, Savings Bank books, lottery tickets, etc., see Ames's Cas. on Trusts (2d ed.), 107–163, 14 Am. & Eng. Encyc. of Law (2d ed.), 1029.

by the defendant while in the employ of the city, during the year covered by the assignment.

The judge found as a fact, that the contract, under which the defendant was employed when the assignment was made, terminated on June 30, 1877, and that a new contract was entered into between the defendant and the trustee on September 1, 1877; ruled that the assignment did not cover funds earned since September 1, 1877, as against the trustee process; and ordered the trustee to be charged. The claimant alleged exceptions.

H. A. Dubuque, for the claimant.

H. K. Braley, for the plaintiff, was not called upon.

By the Court. It is well settled that money to be earned hereafter under a new engagement is not assignable. Mulhall *v.* Quinn, 1 Gray, 105; Hartley *v.* Tapley, 2 Gray, 565; Twiss *v.* Cheever, 2 Allen, 40.

Exceptions overruled.[1]

WELCH *v.* MANDEVILLE.

Supreme Court of the United States, February Term, 1816.

[*Reported in* 1 *Wheaton*, 233.]

Error to the circuit court for the district of Columbia for Alexandria County. This was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville and Jamieson. The suit abated as to Jamieson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this court arises, states, that, on the 5th of July, 1806, James Welch impleaded Mandeville and Jamieson, in the circuit court of the district of Columbia, for the county of Alexandria, in an action of covenant, in

[1] Lightbody *v.* Smith, 125 Mass. 51; Eagan *v.* Luby, 133 Mass. 543; Lehigh R. R. Co. *v.* Woodring, 116 Pa. 513, *acc.*; Edwards *v.* Peterson, 80 Me. 367, *contra*. See also Kendall *v.* United States, 7 Wall 113; Metcalf *v.* Kincaid, 87 Ia. 443.

"It makes no difference, if instead of (an assignment of) a debt now due, it is of money expected to become due at some future time to the assignor, it appearing that there was an existing contract upon which the debt might arise." Cutts *v.* Perkins, 12 Mass. 212. See also in accord, Harrop *v.* Landers Co., 45 Conn. 561; Walton *v.* Horkan, 112 Ga. 814; Metcalf *v.* Kincaid, 87 Ia. 443; Farrar *v.* Smith, 64 Me. 74; Emerson *v.* Railroad, 67 Me. 387; Knevals *v.* Blauvelt, 82 Me. 458; Shaffer *v.* Union Mining Co., 55 Md. 74; Crocker *v.* Whitney, 10 Mass. 316; Gardner *v.* Hoeg, 18 Pick. 168; Lannan *v.* Smith, 7 Gray, 150; Kane *v.* Clough, 36 Mich. 436; Garland *v.* Harrington, 51 N. H. 409; Runnells *v.* Bosquet, 60 N. H. 38; Tiernay *v.* McGarity, 14 R. I. 231; Kennedy *v.* Tiernay, 14 R. I. 528; Chase *v.* Duby, 20 R. I. 463; Dolan *v.* Hughes, 20 R. I. 513; Carter *v.* Nichols, 58 Vt. 553; State Bank *v.* Hastings, 15 Wis. 75. As to the validity of assignments of claims against the United States, see Kendall *v.* United States, 7 Wall. 113; Ball *v.* Halsell, 163 U. S. 72; Price *v.* Forrest, 173 U. S. 410; and of claims against municipal corporations, see Delaware County *v.* Diebold Co., 133 U. S. 473, and cases cited.

which suit such proceedings were had, that, afterwards, to wit, at a session of the circuit court, on the 31st day of December, 1807, "the said James Welch came into court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself." The plea then avers, that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville and Jamieson, in the former suit, are the same persons who are defendants in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into court and acknowledge that he would not farther prosecute the said suit and from thence altogether withdraw himself; and avers that James Welch, being indebted to Prior, in more than 8,707 dollars and 9 cents, and Mandeville and Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in 8,707 dollars and 9 cents, to Welch, he, Welch, on the 7th of September, 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said 8,707 dollars and 9 cents, in discharge of the said debt, of which assignment the replication avers Mandeville and Jamieson had notice. The replication farther avers, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication farther avers, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, that the said James Welch had no authority from Prior to agree or dismiss said suit. The replication farther avers, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers, that the said Prior did not know that the said suit was dismissed until after the adjournment of the court at which it was dismissed; and, farther, that the supposed entry upon the record of the court in said suit, that the plaintiff voluntarily came into court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion, and fraud; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words: "*This suit is dismissed, agreed*," and

that this entry was made by the clerk without the order of the court, and that there is no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.

The cause was argued by *Lee*, for the plaintiff, and *Swann*, for the defendant.

STORY, J., delivered the opinion of the court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit;* and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit, (on which we give no opinion,) it can be so only when it is *bona fide*, and not for the purpose of defeating the rights of third persons. It would be strange indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court, that the judgment of the circuit court, overruling the replication to the second plea of the defendant, is erroneous, and the same is reversed, and the cause remanded for farther proceedings. *Judgment affirmed.*[1]

[1] 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.* 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.

Defences acquired by the debtor against assignor before notice of the assignment are valid. McCarthy *v.* Mt. Tecarte Co., 110 Cal. 687; 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. St. 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.

Defences acquired by the debtor against the assignor after notice of assignment are

EUGENE EMLEY *v.* JAMES H. PERRINE.

NEW JERSEY SUPREME COURT, FEBRUARY TERM, 1896.

[*Reported in* 58 *New Jersey Law*, 472.]

ON rule to show cause, &c.

This action is in contract, and the declaration contains only the common counts in *assumpsit*. The bill of particulars declares that the declaration is founded upon the following instrument, viz.:

"March 28, 1888.

"MESSRS. NIGHTENGALE BROS.:

"I. O. U.

"($250) two hundred and fifty dollars for value received.

"J. H. PERRINE,"

assigned by delivery to plaintiff.

One of the pleas was the general issue.

The verdict being for the plaintiff, the defendant obtained this rule to show cause why a new trial should not be granted.

Argued at November Term, 1895, before BEASLEY, Chief Justice, and Justices MAGIE and LUDLOW.

For the rule, *Clarence Linn.*

The opinion of the court was delivered by

MAGIE, J. In the course of the trial defendant offered in evidence an assignment for the benefit of creditors, dated December 8th, 1890, and made by the firm of Nightengale Brothers, and by John and Joseph Nightengale, who composed that firm, to John S. Barkalow. The offer was rejected on the ground that a defence of that character should have been interposed by plea or notice.

The rejection of the evidence offered was erroneous.

By section 2 of our "Act respecting assignments for the benefit of creditors" (Gen. Stat. p. 78), such an instrument operates to vest in the assignee all property at its date belonging to the assignors, though not included in the inventory annexed.

When the offer was made, it had appeared in evidence that the instrument upon which plaintiff rested his claim to recover had been made at its date and delivered to John Nightengale, one of the firm of Nightengale Brothers, and had been retained in his possession until

invalid. Leigh *v.* Leigh 1 B. & P. 477; State *v.* Jennings, 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; 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.

November or December, 1893, when it was delivered by him to plaintiff for a consideration.

That instrument was non-negotiable and the title which plaintiff acquired by such delivery was not a legal but an equitable title, which, formerly, he could only assert by a suit in the name of the payees of the due bill to his use. 1 Dan. Neg. Inst., § 742. If the present suit is properly prosecuted in his own name, it is by force of the act of March 4th, 1890, amending section 19 of the Practice act. Pamph. L., p. 24; Gen. Stat., p. 2691, § 340.

But a transferee of non-negotiable paper by delivery, whether entitled to bring actions thereon in his own name or not, can acquire no better title to the paper than the transferrer had at the time of the delivery. The assignment offered by defendant showed that the holders of this due bill and implied obligation of defendant had, long before its delivery to plaintiff, parted with all their title thereto, and that such title had thereby vested in Barkalow, their assignee.

The evidence of the assignment was clearly relevant and material in respect to the title of the plaintiff to the chose in action on which he sued.

Nor was the defendant debarred from relying upon and proving the lack of title of the plaintiff or his transferrer, because it had not been set up by a plea or notice.

By the English system of pleading and practice a defendant in an action of *assumpsit* could prove, under the plea of the general issue, any matter which showed that plaintiff had never had cause of action. 1 Chit. Pl. 419. Upon that plea, until the adoption of the new rules in the reign of William IV., the question always was whether there was a subsisting debt or cause of action at the commencement of the suit. 1 Tidd. Pr. 592. This was the system adopted in this country. Gould Pl. c. 6, part 1, § 48. In this state the right of defence under the general issue in *assumpsit* had been left unrestrained until the passage of the act which limits such defences to those specified in response to plaintiff's demand. In the case before us no demand seems to have been made.

Defendant was, therefore, in no mode restrained in his defence, and evidence tending to show that plaintiff had no title to the chose in action sued on was competent. The evidence offered would have shown that the transferrer of this chose in action to plaintiff had not at that time any title thereto, and therefore could not and did not confer any title on him.

For the rejection of this evidence the rule to show cause why a new trial should not be allowed must be made absolute.[1]

[1] Burton *v.* Gage, 85 Minn. 355, *acc.* Other authorities are collected in Ames's Cas. on Trusts (2d ed.), 326, *n.*

PELLMAN AND ANOTHER *v.* HART, CUMMINGS AND HART.

PENNSYLVANIA SUPREME COURT, JULY TERM, 1845.

[*Reported in* 1 *Pennsylvania State*, 263.]

IN ERROR. The opinion of the court was delivered by ROGERS, J.

The plaintiffs, Hart, Cummings and Hart, having issued an execution on a judgment, rendered in their favor, against Daniel Beckley, attached a note for $311, given by Samuel H. Knight and Elizabeth C. Knight, to the said Daniel Beckley. The garnishees admit the note to be in part justly due, but allege that previously to the attachment, viz., on the 5th September, 1844, Daniel Beckley assigned the note for a valuable consideration to Mary Beckley. The plaintiff replies that the note was not assigned before service of the attachment; that if it were assigned, it was fraudulent; that it was delivered afterwards to Beckley to effect a compromise with his creditors, so that he might not be compelled to take the benefit of the bankrupt law, and that the note was in his possession at the time the attachment was served.

The court put the case on the true point, when they referred it to the jury to say, whether the transfer to Mary Beckley was *bona fide;* and if so, whether Daniel Beckley again became the owner of the note, and was so at the time it was attached. That the note was assigned before the attachment, there was no doubt; and to the points in contest, the jury responded in favor of the defendant; and even if wrong, the error can only be remedied on a motion for a new trial. The only inquiry is, in arriving at this result: Have the court erred in their instruction to the jury?

The plaintiffs, it is contended, have a right of action, because no notice was given of the assignment before the note was attached.

If the debtor had paid the note as in Bury *v.* Hartman, 4 Serg. & Rawle, 177, or had become bound as security of the promisor, as in Frantz *v.* Brown, 17 Serg. & Rawle, 287, it would be a good defence, unless they had notice of the assignment. This rule is intended for the protection of the debtor. So equity will protect the assignee or purchaser for a valuable consideration without notice of the assignment. These are principles which cannot be gainsayed, and are recognized by many cases ruled in this and other courts. But this is not the point here, for immediately on the assignment, as between the assignor, who is the original promisor, to the assignee, and the latter, the equitable title vests in the assignee, which of course cannot be taken to pay the debt of the assignor. All that can be seized in execution, is the right which remains in the assignor; and this is nothing more, where the assignment is made *bona fide*, than the legal title, subject to the equitable interest of the assignee. A general creditor, unless a purchaser without notice, is in no better situation than the debtor, and cannot sell a

greater interest than the debtor has — a principle which applies as well to choses in action, as a note or bond, as to any other chattel. He is not considered in the light of a purchaser without notice, nor has he the right of one. The assignment, as is said in Bury *v.* Hartman, operates as a new contract between the obligor and the assignee, commencing upon notice of the assignment; but this is not at all inconsistent with the principle, that as between the obligor and the assignee the latter acquires such an equity, *eo instanti* the assignment is made, as cannot be defeated by the creditors of the obligor.[1]

Again, it is said, the note was re-delivered to Beckley, and therefore the subject of attachment. It is unquestionably true, that if the note had been re-transferred properly to the original owner, it would be liable to debts of the execution creditor; but when it was delivered for the special purpose, as the jury have found, of effecting a compromise with creditors, which failed, it remains the property of the assignee, and consequently gives no right to the attaching creditor. And to this effect, the court instructed the jury.

It is also contended, that the note was assigned in contemplation of bankruptcy, and therefore void. This is a point not taken in the Court of Common Pleas; yet admitting the point to be as is stated, as between the promissor and the assignee, the title passes. And, although, if the debtor had been prosecuted to bankruptcy, the assignment may have been avoided; yet never having become bankrupt, I do not see what right any one of the creditors has to attach the note in payment of his debts.

Judgment affirmed.

[1] 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, 24 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; Speed *v.* May, 17 Pa. 91; Patton *v.* Wilson, 34 Pa. 299; Noble *v.* Thompson Oil Co., 79 Pa. 354, 367; Tiernay *v.* McGarity, 14 R. I. 231; Brown *v.* Minis, 1 McCord, 80; Ballingham Co. *v.* Brisbois, 14 Wash. 173, *acc.*; 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, *contra*. See also McWilliams *v.* Webb, 32 Ia. 577; Ruthven *v.* Clarke, 109 Ia. 25; Whiteside *v.* Tall, 88 Mo. App. 186, 171.

M. WELLS BRIDGE *v.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 1–24, 1890.

[*Reported in* 152 *Massachusetts*, 343.]

CONTRACT, brought by the administrator of the estate of Frank W. Wheeler for the benefit of Nelson W. Holden and Horace M. Hedden, upon a policy issued by the defendant upon the life of the intestate. The defendant admitted its liability, and paid the amount of the policy into court, and Hoyt H. Wheeler intervened as claimant of the fund. In the Superior Court, DUNBAR, J., who tried the case without a jury, found for the plaintiff; and the claimant alleged exceptions. The facts appear in the opinion.

J. A. Titus, for the claimant.

W. B. Harding (*W. E. Sibley* with him), for the plaintiff.

W. ALLEN, J. The policy sued on is dated July 31, 1880, and was duly assigned, under date of August 1, 1880, to Holden and Hedden, for whose benefit the action is brought by the plaintiff, the administrator of the assured. Under the St. of 1886, c. 281, the defendant brought the amount due into court, and dropped out of the case, and Wheeler came in as claimant of the fund; and the proceeding is now between him, on the one hand, and Holden and Hedden, on the other, to determine which of them has the equitable interest in the fund, the legal title to which is in the plaintiff as administrator. The assignment to Holden and Hedden was upon full consideration, and was taken by them in good faith, and without notice of the claim of Wheeler, who was the assignee of a former policy, upon and in consideration of the surrender of which the policy in suit was issued. The court found that Wheeler was guilty of laches; and the real question is whether the facts stated in the exceptions are sufficient to sustain that finding.

The original policy was dated August 4, 1870, and was for five thousand dollars. The first assignment to Wheeler was of the interest of the assured in the policy, one thousand dollars of which had been assigned to another person; two or three years later, the latter assignment was released; and a week or two after that, in April, 1875, a new assignment of the entire policy was made, and sent with the policy to Wheeler. In September, 1878, Wheeler reassigned to the assured all but two thousand dollars of the policy, and sent the policy with the assignment and reassignment to him. This was nearly two years before the policy was surrendered. There was correspondence in regard to the matter, but all that was put in evidence was a letter written to Wheeler by the assured, dated three days before the policy was sent, in which he says: "Yours is just at hand, and in reply I will say, I don't want to surrender the policy if I can help it, and if

you will release four thousand dollars of it I can arrange the payment and keep it along, I think, or you may release three thousand dollars, and that will leave you the two thousand; if you release the four thousand, it will leave you more than the paid-up policy, and I would like to have you release to me three or four thousand of the policy and send the policy to me, and I will keep it all straight for you and myself. I am anxious to keep the policy in force, for I could not get a policy now. I hope you will send it at once, for the premium is now over one month past due. I will assure you that it shall be all right." When Wheeler sent the policy and the reassignment of all but two thousand dollars of it, in accordance with this request, he had reason to believe that the assured intended to use it in some way for raising money. No notice was given to the insurance company, and it does not appear that there was any further communication between the parties in regard to it, or any inquiry concerning the use made of it, before the death of the assured, in November, 1888.

The policy contained the provision that no assignment of it should be valid unless made in writing indorsed thereon, and there was nothing in the policy to show that assignments not indorsed, or assignments of partial interests in a policy, would be recognized by the company. Wheeler was not the assignee of the policy when he returned it to the assured, but of a partial and minor interest in it, and that fact is pertinent in respect to the precautions proper to be taken against the acceptance by the company of its surrender without notifying him. There was a less danger that the company would accept the surrender of a policy from an assured, who had no interest in it, and had made a valid assignment of it, than from one who held the major interest in the policy, and who had made an assignment of a minor interest without its consent.

The assignment to Wheeler was not written upon the policy, but upon a separate piece of paper, which was, as the bill of exceptions states, attached "to the said policy with gluten on the upper edge of the assignment." The reassignment to the assured was also on a separate piece of paper from the policy. The papers were returned to the assured by Wheeler in this condition. When the policy was presented for surrender, the paper had been removed from it, and it does not appear that there was anything in the appearance of the policy to put the insurance company on inquiry, and the company had no knowledge, and no notice, actual or constructive, that there was any assignment of the policy. It cannot be said that the fact that a paper containing a written assignment had formerly been attached to the back of the policy was constructive notice. The insurance company in accepting the surrender of policy, could not be expected to look for an assignment, except as indorsed on the policy. Wheeler put the policy into the hands of the assured with no assignment written upon it or indorsed upon it, except as it was written upon a separate paper attached to the back of the policy in such a manner that it could be

removed. The question is not whether the assignment was indorsed upon the policy so as to be valid as against the company, — we express no opinion as to that, — but whether the claimant was in fault in giving the opportunity for a fraud, from which he or a party not in fault must suffer.

We think that the court properly refused to give the particular rulings asked, which were, in substance, that the claimant had not been guilty of laches, and that the plaintiff had no title as against him; and that there was sufficient evidence to sustain the findings of the court that the claimant was guilty of laches.

Exceptions overruled.[1]

THOMAS CHAPMAN, Plaintiff in Error, *v.* SCOVILLE SHATTUCK, Defendant in Error.

Illinois Supreme Court, December Term, 1846.

[*Reported in* 8 *Illinois*, 49.]

Treat, J. This was an action of debt commenced by Chapman against Shattuck. The declaration was on an appeal bond in the penalty of seventy-one dollars. At the return term, Shattuck moved to dismiss the case and filed a stipulation signed by him and Chapman, stating that the suit had been settled, and agreeing that it should be dismissed at the costs of Shattuck. The motion was resisted by W. T. Burgess, Esq., the plaintiff's attorney. He read an affidavit, alleging in substance that it had been agreed between him and his client that a balance of seven dollars, due him for services as attorney in this and a former case, should be paid out of the proceeds of the judgment to be recovered in this suit. That before the date of the stipulation to dismiss, he notified Shattuck of the agreement between him and his client; and that the settlement was made without his knowledge or consent. The Circuit Court dismissed the case according to the terms of the stipulation. That decision is now assigned for error.

It is insisted that Burgess had such an interest in the subject matter of the suit, as to preclude the parties from compromising it without providing for the payment of the amount due him. If this position can be sustained, it must be on the ground that he was the equitable assignee of the chose in action, on which the suit was instituted. The doctrine is now well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at law, or in equity only. If valid in equity only, the assignee is permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner is not allowed to interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has

[1] See Price *v.* Morning Star Co., 83 Mo. App. 470.

knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. Payment by him to the nominal creditor, after notice of the assignment, will be no defence to an action brought for the benefit of the assignee. Any compromise or adjustment of the cause of action by the original parties, made after notice of the assignment, and without the consent of the assignee, will be void as against him. Andrews *v.* Becker, 1 Johns. Cases, 411; Littlefield *v.* Story, 3 Johns. 426; Raymond *v.* Squire, 11 do. 47; Anderson *v.* Van Allen, 12 do. 343; Jones *v.* Withe, 13 Mass. 304; Welch *v.* Mandeville, 1 Wheaton, 233; McCullom *v.* Coxe, 1 Dallas, 134. A partial assignment, however, of the chose in action will not suffice to bring the case within the principle. The whole cause of action must be assigned. It was well remarked by Justice Story, in Mandeville *v.* Welch, 5 Wheaton, 277, that "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into payments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons." In the case before us, it is not pretended that there was an assignment of the entire cause of action. By the terms of the agreement, Burgess was only to receive a portion of the proceeds of the bond. This gave him no power over the suit. Chapman had not so parted with his interest in the bond as to lose his right to control it. Shattuck was not bound to notice the claim of Burgess. The parties to the record were at full liberty to compromise the case, and having done so, the Circuit Court did right in carrying their stipulation into effect.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.[1]

THE BRITISH WAGGON COMPANY AND THE PARKGATE WAGGON COMPANY *v.* LEA AND COMPANY.

IN THE QUEEN'S BENCH DIVISION, JANUARY 13, 1880.

[*Reported in* 5 *Queen's Bench Division*, 149.]

SPECIAL CASE, the material part of which is stated in the judgment of the court.

A. Wills, Q. C. (*Forbes* and *Lofthouse* with him), for the plaintiffs.

A. L. Smith (*A. Kingdon* with him), for the defendants.

Cur. adv. ult.

[1] The authorities in regard to partial assignments are collected in Ames's Cas. on Trusts (2d ed.), 63 *n*.

The judgment of the court (COCKBURN, C. J., and MANISTY, J.) was delivered by —

COCKBURN, C. J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances: —

By an agreement in writing of Feb. 10, 1874, the Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly tent of £625, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On Oct. 24, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding up of the company should be continued under the supervision of the court.

By an indenture of April 1, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand, covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof, were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the waggons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It is expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said waggons. This, however, they have done under a special agreement come to

between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation, secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding up, the company is by the effect of ss. 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding up of the company," which the continued letting of these waggons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of Robson *v.* Drummond, 2 B. & Ad. 303, approved of by this court in Humble *v.* Hunter, 12 Q. B. 310. In Robson *v.* Drummond, 2 B. & Ad. 303, a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held that the defendant could not be sued on the contract,—by Lord Tenterden, on the ground that "the defendant might have been induced to enter into the contract by reason

of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this Boulton *v.* Jones, 2 H. & N. 564, is a sufficient authority. The case of Robson *v.* Drummond, 2 B. & Ad. 303, comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson *v.* Drummond, 2 B. & Ad. 303, rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company — a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute — the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in Robson *v.* Drummond, 2 B. & Ad. 303, went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much

work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim *Qui facit per alium facit per se* applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in Brice *v.* Banister, 3 Q. B. D. 569, be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.[1]

ARKANSAS VALLEY SMELTING COMPANY *v.* BELDEN MINING COMPANY.

SUPREME COURT OF THE UNITED STATES, APRIL 2 — MAY 14, 1888.

[*Reported in* 127 *U. S.* 379.]

THIS was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing and Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows: —

On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing and Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing and Eilers at their smelting works in Leadville ten thousand tons of carbonate lead ore from its mines at Red Cliff, at the rate of at

[1] Compare Griffith *v.* Tower Publishing Co. (1897), 1 Ch. 21; Tolhurst *v.* Associated Manufacturers (1902), 2 K. B. 660.

least fifty tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once upon the delivery thereof become the property of the second party;" and it was further agreed as follows: —

"The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed, on the basis hereinafter agreed upon, by the closing New York quotations for silver and common lead on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered.

"Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices," specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing and Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract cancelled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade intended the completion of the assay or test by which the value of the

ore was definitely fixed;" and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract.

The Circuit Court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

Mr. *R. S. Morrison*, Mr. *T. M. Patterson*, and Mr. *C. S. Thomas* for plaintiff in error.

This is an executory contract. The rule as to the assignability of such instruments is that all contracts may be assigned, either before or after the breach, which were not entered into upon the one side or the other upon the basis of a personal trust in the peculiar fitness of the other party to perform his part. The illustration so often used is that of an author to write a book; or an artist to paint a picture; neither of which can be assigned on the part of the person whose genius is depended upon. But an agreement to pay $1000 for a valuable consideration, or to deliver ten tons of coal at so much per ton, cannot belong to this class of cases, as in either instance it can make no difference to either party who executes the other part of the contract. Where taste, skill, or genius is one of the elements relied upon the contract cannot be assigned; where it is only a question of so much lost or so much gained, whoever performs the contract, it may be assigned.

To which class does the contract in the case at bar belong? Reduced to its elements the contract amounts to no more than an agreement on the one side to sell ten thousand tons of ore, and on the other to receive and pay for the same. It makes no difference to the one party who gives him the ore, nor to the other who pays him the price; all that both parties want is what they have contracted to get. No peculiar fitness on either side is needed to fulfil the contract, and, in point of fact, the contract is one which from its very nature has to be performed largely through the medium of agents. The contract is no more nor less than an article of property to each party, and the policy of the law is to let such articles of property pass from hand to hand with as much freedom as is requisite to make them valuable.

While all the cases lay down the rule as we have above stated, the New York Court of Appeals, in Devlin *v.* Mayor, 63 N. Y. 8, 16, has given us a criterion by which we can the more readily bring the present

case within the terms of the rule. This criterion is, that whatever contracts are binding upon the executors or administrators may be assigned, while those that die with the person cannot be assigned. While it is true that in both instances we must go back to the principle of personal skill, taste, or genius, as the real test, the fact that this has been the test so far as executors and administrators are concerned for centuries of the common law, will make it much easier to apply in the matter of the assignability of contracts. So that all the cases deciding the question of the liability or rights of the executor or administrator upon executory contracts of the decedent, can be quoted as applicable to the question of the assignability of contracts.

Adopting the law as laid down in that case, we call the attention of the court first to those cases in which the courts have applied the rule to executors and administrators, and then to the assignment of executory contracts.

The general rule as to executors was stated by the Queen's Bench in time of Queen Elizabeth to be that "a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator which they cannot perform." Hyde *v.* Dean and Canons of Windsor, Cro. Eliz. 553.

Lord Coke, a few years later, in the case of Quick *v.* Ludborrow, 3 Bulstr. 29, 30, states the rule to be the same, and says that if one is bound to build a house for another before such a time and dies, his executors are bound to perform the contract. While this was a *dictum* so far as that case was concerned, it is valuable as an illustration of how ancient the principle we are contending for is, and it is also valuable in that the great Chief Justice goes back yet further for his authority, citing to support it the Year Books 31 H. VI. and 15 H. VII.

Lord Mansfield has also given us a clear statement of the law in delivering the unanimous judgment of the King's Bench, and in accord with the view contended for. Hambly *v.* Trott, Cowp. 371.

The Barons of the Exchequer have affirmed the *dictum* of Lord Coke by deciding that where the testator had contracted to build a wooden galley and died before any of the work was done, and his executors had gone on and completed the work, the executors might sue on the contract and recover, — Lord Lyndhurst putting his decision on the ground of the difference between contracts personal in their nature and those that are not. Marshall *v.* Broadhurst, 1 Tyrwh. 348; s. c. 1 Cr. & Jer. 403. See also, Siboni *v.* Kirkman, 1 M. & W. 417; s. c. 4 M. & W. 339; Wentworth *v.* Cock, 10 Ad. & El. 42; Walker *v.* Hall, 2 Levinz, 177; Hyde *v.* Skinner, 2 P. Wms. 196; Berisford *v.* Woodruff, Croke Jac. 404.

A rule so unanimously declared to be a maxim of the common law has never been doubted by the American courts. Petrie *v.* Vorhees, 18 N. J. Eq., 3 C. E. Green, 285; Woods *v.* Ridley, 27 Miss. 119; Pringle *v.* McPherson, 2 Desaussure, 524; White *v.* Commonwealth, 39 Penn. St. 167.

A somewhat lengthy examination of the rule and the cases was made by the Supreme Court of Pennsylvania in one case, and while the view taken of some of the English cases is not in accord with ours the principles are, on the whole, the same; and it seems to acknowledge the rule applied in New York as to assignability. Dickinson *v.* Calahan, 19 Penn. St. 227.

If we admit the rule laid down in New York it does not seem possible to prevent the case at bar from being brought within the above decisions and the contract held to be not personal. But we are not forced to rely upon these cases, as there have been enough adjudications upon the exact doctrine of the assignability of contracts to bring this case far within the limits laid down, and to settle beyond controversy the question of the assignability of this contract.

The English courts have not in terms announced the doctrine stated in New York; but they have, by applying the same principles to both personal representatives and assignees, made it practically the same. The fundamental principle of personal and non-personal contracts runs through all the cases. Robson *v.* Drummond, 2 B. & Ad. 303; Wentworth *v.* Cock, *supra;* British Waggon Co. *v.* Lea, 5 Q. B. D. 149.

The American authorities are, if it were possible, much stronger upon the side of assignability than are the English. No State has rendered a greater number of decisions, and all to the same end, on this question than New York; and, in view of her great commercial power, no State should be listened to with more respect. Devlin *v.* Mayor, *supra;* Sears *v.* Conover, 3 Keyes, 113; Tyler *v.* Barrows, 6 Robertson (N. Y.) 104; Horner *v.* Wood, 23 N. Y. 350. See also, in the reports of other States, Taylor *v.* Palmer, 31 Cal. 240; Parsons *v.* Woodward, 22 N. J. L. (2 Zabriskie) 196; Philadelphia *v.* Lockhardt, 73 Penn. St. 211; Lafferty *v.* Rutherford, 5 Ark. 453; St. Louis *v.* Clemens, 42 Mo. 69; Groot *v.* Story, 41 Vt. 533.

The reports show us many cases in which contracts have been held to be personal and not assignable; but the majority are clearly on the other side of the line. Only two or three need any special mention.

Boston Ice Co. *v.* Potter, 123 Mass. 28, may seem at first view to be against our position; but on examination it will be found the other way. The opinion of Mr. Justice Endicott clearly states the rule, and bases the decision in the case upon the particular facts disclosed.

Lansden *v.* McCarthy, 45 Mo. 106, in view of the facts then existing, might also be cited as against the contract in the present case. The court admit the general principle and decide that the contract there sued upon is personal. We cannot but believe that if the application there can be construed as against the contract at bar, the court erred in its judgment. The personal nature of the contract was held to consist in the fact that one party had relied upon the credit and ability of the other party to pay the price named. Such a view, if accepted, would do much to put an end to the assignability of all contracts and choses in action; for all contracts are entered into with the belief that

the other party will perform his part. And the court, too, seems to forget that the liability of the original parties remains the same, notwithstanding the assignment, and the contracting party may hold both assignor and assignee.

Dickinson *v.* Calahan, 19 Penn. St. 227, criticises some of the English cases cited by us; but, we believe, they are clearly in the line of all the common law authorities, and they have been expressly adopted in terms by the Court of Appeals of New York in Devlin *v.* Mayor, 63 N. Y. 8.

This citation of authority will, we think, convince the court of the correctness of our position as to the assignability of this contract. Nothing more can be made out of the transaction than a contract of sale. Billing and Eilers purchased the right to so many tons of ore; the Belden Mining Company purchased the right to so many dollars per ton for a certain number of tons of its ore. Neither party secured any title or right of property in the taste, skill, or genius of the other party, but simply a title to a definite, tangible, merchantable article that was readily capable of passing from hand to hand. Every element of the contract partakes of the purely mercantile transaction, and the attempt to place it in the category of those contracts that depend upon personal skill, taste, or genius, seems to us an absurdity. No one can doubt the right of Billing and Eilers to sell the ore *after* they had received it from the mining company, and for what reason should they be denied the right of selling it before they received it? The ore itself was certainly capable of being sold, and the right to the ore would seem to be an equal object of barter.

There is another principle upon which we rely, and which we think is conclusive of the present case. It is maintained that whether or not this contract is assignable, the defendant cannot now deny it the quality of assignability. The contract has been assigned twice, and, as under the first assignment the defendant made no objection, but dispensed with whatever rights it had, it is now estopped from denying to the first assignee the same right that it gave to his assignor. If the contract was not assignable in the first place, the implied condition arising from this fact was that upon assignment by either party the other had a right to treat the contract as at an end; but once waived, the condition was gone and could no more be insisted upon. This is a principle so old and well grounded in the common law as to require little or no authority for its support. It has been frequently applied to cases where the contract in express terms provided against assignment, and declared that if assigned the contract should be at an end; and surely it will be applied to a case where the same thing was implied. And it would seem to us that the court would be readier to apply the principle in doubtful cases than where it was expressly provided for. If the contract is claimed to be personal by one party and not personal by the other, and the court is to determine the question by reference to the intention of the parties, it is surely competent for it to look at the treat-

ment of the contract by the parties. If the party who claims that the contract is personal has treated it as not personal, this should be conclusive evidence that at the time it was entered into it was the intention of the parties that the contract should not be considered as personal. The present case, it seems to us, is brought clearly within the spirit and letter of this ruled law. Murray *v.* Harway, 56 N. Y. 337.

No appearance for defendant in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in his own name. Rev. Stat. § 914; Colorado Code of Civil Procedure, § 3; Albany & Rensselear Co. *v.* Lundberg, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in the complaint.

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. In the familiar phrase of Lord Denman, "You have a right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." Humble *v.* Hunter, 12 Q. B. 310, 317; Winchester *v.* Howard, 97 Mass. 303, 305; Boston Ice Co. *v.* Potter, 123 Mass. 28; King *v.* Batterson, 13 R. I. 117, 120; Lansden *v.* McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled 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." Pollock on Contracts (4th ed.) 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and

according to the result of the assay, and the proportions of lead, silver, silica, and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in Murray *v.* Harway, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows: —

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. Sears *v.* Conover, 3 Keyes, 113, and 4 Abbott (N. Y. App.) 179; Tyler *v.* Barrows, 6 Robertson (N. Y.), 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Hambly *v.* Trott, Cowper, 371, 375; Wentworth *v.* Cock, 10 Ad. & El. 42, and 2 Per. & Dav. 251; Williams on Executors (7th ed.), 1723–1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. Dickinson *v.* Calahan, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. Taylor *v.* Palmer, 31 Cal. 240, 247; St. Louis *v.* Clemens, 42 Mo. 69; Philadelphia *v.* Lockhardt, 73 Penn. St. 211; Devlin *v.* New York, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. Robson *v.* Drummond, 2 B. & Ad. 303; British Waggon Co. *v.* Lea, 5 Q. B. D. 149; Parsons *v.* Woodward, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

Judgment affirmed.[1]

[1] In Rochester Lantern Company *v.* The Stiles and Parker Press Company, 135 N. Y. 209, one Kelly had entered into a contract with the defendant by which the latter agreed to make and deliver to the former, for a specified price, certain dies to be used in the manufacture of lanterns. Kelly subsequently assigned the contract to the plaintiff corporation, which brought action to recover damages for the failure of the defendant to furnish the dies. Earle, C. J., in delivering the opinion of the court said (at p. 216): "After the assignment Kelly had no interest in the contract, and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it. There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. Devlin *v.* Mayor, 63 N. Y. 8. The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one. He could not, however, by the assignment absolve himself from all obligations under the contract. The obligations of the contract still rested upon him, and resort could still be made to him for the payment of the dies in case the assignee did not pay for them when tendered to it. After the assignment of the contract to the plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff." See further 2 Am. & Eng. Encyc. of Law (2d ed.), 1034.

EDWARD B. JAMES *v.* CITY OF NEWTON AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JAN. 25 — SEPT. 7, 1886.

[*Reported in* 142 *Massachusetts*, 366.]

THIS was a bill in equity brought by the plaintiff against the City of Newton and Royal Gilkey, assignee in insolvency of the estate of William H. Stewart, to enforce payment of $600, which had been assigned to the plaintiff by Stewart out of money reserved as a guaranty by the City of Newton for the proper performance of a contract by Stewart to build a schoolhouse. The City of Newton in its answer admitted that it had in its hands over $600, due on account of this contract, and stated that it was "willing to pay said balance to such person or persons as should be justly entitled to receive the same." The defendant Gilkey in his answer claimed that the assignment was invalid.[1]

C. C. Powers, for the plaintiff.

W. S. Slocum, for the City of Newton.

W. B. Durant, for Gilkey.

FIELD, J. The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due and payable to me" from the City of Newton, under and by virtue of a contract for building a grammar schoolhouse, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of $600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the City of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of the money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by per-

[1] The statement of facts has been much abbreviated.

mitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. Warren *v.* Comings, 6 Cush. 103.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights as between themselves; and the rule against partial assignments was established for the benefit of the debtor. Public Schools *v.* Heath, 2 McCarter, 22; Fourth National Bank *v.* Noonan, 14 Mo. App. 243.

In many jurisdictions courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defence to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

It may be argued that, if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that, if this is so, it follows that, after notice of the assignment, the debtor cannot rightfully pay the sum assigned to the assignor.

The facts of this case, however, do not require us to decide whether a bill can be maintained after the debtor has paid the entire debt to his creditor, although after notice of a partial assignment. The City of Newton, in its answer, says that it "is willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff, or said Gilkey as such assignee;" and prays "that said plaintiff and said Gilkey may interplead, and settle and adjust their demands between themselves, and that the court shall order and decree to whom said sum shall be paid." This is in effect asking the aid of the court in much the same manner as if the City of Newton had brought a bill of interpleader; and the proceedings are not open to the objection that the court is compelling the City of Newton to assent to an assignment against its will.

This is the first bill in equity to enforce a partial assignment of a debt which has been before this court. It has been often declared here that there cannot be an assignment of a part of an entire debt without the assent of the debtor; but the cases are all actions at law, and in the majority of them the statement was not necessary to the decision.

In Tripp *v.* Brownell, 12 Cush. 376, 381, the action was assumpsit, to recover the amount of the plaintiff's lay as a mariner on a whaling voyage. The defence was an assignment of the balance due, made by the plaintiff and accepted by the defendant. This was held a good defence, the court saying: "It is in terms an assignment of the whole lay; it must be so by operation of law. It is not competent for a creditor to assign part of the debt, so as to give any equitable interest in part of the debt, or create any lien upon it. The debtor, or holder of the assignable interest, cannot, without his own consent, be held legally or equitably liable to an assignee for part, and to the original creditor, or another assignee for another part. Mandeville *v.* Welch, 5 Wheat. 277; Gibson *v.* Cooke, 20 Pick. 15; Robbins *v.* Bacon, 3 Greenl. 346."

Gibson *v.* Cooke, *ubi supra*, was assumpsit, brought in the name of Gorham Gibson for the benefit of one Plympton, to whom Gibson had given an order on the defendant to pay Plympton $175.33 "as my income becomes due." The defendant held property in trust to pay over the "net proceeds once a quarter" to Gibson and others. The court held that it did not appear that, "at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft," and that "a debtor is not

to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire."

Knowlton *v.* Cooley, 102 Mass. 233, was a trustee process, and the trustee had in his hands $147 due the defendant as wages, and the claimant held an order, given by the defendant before the wages were earned, for the payment to him of the defendant's wages, "as fast as they became due, to the amount of $150," which the trustee had accepted. The court held that the order was an assignment of wages, and not having been recorded, was invalid against a trustee process by the St. of 1865, c. 43, s. 2. The court say: "The acceptance of the order by Barton [the trustee] does not change its character. His assent was necessary to give it any validity even as an assignment. Gibson *v.* Cooke, 20 Pick. 15."

Papineau *v.* Naumkeag Steam Cotton Co., 126 Mass. 372, was an action of contract, and the court say: "The order of Couillard on the defendant, in favor of the plaintiff, was not an order for payment of all that should be due the drawer as wages at the several times when the instalments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it as such, but a mere order for money."

It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against a trustee process, or against an assignee in insolvency. Taylor *v.* Lynch, 5 Gray, 49; Lannan *v.* Smith, 7 Gray, 150. In Bourne *v.* Cabot, 3 Met. 305, the court say, "The order of Litchfield on the defendant was a good assignment of the fund, *pro tanto*, to the plaintiff, and the express promise to the assignee, to pay him the balance when the vessel should be sold, constituted a legal contract."

It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against a trustee process, although the trustee has received no notice of the assignment until after the trustee process is served, and has never assented to it. Wakefield *v.* Martin, 3 Mass. 558; Kingman *v.* Perkins, 105 Mass. 111; Norton *v.* Piscataqua Ins. Co., 111 Mass. 532; Taft *v.* Bowker, 132 Mass. 277; Williams *v.* Ingersoll, 89 N. Y. 508.

Before, as well as since, the St. of 1865, c. 43, s. 1 (Pub. Sts. c. 183, s. 38), if the assignment was for collateral security, and the assignee was bound to pay immediately to the assignor, out of the sum assigned, any balance remaining after payment of his debt, it has been held that the excess above the debt for which the assignment is security is attachable by the trustee process. Macomber *v.* Doane, 2 Allen, 541; Darling *v.* Andrews, 9 Allen, 106; Warren *v.* Sullivan, 123 Mass. 283; Giles *v.* Ash, 123 Mass. 353. See Lannan *v.* Smith, *ubi supra*.

In Macomber *v.* Doane, *ubi supra*, the court say: "An order constitutes a good form of assignment, it being for the whole sum due or be-

coming due to the drawer, and it needs not be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to $37.50, but it was given as security for groceries furnished and to be furnished, and, on the day of the service of the writ, the defendant owed the plaintiff for groceries $28.79, and the remaining $8.71 was held by the trustee process.

Some of these cases were noticed in Whitney v. Eliot National Bank, 137 Mass. 351, and the court then declined to decide "whether in equity there may not be an assignment of a part of a debt."

Without considering the cases upon the effect of orders or drafts for money, as constituting assignments of the debt or of a part of it, it seems never to have been decided in this Commonwealth that an assignment for value of a part of an entire debt is not good, to the extent of the assignment, against trustee process. In trustee process, the trustee of the defendant, if charged, is by the statute compelled to pay to the plaintiff so much of what he admits to be due to the defendant as is necessary to satisfy the plaintiff's judgment; and, as an entire debt may thus be divided, it seems equitable that an assignee of a part of the debt should be admitted as a claimant, and this is in effect done when the assignment is as collateral security.

Palmer v. Merrill, 6 Cush. 282, was assumpsit against the administrator of Spaulding, who had caused his life to be insured by a policy payable to himself, his executors, administrators, or assigns; and he, by a memorandum in writing indorsed on the policy, for a valuable consideration, assigned and requested the insurer to pay the plaintiff the sum of $400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice. The policy, with this indorsement thereon, remained in the custody of Spaulding until his decease, and came into the hands of the administrator of his estate, who collected the whole amount of the insurance, and represented the estate as insolvent; and the question was "whether the case shows an assignment which vested any interest in this policy, legal or equitable, in the plaintiff."

The court held that it did not, and said: "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But in order to constitute such an assignment two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee or to some person for his use, the security, if there be one, bond, deed, note or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists. . . . It appears to us that the order indorsed on this policy and retained by the assured fails of

amounting to an assignment in both of these particulars." The court further said that, if an order be "for a part only of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund, until accepted by the drawee. It therefore creates no lien upon the fund. Upon this point the authorities seem decisive. Welch *v.* Mandeville, 1 Wheat. 233, s. c. 5 ib. 277; Robbins *v.* Bacon, 3 Greenl. 346; Gibson *v.* Cooke, 20 Pick. 15."

Welch *v.* Mandeville, *ubi supra*, was an action of covenant broken, brought by Prior in the name of Welch against Mandeville, who set up a release by Welch, to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court consider the effect of certain bills of exchange, and say: "But where the order is drawn either on a general or a particular fund for a part only it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft;" that "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor;" and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The equitable doctrine now maintained by the Supreme Court of the United States is shown by Wright *v.* Ellison, 1 Wall. 16; Christmas *v.* Russell, 14 Wall. 69; Trist *v.* Child, 21 Wall. 441; and Peugh *v.* Porter, 112 U. S. 737. In Peugh *v.* Porter, that court ordered that a decree be entered that Peugh, subject to certain rights in the estate at Winder, was entitled to one fourth of a fund, by virtue of an assignment of one fourth of a claim against Mexico, made before the establishment of the claim from which the fund was derived, and before the fund was in existence, and declared the law to be that "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In Robbins *v.* Bacon, *ubi supra*, the order was for the payment of the whole of a particular fund, and was held good.

The existing law of Maine is declared in National Exchange Bank *v.* McLoon, 73 Maine, 498, by an elaborate opinion, and the conclusion reached is that an assignment of a part of a chose in action is good in equity, and against a trustee process.

In England it is held that the particular fund or debt out of which the payment is to be made must be specified in the assignment (Percival *v.* Dunn, 29 Ch. D. 128); but the assignment of a part of a debt or fund is good in equity. The present case is like *Ex parte* Moss, 14 Q. B. D. 310, and a stronger case for the plaintiff than Brice *v.* Bannister, 3 Q. B. D. 569, where, although the procedure was under the St. of 36 & 37 Viet. c. 66, the foundation of the liability was that the assignment was good in equity; and the case at bar is relieved from the difficulties which

induced Brett, L. J., in that case to dissent; and Brice *v.* Bannister was approved in *Ex parte* Hall, 10 Ch. D. 615. The present case also resembles Tooth *v.* Hallett, L. R. 4 Ch. 242, except that there the sums paid by the trustee for creditors in finishing the house exhausted all that became due under the contract. See also Addison *v.* Cox, L. R. 8 Ch. 76.

In Appeals of Philadelphia, 86 Penn. St. 179, it is conceded that the rule that an assignment of a part of a debt is valid prevails in equity between individuals; but the court refused to apply it to a debt due from a municipal corporation, on the ground that "the policy of the law is against permitting individuals, by their private contracts, to embarrass the principal officers of a municipality." See Geist's appeal, 104 Penn. St. 351. But there is no ground for any such distinction in this Commonwealth.

In New York the assignment of a part of a debt or fund is good in equity. Field *v.* Mayor, 2 Seld. 179; Risley *v.* Phenix Bank, 83 N. Y. 318. And the same doctrine is maintained in other States. Daniels *v.* Meinhard, 53 Ga. 359; Etheridge *v.* Vernoy, 74 N. C. 809; Lapping *v.* Duffy, 47 Ind. 51; Fordyce *v.* Nelson, 91 Ind. 447; Bower *v.* Hadden Blue Stone Co., 3 Stew. (N. J.) 171; Gardner *v.* Smith, 5 Heisk. 256; Grain *v.* Aldrich, 38 Cal. 514; Des Moines *v.* Hinkley, 62 Iowa. 637; Canty *v.* Latterner, 31 Minn. 239; First National Bank *v.* Kimberlands, 16 W. Va. 555.

From the examination of our cases, it appears not to have been decided that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and be enforced in equity against the debtor or person holding the fund. Palmer *v.* Merrill, *ubi supra*, may well rest upon the first reason given for the decision. See Stearns *v.* Quincy Ins. Co., 124 Mass. 61–63. The decisions of courts of equity in other jurisdictions are almost unanimous in maintaining such a lien where the assignment is for value, distinctly appropriates a part of the fund or debt, and makes the sum assigned specifically payable out of it.

Without undertaking to decide what is not before us, and confining ourselves to the facts in the case, which are that the debt is admitted and remains unpaid, and the debtor in his answer asks the court to determine the rights of the different claimants, we think that there should be a decree that the city of Newton pay to the plaintiff $600; and that the remainder of the sum due from the city, after deducting its costs, be paid to Gilkey, assignee.

The assignment was not made in fraud of the laws relating to insolvency. *So ordered.*[1]

[1] The authorities on the effect of partial assignments are collected in Ames's Cas. on Trusts (2d ed.), 63 *n.*

SECTION III.

JOINT OBLIGATIONS.

MARCH *v.* WARD.

AT NISI PRIUS, JUNE 30, 1792.

[*Reported in Peake's Cases*, 130.]

ASSUMPSIT on a promissory note made by the defendant and one Bowling, in the following words, viz:

"I promise to pay three months after date, to Wm. March, £8 5*s*. for value received in fixtures.

"ROBERT BOWLING.
"THOMAS WARD."

It was objected that this promissory note was joint only, and not several.

LORD KENYON. I think that this note, beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton at Chester, exactly similar to the present, wherein I was counsel for the defendant; I persuaded the judge that it was a joint note only, and the plaintiff was nonsuited, but on an application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter I applies to each severally.

Verdict for the plaintiff.[1]

[1] The obligation is joint and several. Bank of Louisiana *v.* Sterling, 2 La. 62; New Orleans *v.* Ripley, 5 La. 122; Hemmenway *v.* Stone, 7 Mass. 58; Van Alstyne *v.* Van Slyck, 10 Barb. 383; Dill *v.* White, 52 Wis. 456. Compare Brown *v.* Fitch, 4 Vroom, 418.

"If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be joint only, and not several." Shep. Touch, 375. See also Jernigan *v.* Wimberly, 1 Ga. 220; Bank of Louisiana *v.* Sterling, 2 La. 62; New Orleans *v.* Ripley, 5 La. 122; Meyer *v.* Estes, 164 Mass. 457. But see *contra*, Morange *v.* Mudge, 6 Abb. Prac. 243.

"If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all or each of them separately. And though that doctrine has been several times questioned, yet it has been held good law from the time of Lord Coke." Streatfield *v.* Halliday, 3 T. R. 779, 782; Stevens *v.* Catlin, 152 Ill. 56, 58, *acc.*

THE CITY OF PHILADELPHIA *v.* REEVES AND CABOT.

PENNSYLVANIA SUPREME COURT, 1865.

[*Reported in* 48 *Pennsylvania State*, 472.]

ERROR to the District Court of Philadelphia.

This was an action of covenant, by the City of Philadelphia against Samuel J. Reeves and Joseph Cabot, as sureties of Fort Ihrie. After a declaration in the usual form, on a covenant dated May 9th, 1859, between the plaintiff and defendants, for the use of a wharf or landing at the foot of Callowhill Street, on the river Delaware; the defendants craved *oyer* of the instrument on which suit was brought.

The plaintiffs thereupon placed on record a copy of the following instrument: —

"Memorandum. The City of Philadelphia demise to Fort Ihrie the wharf or landing at the foot of Callowhill Street, on the river Delaware, and the pier and wharf next south thereof, being the same premises heretofore called and known as the Callowhill Street Ferry and Landing, for the term of three years from April 25th, 1859, at the annual rent of twenty-three hundred dollars, payable quarterly: the first payment to be made on the 25th day of July, 1859; and if the rent shall remain unpaid on any day on which the same ought to be paid, then the lessors may enter on the premises and proceed, by distress and sale of the goods there found, to levy the rent and all costs. The lessee and his sureties, Joseph Cabot and Samuel J. Reeves, covenant with the lessors to pay the rent punctually as above provided for, and the lessee covenants during the term to keep, and at the end thereof peaceably to deliver up the premises, in good order and repair, reasonable wear and tear and damage by accidental fire excepted, and not assign this lease or underlet the premises, or any part thereof.

"And if the lessee shall in any particular violate any one of his said covenants, then the lessors may cause a notice to be left on the premises of their intention to determine this lease, and at the expiration of ten days from the time of so leaving such notice, this lease shall absolutely determine; and upon the expiration or other determination of this lease, any attorney may immediately thereafter, as attorney for the lessee, sign an agreement for entering, in any competent court, an amicable action and judgment in ejectment (without any stay of execution) against the lessee, and all persons claiming under him, for the recovering by the lessors of possession of the hereby demised premises, for which this shall be a sufficient warrant; and the lessee thereby releases to the lessors all errors and defects whatsoever in entering such action or judgment, or in any proceeding thereon, or concerning the same. No such determination of this lease, nor taking or recovering possession of the premises, shall deprive the lessors of any action against the lessee or his sureties for the rent, or against the lessee for damages. All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the heirs, executors, administrators, successors, and assigns of such party.

"In witness whereof the lessee and his sureties have hereunto set their hands and seals, and the corporate seal of the lessors has been hereunto affixed by the mayor of the city of Philadelphia, this 9th day of May, A.D.

1859, the said lease having been awarded prior to the election of the said lessee as a member of common council.

"(Signed) "FORT IHRIE. [SEAL.]
"SAMUEL J. REEVES. [SEAL.]
"JOSEPH CABOT. [SEAL.]

"Sealed and delivered in
the presence of E. B. MCDOWELL.
[SEAL.]

"ALEXANDER HENRY,
"Mayor of Philadelphia."

This instrument being read and heard, the defendants by their attorney prayed judgment of the said writ and declaration, because the supposed covenant in the said declaration mentioned, if any such were made, was jointly made with Fort Ihrie, who sealed and delivered also the said deed, who is still living, to wit, &c., and not by the said Samuel J. Reeves and Joseph Cabot alone, wherefore, inasmuch as the said Fort Ihrie is not named in the said writ and declaration together with the said Samuel J. Reeves and Joseph Cabot, they, the said Samuel J. Reeves and Joseph Cabot, prayed judgment of the writ and declaration, and that the same may be quashed, &c.

To this the plaintiff demurred, and stated the following cause of demurrer, viz., "that the instrument of which there has been *oyer*, shows on the face thereof that the said defendants are bound as sureties for the said Fort Ihrie, and that by reason of the subject-matter the said covenant is not jointly with said Fort Ihrie," &c.

The court below entered judgment for the defendants on the demurrer, which was the error assigned.

David W. Sellers and *F. Carroll Brewster*, for plaintiff in error.

E. Spencer Miller, for defendants in error.

The opinion of the court was delivered, January 25th, 1865, by

STRONG, J. That the covenant for the payment of rent, upon which this suit was brought, imposed upon the defendants only an obligation jointly with Fort Ihrie, their principal, is too clear for doubt. It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contracts, therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments, and at them alone. The subject-matter of the contract, and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint.[1] Even this, however, has been doubted.

[1] Goldsmith *v.* Sachs, 17 Fed. Rep. 726; Burton *v.* Henry, 90 Ala. 281; St. Louis, &c. R. R. Co. *v.* Coultas, 33 Ill. 189; Haskins *v.* Lombard, 16 Me. 140; Jacobs *v.* Davis, 34 Md. 204; Alpaugh *v.* Wood, 53 N. J. L. 638, 644; Gazley *v.* Wayne, 36 Tex. 689; Sharp *v.* Conkling, 16 Vt. 355, *acc.* Compare Meyer *v.* Estes, 164 Mass. 157; and see 1 Parsons on Contracts, *14, note (*j*).

But, however it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test.[1] The covenant is always joint, unless declared to be otherwise: Enys *v.* Donnithorne, 2 Burrows, 1190; Philips *v.* Bonsall, 2 Binn. 138. It is true, that in the covenant to pay rent, contained in the lease to Fort Ihrie, the two defendants are described as sureties, but they and the lessee undertook to pay the rent as one party. Their being described as sureties cannot be regarded as a declaration of intent to undertake severally. Nor does the covenant contain any words of several liability for rent. The defendants assumed no other obligation than that they and the lessee would pay. The case is indubitably within the general rule that a covenant by two or more is joint as to them, if not expressly declared several, or joint and several. The plea in abatement was therefore correctly sustained, and the judgment on the demurrer was right.

The judgment is affirmed.[2]

RICHARDS AND ANOTHER *v.* HEATHER.

IN THE KING'S BENCH, NOVEMBER 6, 1817.

[*Reported in* 1 *Barnewall & Alderson*, 29.]

ASSUMPSIT for work and labor. The declaration contained only one set of counts, charging the defendant in his own right. Plea, non assumpsit. At the trial before Abbott, J. at the last spring assizes for the county of Southampton, the plaintiff proved two distinct demands; one due from the defendant individually, the other in respect of work done upon a ship, which had belonged to the defendant, and one Rous, who had, jointly with the defendant, given directions for the work, and who was dead at the time of action brought. The learned judge entertaining a doubt whether in respect of this last demand the defendant should not have been charged as surviving

[1] But promisors on subscription papers are held to promise severally though the language is appropriate for a joint promise. Davis, &c. Co. *v.* Barber, 51 Fed. Rep. 148; Price *v.* Railroad Co., 18 Ind. 137; Landwerlen *v.* Wheeler, 106 Ind. 523; Hall *v.* Thayer, 12 Met. 130; Davis *v.* Belford, 70 Mich. 120; Gibbons *v.* Bente, 51 Minn. 499; Cornish & Co. *v.* West, 82 Minn. 107. But see *contra*, Davis *v.* Shafer, 50 Fed. Rep. 764; Darnell *v.* Lyon, 85 Tex. 455. See further 22 L. R. A. 80 *n.*

[2] Illustrations of the rule that obligations are presumptively joint may be found in Byers *v.* Doby, 1 H. Bl. 236; Hill *v.* Tucker, 1 Taunt. 7; Mansell *v.* Burredge, 7 T. R. 352; Hatsall *v.* Griffith, 4 Tyr. 487; Crosby *v.* Jeroloman, 37 Ind. 264; Eller *v.* Lacy, 137 Ind. 436; Field *v.* Runk, 2 Zab. 525; Alpaugh *v.* Wood, 53 N. J. L. 638; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 698; Muzzy *v.* Whitney, 10 Johns. 226; Stage *v.* Olds, 12 Ohio, 158. Compare Shipman *v.* Straitsville Co., 158 U. S. 356; Davis, &c. Co. *v.* Jones, 66 Fed. Rep. 124; Des Moines Co. *v.* York Co., 92 Ia. 396; Colt *v.* Learned, 118 Mass. 380; Ernst *v.* Bartle, 1 Johns. Cas. 319. But *contra*, by statute. Pecquet *v.* Pecquet, 17 La. Ann. 204; Stowers *v.* Blackburn, 21 La. Ann. 127; Burney *v.* Ludeling, 47 La. Ann, 73; Clough *v.* Holden, 115 Mo. 336.

partner, directed the jury to find a verdict for the whole sum claimed, with liberty to the defendant to move to reduce it to the amount of the first demand only, if the court should be of that opinion. Accordingly, Pell, Serjt., in Easter Term last, obtained a rule nisi for that purpose; and now

Gaselee and *A. Moore* showed cause.

Pell, Serjt., *contra*.

Lord Ellenborough, C. J. I am of opinion that the plaintiff is entitled to both the sums which he seeks to recover under this declaration. It would be more convenient in all cases, where a debt accrues from the defendant as surviving partner, to declare against him accordingly, because it is convenient to make the forms of declaration subservient to the information of the party charged; but it is not essentially necessary to the maintenance of the action, for where there are several partners who are living, one of them may be declared against as the sole debtor, and the only objection to this mode of declaring is, that the plaintiff is liable to be turned round, by a plea in abatement.[1] But inasmuch as where the other partner is dead there cannot be any plea in abatement, *cessante ratione*, *cessat lex*. The reason which requires that the demand shall be stated as a joint demand ceases when a plea in abatement can be no longer pleaded. It seems to me, therefore, that the plaintiff may maintain his action, as well for the demand for which the defendant was liable individually, as for that for which he was liable jointly with the other partner, who is now dead. According to every principle of law, the joint debt may, by reason of the death of the party, be now treated as if it had been originally a separate debt. I think therefore there is not any occasion to make any distinction in the declaration on account of the sources from which the debts originally sprung.

Bayley, J. I think that the plaintiff is entitled to recover both sums, and that the doctrine in Spalding *v.* Mure cannot be supported. Upon a count for work and labor, goods sold and delivered, and money had and received, &c., a plaintiff may recover all such demands as fall within the range of that count; if he has twenty demands he may recover each and every particular demand to which that count is applicable. Supposing there had been one demand only, namely, a separate demand, could plaintiff have been prevented from recovering that demand on this declaration, on the ground of a variance? Certainly not; it is true in respect of that demand he is solely indebted. Then as to the demand which was due from the defendant and Rous jointly, the work was done for each, and each was liable for the whole;

[1] Rice *v.* Shute, 5 Burr, 2611; Mountstephen *v.* Brooke, 1 B. & Ald. 224; First Nat. Bank *v.* Hamor, 49 Fed. Rep. 45 (C. C. A.); Elder *v.* Thompson, 13 Gray, 91; Coon *v.* Anderson, 101 Mich. 295; Davis *v.* Chouteau, 32 Minn. 548; Sandwich Mfg. Co. *v.* Kimberly, 37 Minn. 214; Maurer *v.* Midway, 25 Neb. 575; Beeler *v.* Bank, 34 Neb. 348; Lieberman *v.* Brothers, 55 N. J. 379; Nash *v.* Skinner, 12 Vt. 219; Hicks *v.* Cram, 17 Vt. 449; Willson *v.* McCormick, 86 Va. 995, *acc.*

this is the argument adopted by Lord Mansfield in Rice *v.* Shute, 5 Burr, 2613: "All contracts with partners are joint and several; every partner is liable to pay the whole." Proving that another person contracted does not negative that the defendant himself contracted. If that be the case, and if the work which was originally done for Rous and Heather was originally done for either, it follows that it may be truly predicated that the defendant was solely indebted for work and labor done for him; and then I do not see upon what principle the plaintiff can be prevented from recovering for this demand also under this declaration.

ABBOTT, J. I am of the same opinion. The question was reserved, in consequence of a doubt suggested by me upon the form of the declaration; and my doubt was, whether it was not necessary to charge the defendant, as surviving partner, in respect of the last demand. My doubt did not arise in respect of there being evidence given of two distinct demands, but in respect of the form of the declaration, as applicable to the last demand. It is possible that I may have had an indistinct recollection of what fell from the court in Spalding *v.* Mure, but I now think that the doctrine there laid down is not law. By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint. In Whelpdale's case, 5 Rep. 119, the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded *non est factum;* the jury found that the bond was a joint bond, made by the defendant and another to the plaintiff, and upon this special verdict it was adjudged by the court that the plaintiff should recover; "because when two men are *jointly* bound in one bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed; for he has sealed and delivered it, and each of them is bound in the whole." That was a case upon a deed, but Rice *v.* Shute was a case upon a simple contract; and it was there held that although the promise was a joint promise, yet the defendant, who was sued alone, could not say that he did not promise; and that the only way of taking advantage of the omission of the other joint contractor was by plea in abatement. These two cases establish this, that proof of a joint contract is sufficient to sustain an allegation that one contracted; and therefore there is no variance; and if not, then the proof given in this case was competent to sustain the declaration in respect of both demands, and this rule must be discharged.

HOLROYD J. I think that the proof was properly received. The declaration charges that the defendant was indebted in a certain sum, for work and labor, which he promised to pay. Under this declaration the plaintiff would not be entitled to recover anything, except for a ground of action corresponding with that stated in the declaration. Now it is not disputed but that the joint demand was a demand coming within the description of work and labor; and if the defendant had been alone sued for it without the other, the plaintiff might have

recovered, because there would not have been any variance. It seems to me, therefore, this demand may now be recovered, although there was a separate cause of action. *Rule discharged.*

JELL *v.* DOUGLAS.

IN THE KING'S BENCH, EASTER TERM, 1821.

[*Reported in* 4 *Barnewall & Alderson*, 374.]

ASSUMPSIT for goods sold and delivered by Jell to the defendant. Plea, general issue. At the trial, before Abbott, C. J., at the last summer assizes for the county of Kent, the proof was, that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. Abbott, C. J., reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* for that purpose having been obtained in last Michaelmas Term, —

Marryat and *Chitty* now showed cause.

ABBOTT, C. J. It is a well-established rule that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in Richards *v.* Heather, 1 B. & A. 29, that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint contractors sue, both being alive, that is a variance,[1] and a good defence upon the general issue.[2] It seems, therefore, to be reasonable that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to Webber *v.* Tivill, 2 Saund. 121, *n.* 1, Mr. Serjt. Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say that that has been the general practice, and I think ought not to have been departed from in this instance. The rule for a nonsuit must be made absolute.

Rule absolute.

Gurney and *Comyn* were to have argued in support of the rule.

[1] Chanter *v.* Leese, 4 M. & W. 295, *acc.*

[2] Or, if the record shows the defect, by demurrer or motion in arrest of judgment. Petrie *v.* Bury, 3 B. & C. 353; Pugh *v.* Stringfield, 3 C. B. N. S. 2; Wetherell *v.* Langston, 1 Ex. 634; Beach *v.* Hotchkiss, 2 Conn. 697; Baker *v.* Jewell, 6 Mass. 460; Wiggin *v.* Cummings, 8 Allen, 353; Davis *v.* Chouteau, 32 Minn. 548; Ehle *v.* Purdy, 6 Wend. 629.

KING AND ANOTHER *v.* HOARE.

IN THE EXCHEQUER, NOVEMBER 25, 1844.

[*Reported in* 13 *Meeson & Welsby*, 494.]

DEBT for goods sold and delivered. Plea, that the said goods were sold and delivered by the plaintiffs to the defendant jointly with one N. T. Smith, and not to the defendant alone, and were to be paid for to the plaintiffs by the defendant jointly with the said N. T. Smith, and not by the defendant alone, and that the said moneys in the declaration mentioned were, at the time of the accruing thereof, to wit, &c., due from the defendant and the said N. T. Smith jointly, and not from the defendant alone; that, the said moneys continuing and being due and payable by the defendant jointly with the said N. T. Smith, the plaintiffs heretofore, to wit, &c., in the court of our lady the Queen at Westminster, impleaded the said N. T. Smith in an action of debt, for the detaining and not paying of the said money and debt, and for and in respect of the same identical causes of action in the declaration mentioned; and such proceedings were thereupon had in the said action, that afterwards, to wit, on, &c., the plaintiffs, by the consideration and judgment of the said court, recovered in the said action against the said N. T. Smith the said several money and sum of £16,000 above demanded, as also £90 6*s*., as damages and costs, whereof the said N. T. Smith was convicted, as by the record and proceedings thereof, still remaining in the said court of our lady the Queen at Westminster, more fully and at large appears; which said judgment still remains in full force and effect, and not the least reversed or made void. Verification.

Special demurrer, assigning for causes, that the defendant has pleaded in bar of the action matter which ought to have been pleaded, if at all, in abatement; that the plea amounts to a plea of never indebted; that the plea does not aver that the moneys were not due from the defendant and N. T. Smith severally and jointly; that the recovery of a judgment against one of two debtors in a sum certain does not of itself, or without satisfaction, operate in law to bar the action of the creditor against the other debtor; and that the plea ought to have concluded with a statement that the defendant was ready to verify it by the record.

Joinder in demurrer.

The case was argued on the 21st of November, by —

J. Henderson, in support of the demurrer. The position which is to be maintained on the part of the defendant is, that a judgment recovered against one of several joint debtors, per se, without satisfaction, may be pleaded in bar to an action against another of the joint debtors. There is no authority for such a position, nor is it consistent either

with natural justice or with the policy of the law. The case of a verdict and judgment against one of several tort-feasors is altogether distinguishable. The distinction between that case and the case of a joint debt is laid down in Brown *v.* Wootton, Cro. Jac. 73, where Popham, C. J., says, "The difference between this case and the case of debt upon an obligation against two is, because there every of them is chargeable, and liable to the entire debt; and therefore recovery against the one is no bar against the other until satisfaction." [Parke, B. — If you look at the same case as reported in Yelverton, 67, it seems to refer to the case of a joint and several obligation against two: "as where two are bound to J. S. jointly and severally, the recovery and execution against one is no bar against the other; for execution is no satisfaction of the £100 demanded."] In the modern cases there are dicta on this subject, some one way, some the other, some doubtful. In Bell *v.* Bankes, 3 Man. & G. 258, 3 Scott, N. R. 497, Maule, J., says, "It may be that taking security of a higher value from one of two joint debtors would cause a merger." [Parke, B. — That observation is applied to the case of a bond given by one of two joint debtors to a creditor by simple contract.] In Watters *v.* Smith, 2 B. & Ad. 892, Lord Tenterden throws out an intimation that the mere recovery against one of two joint debtors will not exempt the other from liability. [Parke, B. — There the sum paid by one of the joint debtors was not meant to be in discharge of the plaintiff's rights against all other parties.] Taunton, J., says in the same case, "A release given to one of two joint contractors enures to the benefit of both. So, a judgment and satisfaction as to the one is a stay of proceedings against the other." In Lechmere *v.* Fletcher, 1 C. & M. 634, on the other hand, Bayley, B., adverting to the language of Popham, C. J., in Brown *v.* Wootton, says, "If, indeed, that were the case of a joint bond, and not a joint and several bond, we have been referred to no authority which goes that length; it may be that where you sue and recover a judgment against one debtor only, on a contract which is joint and not several, your right to sue on the joint contract is destroyed." That is, however, a mere *obiter dictum.* [Parke, B. — It is thus far an authority, that if the court had thought the judgment was no bar, they need not have gone into the case.] The action in that case was founded upon the new promise made by the defendant to pay his proportion of the debt, and the question to be decided was irrespective of the validity of the original contract. At all events, its authority depends upon the correctness of the construction put upon the sixth resolution in Higgens's case, 6 Rep. 44 b.: "And as to the case which has been objected, that where two are bound jointly and severally, and the obligee has judgment against one of them, yet that he may sue the other, it was well agreed." The reason of the rule applies as strongly to a joint as to a joint and several obligation, and it is laid down accordingly without qualification in Brown *v.* Wootton, as reported in Cro. Jac.; and also in Com. Dig., "Action" (K. 4). So, under the same title (L. 4), pl. 2, it is said,

"As if two be bound in a bond, a recovery and execution against one is no bar in an action upon the same bond against the other obligor." [Parke, B. — That is merely a repetition of the old cases relating to joint and several bonds.] The debt is due equally from each of the joint debtors, and capable of recovery from each, unless he resort to the rule of law as to the joinder of his co-contractors, by a plea in abatement. Whelpdale's case, 5 Rep. 119 a.; Rice *v.* Shute, 5 Burr. 2611. For some purposes, even as against the party to the judgment, the debt is still due, — not, indeed, for the purpose of suit, but as to the relation of debtor and creditor. *Ex parte* Bryant, 2 Rose, B. C. 1; Bryant *v.* Withers, 2 M. & Selw. 123. [Parke, B. — Your argument goes the length of saying that, on every joint debt, it is joint and several, just the same as if the debtors had jointly and severally promised to pay.] It is several except for the purpose of the joinder of parties in the action; and that is a matter which has always been viewed with disfavor by the legislature and the courts, who have afforded all facilities to the suing of one of the debtors only. Both owe the debt; one of them, if sued alone, may insist, by a particular proceeding, on the other being joined in the action; but if he do not, all the remedy is several. [Alderson, B. — Here the plaintiff, by bringing the action against the other debtor, has prevented the defendant from pleading the non-joinder in abatement.] The judgment against the other debtor, for all purposes except as between the plaintiff and that debtor, leaves the nature of the debt and the relation of the parties as it was before. As to him it is made a several debt; but for all other purposes it remains a joint debt, without any change of the rights or remedies incident to it. To what class of discharge is this to be attributed? There is no estoppel, no satisfaction, no discharge, as to the present defendant, by merger in a higher security. By a proper plea in abatement, the defendant would have barred this action; but by this mode of pleading he evades all the safeguards which the law has applied to the plea in abatement. The case of the defendant depends upon this, that by the former judgment all the liability of the then defendant, as a contracting party, is gone; if so, by proceeding under the 3 & 4 Will. 4, c. 42, s. 10, there would be a complete remedy against the present defendant for all the costs. [Alderson, B. — If parties make a joint obligation, does it not mean that they agree to be liable to be jointly sued? If a joint and several one, that the creditor may sue them jointly and severally, to which the law superadds this, that he may sue one of them, unless he raises the defence of the non-joinder by plea in abatement? But what principle can give the creditor, in the case of a joint obligation, several suits? That is contrary to the bargain.] The law says that a joint debt is a joint and several debt for all purposes, except that of form in respect to the plea in abatement. Suppose one of the joint debtors is abroad, is the creditor to wait until he return, at the risk of losing his debt altogether? Athough this question has never been directly decided in the courts of this country, there has been an express

decision on the point in the Supreme Court of the United States, according to which this plea is bad. Sheehy *v.* Mandeville, 6 Cranch's Reports, 253.

There are also other formal objections to the plea. First, the declaration alleges a debt due from the defendant alone; the plea alleges a joint debt from him and Smith, and that is admitted by the demurrer; but the plea does not show expressly that the debt was not several as well as joint. [Parke, B. — You ought to have replied that; it must be taken to be joint until you show it to be several also. Rolfe, B. — If it were joint and several, it would not be true that Smith was sued for "the same identical causes of action in the declaration mentioned."] Secondly, it ought to have been a plea in abatement. It will be said, on the authority of Mainwaring *v.* Newman, 2 B. & P. 120, and other cases, that where it will not give a better writ, the plea may be in bar. [Parke, B. — Here it cannot give a better writ, because, as to the other co-contractor, the debt is merged in the judgment. Alderson, B. — There must be some other action which it is feasible to bring, after the plea in abatement is disposed of.] Thirdly, the plea ought to have concluded with a verification by the record. It is no excuse that there is also matter in the plea that might be tried *in pais*, the foundation of the plea being a judgment. Lastly, the want of a prayer of judgment, which the new rules specially preserve in cases of estoppel, is another formal objection.

Bramwell, *contra*. This plea is good in substance and in form. With respect to the first and main ground of objection, two admissions have been made in the argument on the other side, which are fatal to the plaintiff's case: first, that there could be no good answer to a plea in abatement in this case; at one time, therefore, according to the plaintiff's admission, the action was not maintainable against the defendant, if he availed himself of a plea in abatement; and secondly, that it cannot be denied that that which is an answer as to one of the joint debtors, is so as to the other also; if that be so, it inevitably follows that the defendant has the same answer now, in the manner in which he has pleaded it. Suppose Smith, the co-contractor with the defendant, had died or gone abroad since the judgment was recovered against him; in that case the defendant could not plead the nonjoinder in abatement; so that it must be argued that the plaintiff, merely by Smith's death or leaving the country, might acquire a right to maintain the present action. The plaintiff is driven to rely on the 3 & 4 Will. 4, c. 42, s. 10; but the words of that section, "not liable as a contracting party or parties," apply only to persons who were not parties to the original contract, and therefore never could have been sued as contracting parties, — not to persons who were originally liable, but have been subsequently discharged. The remedy given by that statute therefore, could not avail the plaintiff in this case. With respect to the case of Watters *v.* Smith, it is clear that the defendant who was sued in that case could not, on a plea in bar, rely on matter which could only have

been the subject of a plea in abatement; viz., either the nonjoinder of Hunter, or the pendency of the action against him. In the case in the American courts, perhaps Jameson, the person mentioned in the plea, would have been estopped by his promise to say that he was not severally liable. [Parke, B. — The judgment does not proceed on that.] In Bell *v.* Bankes, the whole case proceeded on the ground of its being assumed that a recovery against one joint debtor bars the action against the other; otherwise it would have been unnecessary to go into the other facts of the case. The question there was, whether a judgment in favor of trustees created a merger of a right of acting in favor of a *cestui que trust.* The like observation applies to Drake *v.* Mitchell, 3 East, 251, and also to Lechmere *v.* Fletcher; and there can be no doubt, from the latter case, what was the opinion of Bayley, B., on that subject. He says: "If, on a joint contract, you have sued one, and entered judgment against him, there might be an invincible obstacle, because, upon a new action against another of the parties to the contract, the defendant would have a right to plead that he made no promise except with the other defendant, against whom the judgment was entered, and he could not be joined." It is undoubtedly stated in Com. Dig., in the place already cited, that recovery and execution against one joint obligor is no bar in an action against the other; but the direct contrary is laid down immediately before (K. 4): "A recovery against one obligor. and execution, will be a bar in debt against the other." The difference is explicable by reference to the authorities relating respectively to joint and to joint and several obligations. The distinction is pointed out in Dennis *v.* Payn, Cro. Car. 551. The principle is, that a person who enters a joint contract has a right to say he will not be sued but with his co-contractor, and the plaintiff by his act cannot deprive him of that right. If the action be brought against the two, and it be discharged as against one, it is discharged also as against both. That proposition is unqualified, except as to personal discharges by statute. Seaton *v.* Henson, 2 Lev. 220; Nedham's case, 8 Rep. 136 a. How, then, can the plaintiff be in a better situation by suing one of them only in the first instance?

With respect to the necessity of a plea in abatement, it is strange to say that a defendant, who is bound to give a better writ, must state in his plea that which shows that no writ lies. Besides, *non constat* that the defendant could plead in abatement, or could state that Smith is within the jurisdiction. Then, as to the objection that there is no verification by the record; what is it that the defendant must have stated that he is ready to verify by the record? — all the facts before stated. [Parke, B. — Whereas, on a plea of judgment recovered, *prima facie* there is one fact only which is matter of record, until the plaintiff new assigns.] The record would afford no verification of this plea. [Parke, B. — As to the prayer of judgment, that is not necessary by the new rules; the plea does not operate by way of estoppel.]

Henderson was heard in reply. *Cur. adv. vult.*

PARKE, B. The plea in this case, to an action of debt, stated that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith jointly, and not with the defendant alone; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt, with costs, "as appears by the record remaining in the Court of Queen's Bench, which judgment still remains in full force and unreversed," concluding with the common verification.

To this plea there was a demurrer, assigning several special causes: First, that it was a plea in abatement not properly pleaded; to which the answer is, that the plea does not give a better writ, and is clearly a plea in bar. Secondly, that it amounts to the general issue, which it certainly does not, for it admits a debt originally due. Thirdly, that it does not aver that the debt was not due from the defendant and Smith severally, as well as jointly; to which it was properly answered that the plea sufficiently shows the identical contract declared upon to be joint, and that it cannot be contended, *prima facie* at least, that the same contract was both joint and several. And, lastly, it was objected that the plea ought to have concluded with a verification by the record. The court, however, intimated its opinion that such an averment, though proper when the plea contains matter of record only, was not proper where the averment of matter of record was mixed with averments of matters of fact, on which an issue of fact may be taken. In the case of a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue on the plea. If the judgment were recovered for another cause, there must be a new assignment.

The matters of form being disposed of, the question is reduced to one of substance: whether a judgment recovered against one of two joint contractors is a bar in an action against another.

It is remarkable that this question should never have been actually decided in the courts of this country. There have been, apparently, conflicting dicta upon it. Lord Tenterden, in the case of Watters *v.* Smith, 2 B. & Ad. 892, is reported to have said that a mere judgment against one would not be a defence for another. My brother Maule stated, in that of Bell *v.* Bankes, 3 Man. & G. 267, that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher, 1 C. & M. 634, Bayley, B., strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors; though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle, and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good.

If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained,

so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*, — the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause. Brown *v.* Wootton, Yelv. 67; and s. c., Cro. Jac. 73; and Moor, 762. And though, in the report in Yelverton, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham states the true ground. He says, "If one hath judgment to recover in trespass against one, and damages are certain" (that is, converted into certainty by the judgment), "although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every of them is chargeable, and liable to the entire debt; and therefore a recovery against one is no bar against the other, until satisfaction." And it is quite clear that the Chief Justice was referring to the case of a joint and several obligation, both from the argument of the counsel, as reported in Cro. Jac., and the statement of the case in Yelverton.

We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.

The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by Bayley, B., in the case of Lech-

mere *v.* Fletcher, and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement, or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.

During the argument, a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being contrary to the conclusion this court has come to; the case is that of Sheehy *v.* Mandeville. We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar. Ward *v.* Johnson, 13 Mass. 148.

For these reasons we are of opinion that our judgment must be for the defendant. *Judgment for the defendant.*[1]

[1] Mason *v.* Eldred, 6 Wall. 231 (overruling Sheehy *v.* Mandeville, 6 Cranch, 254); Trafton *v.* United States, 3 Story, 651; Brady *v.* Reynolds, 13 Cal. 31; Wann *v.* McNulty, 2 Gilm. 359; Moore *v.* Rogers, 19 Ill. 347; Crosby *v.* Jeroloman, 37 Ind. 264; Ward *v.* Johnson, 13 Mass. 148; Cowley *v.* Patch, 120 Mass. 137; Davison *v.* Harmon, 65 Minn. 402; Robertson *v.* Smith, 18 Johns. 459; Candee *v.* Smith, 93 N. Y. 349; Smith *v.* Black, 9 Serg. & R. 142, *acc.* But otherwise by statute in many jurisdictions. The law in each state is separately considered in a note in 43 L. R. A. 151.

KEIGHTLEY *v.* WATSON AND ANOTHER.

IN THE EXCHEQUER, APRIL 27, 1849.

[*Reported in* 3 *Exchequer*, 716.]

COVENANT upon an indenture of the 27th of November, 1844, made between one A. A. Dobbs of the first part, the plaintiff of the second part, and the defendants and one Jerome Smith, since deceased, of the third part (profert). The declaration, after reciting certain matters in the deed, and setting out certain covenants hereinafter expressly stated, and the necessary averments of performance, &c., alleged as a breach the non-payment by the defendants to the plaintiff of certain interests on a part of the purchase-money of certain lands, &c., payable by virtue of that instrument.

The defendants, having craved oyer of the deed, set it out in their plea verbatim. The deed, after reciting an indenture entered into by the defendants and plaintiff and Dobbs, whereby the latter agreed to purchase of the plaintiff certain parcels of land and tenements, and after reciting that Dobbs had agreed with the defendants and Smith to sell them the said several parcels of land and tenements, stated that each of the parties thereto, so far as related to the acts and deeds on his own part to be performed, did thereby for himself, his heirs, &c., covenant and agree with the other of them that Dobbs should sell, and the defendant and Smith should purchase, the said parcels of land (describing them) at the sum of £7335, to be paid by the defendants and Smith by the payment of £900 upon the execution of the deed, and £6435 on the 27th of November, 1851; and that Dobbs should then, or within a month after notice, deliver to the defendants and Smith an abstract of his title, &c. The deed then proceeded to state that Dobbs covenanted "that he, and that all other necessary conveying parties, &c., should, on payment on the 27th of November, 1851, of the said sum of £6435, remainder of the said purchase-money as aforesaid, execute a proper conveyance of the said hereditaments, &c., unto the defendants and Smith," &c.

Then followed the covenant upon which the present action was brought: "And the said R. Watson, H. Watson, and J. Smith, for themselves, their heirs, executors, and administrators, hereby covenant with the said W. T. Keightley, his executors, administrators, and assigns, and as a separate covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they the said R. Watson, H. Watson, and J. Smith, their heirs, executors, administrators, and assigns, shall on performance of the covenant and agreement hereinbefore continued on the part of the said A. A. Dobbs, pay to the said W. T. Keightley, his executors, administrators, or assigns, or to the

said A. A. Dobbs, his executors, administrators, or assigns, in case the said W. T. Keightley, his executors, administrators, or assigns, shall then have been paid his or their purchase-money, payable by virtue of the said in part recited contract, the sum of £6435, being the remainder of the said purchase-money, on or before the 27th day of November, 1851; and further that the said R. Watson, H. Watson, J. Smith, their heirs, executors, administrators, or assigns, shall, in the meantime, and until the whole of the said sum of £6435 shall be paid off, pay to the said W. T. Keightley, his executors, administrators, and assigns, interest on so much of the purchase-money as shall from time to time remain unpaid, at the rate of £5 per cent per annum from the date of these presents, by equal half-yearly payments, on the 27th of May and 27th of November in each year; the first payment of the said interest to be made on the 27th day of May next."

The deed then contained a covenant by Dobbs with the defendants and J. Smith, as to making certain sewers, with certain provisions respecting them; with a proviso that the defendants and J. Smith should be entitled to immediate possession of the premises, and that they should be entitled to an absolute conveyance of any portion upon the payment of a certain sum per square yard, in case W. T. Keightley had been paid all that was due to him, &c. There was also a covenant with a power of sale to Dobbs upon non-payment of interest or principal, with a certain proviso as to compensation for mistake in quantity. Then followed a covenant by the plaintiff that he would not exercise his power of sale under the contract with Dobbs, until default in payment by the defendants of interest or principal; and for conveyance of portions, if required, according to the provisions of the deed; and that the plaintiff would apply all moneys received from the defendants and J. Smith in part payment of the debt due from Dobbs.

General demurrer, and joinder.

The defendants' point for argument was, that the declaration was bad, on the ground that the said A. A. Dobbs, one of the parties to the deed, was not joined in the action as a co-plaintiff.

Cowling, in support of the demurrer.

Crompton, *contra*.

POLLOCK, C. B. I am of opinion that in this case the plaintiff is entitled to the judgment of the court. I consider that the inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule — a rule which I am by no means willing to break in upon — that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction. What, then, in this case, did

the parties mean? The words of the covenant are, "And the said R. Watson, H. Watson, and J. Smith, for themselves, their heirs, executors, and administrators, hereby covenant with the said W. T. Keightley, his executors, administrators, and assigns, and as a separate covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they" will do so and so. If I am to put a construction upon that, I should say that it is intended to be a several or separate covenant. In the case of Hopkinson *v.* Lee, it seems to have been understood at one time by this court that there were joint words. There are certainly none. But the nature of the interest, upon looking into that particular case, may possibly justify that decision. The words of this instrument are several, and its terms disclose a several interest; the covenant, therefore, must be construed according to the words, as a several covenant, and it appears to me that the words used by the parties were intended to create such a covenant. I think, therefore, that the plaintiff is entitled to sue alone.

PARKE, B. I am entirely of the same opinion with the Lord Chief Baron. With respect to the rule of law on this question, I apprehend that there is no doubt about it. That rule was correctly laid down by Lord Chief Justice Gibbs, in the case of James *v.* Emery, 5 Price, 533, as taken with the qualification annexed to it by Mr. Preston, which is to be found in his edition of the "Touchstone." That qualification was adopted by Lord Abinger, C. B., and myself, in the case of Sorsbie *v.* Park, 12 M. & W. 156, 158; and I apprehend that the Court of Queen's Bench misunderstood us in the interpretation which they put upon that rule, as there laid down by us. I had reason to explain the matter afterwards at some length, in the case of Bradburne *v.* Botfield, in which I pointed out that neither Lord Abinger nor myself had the least intention of interfering with Anderson *v.* Martindale, or with any of the decided cases. The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words capable of two constructions, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest. I apprehend that no case can be found at variance with that rule, unless Hopkinson *v.* Lee may be thought to have a contrary aspect. During the course of the argument in Bradburne *v.* Botfield, I certainly was under the impression, from reading the case of Hopkinson *v.* Lee, that there were in that case words capable of such a construction as to make the covenant a joint covenant. If that had been so, then the words subsequently introduced would not have made it several, unless there had also been an interest in respect of which it could be several, accord-

ing to the rule referred to by the Lord Chief Baron, as laid down in Slingsby's case, that it is not competent to the court to hold the same covenant joint or several at the option of the covenantee. Now we are to apply the above-mentioned rule to the case before the court, and to see whether the present covenant is a separate covenant with the plaintiff alone, or a joint covenant with the plaintiff and Dobbs, who has not been joined in the action. I think that there is no difficulty in saying that it is a separate covenant with the plaintiff alone, that there are no words to constitute it a joint covenant, and that the matters therein mentioned are capable of being understood as composing two different covenants, relating to two different interests, the one in which Keightley is concerned, and the other in which Dobbs is concerned. The covenant is this: "The defendants, for themselves, their heirs, executors, and administrators, covenant with Keightley, his executors, administrators, and assigns; and as a separate covenant," — not "and with A. A. Dobbs," — "and as a separate covenant with A. A. Dobbs, his executors, &c." [His Lordship read the covenant and proceeded.] Now in this case there are two separate interests, to be provided for by these separate covenants; and in this respect the case differs entirely from that of Hopkinson *v.* Lee, because upon looking at the context in that case, there was, in truth, only one joint interest to be protected. It was the money of one which the other had advanced. But in the present case there are clearly two distinct and separate interests to be protected by the covenant: one is Keightley's interest in the principal, until he shall have been paid off by Dobbs, in which case Dobbs would have to receive the whole of the purchase-money; and, if he should be paid off by Dobbs, then a separate interest in Dobbs to receive the purchase-money, or balance of the purchase-money, on the day when the purchase should be completed. These are two distinct and separate interests. Then, there being in this case no joint words, it is obvious that the parties meant these to be two covenants in respect of their separate interests, and they ought to be so construed. Then comes that branch of the covenant upon which the action is brought, namely, to pay the interest in the mean time. Now, that is a covenant to pay interest to Keightley in the mean time. It is obvious that he is the person who is intended to receive it. And, in the next place, there is no provision as to what is to be done in case Keightley is paid. It seems to me to be quite clear that the parties mean that Keightley is to receive the interest on his own account, until he be paid off, and if he should be paid off the the principal by Dobbs, then that he is to receive the interest of the purchase-money as trustee for Dobbs, until the principal is paid off. Looking, therefore, at the interest of the parties, as it appears from the context, we are not only able, but called upon, according to the express words, to construe this to be a separate covenant. If there had been words importing a joint covenant with the plaintiff and Dobbs as to the principal money, I should have felt considerable difficulty in saying that an action for interest must not have been brought by both, because in

that case there would have been an interest which the joint covenant would protect, although with regard to the other part, there would not have been any such joint interest. But the absence of any words to constitute a joint covenant is a strong argument with me that it was the intention of the parties that at all events, when the contingency should happen of the principal being paid off, the interest was to be paid to Keightley, and that he was the person to sue, if that were not paid. Without any further observations upon the case of Hopkinson *v.* Lee, it seems to me that the present case is clearly distinguishable from it, because on the face of this instrument the parties have separate interests; so that we are called upon to construe a separate covenant according to the precise words of it. I feel no difficulty in saying that the rule which we adopted in Bradburne *v.* Botfield is the correct one; I think it is impossible to doubt the rule to be one of construction merely, and that, like all other rules of construction, it must bend to express words. It cannot be supposed that there can be any intention on the part of the court to force parties to do a joint act when they intended to do a separate act, or to do a separate act when they intended to do a joint act, and in either case have clearly expressed such intention.

ROLFE, B. I am of the same opinion. It seems to me that the question turns entirely upon the rule, as stated by my brother Parke, which was distinctly laid down by this court in the cases cited, and in which I fully concur. It appears to me that Mr. Preston's suggestion was perfectly well founded, that the rule in Slingsby's case was not a rule of law, but a mere rule of construction. From that case it appears that, if a covenant be *cum quolibet et qualibet eorum*, that may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as a joint or several; but it cannot be both. The rule given in Slingsby's case is not very satisfactory to my mind, namely, with regard to the difficulty which arises as to the proper person to recover damages. If a party choose to enter into a covenant which creates such a difficulty, I do not see what the court has to do with it. It is clear that parties can so contract by separate deeds; why, then, should they not be able equally to do so by separate covenants in the same deed? If they so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding that if they choose so to contract as to impose upon themselves that burthen, and state it to be both joint and several, the court ought so to construe it. But Slingsby's case has laid down the opposite rule. I take it that from that time the rule has always been — whether distinctly expressed or not it is not necessary to consider — but the rule has been that you are to look and see from the context what the parties meant. Applying that rule here, I see no doubt about the question. They have said in terms that it is to be a separate covenant. According to the other construction, if Dobbs had satisfied Keightley, and Dobbs

had died, Keightley might have to sue for the money coming to Dobbs, or *vice versa;* or suppose Dobbs had not satisfied Keightley, and Keightley died, Dobbs would have had to sue for the money coming to Keightley's representatives. It is clear that is not what the parties meant. They have expressed themselves in words showing it was to be a separate covenant with each, and I think we should so hold it; consequently the plaintiff is entitled to our judgment.

PLATT, B. It appears by the recitals in this deed that Dobbs had purchased certain lands of Keightley, and that Dobbs sold the same land for £7335 to the defendants, but that inasmuch as at that time Dobbs, not having paid his purchase-money to Keightley, was not in possession of the conveyance of the land, it then became necessary that the second vendees should have the security of the first vendor, in order to have an additional chance of receiving the title which they ought to have upon payment of the money, and that accordingly this contract was entered into. What, then, is to be provided for? Why, undoubtedly, Dobbs is to be paid his money, but Keightley, at the same time, would not have entered into this deed, unless he saw his way to the security of the money to be paid by Dobbs: these are the reasons for this covenant. The covenant is expressly for the protection of Keightley in the first instance, because Watson and Smith do thereby covenant with Keightley, and as a separate covenant with Dobbs, that they will pay to Keightley. It is to pay Keightley the purchase-money, unless Dobbs has already paid the money himself, and in the event of his having paid it, then the purchase-money is to be paid to Dobbs, but only in that event. Then the deed goes on to state that, until the money is paid to the person who is kept out of it, interest upon it shall be paid to him. It is plain that the interest of Keightley was quite separate from that of Dobbs. Then, if the interest is separate, and we find distinct language in the covenant separating the obligation of the one from the obligation of the other, is the court to say that this is a joint covenant? If any language can be used stronger than another, it is that which is used on the present occasion, because it is stated to be a separate and not a joint covenant with Dobbs, plainly showing that the covenant with Dobbs is intended to be entirely separated from that with Keightley; and inasmuch as there is no rule of law which precludes parties from entering into contracts of this kind, why, therefore, should not the court give effect to it? It seems to me that, upon the whole, the plaintiff is clearly entitled to the judgment of the court.

Judgment for the plaintiff.

HENRY J. B. KENDALL AND OTHERS, APPELLANTS, *v.* PETER HAMILTON, RESPONDENT.

IN THE HOUSE OF LORDS, MAY 26 — JULY 28, 1879.

[*Reported in* 4 *Appeal Cases*, 504.]

LORD BLACKBURN.[1] My Lords, in this case the plaintiffs entered into transactions with the firm of Wilson, McLay, & Co., then consisting of two persons, Matthew Wilson and Joseph Corrie Shutters McLay. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills and entered into other transactions, the result of which was that a large sum was owing to the plaintiffs for which they might have maintained an action for money lent against those two persons.

The plaintiffs did not, at the time when they entered into the contracts which resulted in this cause of action, know that any other person was interested in the contracts; they dealt with Wilson & McLay, and with them alone, and gave credit to them alone. But afterwards (in the view which I take of the case, it is immaterial when) the plaintiffs discovered that the defendant Hamilton had agreed to share with Wilson & McLay in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by Wilson & McLay.

This amounted to an authority to Wilson & McLay to borrow money for the joint account of Wilson, McLay, & Hamilton, who were the undisclosed principals of Wilson & McLay in the contract of loan. And it is, I think, now firmly established as law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case Wilson & McLay could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of Hamilton; nor if Wilson & McLay had sued the plaintiffs could they have resisted a set-off of the money lent to them, on the ground that in borrowing it they were agents for a concealed principal.

I will consider how this case would have stood at law before the Judicature Acts, and then inquire what difference these acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the now plaintiffs might have main-

[1] The LORD CHANCELLOR, (EARL CAIRNS) and LORDS HATHERLY, O'HAGAN, SELBORNE, and GORDON delivered concurring opinions. LORD PENZANCE dissented on the ground that the Judicature Acts had changed the common law.

tained an action for money lent against Hamilton, on the ground that he, jointly with Wilson & McLay, being undisclosed principals to Wilson & McLay, was, as such, liable to the plaintiffs. But the facts are such that Hamilton could have proved a plea that the contract, on which he was sued, was made by the plaintiffs with the defendant and Wilson & McLay, jointly, and not with the defendant alone, and that the plaintiffs, before action, had recovered judgment against Wilson & McLay for the same loan upon the same contract. And then the question would have arisen, whether a judgment recovered against one or more of several joint contractors was (without satisfaction) a bar to an action against another joint contractor sued alone. The decision in King *v.* Hoare, 13 M & W. 494, was that it is a bar.

I have already said that, in my view of the matter, it was immaterial when the plaintiffs first discovered that they had a right to have this recourse against Hamilton, which they had never bargained for, and which was to them a piece of pure good luck. If the principle on which King *v.* Hoare, 13 M. & W. 494, was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But King *v.* Hoare, 13 M. & W. 494, proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.

From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the contract must, if alive, join as plaintiffs, and must be joined as defendants. If this was not done there must be a plea in abatement (Com. Dig. Abatement, E. 12, F. 8). That very learned lawyer cites 7 Hen. 4, 6, and 20 Hen. 6, 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, as far as I know, been doubted that the defendant might plead the non-joinder of his joint contractors in abatement, and in that way compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be allegation of a contract between the

parties to the action and no others, and consequently that there should be a nonsuit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff; and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a defendant. Such was the decision of Lord Holt and the Court of King's Bench in Boson *v.* Sandford, 2 Salk. 440. My Lords, I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in Serjeant Williams' note to Cabell *v.* Vaughan, 1 Wms. Saund. 290 *a*, that though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided was Rice *v.* Shute, 5 Burr. 2611. The last in which I find it controverted, though unsuccessfully, was Evans *v.* Lewis, 1 Wms. Saund. 291 (*d*), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still remained the law that all ought to be joined. And consequently I cannot doubt that the judges in King *v.* Hoare, 13 M. & W. 494, were accurate in holding that the two actions were upon the same cause of action. I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The plaintiffs had a right of recourse against Hamilton, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that Hamilton does anything inequitable in taking advantage of the defence which the law gives him. The plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the plaintiffs were willing to take advantage of their good luck against the defendant, it seems no hardship that he should take advantage of their bad luck against them.

But in such a case as King *v.* Hoare, 13 M. & W. 494, where the plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for,

as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances, against one should be, without satisfaction, a bar as to all the others. This hardship is very much removed by the provisions of the existing law, by which the plaintiff recovers judgment against those whom he proves to be his debtors, though he has joined others as defendants; he has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless perhaps in *Ex parte* Waterfall, 4 De G. & Sm. 199, that King *v.* Hoare, 13 M. & W. 494, does truly state the law as it existed before the Judicature Acts, and it was not doubted in the courts below, or I think seriously questioned at the bar, that it did so.

But since the Judicature Act, 1873, s. 24, law and equity are to be concurrently administered. And, therefore, if before the passing of those acts the plaintiffs could have sued in equity on these facts, or if they could have successfully applied for an injunction to prevent the defendant from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the court to administer the equities already existing without the delay and expense formerly required.

On the first argument at your Lordships' Bar, Mr. Rigby, in a very excellent argument, convinced me that in cases of joint contracts there was no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *Inter mercatores jus accrescendi locum non habet* applied; but I was diffident of my opinion on a question of such pure, and I might say, technical equity; and was therefore very willing that the case should be re-argued.

I have now heard the opinion of the noble and learned Lords who are conversant with the proceedings in the Courts of Equity, and have no diffidence in saying that I am of the same opinion.[1]

[1] In Hammond *v.* Schofield [1891], 1 Q. B. 453, it was held that where judgment had been signed by consent against the defendant, it could not be set aside, even with his assent, in order that the writ might be amended by joining another defendant who had been discovered by the plaintiff to have contracted jointly with the defendant.

CHARLES COWLEY *v.* EPHRAIM B. PATCH, Executor.

Supreme Judicial Court of Massachusetts, January 24 — March 3, 1876.

[*Reported in* 120 *Massachusetts*, 137.]

Contract against the executor of John W. Graves. The declaration contained two counts, the first of which was for money had and received to the plaintiff's use by the said Graves. The second count was for professional services and disbursements. The answer alleged, among other things, that if the testate was ever indebted to the plaintiff, as alleged, he was jointly indebted with one Henry H. Fuller, now living, and that the plaintiff had elected to prosecute his suits, for the indebtedness and identical subject-matter in each count contained, against Fuller to final judgments, which judgments had been against the plaintiff, and in favor of Fuller. The case was submitted to the Superior Court upon an agreed statement of facts in substance as follows: —

Each count declares on a distinct and separate demand. The indebtedness in the second count, if any (which the defendant does not admit), was originally the joint indebtedness of the defendant's testate, John W. Graves, and Henry H. Fuller. A suit was formerly brought by the plaintiff for this identical demand against Graves and Fuller, in the lifetime of Graves. Upon the death of Graves during the pendency of the suit in court, the plaintiff discontinued against Graves, and prosecuted his suit to final judgment against Fuller alone as the survivor of the joint debtors. On trial by jury, verdict and judgment were in favor of Fuller, the defendant, who obtained judgment for costs, which have been paid on execution.

A suit for the identical demand sought to be recovered in the first count was formally brought by the plaintiff against John W. Graves in his lifetime. After suit brought and after the death of Graves, the plaintiff by order of court, on motion, summoned Henry H. Fuller into court as a joint debtor, contractor, and defendant, with Graves, alleging that he was such in his motion to summon him in. Fuller was thus joined as a joint debtor and defendant with Graves. Graves dying pending the suit in court, the plaintiff discontinued as to Graves and prosecuted his suit to trial, verdict, and judgment against Fuller alone as the surviving joint debtor. The ground of procedure against Fuller, through trial and up to final judgment, was that he was a joint contractor and debtor with Graves, and the trial was conducted on that ground. Verdict and judgment were in favor of the defendant, Fuller, who obtained a judgment for costs against the plaintiff, which has been paid on execution.

Upon these facts Putnam, J., ruled that the action could not be

maintained, and ordered judgment for the defendant. The plaintiff appealed.

C. Cowley, *pro se.*

G. Stevens, for the defendant.

GRAY, C. J. In order to maintain an action on a joint contract, whether the action is brought against one or against both of the joint contractors, it is necessary to prove the liability of both; for if one only is or ever was liable, there is not a joint, but only a several liability, and a variance from the cause of action declared on. For example, if one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, and judgment is rendered against the one sued, it merges the cause of action against him, and (unless otherwise provided by statute) as the two are no longer jointly liable, prevents a subsequent recovery against the other joint contractor. Ward *v.* Johnson, 13 Mass. 148. King *v.* Hoare, 13 M. & W. 494. Mason *v.* Eldred, 6 Wall. 231. So if, in such an action, the judgment is for the defendant, upon the ground that there is no joint liability, it is a bar to a subsequent action against the other contractor upon the joint contract. Phillips *v.* Ward, 2 H. & C. 717.

The same rule must be applied to this case. It is true that, by reason of the death of one joint contractor, and the provision of the Gen. Sts. c. 97, § 28, enabling an action to be maintained against his administrator as if the contract had been originally joint and several, the plaintiff might maintain one action against the survivor, and another against the administrator of the deceased. Curtis *v.* Mansfield, 11 Cush. 152. New Haven & Northampton Co. *v.* Hayden, 119 Mass. 361. But the severance is merely for purposes of remedy, and the plaintiff must still, in either action, prove that the original liability was joint, and that, so far as concerns that question, both the survivor and the administrator of the deceased are liable.

This action against the executor of Graves cannot be maintained upon the ground that Graves and Fuller were originally jointly liable, because such liability is disproved by the judgments in favor of Fuller in the former actions, one at least of which is shown by the statement of facts to have been prosecuted against Graves and Fuller in the lifetime of both, and both of which were prosecuted against Fuller, after the death of Graves, solely upon the ground of a joint liability.

It cannot be maintained upon the ground that Graves was originally the sole debtor, because as to one count it is admitted that the original liability, if any, was joint; and, as to the other count, the plaintiff in the former action treated the liability as joint, and there are no facts tending to show that it was several.

Judgment for the defendant.

WILLIAM HALE *v.* LEONARD V. SPAULDING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 3, 1887–JANUARY 4, 1888.

[*Reported in* 145 *Massachusetts*, 482.]

CONTRACT, upon an instrument under seal, dated May 23, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff, on demand, six sevenths of any loss to which he might be subjected as the indorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, &c., and dated May 23, 1885.

At the trial in the Superior Court, before HAMMOND, J., it appeared that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody, for the plaintiff.

H. N. Merrill, for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to one joint obligor releases all. Wiggin *v.* Tudor, 23 Pick. 434, 444; Goodnow *v.* Smith, 18 Pick. 414; Pond *v.* Williams, 1 Gray, 630, 536. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433; 2 Chit. Con. (11th Am. ed.) 1154 *& seq.*; *Ex parte* Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See Kenworthy *v.* Sawyer, 125 Mass. 28; Willis *v.* De Castro, 4 C. B. (N. S.) 216; North *v.* Wakefield, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. Tuckerman *v.* Newhall, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of

several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.[1]

PRICE, Public Officer, &c., *v.* BARKER AND CLARK, Executors of GEORGE HOPPS.

In the Queen's Bench, February 22, 1855.

[*Reported in* 4 *Ellis & Blackburn*, 760.]

Coleridge, J., now delivered the judgment of the Court.

This was an action by the public officer of a banking Company against the executors of George Hopps. The declaration was on a bond conditioned for the security to the bank of a banking account of one William Brown. The plea set out the bond, which was the joint and several writing obligatory of the said George Hopps and William Brown, and then set out a general release, made after the accruing of the causes of action, and averred that the release was made in the lifetime of the said George Hopps without the privity, knowledge, authority, or consent of the said George Hopps. The replication set out the release, which, after general words of release, contained the following proviso. "Provided always, that nothing herein contained shall extend, *or be deemed or construed to extend, to prevent* the said Banking Company, their successors or assigns, or the partners for the time being constituting the said Company," "*from suing or prosecuting any person* or persons, other than the said William Brown, his executors, administrators, or assigns, who is, are, shall or may be liable or accountable to pay or make good to the said Banking Company all or any part of any debt or debts, sum or sums of money, now due from the said William Brown to the said Company, either as drawer, indorser, or acceptor of any bill or bills of exchange or promissory note or notes, or as being jointly or severally bound with the said William Brown in any bond or bonds, obligation or obligations, or other instrument whatsoever, or otherwise howsoever, as if these presents had not been executed: it being understood and agreed that, as regards any such suits or prosecutions, these presents shall not operate or be pleaded in bar, or as a release."

[1] *Re* E. W. A., [1901] 2 K. B. 642; Allin *v.* Shadburne, 1 Dana, 68; Lunt *v.* Stevens, 24 Me. 534; Rowley *v.* Stoddard, 7 Johns. 207; Newcomb *v.* Raynor, 21 Wend. 108; Goldbeck *v.* Bank, 147 Pa. 267; Maslin *v.* Hiett, 37 W. Va. 15, *acc.* Compare Watters *v.* Smith, 2 B. & Ad. 889; Field *v.* Robins, 8 A. & E. 90; Bender *v.* Been, 78 Ia. 283; Young *v.* Currier, 63 N. H. 419; Crafts *v.* Sweeney, 18 R. I. 730.

To this replication the plaintiff demurred: and the demurrer was argued before us in the course of the Term.

On the argument two questions arose:

1st, Whether the general words of the release were restrained by the proviso, so that, in order to give effect to the whole instrument, we must construe it as a covenant not to sue, instead of a release.

And, 2dly, Assuming the deed to operate merely as a covenant not to sue, whether the reservation of rights against other parties than the principal debtor contained in the proviso would prevent the surety from being discharged by a binding covenant to give time to, or not to sue, the principal debtor.

To entitle the plaintiff to our judgment, it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff as against the surety were preserved by the particular reservation in question, notwithstanding such covenant not to sue.

With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman, in Nicholson *v.* Revill, 4 A. & E. 675, as explained by Baron Parke in Kearsley *v.* Cole, 16 M. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved: and we think that we are bound by modern authorities (see Solly *v.* Forbes, 2 Br. & B. 38; Thompson *v.* Lack, 3 Com. B. 540; and Payler *v.* Homersham, 4 M. & S. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release. It is impossible to suppose for a moment that the parties to this deed could have contemplated the extinguishment of their rights as against parties jointly liable. It was argued, indeed, that the particular words of the proviso in the present case prevented this construction by appearing to recognize that Brown was not to be sued, and that, in an action against him, the deed was to operate as a release and might be pleaded at bar. The words, however, that the proviso was not to extend to prevent the bank from suing or prosecuting any person or persons other than the said defendant or his representatives, which were said to show that Brown was not to be sued, are quite as applicable to a covenant not to sue as to a release: and the later general words in the conclusion of the deed, "that, as regards any

such suits or prosecutions" (against parties jointly liable), "these presents shall not operate or be pleaded in bar," are, we think, like the words of actual release, too general to prevent us by inference from giving effect to the plainly expressed intention that the parties jointly liable should not be discharged by an extinguishment of the debt. If, therefore, the testator, whom the defendants represent, had been in the situation of co-obligor merely, we should think that he was not discharged by the deed in question.

It remains, however, in the second place, to consider what effect the deed had upon his liabilities in reference to his relation as surety for Brown, the principal debtor. It was thrown out, indeed, in argument, that we were bound to consider him as a principal debtor and not as a surety upon this bond, the obligatory part of the bond being joint and several without any reference to either being surety or principal. But, for the purpose of seeing the relation of the parties, we must look at the condition of the bond, as set out upon the pleadings, which plainly discloses that the defendant was a surety for the liabilities of Brown.

If the question, whether a covenant not to sue, qualified by such a proviso as that in the present case, and entered into by the creditor without the consent of the surety, discharges the surety, were a new one unaffected by authority, we should pause before deciding that such a case does not fall within the general rule of the creditor discharging a surety by entering into a binding agreement to give time to his principal debtor; and we should have thought the forcible observations of Lord Truro in the recent case of Owen *v.* Homan, 3 Macn. & G. 378, entitled to much consideration. We find, however, that the Court of Exchequer in a solemn and well-considered judgment, in the case of Kearsley *v.* Cole, 16 M. & W. 128, 136, after referring to all the authorities, states that the point must "be considered as settled": and they rest their judgment upon this, although it was not necessary to decide it, as the surety in that case had consented to the deed: which consent they treat indeed as an additional reason; but they expressly state that it was not necessary. They state that they "do not mean to intimate any doubt as to the effect of a reserve of remedies *without such consent;*" and they add that "the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with or giving time to a debtor by a binding instrument;" and they then explain how it is that, in their judgment, the reserve of remedies has that effect. After this judgment, and after the strong expression of opinion by the present Lord Chancellor in his judgment in the House of Lords in the case of Owen *v.* Homan, 4 H. L. C. 1037, where he dissents from the remarks made by Lord Truro in the Court below, and states that, but for those remarks, he should have thought that the principle contended for by the plaintiffs was "a matter beyond doubt," we think that we ought to consider the law on this subject as settled, at least until it is questioned in a Court of error.

It seems to be the result of the authorities that a covenant not to sue, qualified by a reserve of the remedies against sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant not to sue is to operate only so far as the rights of the surety may not be affected.

Probably many deeds of this nature are framed continually on the supposition that the law has been supposed to be settled, in the manner stated in the Exchequer, since the time of Lord Eldon: and we think that, sitting as a Court of coördinate jurisdiction with the Exchequer, we ought not to disturb the law stated by them in a solemn judgment to be clearly settled.

Our judgment, therefore, upon the demurrer in the present case is in favor of the plaintiff.

Judgment for the plaintiff.[1]

MARTIN *v.* CRUMP.

IN THE KING'S BENCH, EASTER TERM, 1698.

[*Reported in* 2 *Salkeld*, 444.]

Two joint merchants make B their factor; one dies, leaving an executor; this executor and the survivor cannot join, for the remedy survives, but not the duty; and therefore on recovery he must be accountable to the executor for that.[2]

[1] See also Willis *v.* De Castro, 4 C. B. N. S. 216; Bateson *v.* Gosling, L. R. 7 C. P. 9; Cragoe *v.* Jones, L. R. 8 Ex. 81; Line *v.* Nelson, 38 N. J. L. 358.

[2] Survivorship in the case of a joint right is illustrated in Anderson *v.* Martindale, 1 East, 497; Trammell *v.* Harrell, 4 Ark. 602; McLeod *v.* Scott, 38 Ark. 72, 76; Supreme Lodge *v.* Portingall, 167 Ill. 291; Vandenhauvel *v.* Storrs, 3 Conn. 203; Indiana, &c. Ry. Co. *v.* Adamson, 114 Ind. 282; Needham *v.* Wright, 140 Ind. 190, 198; McCalla *v.* Rigg, 3 A. K. Marsh. 259; Peters *v.* Davis, 7 Mass. 257; Hedderly *v.* Downs, 31 Minn. 183.

Illustrations of the doctrine of survivorship in the case of a joint liability may be found in Richardson *v.* Horton, 6 Beav. 185; Murphy's Adm. *v.* Branch Bank, 5 Ala. 421; Bundy *v.* Williams, 1 Root, 543; Bulkly *v.* Wright, 2 Root, 10; Ballance *v.* Samuel, 4 Ill. 380; Moore *v.* Rogers, 19 Ill. 347; Eggleston *v.* Buck, 31 Ill. 254; Cummings *v.* People, 50 Ill. 132; Stevens *v.* Catlin, 152 Ill. 56; Clark *v.* Parish, 1 Bibb, 547; New Haven, &c. Co. *v.* Hayden, 119 Mass. 361; Tucker *v.* Utley, 168 Mass. 415; Fuller *v.* Wilbur, 170 Mass. 506; Murray *v.* Mumford, 6 Cow. 441; Bradley *v.* Burwell, 3 Denio, 61, Comins *v.* Pottle, 22 Hun, 287; Wood *v.* Fisk, 63 N. Y. 245; Douglass *v.* Ferris, 138 N. Y. 192, 207; Burgoyne *v.* Ohio Life Ins. Co., 5 Ohio St. 586; Kennedy *v.* Carpenter, 2 Whart. 344, 361.

But the estate of a deceased joint contractor has been made liable in many states by statute. Reed *v.* Summers, 79 Ala. 522, 524; Stevens *v.* Catlin, 152 Ill. 56; Clark *v.* Parish, 1 Bibb. 547; Foster *v.* Hooper, 2 Mass. 572; Martin *v.* Hunt, 1 Allen, 418; New Haven, &c. Co. *v.* Hayden, 119 Mass. 361; Cobb *v.* Fogg, 166 Mass. 466, 476; Suydam *v.* Barber, 18 N. Y. 468; Burgoyne *v.* Ohio Life Ins. Co., 5 Ohio St. 586; Weil *v.* Guerin, 42 Ohio St. 299, 302; Eckert *v.* Myers, 45 Ohio St. 525; Taylor *v.* Taylor, 5 Humph. 110; Chadwick *v.* Hopkins, 4 Wyo. 379.

CHARLES H. DAVIS ET AL, APPELLANTS, *v.* MYNDERT VAN BUREN, EXECUTOR, ETC., RESPONDENT.

NEW YORK COURT OF APPEALS, FEBRUARY 18–22, 1878.

[*Reported in* 72 *New York*, 587.]

PER CURIAM. One Bixbee was arrested at the suit of the plaintiffs, in an action commenced against him by them in the New York Common Pleas, and to procure his discharge from such arrest, he, Benjamin G. Bloss and Jordan Mott, defendant's testator, executed an undertaking as required by section 187 of the old Code. There was default in the undertaking, and the plaintiffs then caused a summons to be issued in this action against Bloss and Mott, which was served on Bloss; before it could be served on Mott, he died. Bloss was afterwards discharged in bankruptcy, and the defendant, as executor of Mott, was substituted, and the action continued against him.

The undertaking is a joint obligation. It is so in terms, and we cannot interpolate into it words of severalty. It could have been made joint and several, but it was not. Bloss and Mott were sureties. They did not assume a principal obligation; they undertook for another; they had no interest except as sureties, and were entitled to all the right of sureties. This case cannot, therefore, be distinguished from Wood *v.* Fisk (63 N. Y., 245), and the defendant, as the representative of Mott, cannot be held. It is a rule of the common law, too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. Towers *v.* Moore, 2 Vern. 98; Simpson *v.* Vaughan, 2 Atk. 31; Bradley *v.* Burwell, 3 Denio, 61; Richter *v.* Pappenhausen, 42 N. Y. 393; Pickersgill *v.* Tohms, 15 Wall. 140; Getty *v.* Binsse, 49 N. Y. 388; Risley *v.* Brown, 67 id. 160.

However unjust this rule may be in its general operation we have no right to abrogate it. We must enforce it whenever it is applicable, and leave to the law-making power any needed change.

The judgment must be affirmed.

All concur.

Judgment affirmed.[1]

[1] Compare Richardson *v.* Horton, 6 Beav. 185.

"The sole ground upon which the appellants deny the right of the respondents to share in the assigned estate is that, by the death of the assignor, he being a mere surety, the liability upon his guaranty was extinguished, and they ceased to have any claim upon his estate; and the appellants rely for their contention upon the principle laid down in United States *v.* Price, 9 How. [U. S.] 90; Getty *v.* Binsse, 49 N. Y. 385; Wood *v.* Fisk, 63 id. 245; Risley *v.* Brown, 67 id. 160, and kindred cases.

"It is undoubtedly the rule that in case of a joint obligation of sureties, if one of the obligors die, his representatives are, at law, discharged, and the survivor alone can be sued; but that where the joint obligors were all principal debtors, or received some

SAMUEL OSBORN, JR., AND OTHERS *v.* MARTHA'S VINEYARD RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 27, 1885 — JANUARY 11, 1886.

[*Reported in* 140 *Massachusetts*, 549.]

GARDNER, J. This action was originally commenced by Samuel Osborn, Jr., one of the plaintiffs. After the trial of the case Osborn moved to amend his writ by adding, as joint plaintiffs with him, Shubael L. Norton, and Nathaniel M. Jernegan, which motion was allowed. The action then proceeded upon the allegation in their declaration, that the defendant owed the three plaintiffs $600, according to the account annexed, which was for twenty tons of iron rails at $30 per ton, giving credit for $400, paid to Norton and Jernegan.

The first question which arises is whether the contract made by the plaintiffs with the defendant was joint or several. The report finds that the three plaintiffs purchased twenty tons of iron rails in their own

benefit from the joint obligation, courts of equity have taken jurisdiction in the case of the death of one of the obligors, and enforced the obligation against his representatives. The ground upon which those courts have proceeded is that in conscience the estate of the deceased obligor ought to respond to the obligation; and they have given relief in all cases where, in consequence of a primary liability on the part of the deceased obligor, or of a benefit received by him from the joint obligation, it was morally and equitably just that his estate should be made liable, and unconscionable that it should be discharged. But it has been a rule in courts of equity that where the deceased joint obligor was a mere surety, receiving no benefit from the obligation, and having no interest therein, except as surety, his estate, in case of his death, is discharged from liability. This rule, in such cases, rests upon the ground that the surety is not bound in morals or good conscience to pay, except in accordance with the strict letter of his obligation, and that being discharged therefrom at law, there is no room for the interference of equity upon principles of natural justice by them administered. The reasoning upon which the exemption of the deceased surety's estate from liability is founded, though sanctioned by numerous cases, is not very convincing, and has not always been viewed by judges and jurists with favor.

"It is difficult to perceive why the estate of a surety who was a joint obligor, upon whose credit and responsibility, mainly, the obligee loaned his money, should be discharged by the death of the surety. It would seem that in good conscience and sound morals, and upon principles of natural justice, it should respond, and bear the loss, if any, rather than the obligee who trusted the surety. But it has been quite uniformly held that the mere joint obligation of the deceased surety is not sufficient to create an equity against his estate.

"In all the cases which have come under my observation where it has been held that death discharged the obligation of a joint surety, it appeared that the joint obligor was a mere surety, who received no benefit whatever from the joint obligation. The cases to be found in the books are generally those of joint accommodation indorsers of notes, joint sureties upon official bonds, or upon undertakings given on appeal, or mere sureties upon other instruments of a similar nature." Richardson *v.* Draper, 87 N. Y. 337, 344.

See also Douglass *v.* Ferris, 138 N. Y. 192, 207.

names, giving a promissory note, signed by the three, to the vendor therefor. In this purchase, there was no reference to any separate interest of the purchasers in the iron rails, and they became joint owners thereof. They then sold the rails to the defendant, making no reservation of any single interest in any one of the vendors. The defendant promised jointly, not separately, to pay the three plaintiffs the price therefor. This contract was joint, the several payees having therein a joint interest, so that no one could sue for his proportion. When they jointly undertook to sell the rails in one mass to the defendant, they held themselves out to be joint owners, voluntarily assuming that relation to the property sold to the defendant. The contract became a joint contract, the plaintiffs being joint creditors, not several, of the defendant. 2 Chit. Cont. (11th Am. ed.) 1340 The three owners represented, in effect, that they had a common interest in the property, without any difference in their respective interests and possessions, and that payment was to be made of the entire sum.

The two plaintiffs Norton and Jernegan, in behalf of themselves and of Osborn, settled with the defendant for the amount due, in full payment and satisfaction of their demand, receiving as payment in part money and in part shares of stock in the defendant corporation. The plaintiff Osborn insists that he is not bound by this settlement; and that, in the name of the three vendors, he can recover in money that portion of the original indebtedness to which, as between himself and his associates, he was entitled.

The interest of the three plaintiffs in their joint claim against the defendant was such that each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two thirds belonging to the others. It has been settled in this action that one cannot maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one, being interested in the entire claim, can settle it with the defendant. Each of the three, by the manner of their dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement, or accord and satisfaction, and to release the defendant from its obligation under the contract. 1 Pars. Cont. 25.

In this case there was no formal release by writing under seal. The plaintiffs Norton and Jernegan, upon the settlement, "gave the defendant a receipted bill of the demand for the price of the rails and interest." The delivery of the shares of stock by the defendant to the plaintiffs, and the payment of the money were accepted in satisfaction and payment of the debt. It was an accord and satisfaction unconditional, actually executed and accepted. This operates to release the defend-

ant from further liability upon the contract. No particular form of words is necessary to constitute a valid release. "Any words which show an evident intention to renounce the claim upon, or to discharge, the debtor are sufficient." 2 Chit. Cont. (11th Am. ed.) 1146. The plaintiff Osborn in his argument has not urged that this settlement was not in effect a release. If this transaction between the parties, if assented to by all who participated in it, was such as to release the defendant from all liability to Norton and Jernegan, of which there is no contention, then it follows that the release of two was the release of all. When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, the release of one is as effectual as the release of all. Austin *v.* Hall, 13 Johns. 286; Decker *v.* Livingston, 15 Johns. 479.

In this case, fraud is not set up, nor is there any suggestion of fraud in the transaction. The settlement was in effect an accord and satisfaction, which operates as a release. Wallace *v.* Kelsall, 7 M. & W. 264, 272.

The settlement made by Norton and Jernegan with the defendant released the defendant from further liability upon its contract with the plaintiffs, and the action cannot be maintained. By the terms of the report there must be

Judgment for the defendant.[1]

G. A. Torrey, for the defendant.

C. G. M. Dunham, for the plaintiffs.

[1] Wallace *v.* Kelsall, 7 M. & W. 264; Husband *v.* Davis, 10 C. B. 645, *acc.* Similarly a release by one joint creditor discharges the right of all. Rawstorne *v.* Gandell, 15 M. & W. 304; Myrick *v.* Dame, 9 Cush. 248; Napier *v.* McLeod, 9 Wend. 120. As to the rule in equity, see Piercy *v.* Fynney, L. R. 12 Eq. 69; Steeds *v.* Steeds, 22 Q. B. D. 537; Powell *v.* Brodhurst, [1901] 2 Ch. 160.

Joint obligations have been much discussed in the civil law. See the French Code Civil, Arts. 1197–1216; the German Bürgerliches Gesetzbuch, §§ 420–432; Windscheid, Pandektenrecht, § 292 *seq.*

CHAPTER IV.

THE STATUTE OF FRAUDS.

ACT OF 29 CHARLES II. Chapter 3 (1676).

IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) 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.

XVII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

SECTION I.

CONTRACTS WITHIN THE STATUTE.

A — Guarantees.

BOURKMIRE *v.* DARNELL.

In the Queen's Bench, Michaelmas Term, 1704.

[*Reported in* 3 *Salkeld*, 15.]

Assumpsit, &c., in which the plaintiff declared, that the defendant in consideration he, (the plaintiff,) at the instance and request of the

defendant, would lend and deliver to one Joseph English *unum spadonem* of him the said plaintiff, to ride to Reading in Berkshire; he (the defendant) assumpsit, and promised to the plaintiff, that the said Joseph should re-deliver the said gelding safely to him the plaintiff. Upon non-assumpsit pleaded, the evidence at the trial was, that the said Joseph English would have hired the gelding of the plaintiff, but could not prevail with him till the defendant came, and did undertake for the re-delivery; upon which the counsel for the defendant insisted, that the plaintiff ought to produce a note in writing of this agreement, which being overruled, there was a verdict for the plaintiff; and it was moved in arrest of judgment, and PER CURIAM adjudged, that it was void by the statute of frauds, because it was a collateral undertaking for the act of another, and in such case the statute requires, that it must be in writing. The difference is, where the whole credit is given to the undertaker, in such case the third person is in nature of a servant, and there is no remedy against him; it is true, the undertaking is good, but it is not within the statute, and therefore not requisite it should be in writing; but where the undertaker comes in aid only to procure or obtain credit for another, so that the remedy may be against both, this is a collateral undertaking for another, and made void by the statute if it is not in writing. ET PER CURIAM, In the principal case the plaintiff may maintain an action of detinue against Joseph English, upon the original delivery of the gelding; and therefore this promise, made by the defendant, was to answer for the act and default of another, for which reason the verdict was set aside.[1]

EZRA B. BOOTH, RESPONDENT, *v.* JEREMIAH EIGHMIE, APPELLANT.

NEW YORK COURT OF APPEALS, FEBRUARY 17–MARCH 23, 1875.

[*Reported in* 60 *New York*, 238.]

MILLER, J. By the Statute of Frauds, any promise to answer for the debt, default, or miscarriage of another is void, unless the same be in writing and subscribed by the party to be charged therewith. 2 R. S., 136, § 2.

One Mrs. Collins was a debtor to a plaintiff, the debt being secured by a deed of certain real estate absolute upon its face, but actually intended as a mortgage. Mrs. Collins, being desirous of paying said indebtedness, and obtaining a conveyance of the land, at the request of the defendant, the plaintiff conveyed the land to Mrs. Collins, in con-

[1] Compare other reports of the same case in 2 Lord Ray, 1085, 6 Mod. 248, 1 Salk. 27. The numerous cases enforcing the distinction taken in Bourkmire *v.* Darnell are collected in Ames's Cas. Suretyship, 2–19.

sideration of which the defendant deposited and delivered, in pledge to secure the indebtedness, certain railroad bonds, which he agreed, within one year thereafter, to redeem at par, by paying the principal and interest which they represented.

The question to be determined is whether the promise of the defendant was void by the statute of frauds. The authorities upon the subject are numerous, but the later decisions have, to a great extent, established certain general rules which are in most cases applicable and controlling. The tests to be applied under the statute in every case, is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. Brown *v.* Weber, 38 N. Y. 187. There is, I think, no sufficient ground for claiming that the promise of the defendant was given or accepted as collateral to the demand which the plaintiff held against Mrs. Collins, or in default of her paying the same. There was no such condition made in the agreement, and it is not to be inferred from the facts presented. It was not a promise to become liable as surety for the debt of another, or collateral to the original indebtedness. That indebtedness had been fully discharged by the conveyance of the land by the plaintiff to Mrs. Collins, and it is in no way apparent, nor can it be properly assumed that the plaintiff could enforce his claim against her. The test is, whether the plaintiff could have maintained an action against her for the demand which was paid by a conveyance of the land and acceptance of the bonds. No such element entered into the agreement, either upon the execution of the conveyance or the delivery of the bonds; nor is it to be presumed from the circumstances surrounding the case. An action brought for such a purpose would be without any evidence to support it, and must inevitably fail. The plaintiff had entirely relinquished his claim upon the land, as well as against the original debtor, and the defendant entered into an independent obligation to secure or pay the debt. The case was not that of a creditor who releases a security without extinguishing the debt, but was a relinquishment of the debt against the debtor without having and without reserving any right whatever to pursue a remedy against the debtor.

In my opinion, there is no valid ground for claiming that there was no sufficient consideration to support the promise. By the conveyance of the lands to Mrs. Collins, the plaintiff gave up a security on real estate which, we are authorized to assume, was ample, and took defendant's promise with the bonds, the market-value of which was fifteen per cent below par. He also released the debtor from personal liability, and, without the benefit of the defendant's promise, he no doubt would have been subjected to loss upon the sale of the bonds. Here was an injury to follow by reason of a failure to fulfil the promise, and the

defendant also was benefited by obtaining a lien upon the lands conveyed to Mrs. Collins, by means of security taken, and a mortgage which she executed to him, as well as by a right to develop these lands. 2 Parsons on Con. [5th ed.], 7.

The case of Mallory *v.* Gillett, 21 N. Y. 412, is cited by the counsel on both sides, and I do not discover any doctrine laid down, or principle asserted, which conflicts with the rules already referred to as bearing upon cases of this character. In that case the plaintiff had possession of a canal boat, upon which he had a lien for repairs, and delivered it to a third person, at the defendant's request, upon his verbal promise that he would pay the amount due for such repairs, and it was held, there being no consideration moving to the defendant, that his promise was void under the statute of frauds. There is a marked distinction between the case cited and the one at bar. In the case cited, the plaintiff never relinquished or extinguished his claim against the original owner for the repairs, while here it was completely surrendered. Besides, there was no valid consideration for the promise, and it was collateral to the original debt, which was still in force, and for the collection of which there was an adequate and an ample remedy. It is said, in the prevailing opinion in this case, that among the cases which are not held to be within the statute, are those "where the original debt becomes extinguished, and the creditor has only the new promise to rely upon." The case at bar may, I think, be considered as embraced within this rule, as we have seen that the plaintiff could only rely upon the agreement made with the defendant to obtain payment of her entire demand.

The judgment must be affirmed with costs.

All concur; except ALLEN and FOLGER, JJ., dissenting; CHURCH, C. J., not sitting.

Judgment affirmed.[1]

GUILD & CO. *v.* CONRAD.

IN THE COURT OF APPEAL, JUNE 19, 21, 1894.

[*Reported in* [1894] 2 *Queen's Bench*, 885.]

LINDLEY, L. J. This case is one of considerable difficulty and very near the line. The question is, what is the nature of the promise which the defendant made to the plaintiff. It appears that the real plaintiff, Mr. Binney, is a merchant who was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant; and by a letter of June, 1888, the defendant agreed that, if the plaintiff would give credit to the Demerara firm to the extent of 5,000*l.*, the defendant would indemnify the plaintiff to that

[1] Numerous cases in accord are collected in Ames's Cas. Suretyship, 30.

extent. There is no question that that was a guarantee in the proper sense of the term; that is to say, it was an undertaking by the defendant to be responsible for the Demerara firm for 5,000*l.* This was in writing; but by a verbal guarantee the amount was enlarged afterwards, in March, 1891, to 6,000*l.* The plaintiff claimed that enlarged amount under this verbal guarantee; but the learned judge below has decided this claim in favor of the defendant, and no appeal has been brought in respect of that decision. As time went on, the Demerara firm got overdrawn; and at last, in December, 1891, the plaintiff was so reluctant to accept their bills that he eventually declined to do so; and an interview then took place between the plaintiff and defendant and Wakefield, a member of the Demerara firm. This interview took place on December 31, 1891, when bills of that firm for 5,950*l.* were about to become due, but which the plaintiff would not accept; and in the following January a second interview took place in consequence of some further bills to the amount of 5,280*l.* One of the difficult points in this case is to find out what took place at those interviews. The promises said to have been made were verbal only. Wakefield, one of the parties present at the interviews, is dead. The testimony of the plaintiff and the defendant upon the subject differ entirely. The plaintiff's version is to the effect that the defendant undertook to indemnify him against those bills if he, the plaintiff, would accept them. The defendant's version is that he did not give any such undertaking; and that was the controversy which was before the jury. The jury has decided that controversy in favor of the plaintiff. They have found, after hearing the evidence, that the defendant is wrong; that he did in fact make a promise to find the funds for both batches of bills, and to indemnify the plaintiff against them. I do not now consider the question of the form of the promise — whether it imposed a primary or a secondary liability: I pass that by for the moment. But the struggle on the main point resulted in favor of the plaintiff. The jury were then discharged, and it was arranged that any other questions which might arise in the case should be left to the judge. The judge then addressed his mind to the question whether the promise found by the jury to have been made by the defendant was in such a shape that the Statute of Frauds rendered it nugatory unless it was in writing, or whether it was such that the Statute of Frauds did not apply to it. The question whether that was brought before the jury seems a little uncertain. The learned judge, having seen the witnesses and read the correspondence, came to the conclusion that the promise was to the effect I will state presently. I will read the learned judge's own words. At the end of his judgment he says, the defendant's promise "was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet these acceptances." Now, whether the jury meant that or not is doubtful. The question is one of fact, and if it was not decided by the jury then

it was left to the finding of the judge, and I have read what his finding was. Ought we to differ from that finding? We are urged to say that the judge was wrong in his finding; that the evidence did not come up to that; and that the defendant's promise was merely a contract to pay the plaintiff if the Demerara firm did not pay. That, in my opinion, is a difficult question. The evidence is loose unquestionably; but I cannot bring my mind to say that it cannot bear the construction which the learned judge put upon it. The nature of the promise is all-important: because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the Statue of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds. I think that the learned judge had taken the true view, though it is very near the line. I cannot help thinking that the true result of those interviews was this — that the defendant did promise the plaintiff that, if he would accept those batches of bills, he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them; and it was on the faith of that promise that the plaintiff accepted those bills. If this is the real contract, and if the learned judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities show that the Statute of Frauds does not apply. The authorities are Thomas *v.* Cook, 8 B. & C. 728, and Wildes *v.* Dudlow, Law Rep. 19 Eq. 198. Thomas *v.* Cook appears to me to be undistinguishable from this case, if the facts here are such as I take them to be. There a man named Cook and a man named Morris had been in partnership; and on the dissolution of the partnership it was agreed that Cook should pay the partnership debts, and it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris to save him harmless from the payment of those debts. It being necessary that two sureties should be found to join in the bond, the plaintiff agreed to become one of the sureties on a promise by the defendant to indemnify him, the plaintiff, from all liability by reason of his joining in the bond. The decision was as follows. After pointing out that Morris was a creditor, Bayley, J., said this: "Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds." Then Parke, J., said: "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiffs should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid

money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."

I need not refer to other cases which have followed that; but I must notice the argument which has been addressed to us that Thomas *v.* Cook, 8 B. & C. 728, is bad law. Unquestionably it was not followed by the Court of Queen's Bench in Green *v.* Cresswell, 10 Ad. & E. 453, and Cripps *v.* Hartnoll, 31 L. J. (N. S.) (Q. B.) 150; 2 B. & S. 697; but, notwithstanding the criticism of the learned judges in those cases, Thomas *v.* Cook, *supra*, was set on its feet again by the decision of the Court of Exchequer Chamber in the latter case, 32 L. J. (N. S.) (Q. B.) 381, 4 B. & S. 414, and it has since held its ground; and after the decision in Eastwood *v.* Kenyon, 11 Ad. & E. 438, it is impossible to hold that a promise made by the defendant to the plaintiff to indemnify the plaintiff against a debt due from him to a third person is within the statute, and therefore required to be in writing. In my opinion the decision in Thomas *v.* Cook, *supra*, was right, and it is treated as good law in Hargreaves *v.* Parsons, 13 M. & W. 561, and it is supported in Reader *v.* Kingham, 13 C. B. (N. S.) 344. The modern cases of Wildes *v.* Dudlow, Law Rep. 19 Eq. 198, and *In re* Bolton, W. N. (1892) 163, 8 Times L. R. 668, are equally good law. Such being the case, it follows that the main defence here — namely, that the promise is bad as not being in writing within the Statute of Frauds — breaks down.

[The Lord Justice then dealt with certain other points urged on behalf of the appellant upon the facts of the case, and held that those points failed. The Lord Justice continued: —]

The main questions are, what was the promise? And, secondly, whether the promise was such as is required by the Statute of Frauds to be writing. The promise is, in my opinion, clear; and the Court below has found that the promise was a promise to indemnify, and therefore not within the Statute of Frauds. The decision is, in my opinion, right, and therefore the appeal must be dismissed.[1]

NUGENT *v.* WOLFE.

PENNSYLVANIA SUPREME COURT, JANUARY 11, 1886.

[*Reported in* 111 *Pennsylvania State*, 471.]

MR. JUSTICE STERRETT delivered the opinion of the court, February 1st, 1886.

If the verbal agreement, which plaintiff offered to prove, is within the supplement of 1855 to the Statute of Frauds and Perjuries, there

[1] LOPES, L. J., and DAVEY, L. J., delivered concurring opinions.
Numerous cases in accord are collected in Ames's Cas. Suretyship, 53, 54.

was no error in rejecting the testimony, nor in entering judgment of nonsuit. The supplement declares: "No action shall be brought whereby . . . to charge the defendant upon any special promise to answer for the debt or default of another, 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 by him authorized": P. L. 308.

Plaintiff gave in evidence the record of two judgments in favor of the First National Bank of Ravenna, one dated January, 1876, against Powers & Co., and the other, March, 1877, against himself as bail for stay of execution on the first mentioned judgment. He then offered to prove, in substance, that in February, 1876, defendant Wolfe requested him to become bail for stay of execution; and, in consideration of his agreeing to do so, promised and undertook to indemnify and save him "harmless from any loss or liability, and from paying anything by reason of his so going security;" that, relying on said promise and undertaking of defendant, he did become bail for stay of execution on the judgment against Powers & Co. This offer was objected to on the ground that the agreement was not in writing as required by the statute, and the proposed testimony was excluded by the court. In the same connection it was admitted that Powers & Co. became insolvent, that plaintiff was compelled to pay the judgment, then amounting to $1,499.74, and that defendant, though often requested, had not paid any portion thereof. The question thus presented is, whether the alleged agreement which plaintiff was not permitted to prove is within the clause of the supplement above quoted.

The clause in question is copied, substantially, from the fourth section of the English Statute, 29 Charles II. chap. 3, which, with slight changes in phraseology, has been generally adopted in this country. During the more than two centuries since its original enactment, the construction of this section, and its application to various forms of contract, have been constantly the subject of contention; and on no question, perhaps, has there been greater diversity and contrariety of judicial decision, in this as well as in the parent country. Cases of real or apparent hardship have repeatedly led courts to put a strained and unnatural construction on what appears to be a plain and easily comprehended act, passed for the purpose of preventing the commission of fraud and perjury. If time would permit, a review of the many conflicting and irreconcilable decisions that, from time to time, have been rendered, and the refined distinctions upon which they have been based, would be interesting; but the undertaking would be too great, and withal not specially profitable.

It is very evident that the statute was not intended to apply except in cases where, in addition to the promisor and promisee, there is also a third party to whose debt or undertaking the agreement of the promisor relates, and not even then unless the liability of the third party continues. In other words, the agreement, to be within the

purview of the statute, must in a certain sense be a collateral and not an original undertaking. Independently of the debt or liability of the third party, there must, of course, be a good consideration for the collateral or subordinate agreement, such for example as a benefit or advantage to the promisor or an injury to the promisee. It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

As was said by Mr. Justice Strong in Maule *v.* Bucknell, 50 Pa. St. 39, 52, "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an agreement by which the debt of another is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And, as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for payment of the debt. But, except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated, that while the old debt remains the new must be regarded as not an original undertaking, and therefore within the statute. At least this may be stated as a principle generally accurate. In Williams' Saund. 211, note, it is said: The question whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

If one says to another, "deliver goods to A. and I will pay you," the verbal promise is binding, because A., though he receives the goods, is not responsible to the party who furnishes them. But, if instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if he does not," or uses words equivalent thereto, showing that the debt is, in the first instance, the debt of A., the undertaking is collateral, and not valid unless in writing. In these latter cases, the same consideration, viz.: the consideration of the promise of the principal is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the

original consideration of the principal as the collateral promise of the surety, and is a good consideration for both: Nelson *v.* Boynton, 44 Mass. 396, 400. Other applications of the principles above stated might be suggested, but it is unnecessary to do so.

In the case before us the only consideration, for the alleged agreement, disclosed by plaintiff's offer, is the disadvantage to him, the risk he incurred by becoming bail for stay of execution on the judgment against Powers & Co. If they failed to pay their debt, then in judgment, at the expiration of the stay, he thereupon became fixed for the amount thereof. In consideration of the risk or contingent liability thus assumed by plaintiff at defendant's request, the latter promised and agreed to pay the judgment or see that it was paid by Powers & Co., and thus save plaintiff from the necessity of paying the same. In other words, defendants specially promised, for a good and valid consideration, to answer for the default of Power & Co., in not paying the judgment at expiration of the stay. Such is the nature and character of the agreement on which plaintiff claimed to recover, and it appears to come within the letter as well as the spirit of the clause under consideration. If it is not an agreement to answer for the debt or default of Powers & Co., it would be difficult to say what it is. Their liability to the bank still remained. The only consideration moving between the promisor and promisee, as claimed by the latter, is the risk he incurred in becoming bail for Powers & Co. There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers & Co., and the substance of defendant's agreement is that he would see that they paid it; and, if they failed to do so, he would pay it for them. It was literally a promise to answer for the default of Powers & Co. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank.

Without pursuing the subject further, we are satisfied the alleged promise of defendant is within the statute, and cannot be enforced, because it is not in writing. Our own cases are in accord with this view: Allshouse *v.* Ramsay, 6 Whart. 331; Shoemaker *v.* King, 40 Pa. St. 107; Miller *v.* Long, 45 id. 350; Maule *v.* Bucknell, *supra;* Townsend *v.* Long, 77 Pa. St. 143.

The object of the statute is protection against "fraudulent practices commonly endeavored to be upheld by perjury," and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom. There never was a time in the history of our jurisprudence when the necessity for such a statute was greater than now, when persons in interest, as well as parties to the record, are generally competent witnesses.

Judgment affirmed.[1]

[1] Mississippi, Missouri, Ohio, Pennsylvania, and Tennessee hold that a promise to indemnify is within the Statute of Frauds. See Ames's Cas. Suretyship, 54.

O. A. RESSETER *v.* WATERMAN.

ILLINOIS SUPREME COURT, JUNE 19, 1894.

[*Reported in* 151 *Illinois*, 169.]

APPEAL from the Appellate Court for the Second District; — heard in that court on appeal from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

This was an action of assumpsit, in the Circuit Court of Lee County, brought by appellant against appellee, to recover damages alleged to accrue to appellant, by reason of the failure of appellee to perform his promise to obtain a chattel mortgage upon the personal property of one Ole Severson, to secure the payment of certain indebtedness of John and said Ole Severson, to appellee, and for which appellant was surety.

The declaration alleged, in substance, that on April 12, 1889, Waterman promised Resseter that if he (Resseter) would sign a promissory note for $250, dated February 15, 1889, payable to the order of Waterman one year after date, as surety for the said Seversons, he (Waterman) would forthwith obtain a chattel mortgage upon all the personal property of said Ole Severson, to secure the payment of said note, and to secure the payment of a previous note for $250, dated November 15, 1888, given by the said Seversons to Waterman, and also signed by plaintiff as surety. It is also alleged that said Ole Severson had, during the period covered by the agreement, sufficient unincumbered personal property to secure the payment of both said notes, and that he was then and afterwards ready and willing to give a chattel mortgage sufficient to indemnify the plaintiff as surety, and for that purpose, of which the defendant had notice. That the defendant promised to indemnify, and save harmless the plaintiff as surety, and plaintiff, confiding in the said promises, executed as surety and delivered to defendant the said note of February 15, 1889; that said notes afterwards, and before the maturity thereof, were negotiated by the defendant; that both said Seversons are insolvent, and plaintiff solvent and legally bound to pay said notes; that the defendant did not and would not take a chattel mortgage from said Ole Severson, and did not and would not indemnify plaintiff, as promised, and that plaintiff, relying upon such promise, did not himself procure a chattel mortgage, etc. It is further alleged, that the holder of said notes (Ella Waterman) had, May 1, 1890, obtained judgment thereon for $750, which was a lien upon the plaintiff's property, and that he will be forced and obliged to pay the same, etc.

The defendant pleaded the general issue of non-assumpsit, the plea of *non-damnificatus*, and also set up the statute of frauds.

Trial was had by a jury, who returned a verdict in favor of the plaintiff for $583, and judgment was entered for the amount. On appeal to the Appellate Court, the judgment was reversed, without remandment

of the cause, and that court, having granted a certificate of importance, the plaintiff below appeals.

Messrs. *Dixon & Bethea*, for the appellant.

Messrs. *O'Brien & O'Brien*, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

In this case there is no longer any controversy about the facts. They are, by both the Circuit and Appellate Courts, found to be substantially as contended for by the plaintiff. But the Appellate Court, conceding the case to be with the plaintiff upon the facts, held, that the agreement was one to answer for the debt, default, or miscarriage of another, and not being in writing, was within the statute of frauds, and, therefore, void.

The principal question presented for our consideration is, whether or not the agreement in question is obnoxious to the provision of the statute of frauds, "That no action shall be brought, . . . whereby to charge the defendants upon any special promise to answer for the debt, default, or miscarriage of another person," unless the promise be in writing, and signed by the party to be charged, etc. Sec. 1, c. 59, R. S. A consideration of this question opens the field of discussion and classification of the various cases, illustrating the application of the rule of liability under this clause of the statute, and the nice and well-considered distinctions which have been drawn and followed; but the necessity therefor does not exist, and we forbear entering thereon. See Leonard *v.* Vredenburgh, 8 Johns. 29; Farley *v.* Cleveland, 4 Cow. 432; Mallory *v.* Gillett, 21 N. Y. 412; Anderson *v.* Spence, 75 Ind. 315; Nelson *v.* Boynton, 3 Met. 396.

It may be said to be the settled rule, that where the agreement is original and independent, it is not within the statute; if collateral, it is. Eddy *v.* Roberts, 17 Ill. 505; Geary *v.* O'Neil, 73 id. 53; Hartley *v.* Varner, 88 id. 561. And the agreement may be regarded as original, and not within the statute, although it directly involves the interests of or concerns a third party, or may relate to an act, or the performance thereof, by one not a party to the contract. *Supra*, and cases cited.

It is, therefore, necessary to ascertain whether or not the agreement in question was an original and independent one; a question which has been found by the courts, in a vast number of cases, to be one not of easy determination, but happily, in this case, one of no serious difficulty.

It is contended, that the promise of Waterman, made in consideration of appellant executing as surety the $250 note, dated February 15, 1889, to obtain a chattel mortgage on all of Ole Severson's personalty to secure the payment of that note, and also another one for like amount, previously given by the same party, with appellant as surety, was a promise to answer for the debt, default, or miscarriage of another. That is, that there was an implied obligation upon the part of Ole Severson to indemnify and hold harmless his surety, and that the

promise of appellee was purely collateral thereto. This position, we think, is not tenable.

In order that the promise can be held to be within the statute, it is essential that there be a binding and subsisting obligation or liability to the promisee, to which the promise is collateral. In other words, "that the party for whom the promise has been made must be liable to the party to whom it is made." 3 Pars. on Contr., *21 note p.; Hargreaves *v.* Parsons, 13 M. & W. 561, 50 Exch. Rep.; Eastwood *v.* Kenyon, 11 A. & E. 438; Westfall *v.* Parsons, 16 Barb. 645; Preble *v.* Baldwin, 6 Cush. 549; Pratt *v.* Humphrey, 22 Conn. 317; Alger *v.* Scoville, 1 Gray, 391; Baker *v.* Bucklin, 2 Denio, 45; Perkins *v.* Littlefield, 5 Allen, 370; Thighe *v.* Morrison, 116 N. Y. 263, and cases cited.

In Hargreaves *v.* Parsons, *supra*, it was said by Parke, B.: "The statute applies only to promises made to the persons to whom another is already or is to become answerable. It must be a promise to be answerable for a debt of or a default in some duty by that other person towards the promisee." In Perkins *v.* Littlefield, *supra*, Bigelow, J., said: "It is the well-settled doctrine, that the provision in the statute is applicable only to promises made to persons to whom another is answerable."

Not only must this be so, but it is quite as well settled that the liability of the person for whom the promise is made, to the promisee, must be one which is capable of enforcement. And the doctrine is stated to be (Throop Verb. Ag., sec. 127), "that the principle requires that the liability to which that of the promisor is supposed to be collateral should be one which can be enforced by proceedings at law or in equity; and, therefore, unless it appears that some person, other than the promisor, has incurred an actual liability with respect to the subject-matter of the promise, the agreement is not within the statute, although the third person may be under an imperfect or merely moral obligation to respond." Downey *v.* Hinchman, 25 Ind. 453; Read *v.* Nash, 1 Wilson, 305; Smith *v.* Mayo, 1 Allen, 160; Thighe *v.* Morrison, *supra*.

For, if the third party be not liable to answer, it could not be said that the undertaking of the promisor was one to "answer" for the former's "debt or default," and, therefore, within the statute. There being no liability of the third party to the promisee, the promisor would have nothing to answer for, and his promise, therefore, would necessarily be an original and independent undertaking, and not a collateral one.

No express agreement, that Severson should save harmless his surety, is shown or pretended. And while he might properly be regarded as under an implied obligation to indemnify his surety, he was not bound to do so. Neither at law or in equity was such implied obligation susceptible of being enforced; no bill would lie to compel performance, nor action for damages for its non-performance. Upon this

implied obligation the surety, after discharging the indebtedness, would have his action over against his principal. It is manifest, and requires no citation of authority to show, that the only obligation upon the part of Severson was that arising by operation of law, to reimburse and make good to his surety the amount expended in payment of his debt. It is a familiar rule, that the surety can maintain no action against his principal until he pays the debt. In the absence of express agreement, his only remedy, then, would be assumpsit for the money actually paid and interest. And even where the principal has expressly promised to indemnify and save his surety harmless, the latter can maintain no action on the promise, unless he can show that he has given his own notes or made other like arrangements equivalent to payment of the indebtedness. 3 Pars. on Contr., *186, *187, notes.

As said by Mr. Parsons (3 Law of Contr., *21, note p): "The question would seem to depend upon the time when the promise of C., the person for whom the guaranty is given, arises. And this again will depend upon the particular circumstances of the case. If these are such as to authorize the inference that C. made an actual promise to indemnify his guarantor at the time when the undertaking of A. was given or prior thereto, the reasonable presumption is, that the promise of A. was intended to be collateral. If, on the other hand, there is nothing in the case from which an actual promise by C. can be inferred, and he can only be made liable on a promise raised by operation of law, from B.'s having been compelled to pay money on his account, it would seem to be clear that the promise of A. must be original. For the promise of C. arises upon a subsequent and independent fact, after the promise of A. has become a complete and valid contract." See cases there cited: Bushnell *v.* Beavan, 1 Bing. (N. C.) 320, 27 E. C. L. R.; Jarmain *v.* Alger, 2 C. & P. 249, 12 E. C. L. R.; Wood's Stat. of Frauds, sec. 117; Browne Stat. Frauds, sec. 177; Throop on Verb. Ag., secs. 114, 115; Brandt on Suretyship, sec. 60; and cases cited. It would, therefore, seem clear, that according to the foregoing well-established principles, there being no actual liability on the part of Severson, by express agreement or otherwise, to indemnify his surety, which was capable of enforcement, it follows, necessarily, that the promise of appellee was an independent undertaking, and not within the statute; for there was no promise on the part of Severson to indemnify to which it could be collateral.

But, treating the implied obligation of Severson to indemnify his surety as equivalent to a contract actually made, within the contemplation of the statute, it does not necessarily follow that the promise of a party to hold the surety harmless would, in such case, be regarded as collateral to the implied obligation of Severson. The promisor does not undertake to be answerable for the amount of the note which Severson as principal is, in the first instance, bound to pay, nor could it for a moment be contended that an action thereon could be maintained against him. His promise is to pay what his promisee, the surety, will

be ultimately liable to pay. If, after the principal has defaulted, the surety has had to pay the whole amount or make up a deficit, it is this amount, together with other elements of damage, which the promisor promised that he would be responsible for, and not the sum due and owing on the note from the principal debtor to the payee, or holder. The measure of the amount of recovery in such case would not be the amount of the debt, but the actual damages sustained, including payments made down to the time of trial. 1 Suth. on Dam. 190.

The principle under consideration is illustrated by Mr. Bishop (Law of Contr., sec. 1265), as follows: "One's promise to another to see him harmless, should he become surety for a third person, or should he do anything else, is a mere arrangement between promisor and promisee. It is to pay what the one to whom it is made may become liable for, — not 'another's' debt, but his. Therefore, it is not within the statute, and is valid though oral. . . . On principle, this question is determinable by a very simple test. You promise James that, if he puts his name, as surety for John, on a bond running to Richard, you will hold him harmless; he does it; John makes default. All agree that, in this case, John is the 'another' of the statute. But Richard, to whom the debt is due, cannot sue you; John failing, his claim over is alone on James. Aside from difficulties as to the form of the action, your liability begins only when James has paid him. There remains now for adjustment only what you had promised to James, who is not 'another,' but the promisee himself, — the debt is yours to him, and there is nothing going out from you to any third person. Hence, the case is not within the statute." See cases in notes.

Here, it will be admitted, Severson was the "another" for whose default Waterman must be held to have undertaken to answer, if his promise to Resseter is within the statute. It is clear, that Severson at no time made default in not indemnifying Resseter, for he was under no contract obligation to indemnify him. Not having promised indemnity, Severson could not make default in any promise or undertaking with Resseter, that he would give him a chattel mortgage or other indemnity. Therefore, Waterman's promise to Resseter, that he would take a chattel mortgage from Severson for Resseter's benefit, was not, and could not be, collateral to any promise by Severson to Resseter, for no such promise or undertaking was made or entered into between them.

The undertaking of Waterman was not to release Resseter from any portion of the debt, or to do any act or thing affecting the liability of Severson to pay the note according to its terms, but was an undertaking and promise to do and perform something wholly outside and independent of the indebtedness of Severson, for the benefit of Resseter, in consideration that Resseter would execute the note.

Resseter, at the time of the promise, could have secured himself by chattel mortgage upon Severson's property, or, if not, Severson's property could have been resorted to, to pay the debt then due. Water-

man desired that the indebtedness be extended and a new note given, with Resseter as surety. Now, instead of Resseter taking from Severson a chattel mortgage or other indemnity against his liability as surety for Severson, Waterman undertook and promised Resseter that he, Waterman, would procure a chattel mortgage on Severson's property to indemnify Resseter. But for this promise, Resseter could — and no doubt would — have subjected Severson's property to the payment of the overdue indebtedness. Resseter had a right to rely on the promise of Waterman, by reason of which he was prevented from taking security himself, or then subjecting Severson's property to the payment of the debt. The conclusion is irresistible, that the undertaking of Waterman with Resseter was not to do any act or thing that Severson was bound to do, but an independent promise, made upon sufficient consideration, to do something which was not an undertaking to pay any portion of Severson's debt, but which would indemnify Resseter to the extent of Severson's property if the latter failed to pay the notes.

This is not a case where the promisor promises indemnity against a debt due to himself, and that the surety on the note shall not be liable to pay the same. Resseter was already liable as surety upon the notes; he then had the means of indemnifying himself against loss out of Severson's property. The extension of the debt was of no advantage to him. He declined to sign the note extending the time of payment to Waterman, and was only induced to do so by the promise of Waterman, that a chattel mortgage should be taken by Waterman upon Severson's property for Resseter's benefit. This was not an agreement on the part of Waterman that he would pay any portion of Severson's debt to himself, or in anywise release either Severson or Resseter from liability. It was understood, and subsequent events proved it to be true, Severson was entirely willing to execute the chattel mortgage to Waterman. For Waterman, in violation of his agreement with Resseter, subsequently procured a chattel mortgage from Severson to secure other indebtedness due from Severson to Waterman, and for which Resseter was not security, and thereby swept away the property of Severson, which he agreed with Resseter should stand as indemnity to him, if he would sign the note extending the time of payment.

The mere promise to obtain a chattel mortgage was not indemnity, nor a guaranty of indemnity. Had Waterman procured the mortgage, and thereby have fulfilled his promise to appellant, it is plain that he would not have discharged, or rendered himself liable to discharge, or undertaken to pay any debt or obligation of Severson. And this is said to be "a conclusive test" as to whether the promise is within the statute. Browne on Stat. Fraud, sec. 177. The case of Bushnell *v.* Beavan, *supra*, is in point. There the defendant promised the plaintiffs, owners of a vessel, of which H. S. was in charge, etc., that if they would let H. S. sail, he, the defendant, would get T. M. to sign a guaranty for the payment of freights by H. S. Upon this promise H. S. was permitted to sail, and the guaranty was not procured, and it was

held, that the promise of the defendant was not within the statute of frauds, and a recovery was allowed, H. S. having defaulted. The soundness of this holding was for a time questioned (Green v. Cresswell, 10 A. & E. 453; Carville v. Crane, 5 Hill, 483), but is now generally acquiesced in by the courts and practically all of the recent text writers.

It is, however, insisted, that the views here expressed are in conflict with Scott v. Thomas, 1 Scam. 58. That case is clearly distinguishable in principle from the case at bar. Thomas sued Scott in assumpsit, alleging that Biggs was indebted to him upon a promissory note, and that the defendant held a mortgage upon a tract of land executed by Biggs. That plaintiff's note was past due, and that the defendant agreed, that in consideration of forbearance to sue Biggs on said note, if Biggs did not pay it by the next term of court, that he, the defendant, would foreclose said mortgage, and that plaintiff might buy the land in at the foreclosure sale for $1.25 per acre, if it did not sell for more, and that the plaintiff should first satisfy his own debt, and pay the surplus, if any, over to the defendant; that he did forbear to sue; that the note was not paid, and that the defendant did not foreclose his mortgage. This promise was held to be within the Statute of Frauds. It is manifest, that there was there an obligation from Biggs to pay the note, which could be enforced at law, and the promise of Scott was to pay that debt. It was immaterial that the promise was that the debt should be paid out of the proceeds of the sale of the land, prior to the satisfaction of Scott's mortgage. The effect of the agreement was the promise by Scott to pay Biggs' debt to Thomas, and was properly held to be within the statute. The sole undertaking of Thomas was collateral to the original promise of Biggs. The distinction between the two cases is too apparent to require discussion.

What has already been said disposes of the contention that there was no consideration for the promise of Waterman. Not only was Resseter thereby induced to place himself in a worse position, but Waterman was left in a more advantageous position, whereby he was enabled to control the disposition of Severson's property. If he had carried out his agreement, any balance left after paying the indebtedness for which appellant was surety, would have been in his hands for application upon other indebtedness due from Severson. It needs the citation of no authority, that, if the transaction was of advantage to Waterman, or detrimental or to the disadvantage of Resseter, it would form a sufficient consideration for the promise. That Resseter was induced thereby to consent to the extension of the time of payment to Severson and continue his liability as surety, and forego his right to then compel payment out of Severson's property, which by the failure of Waterman to keep his promise and subsequent conduct in violation of it, subjected Resseter to the loss, is not questioned. Bunting v. Darbyshire, 75 Ill. 408; Buchanan v. International Bank, 78 id. 500; Burch v. Hubbard, 48 id. 164.

We are of opinion, that the Appellate Court erred in reversing the judgment of the Circuit Court, and its judgment will be reversed, and that of the Circuit Court affirmed.

Judgment reversed.

MARY E. BAILEY, APPELLANT, *v.* JOSEPH N. MARSHALL.

PENNSYLVANIA SUPREME COURT, JANUARY TERM, 1896.

[*Reported in* 174 *Pennsylvania State*, 602.]

OPINION by Mr. JUSTICE DEAN, April 6, 1896:

Whether the debt in controversy be that of him who has assumed to pay it, or of another, is in most cases a question of fact. There can be no precise legal definition of liability under the act of 26th of April, 1885, P. L. 308, which will determine, in all cases, perhaps in but very few, the answerability of him who promises to pay. The act says: "No action shall be brought whereby to charge . . . the defendant upon any special promise to answer for the debt or default of another unless the agreement . . . shall be in writing." This is clearly meant to relieve an alleged guarantor or surety; it was never intended to relieve him who had a personal beneficial interest in the assumption. There cannot be a better construction of this statute than in Nugent *v.* Wolfe, 111 Pa. 471, where we held, the present chief justice rendering the opinion, that: "It is difficult, if not impossible, to formulate a rule, by which to determine, in every case, whether a promise relating to the debt or liability of a third person is or is not within the statute; but as a general rule, when the leading object of the promise or agreement is to become guarantor, or surety to the promisee for a debt, for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay, or discharge the debt of another, his promise is not within the statute."

Applying these principles to the facts in the case before us, to what conclusion do they impel us? In September, 1892, Mary E. Bailey held a note against Davis Pennoek in sum of $1,000, with power of attorney to confess judgment. At this time, Marshall, the defendant, entered a judgment against Pennock for $5,000, issued execution, and levied on all the real and personal property of Pennock; the amount actually due and payable on his $5,000 judgment did not exceed, as appeared afterwards from his own statement, $200. The plaintiff was standing there with her judgment ready for entry, on which she could immediately issue execution, seize and bid upon the property; just at this juncture, Marshall, knowing her rights, sent for

her and said: "I will stand by thee and see thee is paid every cent if thee says nothing and does nothing." She accepted his proposition, neither entered her judgment nor took any steps to collect it. The sheriff's sale went on, and Marshall bought the larger part of the real and personal property, and was credited on his purchase with the amount of his own judgment.

We notice by the testimony that Marshall denies the statement of Mrs. Bailey; we express no opinion as to the credibility of the witnesses; the question is, if the jury believed Mrs. Bailey's testimony, would the court have been warranted in granting the compulsory nonsuit on the ground that the promise was to answer for the debt or default of another? What was the leading object of Marshall in making the promise by which he lured her to inaction? Clearly, it was not to pay Pennock's debt, nor Mrs. Bailey's claim. His sole purpose was to silence her as an antagonistic bidder at the sheriff's sale; this was no benefit to Pennock, the debtor; it was an advantage to Marshall, and he reaped the full fruits of it; she was silenced by his promise, and he got the property at his own figure. His leading object was to subserve his own interest; in fact, he had no other object; having accomplished it, he is now called upon to answer, not for Pennock's debt, but for his own, and if Mrs. Bailey be believed, he ought to pay.

The decree of the court below entering compulsory nonsuit is reversed, and procedendo awarded.[1]

HENRY MEYER *v.* WILLIAM HARTMAN.

ILLINOIS SUPREME COURT, JUNE TERM, 1874.

[*Reported in* 72 *Illinois*, 442.]

MR. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It appears that appellee brought a suit against appellant, and had him arrested on a *capias ad respondendum*. The matter was arranged by appellant transferring to appellee notes for $1,000, secured by a mortgage, and an order on one Theis for $62, which was paid. Appellee's claim, which was thus settled, amounted to between $700 and $800. The arrangement was, that the notes, which were indorsed, and the order, were to satisfy appellee's claim, and he was to pay a debt of $500 owing by appellant to Nissen, Steinmeyer & Co. The transfer of the notes and order was not as collateral security, but they were sold and assigned to appellee for the specified consideration.

Appellee subsequently received on the notes $800 in satisfaction thereof, and refused to pay the note to Nissen, Steinmeyer & Co., or any part of it. Appellant thereupon sued appellee in assumpsit. The

[1] The cases are collected in Ames's Cas. Suretyship, 72–84.

first count was special on the contract, and there were also the common counts.

Appellee filed the plea of *non-assumpsit*, and subsequently asked leave to file a plea of the Statute of Frauds, but the court refused to grant leave. A trial was had by the court without a jury, by consent of the parties. The issues were found for the defendant, and judgment was rendered against plaintiff for costs, and he brings the record to this court and asks a reversal.

In any view of the case, on the evidence presented in this record, appellant is entitled to recover.

There seems to be no question that appellant gave to appellee $1,000, in good notes, secured, and well secured, by mortgage, and $62, which he received on an order, and appellee does not pretend to account for but $800, applied to his own debt. He does not pretend that he did not agree, as a part of the consideration for the notes and order, that his debt was satisfied, and that he was to pay Nissen, Steinmeyer & Co. the debt appellant owed them. He could have received certainly $200 more on the notes than he did. That amount was recklessly thrown away and squandered. He was, at all events, bound, even if he was not liable to pay Nissen, Steinmeyer & Co., to act in good faith, and collect, if it could be done, all that was due on the notes he received from appellant, both principal and interest, and was liable, even if only acting as an agent, for all he remitted and gave to the maker of the notes.

He, however, was liable for more than the loss. He is responsible for the breach of the contract, and all damages growing out of it. It was made on a sufficient consideration, was not illegal or opposed to public policy, and was obligatory on him; nor could the Statute of Frauds avail, even had the plea been interposed.

In Wilson *v.* Bevans, 58 Ill. 232, it was said: "The general rule is, that, if the promise is in the nature of an original undertaking to pay the debt of a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provisions of the statute, and need not be in writing, to make it valid and binding." It was there said, that the promisor received the property, and it is wholly immaterial to him what direction was given to the purchase money; that it was his contract to pay the money to the vendor's creditors, and such a contract is valid and binding in law, although it is not evidenced by a writing. See Runde *v.* Runde, 59 Ill. 98. These cases must control this, as it is, in principle and in its facts, similar in all essential particulars.

Appellant was, then, entitled to recover an amount equal to Nissen, Steinmeyer & Co.'s debt, as appellee had, on a sufficient consideration, promised to pay it, but had broken his contract.

It is also objected that appellee's wife was not a competent witness in his behalf. The 5th section of the act of 1867, in relation to evidence, declares that nothing in the 1st section of the act shall render

the husband and wife competent witnesses for or against each other, unless in specified cases, of which this is not one. The court, therefore, erred in permitting the wife to testify.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.[1]

SUTTON & CO. *v.* GREY.

In the Court of Appeal, November 24, 1893.

[*Reported in* [1894] 1 *Queen's Bench*, 285.]

Lord Esher, M. R. In my opinion this appeal should be dismissed. I think that the judgment of Bowen, L. J., was in every respect right. I do not think that the relation between the plaintiffs and the defendant was that of partnership. They had no intention to become partners, and, as the law now stands, a partnership cannot be constituted without such an intention. In my opinion the true relation between the plaintiffs and the defendant was this: The plaintiffs being brokers upon the Stock Exchange, of which the defendant was not a member, they agreed together that the plaintiffs should carry out transactions upon the Stock Exchange for the mutual benefit of themselves and the defendant. The defendant could not himself transact business upon the Stock Exchange, and the plaintiffs made this arrangement with him: "If you will find persons who wish to operate upon the Stock Exchange and will introduce them to us as clients, we will, on behalf of the persons whom you thus introduce to us, transact the ordinary business of a broker on the Stock Exchange, and make ourselves personally responsible according to its rules on these terms — that our brokers' commission on the Stock Exchange shall be divided between us and you, just as if you were our partner and a member of the Stock Exchange, and that, if there should be a loss in respect of the transactions, you shall indemnify us against half the loss." The defendant verbally agreed to this, but there was not any contract or memorandum in writing. The contract, in my opinion, is one which regulated the part which the defendant was to take in the transactions which were contemplated, and, if he was to be an agent for the plaintiffs, the contract regulated the terms of his agency. Again, before the transactions were entered into, the terms were regulated by the agreement, and they were such as to give the defendant an interest in the transactions. The transactions were to

[1] Many cases in accord are collected in Ames's Cas. Suretyship, 32. In most jurisdictions in this country Nissen, Steinmeyer & Co. might also have sued the defendant on his promise to pay them, and the Statute of Frauds would not have been applicable to such suit. Ames's Cas. Suretyship, 39.

be entered into by the plaintiffs partly for their own benefit and partly for the benefit of the defendant. Is such a contract a simple contract of guarantee — "a special promise to answer for the debt or default of another person" — so as to bring the case within sec. 4 of the Statute of Frauds, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is Couturier *v.* Hastie, 8 Ex. 40. In that case a test was given by Parke, B., who delivered the judgment of himself and Alderson, B. (from whom Pollock, C. B., differed as to the construction of the contract). The learned judge said (at p. 55): "The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale" (I would read that "totally unconnected with the transaction") "they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale" (that is, as I read it, "being connected with the transaction"), "the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and sec. 4 does not apply. The rule thus laid down has been adopted as a test in subsequent cases. In Fitzgerald *v.* Dressler, 7 C. B. (N. S.) 374, Cockburn, C. J., said (at p. 392): "The law upon this subject is, I think, correctly stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 e, where the learned editor thus sums up the result of the authorities — 'There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (sec. 4) or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled

with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I, therefore, agree with my learned brothers that this case is not within the Statute of Frauds." The learned judge there used these words, "has himself no interest in the property which is the subject of the undertaking," because he was dealing with a case of property; but if his words be read, as I think they should be, "has no interest in the transaction," he is adopting that interpretation of Couturier *v.* Hastie, 8 Ex. 40, which I think is the right one. Then again, in Fleet *v.* Murton, Law. Rep. 7 Q. B. at p. 133, Blackburn, J., quotes the passage which I have read from the judgment of Parke, B., in Couturier *v.* Hastie, *supra*, and thus interprets it: "He says that it is neither a guaranteeing nor a contract for sale, and that consequently the Statute of Frauds is out of the question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment." If in the present case the agreement is taken as regulating the terms of the defendant's employment, it is not within sec. 4 of the statute; on the other hand, if the transaction is looked at as entered into partly for the benefit of the plaintiffs and partly for the benefit of the defendant, it comes within the rule laid down by Parke, B., in Couturier *v.* Hastie, *supra*, and adopted by Cockburn, C. J., in Fitzgerald *v.* Dressler, 7 C. B. (N. S.) 374. The contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in which the defendant has an interest equally with the plaintiffs. In my opinion, Bowen, L. J., was right in holding that the agreement is not within the statute, and his decision ought to be affirmed.[1]

[1] Cases in accord are collected in Ames's Cas. Suretyship, 67–71.

DANIEL O'CONNELL, JR., AND OTHERS, *v.* MOUNT HOLYOKE COLLEGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 26–NOVEMBER 27, 1899.

[*Reported in* 174 *Massachusetts*, 511.]

CONTRACT, to recover a balance due on the following order:

"HOLYOKE, MASS., Jany. 7th, 1897.

"To A. L. WILLISTON, ESQ.,
"Treas. of Mt. Holyoke College.

"I hereby authorize you to pay to Daniel O'Connell's Sons, on the tenth day of each month, such sums of money as may become due for all brick delivered during the preceding month. Payments to be made on a basis of seventy-five per cent, as shown by statements presented on the first day of each month. All statements presented shall correspond to the tickets issued and signed by said Auguste Chas. Valadier, showing the amount of brick delivered. The final payment for all brick delivered to be paid within thirty days (30) after all the brick required of said Daniel O'Connell's Sons have been delivered.

"Signed in presence of
"JOHN R. CALLAHAN. AUGUSTE CHAS. VALADIER."

Trial in the Superior Court, before MAYNARD, J., who, at the close of the plaintiffs' case, ruled that the plaintiffs could not recover; and they alleged exceptions, which appear in the opinion.

T. D. O'Brien, for the plaintiffs.

W. G. Bassett, for the defendant.

KNOWLTON, J. The principal question in this case is whether the defendant bound itself by an oral acceptance or promise to pay in accordance with the terms of the order or authorization delivered to the plaintiffs by Valadier. It appears that Williston, the defendant's treasurer, wrote to the plaintiffs when the order was received, saying that the defendant's representatives did not accept orders, but promised in his letter to place this one on file, and to pay upon it so long as it seemed to them reasonable and expedient so to do. Thereupon one of the plaintiffs, accompanied by his attorney, visited Williston and endeavored to obtain from him an unqualified acceptance of the order. The plaintiffs admit that on this occasion Williston absolutely refused to give an acceptance in writing, but contend that he accepted the order orally. If we assume in favor of the plaintiffs, without deciding, that there was evidence from which the jury might have found an absolute oral promise to pay in accordance with the terms of the order, and assume also that their case is made out in all other particulars, we come to the question whether an oral promise would be binding under the Statute of Frauds.

It has often been held that an oral acceptance of a bill of exchange is valid. Pierce *v.* Kittredge, 115 Mass. 374; Dunavan *v.* Flynn, 118 Mass. 537; Cook *v.* Baldwin, 120 Mass. 317; Fisher *v.* Beckwith, 19 Vt. 31; Spaulding *v.* Andrews, 48 Penn. St. 411; 4 Am. & Eng. Encyc. of Law (2d ed.), 219. It seems that this rule applies equally to an oral acceptance or promise to pay made for a valuable consideration upon an order for the payment of money, which by reason of uncertainty as to the time or amount of the payment, or of other contingencies, is not technically a bill of exchange. See Grant *v.* Wood, 12 Gray, 220; Eastern Railroad *v.* Benedict, 15 Gray, 289; Washburn *v.* Cordis, 15 Pick. 53; Parkhurst *v.* Dickerson, 21 Pick. 307; Cook *v.* Wolfendale, 105 Mass. 401. But this general doctrine applies only to bills of exchange and orders which are not, in reference to the purposes for which they are given, such contracts as are required to be in writing under the Statute of Frauds.

In the present case the question is whether the promise of Williston, if he orally accepted the order, was a promise to pay the debt of Valadier, as distinguished from the original undertaking. An examination of the papers, in connection with the undisputed facts, furnishes an answer to the question. The order or authorization is to pay to the plaintiffs on the tenth day of each month "such sums of money as may become due for all brick delivered during the preceding month." It was made in connection with a contract in writing under which the plaintiffs were to furnish brick to Valadier and he was to pay for them. The expression, "such sums of money as may become due for all brick delivered during the preceding month," can have no meaning except as a recognition of a contract under which money would continue to become due from Valadier to the plaintiffs from month to month in the future. The later provisions of the order in regard to payment follow exactly the provisions of the original contract between Valadier and the plaintiffs. The writings themselves show that Valadier was to be the principal debtor for the brick, and that the order was given as security for the payment of his debt. The subsequent promise of the defendant to pay, if there was such a promise, was nothing more than a promise to pay Valadier's debt according to the terms of his contract with the plaintiffs. The evidence in regard to the negotiations with Williston is in harmony with this view of the relations of the parties. There is no evidence in the case that would warrant a finding that the brick were to be delivered on the sole credit of the defendant. But inasmuch as the debt was primarily Valadier's, if his liability continued and the brick were not delivered solely on the credit of the defendant, the promise is within the Statute of Frauds. In this particular the case is not distinguishable from Bugbee *v.* Kendricken, 130 Mass. 437, and Swift *v.* Pierce, 13 Allen, 136.

There is no evidence in the case of any new consideration moving to the defendant from the plaintiffs, such as to make the promise of the defendant an original undertaking standing independently of Valadier's

liability, so that the plaintiffs could look to either or both of them, within the principles stated in Furbish *v.* Goodnow, 98 Mass. 296; Nelson *v.* Boynton, 3 Met. 396; and Curtis *v.* Brown, 5 Cush. 488. Upon the undisputed facts the promise relied on by the plaintiffs was within the Statute of Frauds.

In this view of the case the offer of the plaintiffs to show the circumstances under which they brought the suit in the District Court and the reason why they were nonsuited was immaterial.

Exceptions overruled.

B. — Agreements in Consideration of Marriage.

LENA E. HUNT, Appellant, *v.* JOSEPH T. HUNT et al., Executors, Respondents.

New York Court of Appeals, May 21–June 10, 1902.

[*Reported in* 171 *New York*, 396.]

Werner, J. This action was brought to compel the specific performance of an oral antenuptial contract which was entered into between the plaintiff and Wilson G. Hunt, the testator of the defendants, prior to their intermarriage in October, 1896. Under said contract, and in consideration of plaintiff's promise to marry said Wilson G. Hunt, the latter orally agreed to give the former, at once, the sum of five thousand dollars in money, the further sum of two dollars and fifty cents per week, the income of a house and lot in the city of Geneva, N. Y., to convey to her another house and lot in the same city, and to make a will giving her all of his property except a watch and two hundred dollars. The making of this contract, the subsequent intermarriage of the parties thereto, and the still later breach of the agreement by said Wilson G. Hunt, are established by the findings of the learned trial court, and upon these findings it based the conclusion of law that plaintiff is not entitled to recover because said contract is void under the Statute of Frauds. Under the unanimous affirmance of the learned Appellate Division the only question brought to this court by the appellant is whether an oral antenuptial contract, founded upon no other consideration than marriage, can be specifically enforced in a court of equity.

The statute provides that "every agreement or undertaking made upon consideration of marriage, except mutual promises to marry," shall be void unless such agreement or undertaking, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith, or his agent. (R. S. chap. 7, tit. 2, secs. 2 and 8).

The learned counsel for the appellant concedes that the contract in suit falls within the scope of this broad statute, but argues that the intermarriage of the parties to the contract is such a part performance thereof as to invest a court of equity with the power of specific enforcement. The argument for the respondents may be compressed into the single statement that the same act of performance which brings the contract within the sweep of the statute cannot be relied upon to exclude it therefrom. The most notable feature of the statute above quoted is its simplicity and directness of language. All contracts founded upon consideration of marriage, except mutual promises to marry, shall be void unless the commands of the statute are obeyed. Mutual executory *promises* to marry are expressly excluded from its operation.[1] All other contracts, founded upon consideration of *marriage*, are as clearly within its terms. These two diverse provisions of the statute, standing in juxtaposition to each other, so plainly disclose the legislative intent as to render construction unnecessary if not impossible. The letter of the law bears its own interpretation. This view of the statute is not original. Pomeroy in his work on Contracts, under the head of "specific performance" (2d ed., sec. 111), states it most forcibly as follows: "When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree specific execution. This rule, which is firmly established, is based upon the express language of the statute. A promise made in anticipation of a marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential; in fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it which the legislature has said must be in writing." Beach in his Modern Equity Jurisprudence (sec. 622) says: "It is well settled that marriage is not an act of part performance which will take a parol contract out of the statute; for the statute expressly provides that a contract in consideration of marriage shall not be binding unless it is in writing." This is also the view of the statute entertained by the courts of England and the courts in other jurisdictions where the English Statute of Frauds has been copied. Caton *v.* Caton, L. R. (2 Eng. & Ir. App.) 127, affg. s. c., 1 Ch. App. 137; Taylor *v.* Beech, 1 Ves. Sr. 297; Dundas *v.* Dutens, 1 Ves. 196; Lassence *v.* Tierney, 1 McN. & G. 551; Warden *v.* Jones, 23 Beav. 487; Peek *v.* Peek, 77 Cal. 106; Bradley *v.* Saddler, 54 Ga.

[1] Whether the statute expressly excludes such promises or not, they are held to be valid, though oral. Harrison *v.* Cage, 1 Lord Ray. 386; Cork *v.* Baker, 1 Stra. 34 (reversing Philpot *v.* Walcot, Skinner, 24*); Clark *v.* Pendleton, 20 Conn. 495; Blackburn *v.* Mann, 85 Ill. 222; Short *v.* Stotts, 58 Ind. 29; Caylor *v.* Roe, 99 Ind. 1, 5; Withers *v.* Richardson, 5 T. B. Mon. 94; Morgan *v.* Yarborough, 5 La. Ann. 316; Ogden *v.* Ogden, 1 Bland. 284; Wilbur *v.* Johnson, 58 Mo. 600; Barge *v.* Haslam, 88 N. W. Rep. 516 (Neb.).

681; McAnnulty *v.* McAnnulty, 120 Ill. 26; Henry *v.* Henry, 27 Ohio St. 121.

In our own state the trend of the decisions is in the same direction. In Brown *v.* Conger, 8 Hun, 635, it was held that equity cannot enforce an oral contract for the conveyance of lands made in consideration of a marriage subsequently consummated. In Dygert *v.* Remerschnider, 32 N. Y. 629, this court enforced, as against the creditors of the husband, an oral antenuptial contract under which the latter conveyed lands to his wife, but the decision was based upon the distinct ground that the payment by the wife of some of the husband's debts created an independent consideration for the transfer, and in his discussion of that fact Judge Davies said: "Under the authorities, I think she (the wife) had no right based solely upon the consideration of marriage which courts, either of law or equity, could have enforced." To the same effect are Lamb *v.* Lamb, 18 App. Div. 250; Ennis *v.* Ennis, 48 Hun, 11; Whyte *v.* Denike, 53 App. Div. 320; Reade *v.* Livingston, 3 Johns. Chan. 481; Borst *v.* Corey, 16 Barb. 136; and Matter of Willoughby, 11 Paige, 257. In none of these cases, except Brown *v.* Conger, *supra*, was the question presented in precisely the same form as in the case at bar, but in all of them the validity of an oral antenuptial contract was a pertinent and underlying question upon which the courts have held, with unvarying uniformity, that marriage is not such a part performance of an oral antenuptial contract as to take it out of the operation of the Statute of Frauds. Counsel for the appellant vigorously contends that in the case at bar the Statute of Frauds is being used by the respondents as an instrument of fraud, and that this is a consummation that equity never tolerates. In support of this position we are referred to such cases as Freeman *v.* Freeman, 43 N. Y. 34; Winchell *v.* Winchell, 100 N. Y. 159; Winne *v.* Winne, 166 N. Y. 263; Ahrens *v.* Jones, 169 N. Y. 555; Goldsmith *v.* Goldsmith, 145 N. Y. 313; Dunckel *v.* Dunckel, 141 N. Y. 427, and other cases in which equity has intervened to prevent the perpetration of fraud in the name of the statute. There is no analogy between such cases and the case at bar. Courts of equity, in exercising their powers upon the Statute of Frauds, are bound by two important limitations. The first is that equity will never interfere where there is an adequate remedy at law, Russell *v.* Briggs, 165 N. Y. 500, and the second is that equity cannot repeal the statute. Dung *v.* Parker, 52 N. Y. 494. The first of these limitations has, of course, no application to the case at bar because the appellant is clearly without a remedy at law. The second of these limitations is applicable here for the reason that the statute must be repealed before the contract in suit can be enforced. It is just here that we observe the essential difference between this case and those upon which the appellant relies. In the latter class of cases equity intervenes because the language of the statute is so general and elastic as to compel, or at least permit, the presumption that it was not designed to operate as a shield for fraud. In cases like the one at bar

the language of the statute is so specific and rigid that no presumption can be invoked that conflicts with the letter of the law, although in certain cases great injustice may ensue.

Counsel for the appellant also insists that there was evidence tending to show that Wilson G. Hunt made a will in pursuance of the antenuptial contract and in conformity with its terms, and that this fact, of itself, establishes such a part performance of the contract as to take it out of the statute. We cannot discuss this question upon the merits because the trial court has made no finding upon the subject. We have no right to amplify the findings of fact in order to make a sufficient ground for reversal. Hilton *v.* Ernst, 161 N. Y. 227.

The judgment herein should be affirmed, with costs.

PARKER, C. J., BARTLETT, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

Judgment affirmed.[1]

C. — CONTRACT FOR THE SALE OF LAND.

HIRTH *v.* GRAHAM.

OHIO SUPREME COURT, JANUARY TERM, 1893.

[*Reported in* 50 *Ohio State*, 57.]

BRADBURY, J.[2] The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber.

The defendant requested a ruling that the plaintiff could not recover because there was no memorandum of the contract. The justice refused so to rule and judgment was given for the plaintiff. On error to the court of Common Pleas this judgment was affirmed, but on error to the Circuit Court the judgment was reversed. To reverse the judgment of the Circuit Court this proceeding is pending.

[1] See further, Lloyd *v.* Fulton, 91 U. S. 479; Bradley *v* Saddler, 54 Ga. 681; Potts *v.* Merrit, 14 B. Mon. 406; Mallory's Adm. *v.* Mallory's Adm., 92 Ky 316; Powell's Adm. *v.* Meyers, 64 S. W. Rep. 428 (Ky.); White *v.* Bigelow, 154 Mass. 593; Mowser *v.* Mowser, 87 Mo. 437; Carpenter *v.* Commings, 51 Hun, 638; Finch *v.* Finch, 10 Ohio St. 501; Stanley *v.* Madison, 66 Pac. Rep. 280 (Okl.); Adams *v.* Adams, 17 Oreg. 247, *acc.* Compare Houghton *v.* Houghton, 14 Ind. 505; Flenner *v.* Flenner, 29 Ind. 564; Brenner *v.* Brenner, 48 Ind. 262; Rainbolt *v.* Rainbolt, 56 Ind. 538; Southerland *v.* Southerland's Adm., 5 Bush, 591; Gackenbach *v.* Brouse, 4 W. & S. 546; Child *v.* Pearl, 43 Vt. 224; Larsen *v.* Johnson, 78 Wis. 300.

[2] The statement in the opinion has been shortened and a portion of the opinion relating to practice in justices courts has been omitted.

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject.

Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson *v.* Heelis, 2 Taunt. 38, following the case of Waddington *et al. v.* Bristow *et al.*, etc., 2 Bos. & Pul. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby *v.* Wadsworth, 6 East, 601, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them), "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands." Id. 610.

Afterwards, in Teal *v.* Auty, 2 B. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the Statute of Frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation,[1] while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in Marshall *v.* Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the Statute of Frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice,

[1] 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.* McKay, 1 Ired. 265; Walton *v.* Jordan, 65 N. C. 170; Carson *v.* Browder, 2 Lea, 701; Kerr *v.* Hill, 27 W. Va. 276, *acc.* Compare Powell *v.* Rich, 41 Ill. 466; Powers *v.* Clarkson, 17 Kan. 218.

Coleridge, C. J., Brett, and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benjamin on Sales, section 126, ed. of 1892), it cannot be considered as finally settling the law of England on this subject.

The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, 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 of Frauds. Claflin *et al. v.* Carpenter, 4 Metc. (Mass.) 580; Nettleton *v.* Sikes, 8 Metc. (Mass.) 34; Bostwick *v.* Leach, 3 Day. (Conn.) 476; Erskine *v.* Plummer, 7 Me. 447; Cutler *v.* Pope, 13 Me. 377; Cain *v.* McGuire, etc., 13 B. Mon. 340; Byassee *v.* Reese, 4 Metc. (Ky.) 372; Smith *v.* Bryan, 5 Md. 141.[1] In none of these cases except 4 Met. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract, before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited, Marshall *v.* Green, 1 C. P. Div. 35, the vendee had also entered upon the work of felling the trees and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, Giles *v.* Simonds, 15 Gray, 441, holds that, "The owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter on his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation."

The courts of most of the American states, however, that have considered the question, hold, expressly, that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the Statute of Frauds. Green *v.* Armstrong, 1 Denio, 550; Bishop *v.* Bishop, 1 Kernan, 123; Westbrook *v.* Eager, 1 Harr. (N. J.) 81; Buck *v.* Pickwell, 27 Vt. 157; Cool *v.* Box & Lumber Co., 87 Ind. 531; Terrell *v.* Frazier, 79 Ind. 473; Owens *v.* Lewis, 46 Ind. 488; Armstrong *v.* Lawson, 73 Ind. 498; Jackson *v.* Evans, 44 Mich. 510; Lyle *v.* Shinnebarger, 17 Mo. App. 66; Howe *v.* Batchelder, 49 N. H. 204; Putney *v.* Day, 6 N. H., 430; Bowers *v.* Bowers, 95 Pa.

[1] Prater *v.* Campbell, 60 S. W. Rep. 918 (Ky), *acc.* See also Sterling *v.* Baldwin, 42 Vt. 306.

St. 477; Daniels *v.* Bailey, 43 Wis. 566; Lillie *v.* Dunbar, 62 Wis. 198; Knox *v.* Haralson, 2 Tenn. Ch. 232.[1]

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most comfortable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution, as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones *v.* Timmons, 21 Ohio St. 596. Coal, petroleum, building-stone, and many other substances constituting integral parts of the land, having become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury, as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands, should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty.

This rule has the additional merit of being clear, simple, and of easy application, qualities entitled to substantial weight in choosing between conflicting principles.

Whether circumstances of part performance might require a modification of this rule, is not before the court and has not been considered.

Judgment affirmed.

LEE *v.* GASKELL.

IN THE QUEEN'S BENCH DIVISION, MAY 25, 1876.

[*Reported in* 1 *Queen's Bench Division*, 700.]

STATEMENT of claim, *inter alia*, that plaintiff sold to defendant a gas-meter and certain gas-fittings then in a certain mill. The plaintiff furnished defendant with a bill for the meter and fittings, amounting to 11*l.* 18*s.* 8*d.*, which the defendant promised to pay, but has not paid.

Statement of defence: Defendant denies the sale as alleged and that he received the bill and promised to pay it as alleged. That there was no note or memorandum of the bargain in writing signed by the defendant or his agent, nor did he accept part of the goods and

[1] Haflin *v.* Bingham, 56 Ala. 574; Coody *v.* Gress Lumber Co., 82 Ga. 793; Hostetter *v.* Auman, 119 Ind. 7; Harrell *v.* Miller, 35 Miss. 700; Walton *v.* Lowrey, 74 Miss. 484; Mizell *v.* Burnett, 4 Jones (N. C.), 249; Clark *v.* Guest, 54 Ohio St. 298; Miller *v.* Zufall, 113 Pa. 317; Fluharty *v.* Mills, 49 W. Va. 446; Seymour *v.* Cushway, 100 Wis. 580, *acc.*

A sale of bark on standing trees is similar. Thomson *v.* Poor, 57 Hun, 285.

actually receive the same, nor did he give anything as earnest money or as part payment, within 29 Car. 2, c. 3, s. 17.

At the trial before BRETT, J., at the Manchester spring assizes, it appeared, as to this part of the plaintiff's claim, that the defendant was landlord of the mill in which the fixtures were, they were tenant's fixtures, and the tenant had become bankrupt, and the trustee sold them to the plaintiff, and he afterwards sold them to the defendant for the sum claimed. It was objected that the contract came within either sec. 4 or sec. 17 of the Statute of Frauds; and the learned judge directed judgment for the defendant, giving leave to move to enter judgment for the plaintiff.

J. Edwards, Q. C., for the plaintiff, moved accordingly. This was not a contract within either section of the Statute of Frauds. Hallen *v.* Runder, 1 C. M. & R. 266, is directly in point that such a contract is neither an agreement for the sale of an interest in land within sec. 4, nor an agreement for the sale of goods and chattels within sec. 17. This case is recognized as good law in the notes to Greene *v.* Cole, 2 Notes Saund. 656.

H. Collins (with him *C. Russell*, Q. C.), for the defendant. It must be admitted that Hallen *v.* Runder, *supra*, is an authority that such a contract is not one relating to an interest in land within sec. 4; but there is no decision that sec. 17 did not apply, and it may be observed that possession had been taken by the landlord, who was the purchaser in that case. Here the sale was not by the tenant direct to the landlord, but from the tenant or his trustee to the plaintiff, and by him to the landlord.

[COCKBURN, C. J. Is it more than the sale of the right to sever? the fixtures had not been severed.]

Bayley, B., in Hallen *v.* Runder, 1 C. M. & R. at p. 269, says: "It [the sale] effects a severance when the purchase is complete, but not before." The purchase here was complete as between the trustee and the plaintiff, and the fixtures therefore had become chattels by the original sale, before they were resold to the defendant.

[QUAIN, J. They had not in fact been severed when the plaintiff sold to the landlord; what have we to do with any original sale?]

The plaintiff has no title except by that sale. The question is treated as doubtful in Amos and Ferard on fixtures, pp. 252–4, where Parker *v.* Staniland, 11 East, 362, is cited, in which it was held that the sale of a growing crop of potatoes was a contract, not within sec. 4, but within sec. 17. Smith *v.* Surman, 9 B. & C. 561, is to the same effect; and the case of fixtures is very analogous to that of growing crops, as is pointed out by Parke, B., in Hallen *v.* Runder, 1 C. M. & R. at p. 275.

COCKBURN, C. J. The case of Hallen *v.* Runder, 1 C. M. & R. 266, is directly in point and binding upon us, and I think the principle on which it was decided was perfectly right. Fixtures, although they may be removable during the tenancy, as long as they remain un-

severed, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattel because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term. There is but a remote analogy between fixtures and growing crops, but there is this obvious distinction between them, — fixtures, when sold as fixtures, are intended to remain where they are, while, as to growing crops, it is the express intention of the purchaser to remove them.

MELLOR and QUAIN, JJ., concurred.

Judgment for the plaintiff.[1]

LAVERY *v.* PURSELL.

IN THE CHANCERY DIVISION, FEBRUARY 16–23, 1888.

[*Reported in* 39 *Chancery Division*, 508.]

ON November 11, 1886, the defendant sold through an auctioneer the building materials in a certain standing building. By the conditions of the sale the materials were "to be taken down and cleared off the ground on or before the 11th of January next."

On December 17 the defendant returned to the plaintiff £100, which the plaintiff had paid as a deposit, and informed him that the agreement must be considered at an end. Thereafter the plaintiff was excluded from the premises. This suit was brought for specific performance of the agreement, for an injunction restraining the defendant from dealing with the materials in violation of his agreement with the plaintiff and for damages.

Sir *A. Watson*, Q. C., and *D. L. Alexander*, for the plaintiff.

Romer, Q. C., and *Hatfield Green*, for Pursell.

CHITTY, J.[2] I now come to the serious question of law, whether this contract falls within sec. 4 of the Statute of Frauds, as the defendants contend, or within sec. 17, as the plaintiff contends. Now, unquestionably sec. 4 of the Statute of Frauds has been often considered by the courts, and I do not think I am wrong in saying that, in part, the section itself has been embedded in the decisions. But it is useful from time to time to refer back to the statute; and the words of sec. 4, so far as is material, are, "any contract or sale of land, tenements,

[1] Bostwick *v.* Leach, 3 Day, 476; South Baltimore Co. *v.* Mullbach, 69 Md. 395; Moody *v.* Aiken, 50 Tex. 65, *acc.* See also Frear *v.* Hardenbergh, 5 Johns. 272; Benedict *v.* Beebee, 11 Johns. 145; Lower *v.* Winters, 7 Cow. 263.

[2] The statement of the case has been abbreviated, and only so much of the opinion printed as relates to the question whether the agreement was within the Statute of Frauds.

or hereditaments, or any interest in or concerning them." Now the legislature evidently thought in framing that 4th section that there were some contracts of so important a nature that it was not right to leave them to depend on the slippery testimony of men's memories, and therefore that there should be some note or writing which should be preserved to authenticate the contract; and contracts of this class, that is, of the class as to which I read the words, are within those which in the view of the legislature required either a contract in writing signed by the parties to it, or some note or memorandum.

What is this contract? On the one side it is said to be a contract merely for the sale of bricks and mortar and stone and building materials; on the other side, that it is the sale of a standing house, but a standing house which is not be retained as a standing house by the purchaser, but one which, standing at the time, is to be pulled down. Quite apart from authority, it would strike any lawyer, first of all, that the house, which is standing on the land, is a tenement or hereditament. I see no escape from it. This house happens to be a very large and important house, and it does seem strange at first sight that the legislature should protect me if I sell my house as a thing standing and not to be taken away, and should require that there should be a note or memorandum of that contract: but that if I sell my house which is now standing, and which is to be pulled down over my head by somebody else, that that should be considered a less important contract, and that no writing should be required. The thing sold, as it stands at the moment, is a hereditament. It is said that there is no interest in a hereditament, but then that is answered, if I am right, in saying that the standing house is a hereditament. Then it is said that there is no interest in the soil. That is true in this sense, and in this sense only, that there is no permanent interest. But in this contract, and in fact in every contract of this kind, there must be, and is here, a right to go in and hold for the purpose of pulling down; and that again seems to be an interest in the hereditament or tenement. I am now speaking quite apart from decision. How can this question be answered, taking the language of the 4th section, except that this is a contract concerning a hereditament?

Then it is said that there is a distinction, and that the intention of the parties was to treat the house as a chattel and so bring it within the 17th section. I can understand that, without any difficulty, where the owner of the house is to pull his own house down; but I have the greatest difficulty in following the argument where the purchaser is to pull the house down. Indeed there is, as it appears to me, under this contract, first, a contract concerning a hereditament, and, from the very nature of the thing and the time which must be occupied in pulling down these materials (from the 11th of November to the 11th of January upon the contract, and which upon the evidence is about a reasonable time for so doing), accompanied, as it seems to me, with an interest in the way of license or possession, which again brings it

within the scope of the words of the 4th section. The contract itself speaks, as I have already said, in the second clause, of possession; and that is the language the parties have used. Of course on reading the whole contract, I might see that it is not possession simply in point of law, but something less; but on reading this contract I think possession expresses what the parties meant — namely, it is to be possession, although it is for a limited purpose: it is possession for the purpose of taking down and removing the materials. The vendor seems to consider himself, according to these terms, to be out of possession, because by the 12th condition he reserved a right of access. It is not necessary to go very minutely into this point, but I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession; but still a possession of the soil itself — of the land, tenements, and hereditaments; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute. Of course I am not forgetting the mode in which the property is sold. It is sold as building materials, and if the intention of the parties prevailed it might mean that it is sold as a chattel, but the point still is that it is not a chattel at the time of the sale; and the Statute of Frauds, so far as I can see, does not enable parties to say, "We will agree to treat this thing as a chattel," when in point of law it is a hereditament.

Now the authority upon which the plaintiff relied is Marshall *v.* Green, 1 C. P. D. 35. In that case the subject-matter of the contract was standing trees, fit to be cut as timber. The intention of the parties unquestionably was to sell and buy as timber. There was no stipulation there in regard to possession, but it was a part of the terms of the contract that the purchaser should cut, and of course part of the terms of the contract that he should enter for that purpose. On the facts it appeared that six trees had been cut down by the defendant, who was sued for the wrongful acts of cutting down the trees. The substantial question was whether the defendant was a trespasser and wrongdoer in cutting the trees, and that depended upon whether he had an enforceable contract to cut the trees. He had cut six trees, and then a notice was given to him by the owner of the trees to cut no more. After that he entered and still cut, and the question was as to his liability in respect of those trees. Sir *Arthur Watson* in arguing this case, spoke of a revocable license, but the Common Pleas Division appeared to consider that this was not a revocable license, because they held that he was justified in cutting the trees notwithstanding the notice. Then the trees being standing trees to be cut by the purchaser, the court held that it was not within the 4th section. Of course I am bound by the decision itself, and I am bound by any principle of law that is necessary to the decision, but I am not bound by the decision beyond that. Now the court appears to have considered that there was

no interest in the land. I agree that it was a point, if I may say so with great respect, that required a good deal of attention, whether a standing tree is a chattel or can be made by any acts of the parties a chattel. It is a hereditament at the time when the contract is made. It is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by the English law to say that a tree is not a chattel. Indeed if a man were indicted for larceny of a tree the indictment would be quashed. I feel a little difficulty in following that reasoning, which, for the purposes of sec. 4, through the intention of the parties, changes the nature of the property from realty to personalty, but I make these observations merely for the purpose of endeavoring to get at the principle on which the decision turns and not for the purpose of making any unnecessary comments on what was said. The Lord Chief Justice says, and I thoroughly agree with him, that it is difficult, if not impossible, to reconcile all the authorities in these matters. He mentions the cases which referred to the *fructus naturales* and the *fructus industriales*, which have no doubt given rise to a considerable difference of opinion, and he quotes the well-known passage in Williams' Saunders, vol. i. p. 395 (Duppa *v.* Mayo), where it was said that where the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, the contract is for goods. I pause for one moment to say that I am always myself afraid in dealing with propositions of law to use metaphors. They are very often very convenient, but if pressed too far they often lead to erroneous conclusions. Taking this statement, could the land in the case before me be considered as the warehouse for the building? Why, certainly not. Such a contention as that, on the mere statement of it, would be one which could not be permitted in a court of justice. I say that merely to follow the reasoning, but when the case is examined as a whole it will be seen that the judgment turned upon this, that they considered that as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. A point was taken with reference to the statement by Lord Justice Brett, 1 C. P. D. 42: "With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed." I think upon that, that the Lord Justice did not intend to draw any such distinction as to the word commented on — that the tree was affixed or was a fixture. I can see nothing in the argument founded on that proposition. The true basis of his judgment is, I think, to be found in the same page, where he says: "The contract is not for an interest in the land, but relates solely to the thing sold itself."

Though that case may be open hereafter to further consideration, of

course I cannot reconsider it, nor can I differ from it. It is evident that if that view is right, which I will assume it to be, a line must be drawn somewhere, because, if this principle were carried to the full extent, there being no distinction between the timber on the land in point of law and the mines, then it would have to be said, following out what the plaintiff says was the principle of this decision, that a contract for all the coal or minerals under a man's land, with a license to enter and get it, is not within sec. 4. Some explanation why that should be was attempted to be given by plaintiff's counsel, but without success. The answer perhaps is, that courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail," at some time. What I say is that I must draw the line at this case, because on the facts it is quite different, or materially different, from Marshall *v.* Green, 1 C. P. D. 35, and I leave that case as it stands on its own footing, and must hold that this case comes within the 4th section.[1]

LONG *v.* WHITE.

OHIO SUPREME COURT, JANUARY TERM, 1884.

[*Reported in* 42 *Ohio State*, 59.]

BY THE COURT. In the Court of Common Pleas it was averred that, in March, 1878, White entered into a verbal agreement with Benjamin Long to sell and deliver to him a dwelling-house, then standing upon the premises of White, situate in Middlefield, Geauga County, Ohio; White agreed to deliver, standing upon blocks in his yard, on or before the 6th day of October then next; Long agreed to receive the same and to pay therefor $175 in cash, or apply the same on a certain note then held by Long against White. On or before the day agreed upon, White did deliver the house on blocks in his yard, and in all respects performed the conditions of the agreement; in May, 1878, Long died; the claim, duly verified, was presented to the executor and was rejected; White requested the executor to indorse the $175 on the note and the request was refused, and judgment was asked. In a second cause of action the same facts were averred and $175 damages claimed.

The executor answered that the contract was verbal, and that when made, the dwelling-house was standing upon the premises, erected upon permanent walls, and rested thereon, upon a solid and strong foundation, and was permanently affixed to the premises, and constituted a part of the realty, tenements, and appurtenances of said prem-

[1] Meyers *v.* Schemp, 67 Ill. 469, *acc.* Compare Keyser *v.* District, 35 N. H. 477.

ises, and no part of the agreement was in writing and signed by either party.

To this answer White demurred, and the court sustained the demurrer; to which ruling the executor excepted. On error the district court sustained said ruling; and the case is here, asking to reverse the judgment of the district court.

The only question presented is, does the Statute of Frauds prevent recovery?

In applying the Statute of Frauds, buildings are not classed with forest trees, but with growing crops, nursery trees, and fixtures attached to realty.

And buildings are realty or personalty, according to the intention of the parties. And when the parties in interest agree that they may be severed and moved from the realty, buildings are held and treated as personalty. Bostwick *v.* Leach, 3 Day, 476; Hollen *v.* Runder, Cromp. M. & R. 266; Curtis *v.* Hoyt, 19 Conn. 154; Shaw *v.* Carbrey, 13 Allen, 462; Hartwell *v.* Kelly, 117 Mass. 235, 237; Keyser *v.* District No. 8, 35 N. H. 477; Fortman *v.* Goepper, 14 Ohio St. 558; Wagner *v.* C. & T. R. Co., 22 Ohio St. 563, 576.

Judgment affirmed.[1]

WILLIAM F. JOHNSON, Plaintiff in Error, *v.* JOHN C. DODGE, Defendant in Error.

Illinois Supreme Court, June Term, 1856.

[*Reported in* 17 *Illinois*, 433.]

Skinner, J. This was a bill in equity, for specific performance of a contract for the sale of land.

The bill and proofs show that one Iglehart, a general land agent, executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money; that Walters afterwards assigned the contract to Johnson, the complainant; a tender of performance on the part of Walters, and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract and sets up the Statute of Frauds as a defence, to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the terms of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale, under the Statute of Frauds; that the proofs do not show an authority to Iglehart to sign

[1] Scoggin *v.* Slater, 22 Ala. 687; Harris *v.* Powers, 57 Ala. 139, *acc.* See also Rogers *v.* Cox, 96 Ind. 157; Whetmore *v.* Rhett, 12 Rich. 565; Brown *v.* Roland, 11 Tex. Civ. App. 648. Compare Fenlason *v.* Rackliff, 50 Me. 362.

the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud, but where the contract is for the sale of land, and the proof shows a fair transaction and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the Statute of Frauds, that the authority *to the agent* need not be in writing, and by this construction we feel bound. 1 Parsons on Con. 42, and cases cited; Doty *v.* Wilder, 15 Ill. 407; 2 Parsons on Con. 292, 293, and cases cited; Saunders' Pl. and Ev. 541, 542, 551; Story on Agency, 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land, included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. Story on Agency, 51. In such case the party acts without the intervention of an agent and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose, authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. Hawkins *v.* Chance, 19 Pick. 502; 2 Parsons on Con. 291; Story on Agency, chap. 6; Hunt *v.* Gregg, 8 Blackf. 105; Lawrence *v.* Taylor, 5 Hill, 107, 15 Ill. 411; Vanada *v.* Hopkins, 1 J. J. Marsh. 283; Kirby *v.* Grigsby, 9 Leigh, 387.

The mode here adopted was to sign the name of Dodge "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by the party to be charged therewith, or some other persons thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view, his signature to the contract, is a signing by "some other person thereto by him lawfully authorized," within the

statute. Truman *v.* Loder, 11 Ad. and El. 589; 2 Parsons on Con. 291. It is true that authority to *convey* must be in writing and by deed; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Con. 290; McCrea *v.* Purmort, 16 Wend. 160; Shirly *v.* Shirly, 7 Blackf. 452.

We cannot question the sufficiency of the tender in equity, to entitle the complainant to specific performance. Webster *et al. v.* French *et al.*, 11 Ill. 278. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who, for his principal contracts for the sale of land, need not be in writing, yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authority, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

Decree [dismissing the bill] reversed and cause remanded.

Decree reversed.[1]

FRANK E. BATES, APPELLANT, *v.* E. S. BABCOCK ET AL., RESPONDENTS.

CALIFORNIA SUPREME COURT, AUGUST 4, 1892.

[*Reported in* 95 *California*, 479.]

HARRISON, J.[2] — The plaintiff brought this action against the defendants for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate in San Diego. At the trial of the action, the plaintiff offered himself as a witness, and under the objection of the defendants that it was incompetent and immaterial, gave testimony tending to show that an oral agreement had been made between himself and the defendant Babcock, acting on

[1] Heard *v.* Pilley, 4 Ch. App. 548; Rutenberg *v.* Main, 47 Cal. 213; Tibbetts *v.* West and 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, *acc.*

In some states, however, statutes expressly require the agent's authority to be in writing. See Mechem on Agency, § 89.

[2] A portion of the opinion is omitted.

behalf of the defendant the Coronado Beach Company, of which he was president, by which they were to pay off the encumbrances upon certain real estate, sell and dispose of the same, and share the profits and loss in dealing therein; that for that purpose he gave to the defendants fifteen thousand dollars with which to pay certain claims and encumbrances thereon, and that the same was so applied; and that at the request of the defendant Babcock, a conveyance of the property was executed to one Hubbell, who was the secretary of the defendant corporation. After this testimony had been given, the defendants moved to strike out all portions thereof "relating to an agreement for an alleged partnership between the plaintiff and the defendants, or either of them, in the land described in the complaint, or any partnership between the parties, upon the ground that the same is incompetent and immaterial; that a partnership of the character alleged in the complaint must be proved by an instrument in writing, signed by them, or one of them." The court granted the motion, saying that "the contract, as alleged in the complaint, and supported by the evidence, is one clearly for an interest in lands, and as such is void under the Statute of Frauds." Upon the submission of the cause, the court, in its decision, found that there had been no agreement for a partnership in the land, and rendered judgment in favor of the defendants. From this judgment, and an order denying his motion for a new trial, the plaintiff has appealed.

A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional, or commercial, or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture. Dudley *v.* Littlefield, 21 Me. 422; Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Williams *v.* Gillies, 75 N. Y. 201.

Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a dictum in Gray *v.* Palmer, 9 Cal. 639, to the effect that it must be in writing, for which Story on Partnership, section 83, is cited as authority; and in Smith *v.* Burnham, 3 Sum. 458, it was so held by that distinguished jurist.[1] The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence. It was so stated in Coward *v.* Clanton, 79 Cal. 23, where it was held that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels, and for a division of the profits resulting therefrom, in which one party was to furnish

[1] Rowland *v.* Boozer, 10 Ala. 690, 695; 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, *acc.* Compare Watters *v.* McGuigan, 72 Wis. 155.

the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing. More than a hundred years ago it was held by Lord Thurlow, in Elliot *v.* Brown, reported in 3 Swanst. 489, 1 Vern. 217, that the right of survivorship in a joint demise of a farm was destroyed by reason of the tenants having farmed the land upon joint account, and thus by their acts made it partnership assets. The question was very fully considered by Vice-Chancellor Wigram in Dale *v.* Hamilton, 5 Hare, 369, wherein previous decisions involving similar principles were reviewed, and it was held that under the principles of those decisions the existence of such a partnership could be shown by general evidence, without the necessity of a written agreement. In that case a parol agreement had been entered into, under which a tract of land was to be purchased in the name of one McAdam, and laid out in lots, and resold, he furnishing the capital and the plaintiff the skill and labor necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdam, but the defendants who had succeeded to McAdam, with notice of the agreement, afterwards refused to carry it out. Thereupon the plaintiff filed his bill for an accounting and a sale of the land under the direction of the court, with a division of the proceeds in accordance with the terms of the agreement. The defendants resisted the suit, upon the ground that the agreement was within the Statute of Frauds, and could be established only by an instrument in writing; but the vice-chancellor overruled their objections and upheld the bill. In his opinion (p. 383) he uses the following illustration in support of his conclusion, which is peculiarly appropriate to the present case: "In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value, that a loss had been sustained, and that Hamilton and McAdam were the plaintiffs seeking to compel Dale to contribute his proportion of the loss. If in this case the authorities would have enabled Hamiliton and McAdam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will, upon like proof, support the present suit upon the principle — that of mutuality in remedies — which enables a vendor to recover the purchase-money in this court, though the remedy at law may be equally adequate and more appropriate," and cites several authorities to the effect that in such a case the defendant would have been liable for contribution. The rule laid down in Dale *v.* Hamilton, 5 Hare, 369, has since been generally followed, and although there are some decisions to the contrary, may now be said to be the prevailing rule upon that subject.[1]

[1] *Re* De Nicols, [1900] 2 Ch. 410; McElroy *v.* Swope, 47 Fed. Rep. 386; Von Trotha *v.* Bamberger, 15 Col. 1; Morrill *v.* Colehour, 82 Ill. 618; Holmes *v.* McCray,

Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the Statute of Frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense, the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement, — that sense in which the beneficiary, under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest resulting from the sale and a right to have the land sold, rather than an interest in the land itself. The Statute of Frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the Statute of Frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but by reason of the acts of the parties thereunder an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity.

It is a familiar rule in equity, that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships.

The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. The question

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.* Wolford, 33 Minn. 175; Newell *v.* Cochran, 41 Minn. 374; Chester *v.* Dickerson, 54 N. Y. 1; Babcock *v.* Read, 99 N. Y. 609; King *v.* Barnes, 109 N. Y. 267, 285; Flower *v.* Barnekoff, 20 Oreg. 132; Meason *v.* Kaine, 63 Pa. 339; Benjamin *v.* Zell, 100 Pa. 33; Everhart's App., 106 Pa. 349; Howell *v.* Kelly, 149 Pa. 473; Bruce *v.* Hastings, 41 Vt. 380, *acc.*

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.

has frequently arisen in actions for the division of the proceeds after a sale under such an agreement, and it has been invariably held that the Statute of Frauds is no defence thereto. Bruce *v.* Hastings, 41 Vt. 380, 98 Am. Dec. 592; Benjamin *v.* Zell, 100 Pa. 33; Trowbridge *v.* Wetherbee, 11 Allen, 361; Babcock *v.* Read, 99 N. Y. 609; Coward *v.* Clanton, 79 Cal. 23; Reed on Statute of Frauds, sec. 727. See also Byers *v.* Locke, 93 Cal. 493. Under such an agreement, it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement was invalid at the outset, it could not form the basis of such an action. If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose, — the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners. This was the case presented and maintained in Dale *v.* Hamilton, 5 Hare, 369. The same procedure was upheld in Richards *v.* Grinnell, 63 Iowa, 44, 50 Am. Rep. 727; Bunnell *v.* Taintor, 4 Conn. 568; Hunter *v.* Whitehead, 42 Mo. 524; Bissell *v.* Harrington, 18 Hun, 81; Holmes *v.* McCray, 51 Ind. 358, 19 Am. Rep. 735; Coward *v.* Clanton, 79 Cal. 23. After the agreement for the purchase and sale has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the Statute of Frauds. Pico *v.* Cuyas, 47 Cal. 174. The Statute of Frauds has no application to an executed agreement.

That the agreement between the parties, which is averred in the complaint, and the evidence given in support thereof, did not contemplate any transfer of the land, or of any interest therein, to the defendants, or either of them, but had for its object only a division of the profits and loss that would remain after its sale, is shown by a consideration of the averments of the complaint hereinbefore presented, and also by the direction of Babcock to the plaintiff while negotiating the agreement to "sell it off as soon as you can, pay up the debts, and divide the profits." It was not necessary for the plaintiff, in support of these averments, to produce written evidence of the agreement, but the agreement could have been established by his oral testimony; and the court erred in striking out the testimony that he gave in support of the agreement. The first question to be determined by the court was, whether there was a partnership, and that fact could be shown by general evidence. In Forster *v.* Hale, 5 Ves. 309, where the right to an interest in the leasehold of a colliery, claimed by virtue of a partnership with one of the lessees, was involved, and it was objected that by

permitting parol evidence to establish such interest, an interest in real estate or a declaration of trust would be gained without any writing, in violation of the Statute of Frauds, Lord Loughborough said: "That is not the question: it is whether there was a partnership; the subject being an agreement for land, the question is, whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." Under the same principles, if in the present case the court should find, upon sufficient evidence, that a partnership existed between the parties, the fact that they would have an interest in the land which forms a portion of the assets of the partnership would result by operation of law as an incident to such partnership, but this result would not constitute a reason for excluding parol testimony to establish the existence of the partnership.

For the error of the court in striking out the evidence of the plaintiff, the order and judgment are reversed, and the court is directed to grant a new trial.

PATERSON, J., SHARPSTEIN, J., DE HAVEN, J., GAROUTTE, J., and MCFARLAND, J., concurred.

BEATTY, C. J., dissenting. — I dissent. The complaint, in my opinion, shows no cause of action, and the evidence offered and stricken out by the court was of a parol contract, invalid under the Statute of Frauds.

DUNPHY *v.* RYAN.

SUPREME COURT OF THE UNITED STATES, JANUARY 15–25, 1886.

[*Reported in* 116 *United States*, 491.]

ERROR to the Supreme Court of the Territory of Montana.

By the statute law of Montana, there is but one form of action for the enforcements of all private rights, legal or equitable. Ryan, the defendant in error, brought this action on a note. The plaintiff in error admitted the execution, delivery, and non-payment of the note, but set up by way of counterclaim a breach of the contract stated in the opinion of the court. The trial court refused to allow testimony as to this contract because it was not in writing. On appeal to the supreme court of the Territory this judgment was affirmed. By the present writ of error the defendant seeks a reversal of the judgment of affirmance.

Mr. *M. F. Morris*, for plaintiff in error.[1]

Mr. *Edwin W. Toole* and Mr. *Joseph K. Toole*, for defendant in error.

Mr. JUSTICE WOODS delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The defendant insists that the court erred in refusing to allow him to prove the contract set up in his answer. The statute law of Montana applicable to the question in hand is as follows: Chapter XIII., Art. I., of the Revised Statutes of Montana of 1879 provides as follows:

"Section 160. No estate or interest in land, other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

"Section 162. Every contract for the leasing for a longer time than one year, or for the sale of any lands or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made."

The denial in the replication of the plaintiff of the making of the contract on which the defendant based his cross-action is as effective for letting in the defence of the Statute of Frauds as if the statute had been specifically pleaded. May *v.* Sloan, 101 U. S. 231; Buttimere *v.* Hayes, 5 M. & W. 456; Kay *v.* Curd, 6 B. Mon. 100. The question is, therefore, fairly presented, whether the contract alleged in the answer of the defendant, not being in writing, is valid and binding under the statutes of Montana.

We cannot doubt that the contract which the defendant seeks to enforce is a contract for the sale of lands. According to the averments of the answer it was this: The plaintiff, being in treaty for the purchase of the lands, agreed with the defendant to acquire title to the undivided two-thirds thereof in his own name upon the best terms possible, and, when he had acquired the title, to convey to the plaintiff, by a good and sufficient deed, an undivided third of the premises, for which the plaintiff promised to pay the defendant one-third of the purchase-money, and one-half the expenses incurred in obtaining the title. This is simply an agreement of the defendant to convey to the plaintiff a tract of land for a certain consideration. It, therefore, falls precisely within the terms of section 162, above quoted. It is a contract for the sale of lands, and, not being in writing signed by the vendor, is void. The circumstance that the defendant, not owning the land which he agreed to convey, undertook to acquire the title, instead of taking the case out of the statute, brings it more clearly and

[1] The statement of the case has been abbreviated.

unequivocally within its terms. A contract void by the statute cannot be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it. Carrington *v.* Roots, 2 M. & W. 248; Dung *v.* Parker, 52 N. Y. 494. The defendant must, therefore, fail in his cross action, unless he can take his case out of the operation of the Statute of Frauds.

The defendant seeks to evade the effect of the statute by the argument that in the transaction set out in his answer he was acting as the agent of the plaintiff as well as for himself, and that, having as such agent paid for the share of the land which he had agreed to convey to the plaintiff, he is entitled to recover back the price, as for money paid out and expended for the plaintiff at his request.

It is well settled that when one person pays money or performs services for another upon a contract void under the Statute of Frauds, he may recover the money upon a count for money paid to the use of defendant at his request, or recover for the services upon the *quantum meruit* count. Wetherbee *v.* Potter, 99 Mass. 354; Gray *v.* Hill, R. & M., 420; Shute *v.* Dow, 5 Wend. 204; Ray *v.* Young, 13 Texas, 550. But in such cases the suit should be brought upon the implied promise. Buttimere *v.* Hayes, 5 M. & W. 456; Griffith *v.* Young, 12 East, 513; Kidder *v.* Hunt, 1 Pick. 328. Clearly the present case does not belong to that class. Here the suit is based upon, and its purpose is to enforce the void contract.

The cause of action set up in the defendant's answer is that the plaintiff, having contracted to purchase the land and receive a conveyance therefore, became liable, upon a tender to and refusal by him of the deed, to pay the agreed price. This is a suit upon the express contract. There is no implied contract on which the cross-action can rest, for the law implies a contract only to do that which the party is legally bound to perform. As the express contract set up by the defendant was void under the statute, the plaintiff was not bound in law to accept the deed tendered him by the defendant or pay the purchase money. The defendant paid no money to or for the plaintiff. The money paid out by him was to enable him to perform his contract with the plaintiff. He paid it out for himself and for his own advantage. The plaintiff has received neither the money nor the land from the defendant. Neither reason nor justice dictate that he should pay the defendant the price of the land, and therefore the law implies no provision to do so. 2 Bl. Com. 443; Ogden *v.* Sanders, 12 Wheat. 213, 341. The cross-action cannot, therefore, be sustained on any supposed implied promise of the plaintiff.

But the defendant's counsel further insist that there has been such a part performance of the contract as entitles the defendant to equitable relief, on the ground that it would be a fraud on him not to enforce the contract.

The case, as stated in the defendant's answer, is not, either in the averments or prayer, one for equitable relief. There is no averment,

and no proof was offered, that the refusal of the plaintiff to accept the deed and pay the purchase price of the land has subjected the defendant to any loss. His answer avers that before he made his contract with the plaintiff he was negotiating with the owner for the purchase of the land. It is not alleged that he would not have purchased the land if he had not made his contract with the plaintiff. There is no averment that the land is not worth, or that it cannot be sold for, all it cost him. As between these parties there has been no payment, no possession, and no improvements. The only complaint of misconduct on the part of the plaintiff which can be inferred from the pleadings is his refusal to perform a verbal contract for the purchase of lands. But the mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity. Purcell *v.* Miner, 4 Wall. 513. There is no fraud in such a refusal. The party who so refuses stands upon the law and has a right to refuse. Under the circumstances of this case the statute is as binding on a court of equity as on a court of law. If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the Statute of Frauds would be rendered vain and nugatory. The defendant knew or ought to have known that the statute requires such a contract as the one he seeks to enforce to be evidenced by writing. That he did not exact a contract in writing is his own fault. Courts of equity are not established to relieve parties from the consequences of their own negligence or folly.

The Statute of Frauds is founded in wisdom and has been justified by long experience. As was said by Mr. Justice Grier, in Purcell *v.* Miner, *ubi supra*, the statute "is absolutely necessary to preserve the title to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony." It should be enforced. Courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions. But this case is barren of any averment or proof, or offer of proof, which ought to induce a court of equity to afford relief. It follows that neither in a court of law nor a court of equity can the defendant maintain his suit on the cause of action set up in his answer by way of counter-claim or cross-action.

Judgment affirmed.[1]

[1] See further Robbins *v.* Kimball, 55 Ark. 416; Erben *v.* Lorillard, 19 N. Y. 299; Levy *v.* Brush, 45 N. Y. 589; Harrison *v.* Bailey, 14 S. C. 234; Henderson *v.* Hudson, 1 Mun. 510; Walker *v.* Herring, 21 Gratt. 680.

EDWARD P. PARSONS *v.* JAMES PHELAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 9, 1882–JANUARY 9, 1883.

[*Reported in* 134 *Massachusetts*, 109.]

MORTON, C. J. By the Statute of Frauds, no action can be brought upon a contract for the sale of lands, or of any interest in or concerning lands, unless the contract, or some memorandum thereof, is in writing. Gen. Sts. c. 105, § 1. And no trust concerning lands, except such as may arise or result by implication of law, can be created or declared, unless by an instrument in writing. Gen. Sts. c. 100, § 19.

In the case before us, the evidence tended to show that, in 1880, a parcel of land in Lynn was about to be sold by auction; and that the plaintiff and the defendant made an oral contract that the defendant should bid off and buy the estate upon the joint account of both parties, in equal shares.

It is clear upon the authorities that such a contract is within the statutes above cited; and that the plaintiff cannot enforce a trust in his favor in the land after it was conveyed to the defendant, or maintain an action at law for a breach of the contract. Fickett *v.* Durham, 109 Mass. 419; Wetherbee *v.* Potter, 99 Mass. 354; Smith *v.* Burnham, 3 Sumner, 435. This is the contract set out in the first count of the plaintiff's declaration, upon which the Superior Court properly ruled that he could not recover.

But the plaintiff contends that he is entitled to recover under his third count, which alleges that the defendant agreed that he would bid for and buy one undivided half of the land for and in behalf of the plaintiff, and as agent of the plaintiff. Without discussing the question whether this count sets out a contract which is not within the Statute of Frauds, it is enough for the decision of this case that there was not a scintilla of evidence to show any such contract. On the contrary, the testimony of the plaintiff, which was the only evidence in the case as to the terms of the contract, clearly shows that it was, as set out in the first count, that the defendant should buy the estate offered for sale on joint account, and it is susceptible of no other construction.

Though the effect of the contract which was made, if it had been in writing, would be that the plaintiff would become the equitable owner of an undivided half of the estate, this does not change the contract into a contract to buy an undivided half as the agent of the plaintiff. To declare upon the contract as such creates a variance, and is a mere evasion of the statute.

The court should have instructed the jury as requested, that the contract proved was within the statute, and that the plaintiff could not maintain his action. *Exceptions sustained.*[1]

[1] Wallace *v.* Stevens, 64 Maine, 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, *acc.* See also McLennan *v.* Boutell, 117 Mich. 544. Compare Evans *v.* Green, 23 Miss. 294.

JOHN H. DOUGHERTY *v.* HERALD CATLETT.

ILLINOIS SUPREME COURT, JUNE 15, 1889.

[*Reported in* 129 *Illinois*, 431.]

MR. JUSTICE BAILEY delivered the opinion of the Court:

The only questions presented by this appeal are those arising upon the plea of the Statute of Frauds. It appears from the declaration that, prior to the date of the contract upon which the suit is brought, the plaintiff and defendant entered into an agreement in writing, by which the defendant, in consideration of a certain sum of money then paid to him by the plaintiff, and of certain other payments thereafter to be made, agreed to convey to the plaintiff certain lands in Vermilion County; that the plaintiff thereupon entered into possession of said lands; that while so in possession he sold an undivided half of the lands to one McCabe, the defendant conveying said undivided half to McCabe at the plaintiff's request; that after such conveyance was made and while the plaintiff was still in possession of the remaining undivided half, the plaintiff and defendant entered into a verbal agreement whereby the plaintiff agreed to sell and surrender to the defendant said undivided half still in his possession, the defendant agreeing, in consideration thereof, to pay the plaintiff the sum of $3,500; that the plaintiff thereupon surrendered to the defendant the possession of said undivided half of said premises, and that the defendant retained the same in his possession, and afterwards sold and conveyed it to a third person, with the plaintiff's knowledge, for the sum of $4,000. The suit is brought to recover of the defendant the consideration of said verbal agreement.

The second section of the Statute of Frauds of which the defendant seeks by his plea to avail himself is as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized in writing signed by such party."

The execution by the defendant to the plaintiff of the written contract of sale alleged in the declaration vested in the plaintiff an equitable interest in the lands therein described, and there can be no doubt that such interest was an interest in or concerning lands within the meaning of said statute. That the Statute of Frauds embraces equitable as well as legal interests in land is well settled. Browne on Statute of Frauds, sec. 229. As said by Mr. Justice Story in Smith *v.* Burnham, 3 Sumner, 435, "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A

contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third party, or otherwise, is clearly a sale of an interest in lands, within the Statute of Frauds." See also Richards *v.* Richards, 9 Gray, 313; Hughes *v.* Moore, 7 Cranch, 176; Simms *v.* Killian, 12 Ired. 252; Dial *v.* Crain, 10 Texas, 444; Catlett *v.* Dougherty, 21 Ill. App. 116; Jevne *v.* Osgood, 57 Ill. 340.[1]

The plaintiff contends that the acts performed by him under his oral contract to sell and surrender his interest in said lands to the defendant constitute such a performance as should take the case out of the statute. The only act of performance alleged in the declaration is the delivery of possession of the premises sold to the defendant. There is no allegation of any cancellation or surrender of the defendant's contract to convey the lands to the plaintiff on payment of the purchase money, nor is the cancellation of said contract averred, either directly or inferentially. It will therefore be presumed that said contract is still held by the plaintiff as a valid and subsisting legal obligation against the defendant. The averments of the declaration, therefore, as we interpret them, show a partial and not a complete performance.

The doctrine of part performance is a doctrine of equity and does not prevail at law. Mr. Browne, in his Treatise on the Statute of Frauds, sec. 451, says: "It is settled by a long series of authorities, that a part execution of a verbal contract within the Statute of Frauds has no effect at law to take the case out of its provisions," and in support of this statement a large number of cases are cited in a note. To same effect see 2 Reed on the Statute of Frauds, sec. 548, and authorities cited in note. The same rule has been frequently announced by this court. Warner *v.* Hale, 65 Ill. 395; Wheeler *v.* Frankenthal, 78 id. 124; Creighton *v.* Sanders, 89 id. 543.

The plaintiff's contention is, that the facts averred in the declaration amount to a rescission of the defendant's contract to convey, and that such rescission, coupled with a delivery of possession, should be held to be tantamount to a complete performance. The difficulty with this view is that no rescission is averred, either directly or inferentially. The only averment is that the plaintiff had surrendered the possession to the defendant who already had the legal title, and that the defendant subsequently conveyed the land, with the plaintiff's knowledge, to a third person. A surrender of possession did not necessarily involve a rescission of the defendant's contract, since such surrender of possession may be entirely consistent with an intention on his part to retain the defendant's contract with a view of subsequently enforcing it against him. The pleading must be construed most strongly against the pleader, and as the declaration contains no averment of a rescission or of any facts from which a rescission must be necessarily implied, it must be presumed that none was made or intended. If the plaintiff relied on the theory of a rescission he should have averred it, and not

[1] See further, Browne on Statute of Frauds, § 229.

having done so, he cannot recover upon a theory not supported by his declaration.[1]

We are unable to see that any special force is to be given, in this connection, to the averment that the defendant had conveyed the land to a third person with the plaintiff's knowledge. It might perhaps have been different if such conveyance had been made with the plaintiff's consent and approbation. The legal effect of the conveyance, so long as it does not appear to have been made with the plaintiff's consent, is merely to place it out of the defendant's power to perform his contract to convey the land to the plaintiff, but it has no tendency to work a rescission or cancellation of the contract, or to absolve the defendant from his liability thereon, and this is in no way affected by the mere knowledge of the plaintiff that the conveyance was being made. We are of the opinion that the demurrer to the defendant's plea was properly overruled. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

Mr. Justice Wilkin took no part.

ROBERT McKNIGHT *v.* EDWARD BELL.

Pennsylvania Supreme Court, April 24–May 26, 1890.

[*Reported in* 135 *Pennsylvania*, 358.]

Mr. Justice Clark.[2] It is admitted that Robert McKnight, Sr., in the year 1860, died seised *inter alia* of 174 acres of land in Antis township, Blair County, which embraced the lands in dispute, and that by his last will and testament, admitted to probate 8th January, 1861, he devised the same in fee to his six sons, John, William, Blair, Robert, Wilson, and Reuben, equally and in common. On the 16th March, 1875, when the youngest son came of age, an amicable partition of the testator's lands was made among them in writing, by the terms of which Blair, William, and Robert took as their share of the estate the 174 acres of land already mentioned, agreeing to pay, in the nature of owelty, to their brothers Wilson and Reuben, each the sum $750, and to John $100; the widow's dower in the entire estate, adjusted at $420 annually, to remain a charge, payable in equal parts by all the heirs. On the 23d March, 1875, Blair, William, and Robert, by

[1] The Court of Appeals, 21 Ill. App. 116, 119, held the contract unenforceable "whether the transaction be regarded as a sale or an attempt by parol to rescind the written contract by which appellee became vested with such equitable interest, for both would be within the statute, and require evidence in writing to sustain them;" citing as to rescission Reed on Statute of Frauds, II. sec. 456; Dial *v.* Crain, 10 Tex. 444. See further Browne on Statute of Frauds, §§ 431–436.

[2] A portion of the opinion is omitted.

agreement in writing, subdivided their purpart, Blair taking as his share all that portion of their land lying east of the old township road, containing 96 acres 149 perches, upon which were the buildings, and William and Robert taking the balance of the tract, lying west of the township road, containing 78 acres 148 perches; Blair assuming payment of the $1,500 to Reuben and William, and of the $100 to John, and agreeing, besides, to give to William and Robert $1,000 worth of the timber land off his tract, according to the adjustment of three of their neighbors named. An old lane, running in a westerly direction from the township road, divided the purpart of William and Robert into two nearly equal parts. The 39 acre piece, lying north of the lane, was subsequently taken in execution at the suit of Mary McKnight, by the sheriff of Blair County, as the property of William McKnight, and at the June Term, 1884, was sold, and a sheriff's deed dated 20th June, 1884, was executed and delivered to A. L. McCartney, who on the 15th June, 1885, conveyed to Edward Bell the defendant. The plaintiff, Robert McKnight, conceding Bell's right to the undivided one half of the land, in the right of his brother William, claims to recover the other half.

The defendant's contention, however, is that Robert and William McKnight, who it is conceded were originally tenants in common of the 78 acres, long prior to the sheriff's levy and sale, had executed a parol partition thereof between them, by the terms of which Robert became entitled, in severalty and in fee, to the 39 acres south, and William to the 39 acres north of the lane, the latter being the premises in dispute. Whether any such parol partition was in fact executed as alleged, is therefore the principal question in the cause; for, if there was such a partition, the plaintiff has no right of recovery in this case. Upon a full hearing of all the evidence on both sides, the learned judge of the court below gave binding instructions to find for the plaintiff, and this is the first error assigned.

It is now well settled, notwithstanding what was said in Gratz *v.* Gratz, 4 R. 410, that a parol partition of lands between tenants in common is not a sale or transfer of lands, within the Statute of Frauds. If tenants in common, intending to make a partition of their lands, run a line, which is marked on the ground as a division line, and actually take possession of their respective parts in pursuance thereof, and the partition is fully executed between them, it is sufficient to vest the title in severalty. In Rider *v.* Maul, 46 Pa. 376, the question was upon the effect of an alleged parol partition between Martin Jacobs and John Rider. At the trial of that case below, the court was requested, in the defendant's first point, to charge the jury, in substance that, if they believed that the parties had run a line, which was marked on the ground as a division line, and had taken possession of their respective parts in pursuance of such division, the partition was executed. The learned judge refused so to charge, saying that the evidence of a parol partition or division was not sufficient to take the

case out of the Statute of Frauds and Perjuries, and, further, that the jury should disregard it altogether, and treat Jacobs and Rider as tenants in common. When the case came into this court the judgment was reversed. Mr. Justice Thompson, in delivering the opinion of the court, said: "We are of opinion that the defendant's first point should have been answered in the affirmative. It was undoubtedly a correct presentation of the law, as a general proposition: Ebert *v.* Wood, 1 Binn. 216; Pugh *v.* Good, 3 W. & S. 56; Calhoun *v.* Hays, 8 W. & S. 127; and McMahan *v.* McMahan, 1 Har. 376; and there was testimony of which it was predicated, which, if true, (and this was for the jury,) was sufficient to establish an executed parol division of the land." When the case came up the second time, 70 Pa. 15, there was, it is true, an intimation that, if the question was *res nova*, perhaps the court would take a different view, but the former ruling was permitted to stand. But whatever doubt may have arisen, from what was said in the cases cited, was dispelled by the decision of this court in the very recent case of Mellon *v.* Reed, 114 Pa. 649, where we said, in the most explicit manner, that "a partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the Statute of Frauds." The reason of this rule rests in this: that the partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title to land; it is a mere setting apart in severalty of the same interest held in common, not in other, but in the same lands. A parol partition, when fair and equal, and followed by due execution, has been held to bind even infants and femes covert; and a judgment or a mortgage or the lien of a legacy against one of the tenants in common will, after the partition, *ipso facto* cease to bind the whole as an entirety, and attach to his purpart: Williard *v.* Williard, 56 Pa. 119; Darlington's Appropriation, 13 Pa. 430; Bavington *v.* Clarke, 2 P. & W. 115; McLanahan *v.* Wyant, 2 P. & W. 279; Long's App., 77 Pa. 151. The result of such a partition does not confer a merely equitable right, but a right recognized and which will be enforced at law. Ejectment would not lie to compel payment of a sum stipulated in the nature of owelty; nor, in the absence of a contract to that effect, would a bill lie to enforce a conveyance: if the parties do not consummate the transaction by writing, it is because they chose to do otherwise.

It follows that the question whether or not a parol partition was actually made and executed, between Robert and William McKnight, was a question of fact to be determined by the jury, as other questions of fact are determinable at law by that tribunal. There is in all cases, at law, a preliminary question for the court, whether there is any evidence of the fact sought to be established that ought reasonably to satisfy the jury; if there is evidence from which the jury can properly find the question for the party on whom rests the burden of proof, it

should be submitted; if not, it should be withheld from the jury: Hyatt *v.* Johnston, 91 Pa. 196; Patterson *v.* Dushane, 115 Pa. 334; Cover *v.* Manaway, 115 Pa. 338.

As the case was given to the jury with binding instructions to find for the plaintiff, the defendant is entitled to have the testimony he relies upon accepted as true, together with all reasonable inferences therefrom. Referring to the testimony, we are of opinion the case should have been submitted to the jury. We will not recite the testimony, or discuss it, in detail; as the case is to be re-tried, it is better that we should not. A reference in detail to the testimony, to exhibit the ground of this opinion, might be taken at the re-trial, if read in the presence or hearing of the jury, as an expression of our views on the questions of fact involved, and might have a misleading effect. The view we have taken, as to the measure of proof required, will readily suggest the propriety of a submission of these questions to the jury.

The judgment is reversed, and a venire facias de novo awarded.[1]

JOSEPH CAVANAUGH, Respondent, *v.* SAMUEL JACKSON, Appellant.

California Supreme Court, October, 1891.

[*Reported in* 91 *California*, 580.]

Paterson, J. The record shows that in December, 1880, and long prior thereto, the plaintiff was in possession of the Coats place, which he now owns, and the defendant, Jackson, was in possession of an adjoining ranch, known as the Beaughan place. A dispute having arisen as to the boundary line between the two ranches, a surveyor

[1] 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.* Lahat, 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, *acc.* See also Berry *v.* Seawall, 65 Fed. Rep. 742 (C. C. A.).

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, *contra.* See also Duncan *v.* Duncan, 93 Ky. 37.

was employed by plaintiff and defendant to make a survey and establish the true line. Such survey was made in December, 1880. The plaintiff testified as follows: "Jackson had this land fenced up for a long time prior to the first day of September, 1886, — maybe four or five years before that date, — along with other lands of his. . . . Jackson and I established a line of fence between the Coats place, which I now own, and the Beaughan place, now owned by Jackson; we had the land surveyed from the center of section 28, west to the road. We established the line on the quarter-section line, and when we established the line, Jackson moved his fence out to the road, and enclosed this strip in controversy; that strip is narrower at the west end than at the the east end. I bought the Coats place from Mr. Orr, but the deed did not include this strip, and Mr. Warren discovered that I had no deed, and that I must have a deed. I have exercised no acts of ownership over this strip of land. . . . I had A. M. Jones survey this tract in about 1872. That strip is one hundred yards wider at the east end than at the west end. Dan Sullivan assisted Davidson in making the last survey. . . . Jackson and I put up our fences on the line as determined by Mr. Davidson. I did not object to Mr. Jackson putting up fence on line from centre of section 28, west to the road, and enclosing this tract in dispute; he fenced it right after the survey made by Mr. Davidson. That line never was enclosed, except a small portion thereof enclosed by appellant, until Mr. Jackson fenced it after the Davidson survey. We built the fences on the lines agreed on. We ran one line west from centre of section 28 to the road, and on this line Mr. Jackson was to build his fence, and I was to build as much on the north and south line as he was to build on the east and west line; we were to, and did, build equal portions of said fence. Jackson moved out his fence, and enclosed this strip of land. . . . I never asked Mr. Jackson for the land, nor to be let into possession of it."

The defendant testified that he had occupied and used the land exclusively since 1880, and paid taxes on it ever since 1878, when he paid his proportion for the Whitmire patent for the northwest quarter of section 28; that he took all the wood he needed off the land in controversy since the establishment of the boundary line, and had prohibited others from cutting wood there for eight or ten years past. The assessment rolls offered in evidence showed that the land in controversy had been assessed to defendant every year from 1878 to 1887, and that defendant had regularly paid said taxes. The defendant testified that in 1872 a survey was made by one Jones on behalf of Mr. Wholey, Mr. Cavanaugh, and himself, the object being to determine how much Mr. Wholey and defendant were each to pay for the patent for the land granted by the state to Whitmire.

In rebuttal, the plaintiff proved by the records of the assessor and tax collector that he had had the lands in controversy assessed to him for the years 1885 and 1887, and had paid the tax for the year 1885.

We think that on this evidence the defendant was entitled to judg-

ment. The parties entered into an express agreement fixing the dividing line between their lands; fences were built upon the line so established, and the parties have ever since acquiesced therein.

It is well settled that where the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the Statute of Frauds, and it cannot afterwards be controverted by the parties or their successors in interest. White *v.* Spreckels, 75 Cal. 610; Helm *v.* Wilson, 76 Cal. 485; Blair *v.* Smith, 16 Mo. 273; Orr *v.* Hadley, 36 N. H. 575; Laverty *v.* Moore, 32 Barb. 347; Houston *v.* Sneed, 15 Tex. 307.[1] It is the policy of the law to give stability to such an agreement, because it is the most satisfactory way of determining the true boundary, and tends to prevent litigation. Houston *v.* Matthews, 1 Yerg. 118; Fisher *v.* Bennehoff, 121 Ill. 435.

It is claimed by respondent, that, as the payment was made several years prior to the time when he received his deed from Coats for the land in controversy, it is not binding upon him; but the evidence shows that the plaintiff was in possession of the Coats place, and claiming to be the owner up to the line established. The evident meaning of his testimony is, that he had paid for the land, but had failed to secure the legal title thereto. It has been held that such an agreement, made by an occupant of public land, was binding upon him after he acquired legal title from the government. Jordan *v.* Deaton, 23 Ark. 704. See also Orr *v.* Hadley, 36 N. H. 575; Silvarer *v.* Hansen, 77 Cal. 586.

In many states it is held that in the absence of any express agreement, where the boundary line has been recognized, and parties have used and occupied according to it for a considerable period, although less than the period which would be a bar under the statute of limitations, they, and all claiming under them, will be estopped from afterwards claiming a different boundary. Blair *v.* Smith, 16 Mo. 273; Smith *v.* Hamilton, 20 Mich. 438; 4 Am. Rep. 398.

The agreement establishing a dividing line between the plaintiff and the defendant was made in 1881. Coats conveyed to Cavanaugh, April 30, 1884. From the time the agreement was made until the

[1] Jenkins *v.* Trager, 40 Fed. Rep. 726; 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; Haru *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, *acc.*; Liverpool Wharf *v.* Prescott, 4 Allen, 22; 7 Allen, 494, *contra*.

commencement of this action, on April 15, 1887, plaintiff never exercised any acts of ownership over the land in controversy. This long-continued acquiescence by the plaintiff in the line previously established, we think, is a ratification of the agreement made in 1881.

Judgment and order reversed, and cause remanded for a new trial.

HARRISON, J., and GAROUTTE, J., concurred.[1]

D. — AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

PETER *v.* COMPTON.

IN THE KING'S BENCH, TRINITY TERM, 1693.

[*Reported in Skinner*, 353.]

THE question upon a trial before HOLT, Chief Justice, at *nisi prius*, in an action upon the case upon an agreement, in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, was if such agreement ought to be in writing, for the marriage did not happen within a year. The Chief Justice advised with all the judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra*), where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary, otherwise not.

[1] "In the brief of respondent's attorney it is admitted, 'there was no dispute or uncertainty as to where the true line was. All parties knew where it was, but they deliberately disregarded the true line, and made one to suit themselves.' The defendant does not rely upon adverse possession or the Statute of Limitations, but upon the establishment of a boundary line by parol. This, however, is not such a case, but an attempt to convey by parol, and without consideration, a strip of land belonging to one of the tracts abutting upon a well-recognized boundary line. This is squarely in the teeth of the Statute of Frauds. Civ. Code, sec. 1091. In support of his position in reference to establishing a boundary line by parol, respondent cites and relies upon Cavanaugh *v.* Jackson, 91 Cal. 580. In that case, however, as stated by the court, 'a dispute having arisen as to the boundary line between the two ranches, a surveyor was employed by plaintiff and defendant to make a survey and establish a true line. The line in that case was established in 1881, and the defendant occupied and used it exclusively up to the commencement of his action, which was in April, 1887, and the plaintiff never exercised any acts of ownership over it during that period.' And the court say, 'This long-continued acquiescence in the line previously established, we think, is a ratification of the agreement made in 1881.'" Nathan *v.* Dierssen, 134 Cal. 282, 284.

Boyd *v.* Graves, 4 Wheat. 513; Sharp *v.* Blankenship, 67 Cal. 441; Miller *v.* McGlaun, 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, *acc.*

WARNER *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

UNITED STATES SUPREME COURT, MAY 5–NOVEMBER 30, 1896.

[*Reported in* 164 *United States*, 418.]

THIS was an action brought May 9, 1892, by Warner against the Texas and Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

At the trial, the plaintiff, being called as witness in his own behalf, testified that prior to the year 1874 he had been engaged in the lumbering and milling business in Iowa and in Arkansas, and in contemplation of breaking up and consolidating his business, came to Texas, and selecting a point, afterwards known as Warner's Switch, as a suitable location, providing he could obtain transportation facilities; that he found at that point an abundance of fine pine timber, and three miles back from the railroad, a stream, known as Big Sandy Creek, peculiarly adapted to floating logs, and lined for many miles above with pine timber; that in 1874 the defendant's agent, after conversing with him about his experience in the lumber business, the capacity of his mill, and the amount of lumber accessible from the proposed location, made an oral contract with him by which it was agreed that if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large saw-mill, bought many thousand acres of land and timber rights and water privileges of Big Sandy Creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than $50,000, for which the defendant

was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that, when he made the contract, he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, and to have a site for lumber there as long as he lived; and that he told the defendant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run a mill for twenty years longer.

No other testimony being offered by either party, bearing upon the question whether the contract sued on was within the statute of frauds, the Circuit Court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the Circuit Court of Appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. 13 U. S. App. 236. The plaintiff sued out this writ of error.

Mr. *Horace Chilton*, for plaintiff in error.

Mr. *John F. Dillon*, for defendant in error. Mr. *Winslow S. Pierce* and Mr. *David D. Duncan* were on his brief.

Mr. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the State of Texas, reënacting in this particular the English statute of 29 Car. II. c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which 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 by some person by him thereunto lawfully authorized." Texas Stat. January 18, 1840; 1 Paschal's Digest (4th ed.), art. 3875, Rev. Stat. of 1879, art. 2464; Bason *v.* Hughart, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several States.

In the earliest reported case in England upon this clause of the statute, regard seems to have been had to the time of actual performance, in deciding that an oral agreement that if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet if the contingent happen within a year, the action shall be maintainable, and is not within the statute." Francam *v.* Foster (1692), Skinner, 326; s. c. Holt, 25.

A year later, another case before Lord Holt presented the question whether the words "agreement not to be performed within one year" should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." Peter *v.* Compton (1693), Skinner, 353; s. c. Holt, 326; s. c. cited by Lord Holt in Smith *v.* Westall 1 Ld. Raym. 316, 317; Anon., Comyns, 49, 50; Comberbach, 463.

Accordingly about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." Anon., 1 Salk. 280.

Again, in a case in the King's Bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed. A *contingency* is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. Fenton *v.* Emblers, 3 Burrow, 1278; s. c. 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several States of the Union, in reënacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. Tucker *v.* Oxley, 5 Cranch, 34, 42; Pennock *v.* Dialogue, 2 Pet. 1, 18; Macdonald *v.* Hovey, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may in a few instances have been warped or misapplied.

The decision in Boydell *v.* Drummond (1809), 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case, the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number at least should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare subscribers, their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, La Blanc, and Bayley, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In Wells *v.* Horton (1826), 4 Bing. 40; s. c. 12 J. B. Moore, 177, it was held to be settled by the earlier authorities that an agreement by

which a debtor, in consideration of his creditors agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and Chief Justice Best said: "The present case is clearly distinguishable from Boydell *v.* Drummond, where upon the face of the agreement it appeared that the contract was not to be executed within a year." [1]

In Souch *v.* Strawbridge (1846), 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof'; pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of Boydell *v.* Drummond, the rule to be extracted from which is, that, where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In Murphy *v.* O'Sullivan (1866), 11 Irish Jurist (N. S.) 111, the Court of Exchequer Chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot, and Chief Justice Monahan, reviewing the English cases, held that under the Irish statute of frauds of 7 Will. III. c. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of McGregor *v.* McGregor, 21 Q. B. D. 424 (1888), the English Court of Appeal held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain her-

[1] Promises which by their terms extend over 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; Hutchison, 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, aff'd. 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.

self and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down by Chief Justice Tindal in the passage above quoted from Souch *v.* Strawbridge. Lord Justice Lindley said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for two hundred years has been accepted as the leading case on the subject. In Peter *v.* Compton, it was held that 'an agreement that is not to be performed within the space of a year from the making thereof' means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in Murphy *v.* O'Sullivan, above cited, and to disapprove the opposing decision of Hawkins, J., in Davey *v.* Shannon, 4 Ex. D. 81.

The cases on this subject in the courts of the several States are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed.), c. 13, that we shall refer to but few of them, other than those cited by counsel in the case at bar.

In Peters *v.* Westborough, 19 Pick. 364, an agreement to support a girl of twelve years old until she was eighteen was held not to be within the statute.[1] Mr. Justice Wilde, in delivering judgment, after quoting Peter *v.* Compton, Fenton *v.* Emblers, and Boydell *v.* Drummond, above cited, said: "From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend upon any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

In many other States, agreements to support a person for life have

[1] Wooldridge *v.* Stern, 42 Fed. Rep. 311; White *v.* Murtland, 71 Ill. 250; McKinney *v.* McCloskey, 8 Daly, 368, 76 N. Y. 594; Taylor *v.* Deseve, 81 Tex. 246, *acc.* 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.

Goodrich *v.* Johnson, 66 Ind. 258; Shute *v.* Dorr, 5 Wend. 204; Jones *v.* Hay, 52 Barb. 501, *contra.*

been held not to be within the statute. Browne on Statute of Frauds, § 276. The decision of the Supreme Court of Tennessee in Deaton v. Tennessee Coal Co., 12 Heisk. 650, cited by the defendant in error, is opposed to the weight of authority.

In Roberts v. Rockbottom Co., 7 Met. 46, Chief Justice Shaw declared the settled rule to be that "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year"; and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and that he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more clearly that the contract might end within a year, if Leforest should quit the agency within that time."

In Blanding v. Sargent, 33 N. H. 239, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed, that is, incapable in any event of being performed, within one year from the time it is made"; and that "if by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and therefore that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other States are to the same effect. Browne on Statute of Frauds, § 277.

In Hinckley v. Southgate, 11 Vt. 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. Browne on Statute of Frauds, § 279.

In Linscott v. McIntire, 15 Maine, 201, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to pay

to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statute of frauds; Chief Justice Weston saying: "The sale did not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen, until after that time."

In Herrin *v.* Butters, 20 Maine, 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been performed within the year, for it was to clear eleven acres in three years, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, and to receive in consideration thereof all the proceeds of the land, except the two acres first seeded down.

In Broadwell *v.* Getman, 2 Denio, 87, the Supreme Court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In Pitkin *v.* Long Island Railroad, 2 Barb. Ch. 221, cited by the defendant in error, a bill in equity to compel a railroad company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property, was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because from its nature and terms it was not to be performed by the company within one year from the making thereof.

In Kent *v.* Kent, 62 N. Y. 560, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of

the work should be paid out of his estate after his death, which did not happen until twenty years after the son ceased work, was not within the statute. Judge Allen, delivering the judgment of the Court of Appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In Saunders *v.* Kasterbine, 6 B. Monroe, 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly instalments of from $4 to $8 each, which would necessarily postpone performance, by either party, beyond the year.

In Railway Co. *v.* Whitley, 54 Ark. 199, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was made in Sweet *v.* Desha Lumber Co., 56 Ark., 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in Packet Co. *v.* Sickles, 5 Wall. 580, which arose in the District of Columbia under the statute of 29 Car. II. c. 3, § 4, in force in the State of Maryland and in the District of Columbia. Alexander's British Statutes in Maryland, 509; Ellicott *v.* Peterson, 13 Md. 476, 487; Comp. Stat. D. C., c. 23, § 7.

That was an action upon an oral contract by which a steamboat company agreed to attach a patented contrivance, known as the Sickles cut-off, to one of its steamboats, and if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay to the plaintiffs weekly, for the use of the cut-off, three fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract, the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute; and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." 5 Wall. 594–596. And refer-

ence was made to Birch *v.* Liverpool, 9 B. & C. 392, and Dobson *v.* Collis, 1 H. & N. 81, in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In Packet Co. *v.* Sickles, it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or might not happen within one year. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 5 Wall. 581, 594; s. c. (Lawyer's Cop. Pub. Co. ed.) bk. 18, pp. 552, 554. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent, and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1875, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the State had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. McPherson *v.* Cox, 96 U. S. 404, 416, 417; Walker *v.* Johnson, 96 U. S. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the Supreme Court of the State are in accord with the current of decisions elsewhere.

In Thouvenin *v.* Lea, 26 Tex. 612, the court said: "An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year." In that case, the owner of land orally agreed to sell it for a certain price, payable in five years; the purchaser agreed to go into possession and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract, (by reducing it to writing, for instance, as was stipulated should be done,) or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See also Thomas *v.* Hammond, 47 Tex. 42.

In the very recent case of Weatherford, &c. Railway *v.* Wood, 88 Tex. 191, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for ten years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that where there is a contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens." "If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. The statute only applies to contracts *not 'to be performed* within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would

have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give to Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other." 88 Tex. 195, 196.

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a saw-mill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it"; and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth, or in the mind, of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to reenact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of," lands or tenements, and, in the other clause, "or any interest in or concerning them." Stat. 29 Car. II. c. 3, §§ 1, 4; Texas Rev. Stat. of 1879, arts. 548, 2464; 1 Paschal's Digest, arts. 997, 3875; James *v.* Fulcrod, 5 Tex. 512, 516; Stuart *v.* Baker, 17 Tex. 417, 420; Anderson *v.* Powers, 59 Tex. 213.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.[1]

[1] Heflin *v.* Milton, 69 Ala. 354; 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.* Voigt, 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, *acc.*

Dobson *v.* Collis, 1 H. & N. 81; 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., 70 S. W. Rep. 1081 (Mo. App.); 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, *contra.* See also Buhl *v.* Stephens, 84 Fed. Rep. 922; Swift *v.* Swift, 46 Cal. 266; Butler *v.* Shehan, 61 Ill. App. 561.

JOHN DOYLE *v.* JOHN DIXON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1867.

[*Reported in* 97 *Massachusetts*, 208.]

CONTRACT for breach of an agreement by the defendant not to go into the grocery business in Chicopee for five years.[1]

At the new trial in the superior court, before ROCKWELL, J., after the decision reported 12 Allen, 576, it appeared in evidence that the defendant was a grocer at Chicopee, and that on November 19, 1864, he and the plaintiff entered into an agreement and signed a memorandum thereof in writing, by which it was provided that on December 1 ensuing the defendant would transfer to the plaintiff his stock of goods, and would lease to the plaintiff his shop for five years, at an agreed rent, receiving from the plaintiff the market value of the stock, and five hundred dollars besides as bonus, and that if either party should "back out" he should forfeit to the other two hundred dollars.

It appeared also that on November 21 the plaintiff went to the defendant's shop and said that some of his family were sick at North Brookfield and he wanted to go home, and would like to take the lease at once and "settle up the whole business," and the defendant agreed to do so, and proposed that they should go to an attorney's office for the lease to be drawn. One witness testified that, during this conversation, "the defendant said he had some flour coming, and asked if the plaintiff would take it of him; and the plaintiff said he did not want it, that he had not much capital and it would not be convenient to take it; and the defendant said, Will you give me the privilege of selling it? and the plaintiff said, Yes; and the defendant thanked him for it and said he would not trouble him by going into business in five years." The plaintiff himself testified that the defendant said, "I have a lot of flour coming; if you don't want to buy it, will you give me the privilege to sell it?" that he replied, "Yes;" and that the defendant then said, "If you'll let me sell the flour it is all I want, and I shall not trouble you in the grocery business in Chicopee in five years."

It appeared further that the parties then went to an attorney's office, and that, while the lease was in preparation, the plaintiff asked if it would not be well to mention in it that the defendant was not to go into the business in Chicopee for five years, and the defendant said it would be foolish, and the attorney said that there was no need of it; that the parties agreed that the lease thus drawn should be deposited with the parish priest; and that a day or two before December 1 the plaintiff paid the bonus of five hundred dollars, and on or before that

[1] Only so much of the case is printed as relates to the Statute of Frauds.

day all the other stipulations of the memorandum signed on November 19 were fully performed by the parties respectively.

It was also in evidence that on May 15, 1866, the defendant did enter into the grocery business in Chicopee, and continued in it to the time of the commencement of this action on August 15 following.

The plaintiff claimed his right of action only upon and by virtue of the agreement of November 21; whereupon the defendant requested the judge to rule that he could not recover upon an oral agreement not to go into the grocery business in Chicopee within five years, because such agreement was not to be performed within one year from the making thereof and was within the statute of frauds; but the judge ruled the contrary.

The defendant alleged exceptions.

A. L. Soule, for the defendant.

G. M. Stearns, for the plaintiff.

GRAY, J. It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters *v.* Westborough, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill *v.* Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon *v.* King, 11 Met. 411;

Worthy *v.* Jones, 11 Gray, 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

Exceptions overruled.[1]

CHERRY *v.* HEMING & NEEDHAM.

IN THE EXCHEQUER, DECEMBER 5, 1849.

[*Reported in* 4 *Exchequer*, 631.]

THIS was an action of covenant on an indenture, dated the 31st of March, 1836, whereby the plaintiff assigned certain letters patent to the defendants, who covenanted to pay the plaintiff 840*l.*, by instalments extending over several years, subject to a proviso, that if, at the expiration of twelve months from the date of the indenture, the defendants should not approve of the working of the patent, and should give notice of their disapprobation, and of their intention to sell the patent, then the payment of the first instalment should be suspended; and if, having given such notice, the defendants should within six months sell the patent, then the covenant should cease and determine. The defendants pleaded *non est factum*.

At the trial, before PLATT, B., at the Middlesex Sittings after Easter Term, 1849, it appeared that the defendant Needham had executed the deed, and there was the signature to it of all the parties, except that of the defendant Heming. There was, however, a seal at the foot of the deed for each party, being the seal ordinarily used in the office of the plaintiff's attorney who prepared the deed, and who had attested the execution of the defendant Needham. The deed was produced out of the custody of Heming. The defendants had endeavored to work the patent, but, being dissatisfied with it, sent the following notice in the handwriting of the defendant Heming, and signed by both the defendants: —

[1] Witter *v.* Gottschalk, 5 Ohio Dec. 77, 25 Ohio St. 76, *contra*. Compare O'Neal *v.* Hines, 145 Ind. 32.

"In pursuance and by virtue of a proviso in that behalf, contained in an indenture bearing date the 31st of March, 1836, and made between Elizabeth Cherry of the first part, George Wheldon of the second part, John Ratliff of the third part, and the undersigned Dempster Heming and Joseph Smith Needham of the fourth part, We, the said Dempster Heming and Joseph Smith Needham, do hereby give you notice that we do not approve of the working and exercising of the letters patent and invention assigned by the said indenture to us; and we do further give you notice, that it is our intention *bonâ fide* to sell or otherwise duly dispose of the said letters patent and premises, within six calendar months after the date of this notice, in any manner, to any person or persons willing to purchase the same, for the best price in money that can be reasonably obtained for the same; and we do further give you notice, that we shall pay, retain, and apply the money to arise from such sale in manner directed in and by the said indenture."

It was objected, that there was no evidence of the execution of the deed by the defendant Heming; but the learned Judge ruled that there was evidence for the jury. It was also objected, that this was a contract within the 4th section of the Statute of Frauds, 29 Car. II. c. 2, and ought, therefore, to have been signed by the defendant Heming. His Lordship was of opinion that a deed was not within the meaning of that statute, and a verdict was found for the plaintiff.

PARKE, B. The rule must be discharged. With respect to the question, whether this is an instrument within the Statute of Frauds, I think that Donellan *v.* Read is an answer; and, in my opinion, that case was rightly decided. The question turns upon the construction of the words "not to be performed;" and in Donellan *v.* Read the Court considered that those words meant, not to be performed on either side, and did not include cases where the contract was performed on the one side. That was certainly in accordance with the opinion expressed by Lord Tenderden in Bracegirdle *v.* Heald. If Donellan *v.* Read had been simply a decision on a doubtful point, we ought to be bound by it, unless manifestly wrong; and the learned observations of Mr. Smith are not sufficient to induce me to say that it was wrongly decided. The case of Peter *v.* Compton, which he relies on, does not support his view. All that can be said of that case is, that, there being two answers to the Statute of Frauds, Lord Holt gives one which is satisfactory, namely, that the agreement might have been performed within the year. It is unnecessary to give an opinion on the other points; but I must own that I think a deed is not within the Statute of Frauds, because, in my opinion, that statute was never meant to apply to the most solemn instrument which the law recognizes. I also think that the notice which refers to the deed would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the statute. I do not mean to be concluded by this expression of my opinion on the two latter points, but only to state my present impression.

ALDERSON, B. — I also think that Donellan *v.* Read is good law; but even if it were not, this case would not require its assistance, because,

this being the case of a deed, it must be taken to have been sealed by the parties in due form, and the statute does not apply to such instruments, but only to parol agreements.

ROLFE, B. I am strongly inclined to think that the statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

PLATT, B., concurred.

Rule discharged.[1]

DIETRICH ET AL *v.* HOEFELMEIR.

MICHIGAN SUPREME COURT, JULY 19, 1901.

[*Reported in* 128 *Michigan*, 145.]

MOORE, J. This is an action of trover brought to recover the value of 40 sheep claimed to have been converted by the defendant to his own use on the 6th day of January, 1900. The declaration was in the usual form of declarations in trover. The plea was the general issue, with notice of a contract between the parties by which the defendant took 20 sheep from the plaintiffs, to double in four years from the 6th day of January, 1896, and also a notice of tender. Some time in the month of December, 1895, one of the plaintiffs met the defendant at his place of business in Ravenna, when the defendant wanted to know if the plaintiff had any sheep to sell. Plaintiff Leo Dietrich said he had no sheep to sell, but would let defendant have 20 sheep on shares, to double in four years, provided it was satisfactory to his brother Jacob. Soon after that date, and on the 6th day of January, 1896, the defendant went to the place of the plaintiffs to get the sheep, when it was agreed between the plaintiffs and defendant as follows: —

"Plaintiffs agreed to let the defendant have 20 sheep, all ewes, and all with lamb, all good size and good grade; the defendant to take said sheep to double in four years; and return at the end of four years 40 ewe sheep, all to be with lamb, and the same grade or quality of sheep, to be delivered by the defendant to the plaintiffs at his (defendant's) farm."

[1] Compare Milsom *v.* Stafford, 80 L. T. 590.

The sheep delivered were from 2 to 6 years old. Defendant was to return sheep not younger than 2 nor more than 6 years old. A demand was made upon him for the sheep. Upon his refusal to deliver them, this suit was brought.

At the conclusion of the testimony for the plaintiffs, counsel for defendant moved the court "to direct a verdict in favor of the defendant —

"*First*, upon the ground that the contract testified to by the witnesses for the plaintiffs is a verbal contract, and not one to be performed within a year by the defendant, and therefore within the statute of frauds, so called;

"*Second*, upon the ground that the transaction on January 6th and prior thereto between these parties concerning these sheep, as testified to by the plaintiffs' witnesses, was a sale of the sheep, and not a bailment, and that the title passed to the defendant, and the plaintiffs have no title or interest in the specific sheep for which they seek to recover in this action of trover; and,

"*Third* (which is covered in that, perhaps), that an action of trover will not lie. If any action would lie, it would be an action of *assumpsit*."

The trial judge was of the opinion that the contract was within the statute of frauds and was absolutely void, and directed a verdict for the defendant. The case is brought here by writ of error.

Counsel, in their brief, say:

"The position of defendant may be stated as follows: —

"1. The contract on the part of defendant to deliver to plaintiffs 40 sheep at the end of four years was not in writing, and by its terms was not to be performed within one year, and therefore was within the statute of frauds. The contract on the part of plaintiffs to deliver to defendant 20 sheep was to be performed presently, and was fully executed, and therefore was not within the statute of frauds.

"2. The transaction constituted a sale, and not a bailment, of the sheep by plaintiffs to the defendant.

"3. The plaintiffs have mistaken the form of their action. While they might have recovered upon the appropriate common counts in an action of *assumpsit*, they cannot recover in the present action of trover."

We think this position is not tenable. Were it not for the statute of frauds, this contract would not be void; and, were it completely executed, it would be taken out of the statute, so that neither party could question its validity. Browne, Stat. Frauds (5th ed.), § 116. The plaintiffs are not invoking the aid of the statute to avoid the contract. That is done by defendant, who has agreed by parol to do something which he now refuses to do because the contract was not made in writing, after the other parties have performed their agreement. The defendant cannot separate an agreement, which all the parties regarded as an entire one, into two parts, and say that one of

these parts was performed within a year, and therefore makes a complete contract, by which defendant has obtained title to the property, while, as to the other part of the contract, by which defendant was to return twice the number of the sheep which he had received, that as that agreement was not to be performed within a year, and has never in fact been performed, it is void because not in writing, and therefore he will not perform it. To allow this contention would be to permit the making of a contract never contemplated by the parties.

Under the provisions of subdivision 1, § 9515, 3 Comp. Laws, the contract the parties undertook to make was void because it could not be performed within a year, and was not in writing. The circuit judge was right in declaring it to be absolutely void. Scott v. Bush, 26 Mich. 418, 421 (12 Am. Rep. 311); Kelly *v.* Kelly, 54 Mich. 30, 48 (19 N. W. 580); Raub *v.* Smith, 61 Mich. 543, 547 (28 N. W. 676, 1 Am. St. Rep. 619); Wardell *v.* Williams, 62 Mich. 50, 62 (28 N. W. 796, 4 Am. St. Rep. 814); Winner *v.* Williams, 62 Mich. 363, 366 (28 N. W. 904). If this is so, it did not convey the title of the sheep to the defendant, but the title remained with the plaintiffs. After the defendant has got possession of the sheep belonging to plaintiffs by reason of a contract made void by the statute, he cannot invoke the aid of the statute to defeat the title of the plaintiffs, and say the same contract confers upon himself title to the property. The law is not so unfair and unjust as that would be. The title to the sheep, then, remaining in the plaintiffs, and the defendant, without the consent of the plaintiffs, having sold them, and having, upon demand made, refused to return them, the plaintiffs were entitled to maintain this action.

Judgment reversed and new trial ordered.

The other justices concurred.[1]

[1] 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, *acc.* See also Reinheimer *v.* Carter, 31 Ohio St. 579, 587.

Rake's Adm. *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; 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; McClellan *v.* Sanford, 26 Wis. 595; Washburn *v.* Dosch, 68 Wis. 436, *contra.* See also Sheehy *v.* Adarene, 41 Vt. 541.

JESSE W. BILLINGTON, RESPONDENT, *v.* MICHAEL CAHILL, APPELLANT.

NEW YORK SUPREME COURT, JANUARY TERM, 1889.

[*Reported in* 51 *Hun*, 132.]

MARTIN, J. The defendant dismissed the plaintiff from his service on the 26th day of November, 1885. The plaintiff claims that such discharge was wrongful in that it was a breach of the contract between them by which the defendant employed the plaintiff for the period of one year from April 1, 1885. It was to recover damages for such alleged breach of contract that this action was brought.

In his complaint the plaintiff alleges that on or about the month of March, 1885, the plaintiff and defendant entered into an agreement whereby the plaintiff agreed to work for the defendant at farm work for the term of one year, to commence on the 1st day of April, 1885, and expire on the 31st day of March, 1886, at the stipulated price of thirty dollars per month, payable monthly during that time; that the plaintiff was also to have the use of a certain house and garden situated on defendant's farm; to have a certain quantity of milk, a certain proportion of the chickens and eggs produced on the premises, a team to draw his coal or fuel, half of a pig and what fruit was necessary for his family use. The defences interposed by the defendant were: 1. A substantial denial of the allegations of the complaint. 2. That the plaintiff had been fully paid. 3. That the plaintiff was properly discharged for not complying with the conditions of his employment, and for not faithfully discharging the duties of his service.

On the trial the defendant moved for a nonsuit upon the ground that the contract upon which the plaintiff sought to recover was void under the statute of frauds, and that the plaintiff was properly discharged for disobeying defendant's order. This motion was denied and the defendant duly excepted. The correctness of this decision is challenged by the appellant, and presents the questions: 1. Whether the contract between the parties was within the statute of frauds and consequently void. 2. Whether the plaintiff was improperly discharged.

That the agreement between the parties was in writing, or that there was any note or memorandum thereof, is not claimed; that it was made in the month of March, and was for the employment of the plaintiff for the term of one year, to commence on the 1st day of April, 1885, was alleged in the complaint and proved by the plaintiff on the trial; so that upon the plaintiff's own showing, the agreement was for his employment by the defendant for the full term of one year, to commence at a future day. Hence, the question is presented, whether the contract was void as being within the provisions of the statute of frauds, which declares that every agreement that by its terms is not to be performed within one year from the making thereof shall be void, unless such agreement or some note or memorandum thereof be in writing and

subscribed by the party to be charged therewith. 3 R. S. (7th ed.) 2327, § 2.

The appellant contends that the agreement between the parties, as alleged and proved by the plaintiff, was within the statute and void, and that the court erred in denying the defendant's motion for a nonsuit. It seems to be admitted by the respondent that if the agreement was made prior to the 31st day of March, 1885, it was void under the statute of frauds; but he claims that there was evidence sufficient to justify the jury in finding that the agreement was made on the thirty-first of March; that it so found, and, therefore, the agreement could have been fully performed within one year from the making thereof, and was not within the statute.

An examination of the plaintiff's evidence in this case tends to show quite conclusively that the agreement was, in fact, made several days before the 31st of March, 1885. He testified that he had three conversations with the defendant; that at the first conversation, which he testified was about the tenth of March, the defendant stated to him the price which he would pay and the things he would furnish the plaintiff if employed by him; that upon the second occasion, which was several days before the first of April, he told the defendant that he had made up his mind to accept his offer, but there were a few things which he wanted to talk about, which were talked over and agreed upon; that subsequently, upon the thirty-first day of March, and after he had moved all his goods on to the defendant's premises, save the last load, he and the defendant had another conversation about the contract; that he told the defendant they had better have their contract understood and have writings so there would not be any trouble about it; that the defendant said he did not think they needed any writings; that both understood the bargain, and that they did not have any. But upon his cross-examination the plaintiff testifies, in substance, that the terms of the agreement between them were restated by the parties on that day. While doubting the sufficiency of that evidence to show that the contract was made on that day (Oddy *v.* James, 48 N. Y. 685; Wanamaker *v.* Rhomer, 23 Weekly Dig. 60; Snelling *v.* Lord Huntingfield, 1 C. M. & R. 20), still, it is possible, if the contract was valid if made then, that there was sufficient evidence to justify the submission of that question to the jury, and to uphold its finding that the contract was made at that time. If, however, we assume that the contract between the parties was completed on March thirty-first, then the inquiry is presented whether a contract for the employment of another for the term of one year, to commence on the following day, is within the foregoing provision of the statute of frauds. The respondent contends that it is not, and cites, as authorities sustaining his contention, the cases of Cawthorne *v.* Cordrey, 13 C. B. (N. S.) 406; Dickson *v.* Frisbee, 52 Ala. 165; and McAleer *v.* Corning, 50 Super. Ct. (J. & S.), 63. A careful examination of the case of Cawthorne *v.* Cordrey discloses that the doctrine contended for was not held in that case. While

the head note is to the effect that a contract for a year's service made on the twenty-fourth of March, to commence on the twenty-fifth of the same month, is not void by the statute of frauds, still, when the case is examined it will be seen that all that was decided was that there was evidence in that case upon which the jury might find that the contract was made on Monday for service for a year from that day, and that it was to be performed within a year from that time. Britain *v.* Rossiter, L. R. 11 Queen's Bench Div. 123, 124.

In the case of Dickson *v.* Frisbee the doctrine contended for was held by the Supreme Court of Alabama, but the decision in that case was based upon the case of Cawthorne *v.* Cordrey, and upon an understanding that that case decided that a contract made on one day for a year's service to commence on the next, was not within the statute. As we have seen, it was not so held in that case, hence, the Dickson case was decided under a misapprehension of the decision in the Cawthorne case, which very materially diminishes the importance of that case as an authority upon the question. It was held in the McAleer case that if a contract of hiring is made for one year to begin *in præsenti*, although no services are to be performed by the employee until a future day, the contract is operative from the day of its making, and the year ends with the endings of one year from that day, and such a contract is not within the statute. This examination of the authorities cited by the respondent shows that none of the cases relied upon by him uphold the doctrine for which he contends, except the case of Dickson *v.* Frisbee, and that that case was decided upon a misapprehension of the decision in the Cawthorne case. On the other hand, the authorities cited by the appellant seem to hold the doctrine quite distinctly that such a contract is within the statute and void.

In Bracegirdle *v.* Heald, 1 Barn. & Ald. 722, it was held that a contract for a year's service to commence at a subsequent day, being a contract not to be performed within the fourth section of the statute of frauds, must be in writing. In that case Lord Ellenborough said: "This case falls expressly within the authority of Boydell *v.* Drummond, 11 East, 142, and if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for in point of reason an excess of twenty years will equally not be within the act. Such difficulties rather turn upon the policy than upon the construction of the statute. If a party does not reduce his contract into writing he runs the risk of its not being valid in law, for the legislature has declared in clear and intelligible terms that every agreement that is not to be performed within the space of one year from the making thereof shall be in writing."

In Snelling *v.* Lord Huntingfield, 1 C., M. & R. 20, where A, on the twentieth of July, made proposals in writing (unsigned), to B to enter his service as bailiff for a year, and B took the proposals and went away, and entered into A's service on the twenty-fourth of July,

it was held that this was a contract on the twentieth, not to be performed within the space of one year from the making, and was within the fourth section of the statute of frauds.

In Levison *v.* Stix, 10 Daly, 229, it was held that an oral agreement made on the thirty-first day of December for services to be rendered for a period of one year, which was to terminate on the thirty-first day of December of the following year, was void under the statute of frauds. In delivering the opinion in that case, the court says: "In fact, it is impossible to see, if the term of service is to commence at any time subsequent to the time of making the contract, and the contract is for a full year, how it is possible that it should be performed within a year. It is undoubtedly the intention of the statute to require that all contracts which are not to be performed within one year from the time of making shall be in writing; and, in order that they shall be completed within the year, it is absolutely necessary that the time of making and the year of performance must be within the same year; and if the time of making is to be excluded and the time of performance is to be a full year, the contract cannot be performed within the year within which it was made."

In Sutcliffe *v.* Atlantic Mills, 13 R. I. 480, where an oral contract was made between A and B on August twentieth, by which A was to enter B's service for one year, A to begin the term of service as soon as he could, and A began to work for B August twenty-seventh, it was held that the contract was within the statute of frauds, being an oral contract and not to be performed within a year, and that an action by A against B for a breach of this contract could not be maintained.

In Wood on the Statute of Frauds, it is said "a contract for a year's service to commence at a future day, being a contract not to be performed within a year from the making thereof, is within the statute." Sec. 272. The same doctrine is laid down in Smith on the Law of Master and Servant, and Wood on Master and Servant. Oddy *v.* James, 48 N. Y. 685; Amburger *v.* Marvin, 4 E. D. Smith, 393; Blanck *v.* Littell, 9 Daly, 268; Nones *v.* Homer, 2 Hilt. 116.

To hold that a contract made on the 31st day of March for service for one year, to commence on the first day of April, was not within the statute of frauds, would be to evade and not to execute that statute. The mandate of the statute is positive that an agreement that, by its terms, is not to be performed within one year from the making thereof shall be void, unless it is evidenced by some writing signed by the party to be charged therewith. It is not apparent to us how it can be fairly held that a contract for a full year's service can be performed within one year from the making thereof, when it was made on a day previous to the commencement of the year. If this statute can be thus extended for one day, why may it not be extended indefinitely? The agreement in this case was within the letter and intent of the statute, even if made when claimed by the respondent. The weight of the authorities is to that effect.

We are of the opinion that the agreement, as alleged and proved by the plaintiff, was within the provision of the statute of frauds and void; that the trial court erred in denying the defendant's motion for a nonsuit made on that ground; and that for such error the judgment should be reversed. This conclusion renders it unnecessary to examine the other questions in the case.

Judgment and order reversed on the exceptions, and a new trial granted, with costs to abide the event.

FOLLETT and KENNEDY, JJ., concurred.

Judgment and order reversed on the exceptions, and a new trial granted with costs to abide the event.[1]

WILLIAM D. ODELL, RESPONDENT, *v.* HENRY WEBENDORFER, APPELLANT.

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, APRIL TERM, 1900.

[*Reported in* 50 *New York Supreme Court, Appellate Division,* 579.]

HIRSCHBERG, J. The plaintiff alleges that he was hired by the defendant on April 1, 1898, to work his farm for one year and to furnish an additional man, for which he was to be paid sixty dollars a month, and to receive house rent, a horse once a week, four quarts of milk per day, potatoes, apples, and stable room. He claims that he was unlawfully discharged December 1, 1898, and sues for his money wages during the remainder of the term, and for the value of the "privileges." The defendant denied that the hiring was for a year, alleged that the discharge was for adequate cause, and pleaded the Statute of Frauds.

The agreement for hiring, as stated by the plaintiff, was oral, and was made in the middle of March, 1898, for a year, to commence April 1, 1898. The plaintiff claims that the agreement was renewed April 1, 1898, but his evidence would seem to be limited to proof

[1] Dollar *v.* Parkington, 84 L. T. 470, *acc.* See 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.

A contract of personal service for more than a year is generally held within the statute though the death of the employee may terminate the contract within the year. 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, 70 S. W. Rep. 1081 (Mo. App.); 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.

that its terms were merely restated, and that no new contract was actually entered into on that day. He said on direct examination: "Q. Was this talk the first of April? A. We were mentioning over what it was already understood. Q. What was the talk? A. That was it. Q. Did you have a similar talk with him before? A. I did. Q. What was the occasion of your speaking to him that day? A. After I made the arrangements with Mr. Webendorfer to work for him, I heard that he did n't always stand up to his agreements, and I thought to make myself safe I would repeat it there on the first day of April, and have an understanding." On cross-examination he said: "Q. So that when it came the first of April you had no agreement to make with Mr. Webendorfer at all? A. Only to repeat the bargain. Q. Answer the question. Did you have any further agreement with him, did you have any further agreement or contract on the first day of April? A. I did n't presume it was necessary, but as I say, as I heard Mr. Webendorfer did n't always stand up to his agreements, I thought that it was necessary for me to repeat the contract, and see if it was satisfactory. Q. On the first day of April you talked over your previous contract? A. Yes, sir. Q. You made no new contract? A. No, sir, just the previous bargain."

By the plaintiff's own showing the contract was not made on the first of April. No contract was made that day, but only the terms of the prior contract were restated by either him or the defendant, for the sake of certainty as to the mutual obligations. What was actually said on the first of April does not appear in the case at all. This is not sufficient to take the case out of the operation of the statute. A new contract then made is requisite; that is, the former contract should then be expressly renewed or the employer cannot be held bound. Oddy *v.* James, 48 N. Y. 685; Berrien *v.* Southack, 26 N. Y. St. Rep. 932; Billington *v.* Cahill, 51 Hun, 132.

It was error also to permit the jury to include the "privileges" in the assessment of damages. The plaintiff made no proof whatever as to the money value of the privileges, and there was, therefore, nothing in the case on which the damages created by their loss could be estimated.

The judgment and order should be reversed and a new trial granted. All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.[1]

"[1] On the new trial the plaintiff testified that on the 1st day of April, 1898, he had a separate and distinct understanding with the defendant as to what the bargain would be; that he stated to the defendant that he supposed his work was to commence that morning to continue for the year, and that they then had an understanding in his language as follows: 'He,' the defendant, 'said I was to work for the year and have sixty dollars a month, and I was to furnish my man, and I was to have the privilege of house rent, wood, potatoes, apples, and milk, and a horse and wagon once a week. I was to pay the hired man. Mr. Webendorfer was to pay me, and I was to pay the hired man out of what Mr. Webendorfer paid me. I was to board the hired man, and

LYDIA DERBY *v.* GEORGE W. PHELPS.

NEW HAMPSHIRE SUPERIOR COURT OF JUDICATURE, NOVEMBER TERM, 1822.

[*Reported in* 2 *New Hampshire*, 515.]

THIS was an action of assumpsit on a promise of marriage. At the trial here, under the general issue, and a plea of the statute of limitations, the plaintiff proposed to prove, that in A. D. 1811, the defendant, being about to commence the study of his profession, desired the plaintiff to receive his addresses as a suitor, and at the end of about five years, when he expected to be settled in business, to marry him; and that, in pursuance of this offer, his addresses were received, and continued till the defendant's marriage with another lady, in A. D. 1820.

This evidence was objected to, as within the statute of frauds; but having been admitted, a verdict was found for the plaintiff, subject to future consideration on the validity of the above objection.

S. Wilcox and *R. Fletcher*, for plaintiff.

Phelps, *Bell*, *Chamberlain*, and *Bartlett*, for the defendant.

WOODBURY, J. Our statute "to prevent frauds and perjuries," provides, among other things, "that no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, or upon any agreement, that is not to be performed within the space of one year from the time of making it, unless such promise or agreement" "be in writing," &c. 1 N. H. Laws, 178.

The defendant cannot avail himself of the first clause above cited; because, though once decided in Philpott *v.* Wallet, 3 Lev. 65, that a contract to marry must in all cases be in writing; yet, that decision has since been overruled in Cork *v.* Baker, 1 Stra. 34, and in Harri-

under that arrangement I went to work for Mr. Webendorfer at that time.' If this conversation really was had between the parties on April first, being in effect a distinct renewal of the contract as previously made and agreed upon, it would serve to take the case out of the operation of the statute, notwithstanding that the terms of both contracts were identical. On the second trial the plaintiff further testified that the first contract was made on Sunday and on election day, and that was one of the reasons why, to quote his words, 'I took pains to make the contract on the 1st of April again.' He further testified: 'Q. How did you happen to have this talk that you spoke of, with Mr. Webendorfer on the morning of the first of April? A. Well, because I had heard that Mr. Webendorfer didn't always stand to his agreements, and I thought to have myself secured. I thought I would make a new arrangement on the first of April and everything would be all right. Q. You thought you would repeat the bargain? A. I thought I would make the bargain.'

"The difference in his evidence given on the two trials is vital. On the first trial the suggestion was a mere rehearsal of the terms of the original contract for the purpose of avoiding any misunderstanding as to what they were. On the second trial he testified that the bargain was expressly renewed. Odell *v.* Webendorfer, 60 N. Y. App. Div. 460, 461." See also Comes *v.* Lamson, 16 Conn. 246; Sines *v.* Superintendents, 58 Mich. 503; Turner *v.* Hochstadter, 7 Hun, 80; Lajos *v.* Eden Musee Co., 30 N. Y. Supp. 916.

son *v.* Cage and wife, 1 Ld. Ray. 386; Salk. 24; 5 Mod. 411; Bull. N. P. 280; 2 Eq. Ca. Ab. 248; Skin. 196.

This clause of the statute is now held to reach not mutual promises to marry, but only promises for other things made in consideration of marriage. Bac. Ab. "Agreement," C. 3.

But under the other clause of the statute, we apprehend the objection to the evidence must be adjudged fatal. This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been, that the contract should be fulfilled on a certain event, which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. 1 Salk. 280; Skin. 326; Stra. 34; Burr. 1278; 1 Bl. Rep. 353; 1 Ld. Ray. 317; Com. Rep. 49; Holt, 326; 3 Salk. 9; 10 John Rep. 244.

But such was not the tenor of it. Nor can this description of contracts be taken out of the statute by the circumstance, that when the original statute of frauds passed under Charles the II., these contracts were not sued at law, but were merely the subject of proceedings to compel a performance of them in the ecclesiastical courts. For numerous kinds of contracts, not then in use and not then prosecuted in the common law courts, have since had birth under the new exigencies and improvements of society, and are all brought to the test of the general provisions of the statute.

In respect to a part performance of this contract, which doubtless, if proved, might cure the absence of any writing (Bac. Ab. "Agreement," C., and Auths. there cited), the case as saved presents no question of this kind, and, according to our recollection, none such was raised at the trial.

Should this be relied on hereafter as an answer to the statute, it will then be early enough to decide what ought to be considered a part performance of a contract, on whose rites and ceremonies, and their respective importance in perfecting a marriage, so much diversity of opinion exists. See Londonderry *v.* Chester, 2 N. H. 268.

New trial.[1]

[1] Ullman *v.* Meyer, 10 Fed. Rep. 241; Paris *v.* Strong, 51 Ind. 339; Nichols *v.* Weaver, 7 Kan. 373; Barge *v.* Haslam (Neb.), 88 N. W. Rep. 516. See also McConahey *v.* Griffey, 82 Ia. 564; Lawrence *v.* Cooke, 56 Me. 187, 193.

Lewis *v.* Tapman, 90 Md. 294; Brick *v.* Gannar, 36 Hun, 52, *contra*. See also Clark *v.* Pendleton, 20 Conn. 495; Nearing *v.* Van Fleet, 71 Hun, 137, 151 N. Y. 643.

E. — Contracts for the Sale of Goods.

LEE *v.* GRIFFIN.

In the Queen's Bench, May 9, 1861.

[*Reported in* 1 *Best & Smith*, 272.]

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea. That the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of 21*l.* for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the sittings for Middlesex after Michaelmas Term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows: —

"My dear Sir. I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, &c., Frances P."

Shortly after writing the above letter, Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29, Car. II. c. 3., and the learned Judge was of that opinion. The plaintiff's counsel then contended that, on the authority of Clay *v.* Yates, 1 H. & N. 73, the plaintiff could recover in the action on the count for work and labor done and materials provided. The learned Judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

In Hilary Term following, a rule *nisi* having been obtained accordingly,

Patchett now showed cause.

Griffits, in support of the rule, was not called upon to argue.

Crompton, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of

Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of showing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. Clay *v.* Yates, 1 H. & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labour, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in Clay *v.* Yates, *supra*, is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. Atkinson *v.* Bell, 8 B. & C. 277, is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J. in Grafton *v.* Armitage, 2 C. B. 339, where he says: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff." And Tindal, C. J., in his judgment in the same case, p. 340, points

out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of Atkinson *v.* Bell, 8 B. & C. 277, is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted: no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In Atkinson *v.* Bell, *supra*, the contract, if carried out, would have resulted in the sale of a chattel. In Grafton *v.* Armitage, 2 C. B. 340, Tindal, C. J., lays down this very principle. He draws a distinction between the cases of Atkinson *v.* Bell, *supra*, and that before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other:" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of Clay *v.* Yates, 1 H. & N. 73, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description,

might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless, be a contract for the sale of a chattel.

Rule absolute.[1]

GODDARD *v.* BINNEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[*Reported in* 115 *Massachusetts*, 450.]

CONTRACT to recover the price of a buggy built by the plaintiff for the defendant.

Trial in the Superior Court before DEWEY, J., who reported the case for the consideration of this court in substance as follows:

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and the plaintiff entered the order in his order-book; the defendant gave directions that the color of the lining should be drab, and the outside seat of cane, and as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of $675 was agreed as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered.

The last of August, when the buggy was nearly completed, wanting only the last coat of varnish, and the hanging of it on the wheels, the defendant came to the plaintiff's place of business and asked when it would be done. The plaintiff replied in about ten days, and asked the defendant if he might sell the buggy, or if he wished it, as he, the plaintiff, had opportunities of selling it to others. The defendant then inquired if the plaintiff could furnish him another if he sold that, to which he replied he could not, as he was going to give up the business of manufacturing, and that unless he took this he could not have any. The defendant then said he would keep this one.

The defendant did not at this, nor at any other time, see the buggy. The buggy was finished September 15, in accordance with the original order. It is usual to keep carriages some time after they are finished to let the paint and varnish harden.

October 14, 1872, the plaintiff sent to the defendant the following bill: "Boston, October 14, 1872. Mr. H. P. Binney. Bo't of Thos. Goddard, one new cane seat buggy, $675. Rec'd Pay't. (Buggy was finished Sept. 15.)"

[1] Isaacs *v.* Hardy, 1 Cab. & E. 287; Burrell *v.* Highleyman, 33 Mo. App. 183; Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 272; Pratt *v.* Miller, 109 Mo. 78, *acc.*

The bill was presented by a clerk of the plaintiff. The defendant, after looking at it, said he would see the plaintiff soon. The bill was in the plaintiff's handwriting and was kept by the defendant. The same clerk called again soon after and asked the defendant for a check, to which he replied that he would pay it soon, and would see the plaintiff. Calling a third time, before the fire of November 9th, the defendant said, "Tell Mr. Goddard I will come and see him right away." By the fire of November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed. After the fire the plaintiff again called on the defendant for payment. He wanted to know if it was insured, and said he would see the plaintiff about it.

After the buggy was finished, it was kept with the completed work on the plaintiff's premises; and it was at all times after it was finished till burned worth and could have been sold by the plaintiff for upwards of $700, the value of buggies of the plaintiff's manufacture having advanced after the contract was made in April.

The defendant put in no evidence, and contended that this action could not be maintained, that it came within the provisions of the Gen. Sts. c. 105, § 5, and that there had never been any delivery of the said buggy to the defendant, nor any acceptance thereof by him, and that the property belonged to and was at the sole risk of the plaintiff at the time of the fire, and that if any cause of action arose against the defendant for not taking away the said buggy, it arose prior to the fire, and no damage was caused to the plaintiff thereupon. The plaintiff contended that the contract did not come within the provision of the statute referred to, and that it was the duty of the defendant, upon being notified that the buggy was completed, to take the same away within a reasonable time, and that not having done so the buggy was at the risk of the defendant when burned.

The plaintiff further contended that upon the evidence the jury would be authorized to find that there had been a delivery of the buggy to the defendant, and an acceptance by him, and without submitting that question to the jury it was agreed by the parties, that if there was any evidence which could have properly been submitted to the jury as showing a delivery, and an acceptance of the buggy by the defendant, then it shall be taken that the jury would have found said delivery and acceptance.

Upon the evidence hereinbefore stated, the presiding judge directed a verdict for the defendant; and it was agreed that if the jury would have been authorized to find a delivery and an acceptance by the defendant, or if upon the facts above stated the court is of opinion that at the time of the fire the said buggy was on the premises of the plaintiff, at the risk of the defendant, the verdict is to be set aside, and judgment entered for $675 and interest, from October 15, 1872; otherwise, judgment on the verdict.

C. A. Welch, for the plaintiff.

G. Putnam, Jr., for the defendant. The contract between the

plaintiff and defendant was not one for labor and materials, but was a contract, the result of which, when carried out, would be the change of property in the chattel from the plaintiff to the defendant, and therefore was a contract of sale within the statute of frauds. Benjamin on Sales, 79 *& seq.;* Lee *v.* Griffin, 1 B. & S. 272; Atkinson *v.* Bell, 8 B. & C. 277; Moody *v.* Brown, 34 Me. 107. In the cases of Mixer *v.* Howarth, 21 Pick. 205, and Spencer *v.* Cone, 1 Met. 283, it was held that the statute of frauds does not apply to contracts for the manufacture of articles not in the usual course of the vendor's business; but this is on the ground that the statute does not apply to executory contracts, unless they relate to articles usually sold by the vendor. It has never been decided in Massachusetts that such contracts are for labor and material.

The case of Mixer *v.* Howarth rests on a supposed distinction which more recent criticism has shown not to be based on principle nor on a sound construction of the statute. Benjamin on Sales, 79; Lee *v.* Griffin, and Moody *v.* Brown, *supra.* It is noticeable that every case which has since arisen in the Commonwealth, except Spencer *v.* Cone, 1 Met. 283, which was decided the next year in a *per curiam* opinion, has been distinguished from it. Gardner *v.* Joy, 9 Met. 177; Lamb *v.* Crafts, 12 Met. 353; Waterman *v.* Meigs, 4 Cush. 497; Clark *v.* Nichols, 107 Mass. 547. If the decision of Mixer *v.* Howarth rests upon the distinction between articles which the plaintiff usually has for sale in the course of his business and articles which he manufactures expressly to order, then that decision is overruled in principle by the later case of Lamb *v.* Crafts, where the court says: "When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor." In Mixer *v.* Howarth, as in this case, the article was manufactured in the course of the plaintiff's business, and consequently the transaction was a contract of sale, within the meaning of Lamb *v.* Crafts.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank *v.* Burrell, 18 Johns. 58; Sewell *v.* Fitch, 8 Cow. 215; Robertson *v.* Vaughn, 5 Sandf. 1; Downs *v.* Ross, 23 Wend. 270; Eichelberger *v.* M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as sub-

stantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this Commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done

but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon *v.* Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyers should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent Com. (12 ed.) 492; Bloxam *v.* Sanders, 4 B. & C. 941; Tarling *v.* Baxter, 6 B. & C. 360; Hinde *v.* Whitehouse, 7 East, 571; Macomber *v.* Parker, 13 Pick. 175, 183; Morse *v.* Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and *Judgment entered for the plaintiff.*[1]

[1] Flynn *v.* Dougherty, 91 Cal. 669; Atwater *v.* Hough, 29 Conn. 508; Cason *v.* Cheely, 6 Ga 554; Hight *v.* Ripley, 19 Me. 137; Cummings *v.* Dennet, 26 Me. 397; Abbott *v.* Gilchrist, 34 Me. 260; Edwards *v.* Grand Trunk R. R. Co., 48 Me. 379; Crockett *v.* Scribner, 64 Me. 447; Turner *v.* Mason, 65 Mich. 662; Phipps *v.* McFarlane, 3 Minn. 109; Russell *v.* Wisconsin Ry. Co., 39 Minn. 145; Brown & Haywood Co. *v.* Wunder, 64 Minn. 450; Pitkin *v.* Noyes, 48 N. H. 294; Prescott *v.* Locke, 51 N. H. 94; Finney *v.* Apgar, 31 N. J. L. 266; Pawelski *v.* Hargreaves, 47 N. J. L. 334; Orman *v.* Hager, 3 N. Mex. 331; Puget Sound Depot *v.* Rigby, 13 Wash. 264; Meincke *v.* Falk, 55 Wis. 427; Hanson *v.* Roter, 64 Wis. 622; Williams-Hayward Shoe Co. *v.* Brooks, 9 Wyo. 424, *acc.* See also Sawyer *v.* Ware, 36 Ala. 675; Pratt *v.* Miller, 109 Mo. 78; Scales *v.* Wiley, 68 Vt. 39. Compare Smalley *v.* Hamblin, 170 Mass. 380.

PARSONS *v.* LOUCKS.

NEW YORK COURT OF APPEALS, SEPTEMBER, 1871.

[*Reported in* 48 *New York*, 17.]

APPEAL from judgment of the General Term of the Superior Court, in the city of New York, affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

The action is to recover damages for an alleged breach of contract to manufacture and deliver a quantity of paper.

The referee to whom this case was referred found, and reported as matter of fact:

1st. That on or about the 30th day of October, 1862, it was agreed between the plaintiffs and the defendants, who then were and still are copartners as paper manufacturers, that the defendants should manufacture and deliver to the plaintiffs, at the city of New York, ten tons, to wit, 20,000 pounds of book paper, similar to other paper which the defendants had previously made for the plaintiffs, as soon as they, the defendants, should finish certain other orders for paper, which they stated they had on hand, and would take about three weeks from said date last mentioned, with a fair supply of water, to finish; and that the plaintiffs on such delivery should pay the defendants therefor thirteen cents a pound, less a discount of five per cent.

2d. That in the month of January, 1863, and in or about the middle of that month, the defendants stated to the plaintiffs that they would not perform the said agreement, or manufacture or deliver said paper, and refused the said agreement, although thereto requested by the plaintiffs, and that the plaintiffs were at all times ready and willing to receive said paper and pay for the same, pursuant to the terms of the said agreement, and that said defendants have never delivered to said plaintiffs said ten tons of paper, or any part thereof, but have refused so to do.

3d. That by reason of the breach of the said agreement the plaintiffs have sustained damage to the amount of $1,930, as of the time when such breach occurred, the difference between the contract price (thirteen cents, less five per cent discount) per pound, and the market price of such paper (twenty-two cents per pound) at the time of such breach, on 20,000 pounds, amount to said sum of $1,930.

As matter of law: That the plaintiffs are entitled to recover of the defendants said sum of $1,930, with interest thereon since the 1st day of January, 1863, that is to say, the sum of $2,301.51, with costs.

Augustus F. Smith, for the appellants.

John E. Parsons, for the respondents.

HUNT, C. J. The paper to be delivered was not in existence at the time of the making of the contract in October, 1862. It was yet to be brought into existence by the labor and the science of the defendants. Of the 20,000 pounds to be delivered, not an ounce had then been

manufactured. It was all of it to be created by the defendants, and at their mill. In such a case it is well settled, that the statute of frauds does not apply to the contract. The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase-price. The latter is not. The statute reads, "every contract *for the sale* of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless," etc. 2 R. S. 136, § 3. The statute alludes to a *sale* of goods, assuming that the articles are already in existence. This distinction was settled in this State in 1820, by the case of Crookshank *v.* Burrell (18 John. R. 58), and has been followed and recognized in many others. Sewell *v.* Fitch, 8 Cowen, 215; Robertson *v.* Vaughan, 5 Sand. S. C. R. 1; Bronson *v.* Wiman, 10 Barb. 406; Donovan *v.* Willson, 26 Barb. 138; Parker *v.* Schenck, 28 id. 38; Mead *v.* Case, 33 id. 202; Smith *v.* N. Y. Central R. R., 4 Keyes, 194.

The present is not one of the border cases, in which an embarrassing or doubtful question is presented, as where wheat is sold, but the labor of thrashing remains to be done (Downs *v.* Ross, 23 Wend. 270), or a sale of flour which has yet to be ground from the wheat (Garbutt *v.* Watson, 5 B. & Ald. 613), or the sale of wood or timber which requires to be cut or corded (Smith *v.* N. Y. Central R. R. *supra*), nor where the defendants might procure other parties to manufacture the paper. 3 Pars. on Contracts, 52. It was a simple naked agreement to manufacture at their own mills, and deliver at a specified price, 20,000 pounds of paper of specified sizes, no part of which was in existence at the time of making the contract. Indeed, there is no evidence that the rags and other materials from which it was to be manufactured were owned by the defendants, or were in existence, except so far as it may be argued that matter is indestructible, and that in some form they must necessarily have then existed. As to cases of this character, the course of decisions in this State has been uniform. If we desired to do otherwise, we have no choice; we must follow them.

The judgment must be affirmed with costs.

All concur for affirmance, except GRAY, C., dissenting.[1]

Judgment affirmed.[2]

[1] The dissenting opinion of GRAY, C., is omitted.

[2] In Cooke *v.* Millard, 65 N. Y. 352, the defendants desiring to purchase lumber, went to the plaintiff's yard and were shown lumber of the desired quality, but which needed to be dressed and cut into the different sizes desired. An order was given orally for certain quantities The order was complied with, and the lumber was placed as ordered on the plaintiff's dock. While there it was burned. The plaintiffs sued for the price. DWIGHT, Commissioner, in giving judgment for the defendant, said:

"The New York rule is still different. It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour

FRANCES GREENWOOD, PLAINTIFF IN ERROR, *v.* GEORGE LAW, DEFENDANT IN ERROR.

NEW JERSEY COURT OF ERRORS OF APPEALS, NOVEMBER TERM, 1892.

[*Reported in* 55 *New Jersey Law*, 168.]

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this state for the sum of $3,700. Law alleged that Greenwood entered into a parol agreement with him to assign him this mortgage for the sum of $3,000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement.

On the trial below, a motion was made to nonsuit the plaintiff, on the ground that the alleged agreement was within the statute of frauds. The refusal of the trial court to grant this motion is assigned for error.

Lord Chief Justice Denman, in Humble *v.* Mitchell, reported in 11 Ad. & E. 205, and decided in 1840, said that no case directly in point

from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word *sale*. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court Parsons *v.* Loucks, 48 N. Y. 17, 19. The contrast between Parsons *v.* Loucks, in this State, on the one hand, and Lee *v.* Griffin, 1 Best & Smith, 272, in England on the other, is, that in the former case the word *sale* refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this State agreeing with Parsons *v.* Loucks, are Crookshank *v.* Burrel, 18 J. R. 58; Sewall *v.* Fitch, 8 Cow. 215; Robertson *v.* Vaughn, 5 Sandf. S. C. 1; Parker *v.* Schenck, 28 Barb. 38. These cases are based on certain old decisions in England, such as Towers *v.* Osborne, 1 Strange, 506, and Clayton *v.* Andrews, 4 Burrow, 2101, which have been wholly discarded in that country.

"The case at bar does not fall within the rule in Parsons *v.* Loucks. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and, so far as appears, not even the rags, 'except so far as such existence may be argued from the fact that matter is indestructible.' So in Sewall *v.* Fitch, *supra*, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

"Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser — dressed and put in a condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed upon principle. . . .

"In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so even to the clapboards. Although not strictly in existence as claphoards, they fall within the rule in Smith *v.* Central Railroad Company. They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of Parsons *v.* Loucks, where the

on this subject had been found, and he held that shares in an incorporated company were not goods, wares, and merchandise within the seventeenth section of the statute of frauds.

He overlooked the cases of Mussell *v.* Cooke, reported in Precedents in Chancery, 533 (decided in 1720), and Crull *v.* Dodson, reported in Select Cases in Chancery, 41 (decided in 1725), in which the contrary view was taken.

In the case of Pickering *v.* Appleby, Com. 354, this question was fully argued before the twelve judges, who were equally divided upon it. The cases decided in the English courts since 1840 have followed Humble *v.* Mitchell.[1] They will be found collected in Benjamin on Sales (ed. 1888), in a note on page 106.

In this country a different rule prevails in most of the states.

In Baldwin *v.* Williams, 3 Metc. 365, a parol contract for the sale of a promissory note was held to be within the statute.[2]

In Connecticut and Maine a contract for the sale of shares in a joint stock company is required to be in writing. North *v.* Forest, 15 Conn. 400; Pray *v.* Mitchell, 60 Me. 430.[3]

Chief Justice Shaw, after a full discussion of the subject in Tisdale *v.* Harris, 20 Pick. 9, concludes that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute of frauds, and in the absence of the other requisites of the statute must be proved by some note or memorandum in writing signed by the party to be charged or his agent. He did not regard the argument, that by necessary implication the statute applies only to goods of which part may be delivered as worthy of much consideration. An animal is not susceptible of part delivery, yet undoubtedly the sale of a horse by parol is within the statute. The exception in the statute is, when part is delivered; but if there cannot

product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In Gilman *v.* Hall, 36 N. H. 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence and a sale."

Bennett *v.* Nye, 4 Greene, (Ia.) 410 (compare Mighell *v.* Dougherty, 86 Ia. 480; Lewis *v.* Evans, 108 Ia. 296; Dierson *v.* Petersmeyer, 109 Ia, 233); Eichelberger *v.* McCauley, 5 H. & J. 213; Bagby *v.* Walker, 78 Md. 239; Deal *v.* Maxwell, 51 N. Y. 652; Higgins *v.* Murray, 4 Hun, 565, 73 N. Y. 252; Rutty *v.* Consolidated Fruit Jar Co., 58 Hun, 611; Winship *v.* Buzzard, 9 Rich. 103; Suber *v.* Pullin, 1 S. C. 273; Mattison *v.* Wescott, 13 Vt. 258; Ellison *v.* Brigham, 38 Vt. 64; Forsyth *v.* Mann, 68 Vt. 116, *acc.* See also Hientz *v.* Burkhard, 29 Oreg. 55.

[1] Webb *v.* Baltimore, &c. Railroad, 77 Md. 92, *acc.*

[2] Riggs *v.* Magruder, 2 Cranch, 143; Hudson *v.* Weir, 29 Ala. 294; Gooch *v.* Holmes, 41 Me. 523; Pray *v.* Mitchell, 60 Me. 430, 435; Somerby *v.* Buntin, 118 Mass. 279, *acc.*; Vawter *v.* Griffin, 40 Ind 593; Whittemore *v.* Gibbs, 24 N. H. 484, *contra.* See also Howe *v.* Jones, 57 Ia. 130.

[3] Mayer *v.* Child, 47 Cal. 142; Southern Trust Co. *v.* Cole, 4 Fla. 359; Banta *v.* Chicago, 172 Ill. 204, 218; Colvin *v.* Williams, 3 H. & J. 38 (overruled); Tisdale *v.* Harris, 20 Pick. 9; Boardman *v.* Cutter, 128 Mass. 388; Fine *v.* Hornsby, 2 Mo. App. 61; Bernhardt *v.* Walls, 29 Mo. App. 206, *acc.*

be a delivery in part, the exception cannot exist to take the case out of the general prohibition.

Bonds and mortgages were expressly held to be goods and chattels in Terhune v. Executors of Bray, 1 Harr. 53. That was an action of Trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which upon sound legal principles such securities are goods and chattels.

This sense ought to be applied to these words in this case.

Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property.

The words "goods, wares, and merchandise" in the sixth section of the statute are equivalent to the term "personal property," and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section. In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit.[1]

BALDEY and Another v. PARKER.

In the King's Bench, June 5, 1823.

[*Reported in* 2 *Barnewall & Cresswell*, 37.]

Assumpsit for goods sold and delivered. Plea, general issue. At the trial before Abbott, C. J., at the London Sittings after Trinity Term 1822, the following appeared to be the facts of the case. The plaintiffs are linen-drapers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for

[1] In some jurisdiction choses in action are expressly included by the words of the statute. Hinchman v. Lincoln, 124 U. S. 38; Artcher v. Zeh, 5 Hill. 200; People v. Beebe, 1 Barb. 379; Peabody v. Speyers, 56 N. Y. 200; Tompkins v. Sheehan, 158 N. Y. 617 (compare Aguirre v. Allen, 10 Barb. 74; Kessel v. Albetis, 56 Barb. 362); Spear v. Bach, 82 Wis. 192.

In Somerby v. Buntin, 118 Mass. 279 (as also in Jones v. Reynolds, 120 N. Y. 213), it was decided that an oral agreement for the sale of an interest in an invention before letters-patent had been obtained could be enforced, and the court said: The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." These words are quoted with approval in Meehan v. Sharp, 151 Mass. 564, and in Vincent v. Vieths, 60 Mo. App. 9. See also Banta v. Chicago, 172 Ill. 204, 218. In Walker v. Supple, 54 Ga. 178, however, a sale of book accounts was held within the statute.

No choses in action are held within the English Act. Colonial Bank v. Whinney, 30 Ch. D. 261, 283. Compare Evans v. Davies, [1893] 2 Ch. 216.

each, and no one article was of the value of 10*l.* Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l.* The defendant looked at the account, and asked what discount would be allowed for ready money, and was told 5*l.* per cent.; he replied that it was too little, and requested to see the person of whom he bought the goods (Baldey), as he could bargain with him respecting the discount, and said that he ought to be allowed 20*l.* per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The Lord Chief Justice thought that this was a contract for goods of more than the value of 10*l.* within the meaning of the seventeenth section of the statute of frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favor for 70*l.* A rule having accordingly been obtained for that purpose,

Scarlett and *E. Lawes* now showed cause.

Denman and *Platt*, contra.

ABBOTT, C. J. We have given our opinion upon more than one occasion, that the 29 Car. II. c. 3, is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the legislature, which was the prevention of fraud. It appeared from the facts of this case, that the defendant went into the plaintiffs' shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him. The first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs therefore cannot maintain this action unless they can show that the case is within the exception of the 29 Car. II. c. 3, s. 17. Now the words of that exception are peculiar, "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

HOLROYD, J. I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of 10*l.* and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last therefore it was one entire contract within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.* it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act. With respect to the exception in the seventeenth section, it may perhaps have been the intention of the legislature to guard against mistake, where the parties mean honestly as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Each of those particulars either shows the bargain to be complete, or still further, that it has been actually in part performed. The change of possession does not in ordinary cases take place until the completion of the bargain: part payment also shows the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to show that some further arrangement might not remain unsettled after the price for each article has been agreed upon. There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

Rule discharged.[1]

[1] BAYLEY and BEST, JJ., delivered brief concurring opinions.

See further Emmerson *v.* Heelis, 2 Taunt, 38; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* Eastern Counties Ry. Co., 12 M. & W. 33; Bigg *v.* Whisking, 14 C. B. 195; Weeks *v.* Crie, 94 Me. 458; Jenness *v.* Wendell, 51 N. H. 63; Allard *v.* Greasert, 61 N. Y. 1; Tompkins *v.* Sheehan, 158 N. Y. 617.

SECTION II.

SATISFACTION OF THE STATUTE.

CUSACK AND OTHERS *v.* ROBINSON.

IN THE QUEEN'S BENCH, MAY 25, 1861.

[*Reported in* 1 *Best & Smith*, 299.]

DECLARATION for goods sold and delivered, and goods bargained and sold. Plea, never indebted. At the trial, before BLACKBURN, J., at the Liverpool Winter Assizes in 1860, it appeared that the defendant, who was a London merchant, on the 24th October, 1860, at Liverpool, called on the plaintiffs, who are importers of Canadian produce, and said he wanted to buy from 150 to 200 firkins of Canadian butter. He then went with one of the plaintiffs to their cellar, where he was shown a lot of 156 firkins of butter, "Ex-Bohemian," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which, however, did not suit the defendant. At a later period of the same day, the plaintiffs and the defendant made a verbal agreement, by which the defendant agreed to buy that specific lot of 156 firkins, at 77*s.* per cwt. When the price had been agreed on, the defendant took a card on which his name and address in London were written "Edmund Robinson, 1, Wellington Street, London Bridge, London," and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs, and at the same time said that his agents, Messrs. Clibborn, at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. The plaintiffs, by Clibborn's directions, delivered the butter to Pickford's carts to be forwarded to the defendant at Fenning's Wharf. The plaintiffs sent an invoice, dated the 25th October, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th October the plaintiffs, in Liverpool, received a telegram from the defendant in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty, that was equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept. A clerk at Fenning's Wharf proved that Messrs. Fennings

stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October, Pickford & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th October. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to Pickford & Co. under a delivery order from the defendant dated 27th October. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded 10*l.*, and that there was nothing proved to satisfy the requisitions of the statute of frauds. The verdict was entered for the plaintiffs for 420*l.* 10*s.* 1*d.*, with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

In Hilary term, 1861, Edward James obtained a rule nisi accordingly, citing Nicholson *v.* Bower, 1 E. & E. 172, which rule was argued at the sittings in banc after Easter term, on the 9th May, before HILL and BLACKBURN, JJ.

Mellish and *Quain* showed cause.

Milward, in support of the rule.

The judgment of the court was now delivered by

BLACKBURN, J. (After fully stating the facts his lordship proceeded). It was not contended that there was any sufficient memorandum in writing in the present case; but it was contended that there was sufficient evidence that the defendant had accepted the goods sold, and actually received the same; and, on consideration, we are of that opinion.

The words of the statute are express, that there must be an acceptance of the goods, or part of them, as well as an actual receipt; and the authorities are very numerous to show that both these requisites must exist or else the statute is not satisfied. In the recent case of Nicholson *v.* Bower, *supra*, which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat; on the contrary, it was shown to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods, and each of the judges mentions that fact as the ground of their decision. In Meredith *v.* Meigh, 2 E. & B. 364, the goods, which were not specified in the original contract, had been selected

by the vendor, and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with Hanson *v.* Armitage, 5 B. & Ald. 557, that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree: for, though the selection of the goods by the vendor, and putting them in transit, would, but for the statute, have been a sufficient delivery to vest the property in the vendee; it could not be said that the selection by the vendor, or the receipt by the carrier, was an acceptance of those particular goods by the vendee.

In Baldey *v.* Parker, 2 B. & C. 37, which was much relied on by Mr. Milward in arguing in support of this rule, the ground of the decision was that pointed out by Holroyd, J., who says, p. 44: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retrain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." The principle here laid down is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, as unpaid vendor, so as to preserve his lien; and it has been repeatedly recognised. But though the goods remain in the personal possession of the vendor, yet, if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute; Marvin *v.* Wallis, 6 E. & B. 726; Beaumont *v.* Brengeri, 5 C. B. 301. In both of these cases the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods, when placed in Fenning's Wharf, were put under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had, at Liverpool, selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance, and the only remaining question is, whether it is necessary that the acceptance should follow, or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In Saunders *v.* Topp, 4 Exch. 390, which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff 45 couple of sheep which the defendant, the purchaser, had himself selected,

and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was, in addition, some evidence that the defendant, after seeing them in the field counted them and said it was all right, and, as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. Parke, B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant, but in his judgment he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three Barons — Alderson, Rolfe, and Platt — express an inclination of opinion that it is necessary, under the statute, that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord Campbell in Morton *v.* Tibbet, 15 Q. B. 428, in which the nature of an acceptance and actual receipt sufficient to satisfy the statute is fully expounded, he says (p. 434): "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." The intention of the legislature seems to have been that the contract should not be good unless partially executed, and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor, by the vendee's directions, parts with the possession, and puts them under the control of the vendee so as to put a complete end to all the rights of the unpaid vendor as such. We think, therefore, that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are, therefore, of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged.

Rule discharged.[1]

[1] "There is nothing in the statute which fixes or limits the time within which a purchaser is to accept and receive part of the goods sold, or give something in earnest to bind the bargain, or in part payment." Marsh *v.* Hyde, 3 Gray, 331.

The English Sale of Goods Act, provides, § 4 (3): "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not." This definition follows Kibble *v.* Gough, 38 L. T. R. 204, and Page *v.* Morgan, 15 Q. B. D. 228. Compare Taylor *v.* Smith, [1893] 2 Q. B. 65. Under this definition examining goods and rejecting them is an acceptance. Abbott *v.* Wolsey, [1895] 2 Q. B. 97.

In America, this forced construction does not prevail. See Browne on the Statute of Frauds, chap. xv.

WALKER *v.* NUSSEY.

IN THE EXCHEQUER, JANUARY 18, 1847.

[*Reported in* 16 *Meeson & Welsby*, 302.]

DEBT for goods sold and delivered, and on an account stated. Pleas, — 1st, never indebted; 2d, a set-off for goods sold and delivered, and on an account stated. Issues thereon. At the trial, before the undersheriff of Yorkshire, it appeared that, the defendant having sold goods to the plaintiff to the amount of 4*l.* 14*s.* 11*d.*, the defendant, on a subsequent occasion, bought of him a lot of leather, of two sorts, by sample. It was then verbally agreed between them, that the 4*l.* 14*s.* 11*d.* due to the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant, with this invoice: —

"HALIFAX, Oct. 14th, 1846.

"Mr. William Nussey, bought of Thomas Walker.

	£	*s.*	*d.*
Dressed hide bellies, 287 at 9*d.*	10	15	3
Insole, 376 at 6½	10	3	8
	20	18	11
By your account against me	4	14	11"

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the 4*l.* 14*s.* 11*d.* The plaintiff refused to receive the goods, and brought this action, stating, in his particulars of demand, that the action was brought to recover the sum of 16*l.* 4*s.*, as the "balance of the following account" (setting out the above invoice).

The undersheriff ruled, that there was nothing to show that the 4*l.* 14*s.* 11*d.* had been given by the defendant in earnest, or part of payment, under 29 Car. II. c. 3, s. 17, and left nothing to the jury, except on the point of acceptance of the goods by the defendant, directing them to find for him if they thought he returned the goods in a reasonable time, without taking to them. The jury found a verdict for the defendant on both issues.

POLLOCK, C. B. I think no rule ought to be granted. The plaintiff sues for goods sold and delivered by him, to the defendant, above 10*l.* in value, and it was admitted that the defendant had previously sold him goods for 4*l.* 14*s.* 11*d.* On the new dealing between them the agreement was, that the sum should be taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the amount of the goods bought from him. This contract was verbal; but it is argued that the 4*l.* 14*s.* 11*d.* was a part payment by the defendant, so as to take the case out of the statute of frauds. But I think it was not. Here

there was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by the plaintiff. Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of 4*l.* odd, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute.

PARKE, B. I am of the same opinion, and think the ruling at the trial was right. The facts seem to be these. The plaintiff owed the defendant a sum of 4*l.* 14*s.* 11*d.* The parties then verbally agreed that the plaintiff should sell to the defendant goods above 10*l.* in value, according to a given sample, the plaintiff's debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely. If Mr. Addison could have shown the contract to have been, that the parties were to be put in the same situation at that time, as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant, and repaid by him to the plaintiff as earnest, the statute might have been satisfied, without any money having passed in fact; but the agreement was in fact, that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not "give something in earnest to bind the bargain, or in part of payment." The "part payment" mentioned in the statute must take place either at or subsequent to the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff; either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest, or in part of payment, then or subsequently.

ALDERSON, B. The 17th section of the statute of frauds implies, that to bind a buyer of goods of 10*l.* value, without writing, he must have done two things; first, made a contract, and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment that term cannot alone be equivalent to actual part payment. In this case, the part payment, or

whatever else the bargain may amount to, is part of that bargain itself, and cannot be wrested into proof of an actual payment, without repealing the statute, and suffering a verbal contract for the sale of goods of 10*l.* value to have effect, without the safeguards provided by law against fraud in such cases.

PLATT, B. In this case, as no note in writing was signed by the parties, it is clear, from section 17, that something was to be done by way of ratifying the bargain, in addition to it, and at the time of its being made. If, on making the bargain, the defendant resigned the debt previously due to him from the plaintiff, or discharged the plaintiff's liability to that amount, that would not be giving earnest at the time of the bargain made, or in part of payment of the whole sum then due from the defendant. As to any discharge of the plaintiff from liability to the defendant at the time of making the second bargain between them, no receipt for the plaintiff's debt was given by the defendant, or any other thing done by him, so that everything rested in mere verbal contract, and nothing in the evidence makes it binding on the defendant. *Rule refused.*[1]

THE SALMON FALLS MANUFACTURING COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM W. GODDARD.

SUPREME COURT OF THE UNITED STATES.

[*Reported in* 20 *Curtis*, 276; 14 *Howard*, 446.]

NELSON, J., delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

[1] See further Raymond *v.* Colton, 104 Fed. Rep. 219; Galbraith *v.* Holmes, 15 Ind. App. 34; Dieckman *v.* Young, 87 Mo. App. 530; Matthiessen & Co. *v.* McMahon, 38 N. J. L. 536; Artcher *v.* Zeh, 5 Hill, 200; Edgerton *v.* Hodge, 41 Vt. 676; Sharp *v.* Carroll, 66 Wis. 62.

"In any view we can take of the matter, we perceive no sufficient reason for supposing that the payment, in the contemplation of the framers of this statute, was restricted to a payment made at the precise period of making the verbal agreement. It is doubtless true that, until such payment of part of the purchase money, the contract would be of no validity, and it would be entirely competent for either party to repudiate it. Neither party would be bound by its terms; the vendee would be under no obligation to make a payment, and the vendor under no obligation to receive one. But when actually made and accepted with the full concurrence of both parties, then the contract takes effect; then a part payment of the purchase money has been made; and then the parties have made a valid contract. This would seem to be a very reasonable construction of the statute, if it was necessary to decide the abstract question of the effect of payment of a part of the purchase money, after the same time of entering into a verbal contract." Dewey, J., Thompson *v.* Alger, 12 Met. 428, 436.

See to the same point, Davis *v.* Moore, 13 Me. 424; Gault *v.* Brown, 48 N. H. 189. Where, however, as in New York, the statute expressly requires payment at the time of the contract, it is necessary that there should be at least a "restatement or recognition of the essential terms of the contract" when payment is made. See Bissell *v.* Balcom, 39 N. Y. 275; Hawley *v.* Keeler, 53 N. Y. 114; Hunter *v.* Wetsell, 84 N. Y. 549.

The suit was brought by the plaintiffs in the court below to recover the price of three hundred bales of brown, and of one hundred cases of blue drills, which they had previously sold to the defendant.

The contract for the purchase was made with the house of Mason and Lawrence, agents of the plaintiffs, in Boston, on the 19th September, 1850, and a memorandum of the same signed by the parties. A bill of parcels was made out under date of 30th September, stating the purchase of the goods by the defendant, carrying out prices and footing up the amount at $18,565.03; also the terms of payment — note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on the 11th October, and in pursuance of an order from him, the three hundred bales were sent from their establishment at Salmon Falls by the railroad and arrived at the depot in Boston on the 30th October, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse, or place of delivery, for the reason as subsequently stated by his clerk, there was no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery by letter, adding that the goods remained at the depot at his risk, and subject to storage, to which no answer was returned. On the night of the 4th November, the railroad depot was consumed by fire, and with it the three hundred bales of the goods in question. The price was to be paid by a note at twelve months, which the defendant refused to give, upon which refusal this action was brought.

The court below, at the trial, held that the written memorandum, made at the time of entering into the contract between the agents of the plaintiffs and the defendant, was not sufficient to take the case out of the statute of frauds, and as there was no acceptance of the goods, the plaintiffs could not recover.

As we differ with the learned judge who tried the cause, as to the sufficiency of the written memorandum, the question upon the statute is the only one that it will be material to notice. The memorandum is as follows: —

"Sept. 19, — W. W. Goddard, 12. mos.
300 bales S. F. drills 7¼
100 cases blue do. 8¾
Credit to commence when ship sails: not after Dec. 1 — delivered free of charge for truckage.
The blues, if color satisfactory to purchasers.

R. M. M.
W. W. G."

The statute of Massachusetts on this subject is substantially the same as that of 29 Car. II. c. 3, § 17, and declares that no contract for the sale of good, &c., shall be valid, &c., "unless some note or memorandum in writing of the bargain be made, and signed by the

party to be charged thereby, or by some person thereunto by him lawfully authorized."

The word "bargain," in the statute, means the terms upon which the respective parties contract; and in the sale of goods, the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the statute.

This brief note of the contract, however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them. And although specific and express provisions will control the usage, and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning. 2 Kent C. 556, and n. 3; ibid. 260, and n.; Long on Sales, 197, ed. 1839; 1 Gale & Davis, 52.

Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. Higgins *v.* Senior, 8 M. & Wels. 834; Truman *v.* Loder, 11 Ad. & Ell. 589.[1] Lord Denham observed, in the latter case: "That parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."[2]

So the signature of one of the parties is a sufficient signing to

[1] Newell *v.* Radford, L. R. 3 C. P. 52; Williams *v.* Bacon, 2 Gray, 387; Wheeler *v.* Walden, 17 Neb. 122, 124; Dykers *v.* Townsend, 24 N. Y. 57, *acc.* See also McConnell *v.* Brillhart, 17 Ill. 354.

[2] In Bibb *v.* Allen, 149 U. S. 481, the memorandum relied on was made up of slip contracts. The court said: "It is no valid objection to these 'slip contracts,' executed in duplicate, that the sales purported to be made on account of 'Albert,' 'Alfred,' 'Alexander,' 'Armanda,' and 'Winston,' etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show that these fictitious names which defendants had adopted, represented them as the parties for whom the sales were made." In Selby *v.* Selby, 3 Meriv. 2, Sir William Grant held that the signature "your affectionate Mother" was insufficient. The case is, however, questioned by Browne, § 362.

charge the firm. Soames *v.* Spencer, I D. & R. 32; Long on Sales, 58.

It has also been held, in the case of a sold note which expressed "eighteen pockets of hops, at 100*s.*," that parol evidence was admissible to show that the 100*s.* meant the price per cwt. Spicer *v.* Cooper, 1 Gale & D. 52; 5 Jurist, 1036.

The memorandum in that case was as follows: "Sold to Waite Spicer, of S. Walden, 18 pos. Kent hops, as under July 23, 1840; 10 pos. Barlow East Kent, 1839; 8 pos. Springall Goodhurst Kent, 1839, 100*s.* Delivered, JOHN COOPER."

Evidence was admitted on the trial to prove that the 100*s.* was understood in the trade to refer to the price per cwt., and the ruling approved by the king's bench. Lord Denman put a case to the counsel in the argument to illustrate his view, that bears upon the case before us. Suppose, he said, the contract had been for ten butts of beer, at one shilling, the ordinary price of a gallon — and intimated that the meaning could hardly be mistaken.

Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason and Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show that the figures $7\frac{1}{4}$ and $8\frac{3}{4}$, set opposite the three hundred bales and one hundred cases of goods, meant seven and a quarter cents, and eight and three quarter cents per yard.

The memorandum, therefore, contains the names of the sellers, and of the buyer — the commodity and the price — also the time of credit and conditions of the delivery; and, in the absence of any specified time or place of delivery, the law will supply the omission, namely, a reasonable time after the goods are called for, and usual place of business of the purchaser, or his customary place for the delivery of goods of this description.

In respect to the giving of the note, which was to run during the period of the credit, it appears to be the uniform custom of the house of Mason and Lawrence to take notes for goods sold of this description. The defendant was one of their customers, and knew this usage; and it is a presumption of law, therefore, that the purchase was made with reference to it, there being no stipulation to the contrary in the contract of the parties.

We are also of opinion, even admitting that there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, that it would be competent, under the circumstances of the case, to refer to the bill of parcels delivered, for the purpose of explanation. We do not say that it would be a note in writing, of itself sufficient to bind the defendant within the statute; though it might be to bind the plaintiff.

It was a bill of sale made out by the seller, and contained his

understanding of the terms and meaning of the contract; and having been received by the buyer, and acquiesced in, (for the order to have the goods forwarded was given after it was received,) the natural inference would seem to be, that the interpretation given was according to the understanding of both parties. It is not necessary to say that this would be the conclusion if the bill differed materially from the written contract; that might present a different question; but we think it is so connected with, and naturally resulting from, the transaction, that it may be properly referred to for the purpose of explaining any ambiguity or abbreviations, so common in these brief notes of mercantile contracts.

A printed bill of parcels, delivered by the seller, may be a sufficient memorandum within the statute to bind him, especially if subsequently recognized by a letter to the buyer. 2 B. & P. 238 D.; 3 Esp. 180. And, generally, the contract may be collected from several distinct papers taken together, as forming parts of an entire transaction, if they are connected by express reference from the one to the others. 3 Ad. & Ell. 355; 9 B. & Cr. 561; 2 ibid. 945; 3 Taunt. 169; 6 Cow. 445; 2 M. & Wels. 660; Long on Sales, 55, and cases.

In the case before us, the bill of parcels is not only connected with the contract of sale, which has been signed by both parties, but was made out and delivered in the course of the fulfilment of it; has been acquiesced in by the buyer, and the goods ordered to be delivered after it was received. It is not a memorandum sufficient to bind him, because his name is not affixed to it by his authority; but if he had subsequently recognized it by letter to the sellers, it might have been sufficient. 2 B. & P. 238; 2 M. & Wels. 653; 3 Taunt. 169.

But although we admit, if it was necessary for the plaintiffs to rely upon the bill as the note or memorandum within the statute, they must have failed, we think it competent, within the principle of the cases on the subject, from its connection with and relation to the contract, to refer to it as explanatory of any obscurity or indefiniteness of its terms, for the purpose of removing the ambiguity.

Take, for example, as an instance, the objection that the price is uncertain, the figures $7\frac{1}{4}$ and $8\frac{3}{4}$, opposite the 300 bales and 100 cases of drills, given without any mark to denote what is intended by them.

The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he ordered the goods to be forwarded.

We cannot doubt but that the bill, under such circumstances, affords competent evidence of the meaning to be given to this part of the written memorandum. And so, in respect to any other indefinite or abbreviated item to be found in this brief note of a mercantile contract.

For these reasons, we are of opinion that the judgment of the

court below must be reversed, and the proceedings remitted, with directions to award a *venire de novo.*

CATRON, J., DANIEL, J.,[1] and CURTIS, J., dissented.

CURTIS, J. I have the misfortune to differ from the majority of my brethren in this case, and, as the question is one which enters into the daily business of merchants, and at the same time involves the construction of a statute of the commonwealth of Massachusetts, I think it proper to state briefly the grounds on which I rest my opinion.

The first question is, whether the writing of the 19th of September is a sufficient memorandum within the 3d section of the 74th chapter of the revised statutes of Massachusetts. The writing is in these words and figures: —

"Sept. 19. W. W. Goddard, 12 mos.
300 bales S. F. drills 7¼,
100 cases blue " . . . . . 8¾.
Cr. to commence when ship sails; not after Dec'r 1st; delivered free of charge for truckage.

R. M. M.
W. W. G.

The blues, if color is satisfactory to purchaser."

Does this writing show, upon its face, and without resorting to extraneous evidence, that W. W. Goddard was the purchaser of these goods? I think not. Certainly, it does not so state in terms; nor can I perceive how the fact can be collected from the paper, by any certain intendment. If it be assumed that the sale was made, and that Goddard was a party to the transaction, what is there, on the face of the paper, to show whether Goddard sold or bought? Extraneous evidence that he was the seller would be just as consistent with this writing as extraneous evidence that he was the purchaser. Suppose the fact had been that Mason was the purchaser, and that the writing might be explained by evidence of that fact; it would then be read that Goddard sold to Mason, on twelve months' credit; and this evidence would be consistent with everything which the paper contains, because the paper is wholly silent as to the fact whether he was the seller or the purchaser. In Bailey *et al. v.* Ogden, 3 Johns. 399, an action for not accepting sugars, the memorandum was: —

"14 December.
J. Ogden and Co. Bailey and Bogart.
Brown, 12½, White, 16¼. } 60 and 90 days.
Debenture part pay."

Mr. Justice Kent, who delivered the opinion of the court, enumerating the objections to the memorandum, says, no person can ascertain

[1] The dissenting opinion of DANIEL, J., is omitted. His dissent was on the ground that the court had no jurisdiction of the case. On the question in regard to the Statute of Frauds, he expressed assent to the opinion of NELSON, J.

from this memorandum which of the parties was seller and which buyer; and I think it would be difficult to show that the memorandum now in question is any more intelligible in reference to this fact.

Indeed, I do not understand it is supposed that, in the absence of all extraneous evidence, it could be determined by the court, as matter of law, upon an inspection of the paper alone, that Goddard was the purchaser of these goods. The real inquiry is, whether extraneous evidence of this fact is admissible.

Now, it is true, the statute requires only some note, or memorandum, in writing, of the bargain; but I consider it settled that this writing must show who is vendor and who is purchaser. In Champion *v.* Plumer, 1 B. & P. New Rep. 252, the memorandum contained the name of the vendor, a description of the goods, and their price, and was signed by the vendee; yet, it was held that the vendee could not maintain an action thereon, because it did not appear, from the writing, that he was vendee, though it was clearly proved by parol.

In Sherburn *et al. v.* Shaw, 1 N. H. Rep. 157, the plaintiffs caused certain real estate to be sold at auction, and the defendant, being the highest bidder, signed a memorandum agreeing to take the property; this memorandum was written on a paper, headed: "Articles of sale of the estate of Jonathan Warner, deceased," containing the terms of the sale; and this paper was also signed by the auctioneer. Yet, the court through Mr. Justice Woodbury, who delivered the opinion, held that, as the paper failed to show that the plaintiffs were the vendors, it was radically defective. Here, also, there was no doubt that the plaintiffs were the vendors, but extraneous evidence to supply this fact was considered inadmissible.

It seems to me that the fact that the defendant was the purchaser is, to say the least, as necessary to be stated in the writing as any other fact, and that to allow it to be proved by parol, is to violate the intent of the statute, and encounter the very mischiefs which it was enacted to prevent. Chancellor Kent, 2 Com. 511, says: "The contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof." And this position rests upon a current of authorities, both in England and America, which it is presumed are not intended to be disturbed. But how can the contract be understood from the writing itself, when that fails to state which party is vendor and which purchaser?

I am aware that a latent ambiguity in a contract may be removed by extraneous evidence, according to the rules of the common law; and that such evidence is also admissible to show what, in point of fact, was the subject-matter called for by the terms of a contract. Bradlee *v.* Steam P. Co., 13 Pet. 98. So when an act has been done by a person, and it is doubtful whether he acted in a private or official capacity, it is allowable to prove by parol that he was an agent and

acted as such. But these cases fall far short of proving that when a statute requires a contract to be in writing, you may prove by parol the fact that the defendant was purchaser, the writing being silent as to that fact; or that a writing, which does not state who is vendor and who purchaser, does contain in itself the essentials of a contract of sale.

It is one thing to construe what is written; it is a very different thing to supply a substantive fact not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract, and it is another thing to take a writing, which on its face imports no contract, and make it import one by parol evidence. It is one thing to show that a party, who appears by a writing to have made a contract, made it as an agent, and quite a different thing to prove by parol that he made a purchase when the writing is silent as to that fact. The duty and power of the court is a duty and power to give a construction to what is written, and not in any case to permit it to be added to by parol. Least of all when a statute has required the essential requisites of a contract of sale to be in writing, is it admissible, in my judgment, to allow the fact, that the defendant made a purchase, to be proved by parol. If this fact, which lies at the basis of the action and to which every other is but incidental, can be proved by evidence out of the writing signed by the defendant, the statute seems to me to be disregarded.

It has been argued that the bill of parcels, sent to Goddard by Mason and Lawrence, and received by him, may be resorted to for the purpose of showing he was the purchaser. But it is certainly the law of Massachusetts, where this contract was made, and the case tried, as I believe it is of most other States, and of England, that unless the memorandum which is signed contains a reference to some other paper, no paper, not signed by the party to be charged, can be connected with the memorandum, or used to supply any defect therein. This was held in Morton *et al. v.* Dean, 13 Met. 385, a case to which I shall have occasion more fully to refer hereafter. And in conformity therewith, Chancellor Kent lays down the rule, in 2 Com. 511, and refers to many authorities in support of it. I am not aware that any court has held otherwise.

That this bill of parcels was of itself a sufficient memorandum under the statute, or that it was a paper signed by the defendant, or by any person by him thereunto lawfully authorized, I do not understand to be held by the majority of the court.

Now the memorandum of the 19th September is either sufficient or insufficient, under the statute. If the former, there is no occasion to resort to the bill of parcels to show who was vendor and who purchaser; if the latter, it cannot, consistently with the statute, be made good by another paper not signed, and connected with it only by parol. To charge a party upon an insufficient memorandum, added to by another independent paper, not signed, would be to charge him when

there was no sufficient memorandum signed by him, and therefore in direct conflict with the statute. It does not seem to me to be an answer, to say that the bill of parcels was made out pursuant to the memorandum. If the signed memorandum itself does not contain the essentials of a contract of sale, and makes no reference to any other paper, in no legal sense is any other paper pursuant to it — nor can any other paper be connected with it, save by parol evidence, which the statute forbids. In point of fact, it would be difficult to imagine any two independent papers more nearly connected than a memorandum made and signed by an auctioneer, and the written conditions read by him at the sale. Yet it is settled, that the latter cannot be referred to, unless expressly called for by the very terms of the signed memorandum. Upon what principle does a bill of parcels stand upon any better ground?

The distinction, heretofore, has been between papers called for by the memorandum by express reference, and those not thus called for; this decision, for the first time, I believe, disregards that distinction, and allows an unsigned paper, not referred to, to be used in evidence to charge the purchaser.

In my judgment, this memorandum was defective in not showing who was vendor and who purchaser, and oral evidence to supply this defect was not admissible.

But if this difficulty could be overcome, or if it had appeared on the face of the paper that Goddard was the purchaser, still, in my judgment, there is no sufficient memorandum. I take it to be clearly settled, that if the court cannot ascertain from the paper itself, or from some other paper therein referred to, the essential terms of the sale, the writing does not take the case out of the statute. This has been so often decided that it is sufficient to refer to 2 Kent's Com. 511, where many of the cases are collected.

The rule stated by the chancellor as a just deduction from the authorities is: "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent."

The statute, then, requires the essential terms of the sale to be in writing; the credit to be allowed to the purchaser is one of the terms of the sale.

And if the memorandum shows that a credit was to be given, but does not fix its termination, it is fatally defective, for the court cannot ascertain, from the paper, when a right of action accrues to the vendee, and the contract shown by the paper is not capable of being described in a declaration. The rights of the parties, in an essential particular, are left undetermined by the paper. This paper shows there was to be a credit of six months, and contains this clause —

"Cr. to commence when ship sails: not after December 1." According to this paper, when is this credit to commence? The answer is, when ship sails, if before December 1. What ship? The paper is silent.

This is an action against Goddard for not delivering his note on twelve months' credit, and it is an indispensable inquiry, on what day, according to the contract, the note should bear date. The plaintiffs must aver, in their declaration, what note Goddard was bound to deliver, and the memorandum must enable the court to say that the description of the notes in the declaration is correct. They attempt this by averring, in the declaration, that the contract was for a note payable in twelve months from the sailing of a ship called "The Crusader," and that this ship sailed on the sixth day of November. But the writing does not refer to the "Crusader"; and if oral evidence were admissible to prove that the parties referred to "The Crusader," this essential term of their contract is derived from parol proof, contrary to the requirement of the statute. It was upon this ground the case of Morton *et al. v.* Dean, and many other similar cases, have been decided. In that case, there was a memorandum signed by the auctioneer, as the agent of both parties, containing their names, as vendor and vendee, the price to be paid, and a sufficient description of the property. But it appeared that there were written or printed conditions read at the sale, but not referred to in the memorandum, containing the terms of credit, &c., and therefore that the memorandum did not fix all the essential parts of the bargain, and it was held insufficient.

But, further; even if oral evidence were admissible to show that the parties had in view some particular vessel, and so to explain or render certain the memorandum, no such evidence was offered, and no request to leave that question of fact to the jury was made. Mason, who made the contract with Goddard, was a witness, but he does not pretend the parties had any particular vessel in view, still less that they agreed on "The Crusader" as the vessel, the sailing of which was to be the commencement of the credit. I cannot perceive, therefore, how either of the counts in this declaration is supported by the evidence, or how a different verdict could have lawfully been rendered.

The count for goods sold and delivered, was clearly not maintained, because, when the action was brought, the credit had not expired, even if it began on the 19th of September. One of the special counts avers, that the notes were to be due twelve months from the 30th of September; but this is inconsistent with the written memorandum, and there is no evidence to support it. The other special counts all declare for a note due twelve months after the sailing of "The Crusader," but, as already stated, there is no evidence whatever to support this allegation, and a verdict of the jury, affirming such a contract, must have been set aside.

It may be added, also, that no one of the prayers for instructions,

contained in the bill of exceptions, makes the fact that the parties had reference to "The Crusader," any element of the contract, but that each of them asks for an instruction upon the assumption that this necessary term of the contract had not been in any way supplied.

I consider the language of Chief Justice Marshall, in Grant *v.* Naylor, 4 Cranch, 234, applicable to this case. That great judge says: "Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion."

I am authorized to state that Mr. Justice Catron concurs in this opinion.[1]

WRIGHT *v.* DANNAH.

AT GUILDHALL, CORAM LORD ELLENBOROUGH, JULY 4, 1809.

[*Reported in* 2 *Campbell*, 203.]

GOODS bargained and sold. — Plea, the general issue.

The action was brought for the value of four sacks of clover seed. The parties having met on the corn exchange in London, entered into a negociation for the sale of this seed; and after they had agreed on the price, the plaintiff wrote the following memorandum of the contract.

"Robert Dannah, Windley near Derby.
4 Sacks clover seed, at 6*l.* 18*s.*
Per Fly Boat."

After the plaintiff had written this memorandum, the defendant, who overlooked him while he wrote it, desired him to alter the figures 18 to 16, — 6*l.* 16*s.* being the price agreed on. This the plaintiff accordingly did. They then parted, the memorandum being left with the defendant.

Park objected that this was not a sufficient memorandum within the statute of frauds, not being signed by the party to be charged by it, or his authorized agent.

Garrow and *Puller*, contra, submitted that the defendant had made the plaintiff his agent for the purpose of signing the memorandum,

[1] In Grafton *v.* Cummings, 99 U. S. 100, 111, Mr. Justice Miller, in delivering the opinion of the court, said of Salmon Falls Manufacturing Co. *v.* Goddard: "It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers is sound law." The decision is also expressly disregarded in Mentz *v.* Newwitter, 122 N. Y. 491, 497.

by overlooking and approving of what he had written; and they put the case of a man incapable from disease or ignorance of writing for himself.

Lord ELLENBOROUGH said, the agent must be some third person, and could not be the other contracting party.

Plaintiff nonsuited.

Garrow and *Puller*, for the plaintiff.
Park, for the defendant.

JONES BROTHERS *v.* JOYNER.

IN THE QUEEN'S BENCH DIVISION, MAY 31, 1900.

[*Reported in* 82 *Law Times Reports*, 768.]

THIS was an appeal from his Honor Judge Sir RICHARD HARINGTON, sitting at the Worcester County Court.

The plaintiffs were hop growers and the defendant was a publican, and the action was brought to recover price of two pockets of hops, and at the trial an alternative claim was added for damages for the refusal of the defendant to accept the hops.

On the 22nd April, 1899, the defendant gave the plaintiff the order and signed the following memorandum:

April 22. — Mr. J. P. Joyner, Worcester. — 2 Pos. of Hops 1898, at 7*l.* 5*s.* per cwt., awaiting order. Cash on delivery. — J. P. Joyner.

The above memorandum was made by the plaintiffs in a paper memorandum or note-book in which orders were generally put, and it was signed by the defendant.

This paper book was slipped into a leather cover, upon which the name "James Jones" was stamped. When the paper memorandum book was full, it could be withdrawn and a fresh one inserted in the same leather cover.

It was contended by the defendant that there was no sufficient memorandum to satisfy the Sale of Goods Act 1893, sec. 4, as the plaintiffs' name did not appear in the memorandum signed by the defendant.

It was contended by the plaintiffs that the name being on the cover of the case in which the memorandum book was at the time the order was taken was sufficient to satisfy the statute, and the book and case were sufficiently connected to make the name on the case part of the memorandum, on the authority of Sarl *v.* Bourdillon, 1 C. B. N. S. 188, 2 Jur. N. S. 1208.

The learned judge distinguished that case on the ground that there the name of the plaintiff was on the fly-leaf of the book itself, and he gave judgment for the defendant, holding that the cover and the book were two distinct articles.

The plaintiffs appealed.

Hon. *A. Lyttelton*, Q. C., and *Harold Hardy*, for the plaintiffs.

J. B. Matthews, for the defendant.

DARLING, J. The plaintiffs in this case, Jones Brothers, are sellers of hops, and this book belonged to one of the partners. He sold certain hops to the defendant, and made the note in his book which was signed by the defendant. It is now objected that there was not sufficient memorandum to satisfy the Statute of Frauds, re-enacted by sec. 4 of the Sale of Goods Act 1893, where the names of the buyer and seller must both appear. The learned county court judge has held that there was not a sufficient memorandum to satisfy the statute, and he made reference in his judgment to the two cases of Sarl *v.* Bourdillon, 1 C. B. N. S. 188, 2 Jur. N. S. 1208 and Vandenberg *v.* Spooner, 14 L. T. Rep. 701, L. Rep. 1 Ex. 316. That latter case has little to do with the matter, for the name Vanderberg had only to do with identifying the goods. In Sarl *v.* Bourdillon the note made had been signed by the buyer, and the name of the seller was on the fly-leaf of the book itself. The learned judge in his judgment says: "In Sarl *v.* Bourdillon evidence that the entry was signed by the defendant in plaintiff's order book containing the name of the plaintiff on the fly-leaf was held sufficient. But there the book was an order book, and appears to have been an entire document as much as a deed engrossed on several skins of parchment attached together would be. Here the cover and the book were too distinct articles and the name was evidently printed on the case as an indictment of ownership of it and its contents, whatever they might happen to be, and not for the purpose of indicating concurrence in contracts." He seems to think that if this had all been an order book it might have been sufficient; but although this book was a pocket-book, it was one in which there were orders, and in which orders were written. In Champion *v.* Plummer, 1 Bos. & P. 252, it was held that a note or memorandum in writing, signed by the seller only and without anything on the memorandum to show who the buyer was, was not a sufficient memorandum to satisfy the statute. In the course of the report it says that it was proved that a note was made in a common memorandum book and signed by the defendant. No point is made in the judgment that this was merely a common memorandum book, and I do not mention this point for the first time, for in Allen *v.* Bennet, 3 Taunt. 169, Sir James Mansfield, C. J., says: "To be sure this case at first sight comes near to the case of Champion *v.* Plummer, and the objection there certainly was that the memorandum was not signed by the purchaser; that was a note made in what the report calls a common memorandum book; this book certainly was not like what I at first apprehended it to be, until it was produced; for I at first thought this had been an order book. . . ." However, in Champion *v.* Plummer the court did not take the point that it was only a common memorandum book. But this case which is most like the present is undoubtedly

Sarl *v.* Bourdillon, *supra*, where the book is described as an order book. The other point that the learned county court judge took was that the book and cover were two distinct articles. But when the memorandum was made they were only one. Take the case of a letter and envelope. First of all the letter is written, it is placed in an envelope, and the name of the other person appears on the envelope. In such a case there may be two distinct articles, which are used as one. Further I think it makes no difference that the words "order book" do not appear. In fact, the orders were placed in a book which was used for that purpese. The appeal must be allowed.

Bucknill, J. From a common-sense point of view one cannot say that there were two distinct articles. In fact there was only one article. I come to the same conclusion as my brother, that this appeal must be allowed.

Appeal allowed.

EVANS *v.* HOARE and Another.

In the Queen's Bench Division, March 14, 15, 1892.

[*Reported in* [1892] 1 *Queen's Bench*, 593.]

Appeal by the plaintiff from the judgment of the assistant judge of the Mayor's Court.

The action was brought to recover damages for wrongful dismissal. In 1886 the plaintiff entered into the service of the defendants, as ledger clerk, at a salary of 80*l.* a year. On two subsequent occasions his salary was raised 10*l.*, bringing it up to 100*l.* a year. On February 19, 1890, the following document was drawn up by a clerk of the defendants named Harding, who was acting with the defendants' authority, and presented by Harding to the plaintiff for signature, and signed by the plaintiff.

5, Campbell Terrace, Cannhill Road, Leytonstone, E.,
Feb. 19, 1890.

Messrs. Hoare, Marr & Co., 26, 29, Budge Row, London, E. C.

Gentlemen, — In consideration of advancing my salary to the sum of 130*l.* per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130*l.* per annum aforesaid, payable monthly as hitherto.

Yours obediently,
George E. Evans.

Afterwards the defendants dismissed the plaintiff from their service.

At the trial the jury found a verdict for the plaintiff for 34*l.* 13*s.* 4*d.* damages; but the assistant judge, being of opinion that the document of February 19, 1890, was an agreement that was not to be performed within the space of one year from the making thereof, and was not

signed by the defendants or any other person by them lawfully authorized, and that therefore the plaintiff was prevented from recovering by sec. 4 of the Statute of Frauds, 29 Car. II. c. 3, gave judgment for the defendants.

Mar. 14. *Crump*, Q. C. (*Leslie Probyn*, with him), for the plaintiff, in support of the appeal.

Witt, Q. C. (*Tatlock*, with him), for the defendants.

March 15. The following judgments were delivered: —

DENMAN, J. This was an action for wrongful dismissal. The plaintiff entered the defendants' service as a ledger clerk at 80*l.* a year; the salary was twice raised 10*l.* a year until it reached 100*l.* On February 19, 1890, the plaintiff signed an agreement as follows: —

5, CAMPBELL TERRACE, CANNHILL ROAD, LEYTONSTONE,
Feb. 19, 1890.

MESSRS. HOARE, MARR & CO., 26, 29, BUDGE ROW, LONDON, E. C.

GENTLEMEN, — In consideration of your advancing my salary to the sum of 130*l.* per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130*l.* per annum aforesaid, payable monthly as hitherto.

Yours obediently,
GEORGE E. EVANS.

If this agreement was within sec. 4 of the Statute of Frauds, the judgment was justified. The learned judge gave judgment for the defendants on the ground that the document was not signed within that section. This decision would be right unless the words "Messrs. Hoare, Marr & Co.," at the commencement, can, under the circumstances, be held to be "a signature by a person authorized thereunto by the defendants." In fact, the document was drawn up by one Harding, who was authorized by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature. It appears to me that the case falls within the principle of the decisions cited in favor of the plaintiff, especially Schneider *v.* Norris, 2 M. & S. 286, and Jones *v.* Victoria Graving Dock Co., 2 Q. B. D. 314; see also the case of Bleakley *v.* Smith 11 Sim. 150. In the present case it is impossible to doubt that the word "your," twice used in the written document, refers to the defendants, whose name and address is given in full at the head of the document. Nor can I doubt that both Harding and the defendants intended that this document, when signed by Evans, should be the final memorandum of the contract binding upon the defendants as well as the plaintiff. Mr. Witt contended that the cases relied upon were all cases where the document was sent out by the person charged. I do not think that this is necessary, if by the expression "sent out" is meant more than submitted for signature to the other party. If the party sued has authorized an agent to lay before the party suing a document *containing his name in full* as that of the party with whom the contract is to be

made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is a sufficient "agreement or memorandum thereof, signed by a party authorized thereunto" within sec. 4 of the Statute of Frauds. That appears to me to be the case here. I therefore think that the plaintiff is entitled to judgment for the amount of the verdict.

CAVE, J. I am of the same opinion. The case put forward on behalf of the plaintiff was based on the grounds which have been stated by my brother DENMAN; and it was further contended that the plaintiff had served, and must, therefore, be entitled to recover something in respect of such service. It is obvious, however, that this latter contention is not well founded; for the plaintiff had not completed any one month of service under the contract. The real point to be decided is, whether the document in question is a memorandum or note in writing of an agreement signed by the party to be charged, or by some other person lawfully authorized, within the meaning of sec. 4 of the Statute of Frauds, 29 Car. II. c. 3. The Statute of Frauds was passed at a period when the legislature was somewhat inclined to provide that cases should be decided according to fixed rules, rather than to leave it to the jury to consider the effect of the evidence in each case. This, no doubt, arose to a certain extent from the fact that in those days the plaintiff and the defendant were not competent witnesses. Several cases were referred to in the course of the argument, which it was contended could not be distinguished from the present case; but it is difficult to ascertain whether the circumstances of the different cases are the same, or rather whether the circumstances in which the different cases are similar or dissimilar are material or immaterial to the point under consideration. No doubt, in attempting to frame a principle, one is obliged to depart somewhat from the strict lines of the statute. I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and, secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute. In the present case it is true that the name of the defendants occurs in the agreement; but it is suggested on behalf of the defendants that it was only put in to show who the persons were to whom the letter was addressed. The answer is that there is the name, and it was inserted by the defendants' agent in a contract which was undoubtedly intended by the defendants to be binding on the plaintiff; and, therefore, the fact that it is only in the form of an address is immaterial. A case was referred to in the argument, Schneider *v.* Norris, 2 M. & S. 286, in which a printed bill-head was held to amount to a signature within

the meaning of the statute. That is a stronger case than the present. The printed heading there was not put into the document for the purpose of constituting a memorandum of the contract; but it was so used with the assent of the party sought to be charged, and it therefore was held to have the effect of a signature. This shows that it is unimportant how the name came to be inserted in the document. I cannot discover any other principle than that which I have stated, and I am of opinion that the present case comes within that principle; and therefore the plaintiff is entitled to judgment for the amount of the damages found by the jury.

Appeal allowed.
Leave to appeal refused.[1]

HUCKLESBY *v.* HOOK.

IN THE CHANCERY DIVISION, FEBRUARY 14, 1900.

[*Reported in* 82 *Law Times Reports*, 117.]

THIS action turned upon the sufficiency of a memorandum of a contract for the sale of land, not signed by the defendant, but bearing his printed name and address, to satisfy the Statute of Frauds.

Mr. F. J. Hucklesby, a land agent residing at Stamford Hill, was informed that Mr. Hook, an hotel-keeper at Clacton-on-Sea, had some land for sale in that town, and he accordingly went down to negotiate for the purchase.

The evidence showed that Mr. Hucklesby called upon Mr. Hook at the hotel, and that after some little conversation they adjourned to the coffee-room, where Mr. Hook took from a rack a sheet of note-paper, bearing the printed words:

[1] 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."

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 Col. 275.

"The Warwick Castle Hotel, Pier-avenue, Clacton-on-Sea; sole proprietor, Wm. Thos. Hook."

and handed it to Mr. Hucklesby, who wrote as follows:

285, St. Ann's-road, Stamford Hill, N., April 3, 1899. — T. Hook, Esq. — Dear Sir, — I hereby agree to give you the sum of 590*l.* for the piece of land at the corner of Marine-parade and Town-road. Please instruct your solicitor to forward the contract to me. (Signed) F. J. HUCKLESBY.

Mr. Hucklesby then handed this document to Mr. Hook, and on the following day sent him a cheque for 59*l.* as deposit.

Mr. Hook was not in fact the owner of the land; the actual owner refused the offer, and the 59*l.* was returned to Mr. Hucklesby, who thereupon brought this action against Mr. Hook, claiming specific performance of the contract, and, alternatively, damages for misrepresentation on the ground that the defendant had alleged himself to be the owner. The defendant relied on the Statute of Frauds.

It was alleged, but not proved, that the letter was written at the dictation of the defendant.

E. Ford, for the plaintiff.

Astbury, Q. C., and *J. H. Gray*, for the defendant, were not called upon.

BUCKLEY, J. It seems to me that the plaintiff's case fails altogether. (His Lordship read the memorandum and referred to the evidence, upon which he found that the defendant did not dictate the document, and continued:) Now, the first ground upon which it appears to me that the document is not a memorandum within the statute is this: I think the printed words at the head of the letter form no part of the letter at all. The object of the address at the head of the letter, I apprehend, is this: it is an intimation given by the writer of the letter that the address at the top is the address to which the person can make a reply. It is no part of the document, but it forms his address. When the plaintiff wrote "285, St. Ann's-road, Stamford Hill, N.," he, in my opinion, did the same thing as if he had struck his pen through the preceding words, "The Warwick Castle Hotel, Pier-avenue, Clacton-on-Sea; sole proprietor, Wm. Thos. Hook," and he meant, that is not the address from which I sent this letter — the address from which I send it is 285 St. Ann's-road, Stamford Hill. The name of Hook occurs later in the document in the form "T. Hook, Esq.," as the name of the person to whom it is sent, and the words might be material there. But here I pause to consider three cases which have been referred to as determining the law upon this point. Before going to the cases themselves, I will state what I conceive to be the principle that they involve. The exact words in the statute are: "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." These cases, I think, proceed upon the principle that signing for the

purposes of the statute does not necessarily mean writing your name, but means ratifying by writing in some form or other the document which contains the contract. That is the principle which lies, I think, at the root of Schneider *v.* Norris, a case in 2 M. & S. at p. 286, and of Evans *v.* Hoare, 66 L. T. Rep. 345, (1892) 1 Q. B. 593. In Schneider *v.* Norris what happened was this: the document contained in print the defendant's name; the defendant wrote in it the plaintiff's name — that is to say, he wrote some part of the document which did not contain the defendant's name. Now, what Lord Ellenborough says is this: "If, indeed, this case had rested merely on the printed name unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it might not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognizing printed name as much as if he had subscribed his mark to it." I understand that to mean, that in writing the plaintiff's name upon the document which contained the defendant's name, the defendant had written recognizing the document which contained his name, although he had not written his own name, but had identified by writing the document which contained the contract. Dampier, J., puts it in this form: "The defendant has ratified the sale to Schneider and Co. by inserting their name as buyer to a paper in which he recognizes himself as seller." That was the case, therefore, in which the defendant wrote some part of the document which contained the defendant's name. The case of Evans *v.* Hoare, *ubi supra*, was a case with reference to a similar question. There the defendant by his agent wrote the whole document, and the document contained his name and the plaintiff signed it, and the ground upon which Denman, J., rested his judgment seems to me to be this: "If the party sued has authorized an agent to lay before the party suing a document containing his name in full as that of the party with whom the contract is to be made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is sufficient 'agreement' or memorandum thereof signed by a party authorized thereunto within sec. 4 of the Statute of Frauds." Above he had said: "In fact, the document was drawn up by one Harding, who was authorized by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature." So that in this case it was a document written by the defendants containing the defendant's name, and tendered by them to the plaintiff as containing the terms of the contract, and then signed by the plaintiff. Then, Cave, J., says: "There is the name" — that is to say, the defendant's name — "and it was inserted by the defendant's agent in a contract which undoubtedly was intended to be binding on the plaintiff, and therefore the fact that it is only in the form of an address is immaterial." That, there-

fore, seems to me to be the principle of these two cases, that there was a writing by the defendant, or by an agent of the defendant, of some part or the whole of a document containing the defendant's name. The other case proceeds upon a somewhat different principle. That is the case of Torret *v.* Cripps, 27 W. R. 706. There the defendant wrote and sent to the plaintiff a letter containing an offer of a lease of certain houses, and sufficiently stating the terms, but he did not sign it. The letter was written on a sheet of memorandum paper at the head of which were the printed words, "From Richard L. Cripps," with his address. The plaintiff accepted the offer, the defendant did not grant the lease, and the plaintiff commenced an action for specific performance. The defendant pleaded the Statute of Frauds. The Vice-Chancellor put his judgment upon the ground: "The case of Schneider *v.* Norris before Lord Ellenborough shows the principle to be that where a party desiring to sell (as was the case of the defendant) send to the party desiring to buy a document containing the name of the former party, though it may be in print, yet in such a way as to show that the sender recognizes it to be his own name, and the document contains terms of a contract that is a sufficient note in writing to charge the sender. The contention which has been addressed to me, that it is necessary to show that there was a custom or habit, would lead to difficulties. What would be regarded as amounting to a habit for that purpose? Here it is not in issue that the document upon which the defendant is charged was actually sent by him, it contains his name, and it is not disputed that the document with that exception is in the defendant's own handwriting." So that here you have got, coupled with the fact that the defendant wrote the document, the fact that he acted upon it by sending it to the plaintiff. I think that involves this matter of principle, that it may be a signature in writing within the statute for a person to take a document and hand it to another and say, the document being in his writing, "That is the document which I ask you to take as forming the contract that you are going to sign." Now here the defendant wrote no part of the document at all. The mere fact that it contained his name, that it was written by the plaintiff and addressed to him, is, I think, upon many grounds insufficient to make this contract within the statute. It appears to me that the contract does not satisfy the statute, and that there is nothing signed by the defendant to bind him, and I have only got to look to some other facts which have been given in evidence to see if there is anything which can carry the matter any further. If it had been proved that the defendant dictated the document, actually dictated the words, and then did anything equivalent to handing it to the plaintiff, and said, "Sign that as representing the contract between us," I do not say that might not have been sufficient for the purposes of the statute. But see what took place. The plaintiff's evidence seems to me, even if there was no more in the case, to put him entirely out of the court. What the plaintiff says in his cross-examination is this:

"The defendant asked me to write that I would give 590*l.* for the land, and he would send the paper on to his solicitor, and his solicitor would communicate with me." He says he dictated the words "Please instruct your solicitor to forward the contract to me signed." That is what he said in cross-examination. In re-examination he wanted to add something as to the word "signed." Then he says: "The defendant signed nothing. I asked him to countersign the letter. He said, 'I never sign a document out of the presence of my solicitor. That,' he said, 'is business.'" After that answer, it seems to me hopeless to contend that this was a document which the defendant recognized as one dictated by him and which he handed to the plaintiff and said: "Here are the terms of agreement between us." The other witness said substantially the same. Now there is only one other matter that I have to observe upon, and that is as to some points in the contract itself. It finishes thus: "Please instruct your solicitor to forward the contract to be signed." If nothing arose upon the Statute of Frauds at all, it seems to me that that involves this, coupled with the evidence which has been given in the case, that this was not to be the contract between the parties. This is not one of the cases in which there is an agreement made by offer and acceptance, and then after acceptance there is added: "The terms of this are to be included in a more formal contract." It is not a case in which this document is not to be the contract, but is to be followed by something to be signed by the defendant which is to be the contract. Upon all these grounds it appears to me that the plaintiff fails to make any case at all as to the existence of a contract at law. Then he says, further, that there were representations made to him that Hook was the owner of the property, which he was not, and that he was entitled in an action of deceit to proceed for misrepresentation. But if I am right in thinking that there was no contract, and even assuming (which I think is not the case) that there was a representation by Hook that he was the owner, it would not result in anything. It simply produces this, that the plaintiff did not as the result enter into any contract, and upon these grounds I think the plaintiff's case entirely fails, and I dismiss the action with costs.

BAILEY AND ANOTHER *v.* SWEETING.

IN THE COMMON PLEAS, JANUARY 12, 17, 1861.

[*Reported in* 9 *Common Bench, New Series*, 843.]

THIS was an action brought to recover a sum of 76*l.* 14*s.* 3*d.* for goods bargained and sold. The defendant paid 38*l.* 8*s.* 9*d.* into court, and as to the rest of the claim pleaded never indebted.

At the trial before ERLE, C. J., at the sittings in London after last Easter Term, the following facts appeared in evidence: The defendant was a furniture dealer at Cheltenham: the plaintiffs were manufacturing

upholsterers and cabinet makers in London. In July, 1859, the defendant called at the plaintiffs' place of business in London, and then purchased five chimney-glasses (a "job lot," as it was called), *which were to be paid for by check on delivery.* He at the same time purchased other goods *on credit* to the amount of 39*l.* 10*s.* 19*d.*, some of which had to be made for him. The chimney-glasses were packed and sent by carrier, addressed to the defendant at Cheltenham. They were, however, found to be so damaged when they reached their destination that the defendant refused to receive them, and at once communicated such refusal to the plaintiffs.

The other goods were subsequently forwarded at three different times, with separate invoices, and were duly received by the defendant. The value of these parcels was covered by the payment into court: and the question was, whether the defendant was liable in respect of the chimney-glasses, the value of which with the cases was 38*l.* 10*s.* 6*d.*

On the part of the plaintiffs it was insisted that the whole of the goods were sold under one contract, and that the case was taken out of the Statute of Frauds (29 Car. II. c. 3, s. 17) by the acceptance of part. They also relied upon the following letter addressed to them by the defendant, as being a sufficient memorandum to satisfy the requirements of that statute:

"CHELTENHAM, December 3d, 1859.

"GENTLEMEN, — In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was, the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time. With regard to the other items, viz. 11*l.* 4*s.* 9*d.*, 14*l.* 13*s.*, and 13*l.* 13*s.*, for goods had subsequently (less cases returned), those goods are, I believe, subject to the usual discount of 5*l.* per cent; and I am quite ready to remit you cash for these parcels at once, and, on the receipt of your reply to this letter, will instruct a friend to call on you and settle accordingly."

For the defendant it was insisted that the contract for the chimney-glasses was a separate and distinct contract, and void for want of a sufficient memorandum.

His lordship (at counsel's request) left it to the jury to say whether the bargain for the chimney-glass was a separate and distinct bargain from that for the rest of the goods, telling them that, if they were of that opinion, they must find for the defendant.

The jury found that the two were separate and distinct transactions and accordingly returned a verdict for the defendant.

Hawkins, Q. C., in Trinity Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiffs for 38*l.* 10*s.* 6*d.*, on the ground that the defendant's letter of the 3d of December, 1859, was a sufficient memorandum or note in writing to satisfy the statute, or for a new trial on the ground that the verdict was against evidence.

H. James and *Tompson Chitty* showed cause.

Hawkins, Q. C., and *Kemplay*, in support of the rule.

ERLE, C. J. This was an action for goods sold and delivered. There was an oral contract for the sale and delivery of the goods in question: but the defendant relies upon the Statute of Frauds, and contends that there was no note or memorandum of the bargain in writing to satisfy that statute. After the making of the oral contract, however, there was a letter written by the vendee to the vendors, which contains this statement, — "The goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*" (the goods in dispute), "which goods I have never received, and have long since declined to have, for reasons made known to you at the time," — the reason being, that, in consequence of the negligence of the carrier through whom they were sent, the goods were damaged. Now, the first part of that letter is unquestionably a note or memorandum of the bargain: it contains a description of the articles sold, the price for which they were sold, and all the substantial parts of the contract. If it had stopped there, there could be no dispute as to its being a sufficient note or memorandum to satisfy the statute. It is clear that the note or memorandum may be made after the time at which the oral contract takes place; and, to my mind, that which passed orally between the parties on the subject of the bargain in July, was in the nature of an inchoate contract, and the subsequent letter had a retroactive effect, making the contract good and binding. The latter part of the defendant's letter in effect says, "I decline to take the goods because the carrier damaged them in their transit:" and it is contended on his part that the acknowledgment at the beginning of the letter does not constitute a sufficient memorandum within the statute, because the latter part contains a repudiation of his liability, — relying much on the passage cited from my Brother Blackburn's book on the Contract of Sale, where it is suggested that a subsequent acknowledgment in writing has not the effect of making the contract good, if it is accompanied by a repudiation of the defendant's liability under it. A case is referred to, of Rondeau *v.* Wyatt, 2 H. Bl. 63, where an answer to a bill of discovery, in which the defendant admitted the agreement, was held not to preclude him from taking the objection that there was no note or memorandum to satisfy the Statute of Frauds. We have adverted to the authorities cited in Mr. Justice Blackburn's book, and to the case Rondeau *v.* Wyatt; but we find no decided authority upon the point in judgment. In that state of the authorities, we are remitted to the Statute of Frauds itself: and, upon reference to its language, we think the defendant's letter does amount to a sufficient memorandum in writing, and makes the contract good. The purpose of the statute was, to prevent fraud and perjury. Now, the danger of perjury in this case is effectually prevented by the letter of the defendant; for, he distinctly admits that he made the contract, and at the price alleged. I do not consider that the defendant intended to deny his liability by reason of the absence or insufficiency of the contract: but that the only question which he intended to raise, was, whether he or the plaintiffs should settle with the carriers for the damage done to the goods. I think that

constitutes a material distinction between the present case and those cited, in which the defendant, admitting the contract, has rested his defence on the non-compliance with the statute. But, if there be no such distinction, and we are called upon to consider whether the doctrine suggested in my Brother Blackburn's book correctly represents the law upon this subject, with the highest respect for that clear-headed and highly eminent judge, I must say that I am unable to give my assent to his proposition. I think the purpose of the Statute of Frauds is answered by the defendant's letter, and the plaintiffs are entitled to recover.

WILLIAMS, J.[1] — I am entirely of the same opinion. It cannot for a moment be controverted here, that in point of fact there was a good and lawful contract between the plaintiffs and the defendant for the sale of the goods in question. But it is equally clear, that, as the price of the goods bargained for exceeded the value of 10*l.*, the contract was not an actionable one unless the requisites of the 17th section of the Statute of Frauds were complied with; the section enacting, "that no contract for the sale of any goods, wares, and merchandises for the price of 10*l.* sterling or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same, or (2) give something in earnest to bind the bargain or in part of payment, or (3) that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The effect of that enactment is, that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, *e. g.* unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract. The question, therefore, in the present case, is, whether such a memorandum has come into existence. It is plain to my mind that the terms of the defendant's letter of the 3d of December do constitute such a memorandum as the statute contemplated. It completely recites all the essential terms of the bargain: and the only question is whether it is the less a note or memorandum of the bargain, because it is accompanied by a statement that the defendant does not consider himself liable in law for the performance of it. There is nothing in the statute to warrant that. I think the statute is satisfied, and that the contract is an actionable contract. It is said that there may be

[1] In the course of the argument of the case Williams, J., said, "A memorandum given after action brought will not do. Bill *v.* Bament, 9 M. & W. 36. The reason given is, that the cause of action is not complete until the memorandum is given. Parke, B., there says: 'There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned. I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute.'" This point was re-affirmed in Lucas *v.* Dixon, 22 Q. B. D. 357. But see *contra*, Cash *v.* Clark, 61 Mo. App. 636.

a difficulty in maintaining this doctrine, in consequence of the inconvenience which may arise from the property not passing by the contract until it has become capable of being enforced by action. That may be true: but the same may be said as to part acceptance or the payment of earnest, and yet nobody ever suggested a doubt that an action might be brought upon a verbal contract where either of these things has taken place. I entirely agree with my Lord in his appreciation of my Brother Blackburn's book: but, after fully considering the proposition which has been cited from it, and the reasoning upon which that proposition is based, I feel bound to say that I do not consider it satisfactory. The right of the defendant to put an end to the contract, if any such right existed, ought not to affect the question whether there was a valid contract or not. There was a valid contract, and the memorandum was a sufficient memorandum. The intention of the defendant to repudiate or abandon the contract cannot affect the question as to the sufficiency or insufficiency of it.

Rule absolute accordingly.[1]

GIBSON AND ANOTHER *v.* HOLLAND.

IN THE COMMON PLEAS, NOVEMBER 9, 1865.

[*Reported in Law Reports*, 1 *Common Pleas*, 1.]

THIS was an action to recover the price of a horse bargained and sold by the plaintiffs to the defendant.

Plea never indebted.

The cause was tried before WILLES, J., at the last Devonshire Summer Assizes. The plaintiffs, Gibson and Luke, are horse-dealers at Exeter. The defendant is a gentleman who occasionally deals in horses. Having heard from one Rookes, a horse-dealer of Exeter, that the plaintiffs had a mare which was likely to suit him, and having seen and approved of her, the defendant authorized Rookes to buy her for him, if he could, for forty guineas. Rookes accordingly made the purchase at that price, and communicated that fact to the defendant in a letter, as follows: —

"15th May, 1865.

"I have heard from Mr. Gibson and seen Tom Luke this morning, respecting the bay mare, and *have bought her for forty guineas.* Will you, therefore, forward me your cheque, with instructions how she is to be sent?

"WM. ROOKES."

[1] WILLES and KEATING, JJ., delivered concurring opinions. 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.* Lovick, 29 S. C. 533, *acc.* 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.

Receiving no reply, Rookes addressed the following letters on the 20th and 23d of May, 1865, respectively, to the defendant: —

"I wrote you on Monday last to say I had, *in accordance with your request, purchased Mr. Gibson's bay mare for you at forty guineas*, requesting you would send me a cheque, with instructions how to forward her. Not having received any reply, I fear you must have been absent. Please send me cheque at once, with necessary instructions.

"WM. ROOKES."

"I cannot but express my surprise at not having received any reply to my letters of the 15th and 20th. In the first *I informed you that I had purchased Mr. Gibson's bay mare;* and in the second *I asked you to send a cheque for the same*, viz. 42*l.*, in order that I may settle with him. Mr. Luke has called again this morning; and it makes me look very foolish, as of course they look to me to fulfil my contract; and I hope that you will, on the receipt of this, send me the cheque, with the necessary instructions how the mare is to be forwarded. WM. ROOKES."

On the 25th of May, 1865, the defendant wrote to Rookes as follows: —

"I only returned home yesterday evening, or I should have at once answered your first letter, and sent you a cheque for the mare *which you were kind enough to buy for me.* I am glad to say I have sold her to Mr. Tonybee. When I told him of her, he said he knew her well, and would buy her from me, which he did; and you will receive a cheque for her from me by this evening's post. C. HOLLAND."

On the 26th of May, Rookes wrote in reply to the last letter: —

"Mr. Toynbee has never seen the mare that you have purchased. The one he alludes to I sold Mr. Gibson for Sir L. P., and she is not for sale at any price. You will, therefore, please to rectify this mistake, and send me your cheque, as it is a fortnight to-morrow since *I bought her for you*, and she has been standing at livery ever since. WM. ROOKES."

On the 10th of June, Rookes again wrote to the defendant :—

"Mr. Gibson and Mr. Luke called here this afternoon; and, as they have both failed in seeing you in London, they now call upon me to complete *my contract* for the sale of the mare. You are fully aware that *you commissioned me to buy the mare for you;* and, had I thought there would have been any trouble or annoyance, I should have had nothing to do with it; but, simply acting as your agent, I must request that you will at once remit me your cheque for 42*l.*, cost price, together with half the keep, two guineas, as it is a month ago next Monday that I bought her for you, and she has been standing at livery ever since, and they have a perfect right to claim the whole of the keep. WM. ROOKES."

On the 16th of June, Rookes again wrote to the defendant: —

"Messrs. Gibson & Luke have been and seen me again to-day respecting the bay mare *which you told me to purchase from them for you;* and they have threatened me with an action," &c.

Rookes having on the 17th of June received a letter from the

plaintiffs' attorneys, demanding payment from *him* of 46*l.*, alleged to be due from *him* for a brown mare sold by them *to him*, and her keep, sent it to the defendant, writing: —

"This morning's post brought me the enclosed from Messrs. Gibson & Luke's solicitors; I really do hope that you will not allow me to be put to any further trouble or annoyance in this most unpleasant matter, but at once remit your cheque either to me. [*sic.*] If they sue me, I have no alternative but to sue them or you."

On the part of the defendant it was objected that there was no contract in writing to satisfy the 17th section of the Statute of Frauds, 29 Car. II. c. 3. For the plaintiffs it was insisted that the correspondence amounted to a contract, or at all events to a sufficient memorandum of a contract to charge the defendant.

Under the direction of the learned judge, a verdict was found for the plaintiffs for the sum claimed, reserving to the defendant leave to move.

Karslake, Q. C., moved to enter a nonsuit.

ERLE, C. J.[1] I am of opinion that there should be no rule. The contract for the purchase of the mare in question was made by Rookes. If Rookes was the agent of both parties, there was nothing to reserve; therefore I place no reliance on that. But I am of opinion that the letters put in, taken together, do amount to a sufficient note or memorandum of the contract within the 17th section of the Statute of Frauds. Apart from the statute, it is beyond doubt that Rookes made a contract on behalf of the defendant to buy the plaintiffs' mare. The defendant relies upon the 17th section, which enacts that no contract for the sale of any goods, &c., for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest or part payment, or unless "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The defendant's letters amount to a clear admission that Rookes did make, on his behalf, the contract which is described in that correspondence. But the objection relied on is, that the note or memorandum of that contract was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other. The object of the Statute of Frauds was, the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would incline to think that a statement made

[1] WILLES, J., delivered a concurring opinion. KEATING, J., also concurred.

by the party to his own agent would be the more satisfactory evidence of the two. Then, how stand the authorities on the subject? In Leroux v. Brown, 12 C. B. 818, 22 L. J. (C. P.) 1, in support of the position that a letter addressed by the defendant to a third person, containing an admission of a contract with the plaintiff, will be enough to charge the former, Sir G. Honyman refers to Sugden's V. & P., 11th ed. 122, where it is said that "a note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will be a sufficient agreement to take a case out of the statute;" and for this the learned author vouches Lord Hardwicke, who, in Welford v. Beazely, 3 Atk. 503, says: "The meaning of the statute is, to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and, therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on. Hawkins v. Holmes, 1 P. Wms. 770. There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provisions of it." See Clerk v. Wright, 1 Atk. 12. Sir E. Sugden goes on to say that "the point was expressly determined in the year 1719, in the Court of Exchequer. Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page were of opinion that the letter was a writing within the Statute of Frauds": Smith v. Watson, Bunb. 55. These cases, it is true, arose upon the 4th section of the statute, but the analogy holds equally good as to the 17th section. In the case referred to by my Brother Willes, of Bailey v. Sweeting, 9 C. B. (N. S.) 843, 30 L. J. (C. P.) 150, this court went very fully into the general doctrine, and came to the conclusion that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy the 17th section, notwithstanding the writer repudiated his liability. To satisfy the statute, you must have the oral statement of the contract corroborated by an acceptance of part of the goods or a part-payment of the price, or you must have some note or memorandum in writing of the bargain. If so, the danger of perjury, which the statute was designed to exclude, is abundantly guarded against if there be a written statement of the terms of the contract, signed by the party to be charged, made to an agent. For these reasons, I feel bound to hold that the requirements of the statute have been complied with in this case, and consequently that there should be no rule.[1]

[1] Moore v. Hart, 1 Varn. 110; Ayliffe v. Tracy, 2 P. Wms. 65; Owen v. Thomas, 3 Myl. & K. 353; Moss v. Atkinson, 44 Cal. 3; Spangler v. Danforth, 65 Ill. 152;

BECKWITH *v.* TALBOT.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

[*Reported in* 95 *United States*, 289.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by Talbot against George C. Beckwith in the District Court of Colorado for the County of Fremont, to recover damages for the breach of a contract alleged to have been made on the 7th of October, 1870, between the plaintiff and two others on the one part, and the defendant on the other, whereby they were to herd and care for a large herd of cattle for the defendant, from that time until the fifth day of December, 1872, for which he was to give them one-half of what the cattle and their increase should then bring over $36,681.60; that is, to each one-third of such half. The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

On the trial, two defences were relied on which are made the subject of assignments of error here: First, that the alleged contract was void by the Statute of Frauds, because, though not to be performed within a year, it was not in writing signed by the defendant; secondly, that it was a joint contract on which the plaintiff could not maintain a separate action.

The territorial Statute of Frauds declares that "every agreement which by its terms is not to be performed within a year unless some note or memorandum thereof be in writing and subscribed by the party chargeable therewith, shall be void." The verbal difference between this statute and that of Charles II. is not material in this case.

It appeared on the trial that the agreement made by the parties was committed to writing at the defendant's instance, and was in the following words, to wit: —

"WET MOUNTAIN VALLEY, Oct. 7, 1870.

"This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at $36,681.60 on shares from George C. Beckwith; time to expire on the fifth day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one-half and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) "C. W. TALBOT.
"ELTON T. BECKWITH.
"EDWIN F. BECKWITH."

Wood *v.* Davis, 82 Ill. 311; Fugate *v.* Hansford's Ex., 3 Litt. 262; Kleeman *v.* Collins, 9 Bush (Ky.), 460; Moore *v.* Mountcastle, 61 Mo. 424; Cunningham *v.* Williams, 43 Mo. App. 629; Cash *v.* Clark, 61 Mo. App. 636; Mizell *v.* Burnett, 4 Jones L. (N. C.) 249; Lee *v.* Cherry, 85 Tenn. 707, *acc.* First Nat. Bank of Plattsburgh *v.* Sowles, 46 Fed. Rep. 731; Kinloch *v.* Savage, Speers Eq. 464; Buck *v.* Pickwell, 27 Vt. 157, 167, *semble contra.*

This agreement was signed by the plaintiff and the two young Beckwiths, but was not signed by the defendant. It was delivered to him, however, and was kept by him until he produced and proved it on the trial. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed.

Two letters written by the defendant to the plaintiff on the subject-matter of the contract, and whilst he had the said agreement in his possession, and whilst it was being executed by the plaintiff, namely, one on the 21st of September, 1872, and the other on the 10th of November, 1872, were also produced in evidence; from which the following are extracts: —

"DENVER, Sept. 21, 1872.

"MR. TALBOT, SIR, — On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low. . . . I have used every exertion for the last three months to sell. . . .

"You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and Edwin would be glad to do the same; but at that rate I would not get my money back I put into the cattle.

"The cattle must be sold and settled up according to the agreement. I will do everything I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle so as to make the most out of them. . . .

"You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. . . .

"Yours respectfully, GEORGE C. BECKWITH."

"DENVER, Nov. 10, 1872.

"MR. TALBOT, SIR, — At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. . . . I notified you to get a purchaser for the cattle months ago; and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say anything to you or to any one else?

"But what next? You quarrelled with me because I would not break the agreement and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered $31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

"Yours in haste, GEORGE C. BECKWITH."

We agree with the Supreme Court of Colorado that, in the face of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to "the agreement" again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. What agreement could he possibly refer to but the only one which, so far as appears, was ever made: the one which he took into his possession,

and then had in his possession; the one under which it was conceded the parties were then acting? The defendant, being examined as a witness on his own behalf, and testifying with regard to the contract between the parties, said, "The matter was all talked over, and, I thought, understood. I said to my son Elton: 'You understand the matter. Will you take a pen and paper and write the contract?' He wrote it. Talbot read it and signed it, and then my sons signed it." On cross-examination, he said, "The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial."

It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. Johnson *v.* Dodgson, 2 M. & W. 653; Salmon Falls Co. *v.* Goddard, 14 How. 446. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it as follows: "My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it." Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant. The present case is as strong as that would be. In our judgment, the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign, and which he put in his pocket and kept, and sought to enforce against the plaintiff for two whole years.

On this point, therefore, we are clearly of opinion that no error was committed by the court below.

The allegation that the plaintiff was interested jointly with the defendant's two sons, and, therefore, could not maintain a separate action for his equal share of the profits, is equally untenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence shows that each supported himself, found his own assistance, and paid his own expenses. Each was to have as his compensation, one-third of half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other. Sergeant Williams, in his note to Eccleston *v.* Clipsham, 1 Saund. 154, says, "Though a man covenant with two or more jointly, yet if the interest and cause of action of the

covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." In the present case, the cause of action was the service performed under the contract; and each performed his own distinct service, and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of Servante and Others *v.* James, 10 B. & C. 410, where the master of a vessel covenanted with the several part-owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant inured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate.

In the present case, the material fact is that the plaintiff and his associates were employés, and not proprietors. They were in the service of the defendant, and employed in and about his property and business, and not their own. Hence they were not partners, either with each other or with him. They were not liable for any losses. The entire responsibility for these was on him. They were only interested in the losses as they might affect the amount of their ultimate compensation.

These considerations dispose of another point made by the plaintiff in error, though not distinctly assigned for error; namely, that the contract created a partnership between the defendant and the other parties to it. No such result was intended, nor does it follow from any fair construction of the contract. There was no community of interest in the capital employed, nor in the profits and losses. The cattle remained the entire property of the defendant. If the whole herd had perished by distemper, it would have been his loss alone, and the other parties would only have been interested in the loss of compensation for their services.

Judgment affirmed.[1]

[1] In Darling *v.* Cumming, 92 Va. 521, the words in a signed paper promising performance, "according to an understanding between us," were held an insufficient reference to unsigned paper containing a statement of the understanding.

On the general question of the right to read several papers together to make out a memorandum, see Browne, § 346 *b*, *et seq.*, 2 L. R. A. 212.

THOMAS P. LERNED AND ANOTHER *v.* CHARLES WANNEMACHER AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER, 1864.

[*Reported in* 9 *Allen*, 412.]

CONTRACT brought to recover damages for the failure to deliver a quantity of coal, sold by the defendants to the plaintiffs. One ground of defence was, that the contract was not binding because not executed in conformity to the statute of frauds.

At the trial in the superior court, before MORTON, J., the plaintiffs introduced evidence tending to show the following facts: Albert Betteley was authorized to sign contracts for the sale of coal, in behalf of the defendants, who were commission merchants in Philadelphia, under the firm of Wannemacher & Maxfield. On the 31st of March, 1863, the plaintiffs made a parol contract for the purchase of one thousand tons of coal of Betteley, as agent of the defendants, according to the terms of the written memorandum hereinafter set out. The plaintiffs then signed and delivered to Betteley, as agent of the defendants, a memorandum of the contract, partly written and partly printed, as follows, the written parts being here put in Italics:

"Coal, when delivered on board of vessels, boats, or barges, to be in all respects at the purchaser's risk; bills of lading, or other regular testimony of shipment, to be proof of such delivery, both as to time and quantity. Each cargo of coal to be settled for from time to time as delivered, in the mode specified in the contract. Captains of vessels sent by purchasers for their coal, to bring written orders, and take each his regular turn in loading. All possible despatch will be given in loading, but no claims will be allowed for demurrage, nor for the consequences of unavoidable delay. No responsibility assumed as regards procuring vessels, boats, or barges; but every exertion will be used to engage them. Every effort will be made for the fulfilment of this contract; but if prevented or obstructed by breaches, or other unavoidable occurrences, on the canals or railroads, or at the mines, or by combinations, strikes, or turn-outs among miners, boatmen, or laborers, no claim for damages will be allowed. Wannemacher & Maxfield, commission merchants, Philadelphia. Boston, March 31, 1863.

"On the above terms and conditions, please deliver on board, at your wharves at *Philadelphia,* to be shipped to *Cambridgeport, 10* feet of water, 7 bridges, *1000* tons . . . . . *Swatara; 800 Stove, 200 Egg; Swatara; $4.50.*

"Terms cash, or approved paper at interest, added from date of bill of lading, or other proof of shipment; *United States tax to be added. We will send our own vessels. After first cargo is shipped, the purchaser has the right to refuse the balance if not satisfactory. T. P. Lerned & Son.*"

At the same time Betteley signed the name of "Wannemacher & Maxfield, by Albert Betteley," to a memorandum precisely similar to the above in every respect, except that the name of the plaintiffs was not signed to it, and delivered the same to the plaintiffs. Two or three

weeks afterwards Betteley, as agent of the defendants, wrote upon the back of the memorandum delivered to him by the plaintiffs these words: "To be shipped immediately, if vessels are not sent;" and the plaintiffs signed the same, and redelivered the memorandum to him. Both of the above papers were put in evidence by the plaintiffs, the one signed by them being produced by the defendants on notice. The price of coal subsequently increased in the market, and the defendants refused to deliver the said one thousand tons.

Upon the introduction of this evidence, the judge ruled that the action could not be maintained, and a verdict was accordingly taken for the defendants. The plaintiffs alleged exceptions.

G. A. Somerby, for the plaintiffs.

C. A. Welsh, for the defendants.

HOAR, J. The ruling to which exceptions were taken at the trial was this: that the plaintiffs could not maintain their action upon the contract set forth in the declaration, because it was a contract for the sale of merchandise for the price of more than fifty dollars, and there was no acceptance of any part of the goods, or giving anything in earnest to bind the bargain, or part payment, and no sufficient note or memorandum in writing of the bargain made and signed by the defendants, or by any person thereunto by them lawfully authorized. Gen. Sts. c. 105, § 5. And the question before us is of the sufficiency of the memorandum produced.

The first objection is, that neither the memorandum signed by the purchasers and delivered to the sellers, nor the counterpart signed by the sellers and delivered to the purchasers, contains in itself a complete statement of the bargain; that there is nothing in the papers themselves by which they can be connected, and it is not sufficient to connect them by parol; and that if connected they are only orders, and do not amount to a contract.

On examining the memorandum retained by the sellers which is signed by the plaintiffs, we think it is a complete memorandum of the bargain proved, and would undoubtedly have been sufficient in an action by the defendants against the plaintiffs. It must be observed that the contract itself, and the memorandum which is necessary to its validity under the statute of frauds, are in their nature distinct things. The statute presupposes a contract by parol. Marsh *v.* Hyde, 3 Gray, 333. The contract may be made at one time, and the note or memorandum of it at a subsequent time. The contract may be proved by parol, and the memorandum may be supplied by documents and letters, written at various times, if they all appear to have relation to it, and if coupled together, they contain by statement or reference all the essential parts of the bargain, signed by the party to be charged or his agent. William *v.* Bacon, 2 Gray, 387. Now it was proved by parol testimony that the contract declared on was made orally by the defendants, through their agent, with the plaintiff; and that the memorandum was delivered to the defendants by the plaintiffs as a statement of the terms of the bargain. In the printed part, it is spoken of as "this

contract," and "the contract." It recites that "every effort will be made for the fulfilment of this contract." It then contains a request to the defendants to deliver the coal, "on the above terms and conditions," "at your wharves at Philadelphia" — the defendants' place of business — "to be shipped to Cambridgeport" — the plaintiffs' place of business. The quantity, price, and terms of payment are then stated. It says, "we will send our own vessels," an agreement to receive; and concludes with an option to "the purchaser" to refuse all but the first cargo if that is not satisfactory. That there is a contract, a seller, a purchaser, a thing sold, a price, a place of delivery, and terms of payment, all sufficiently appear. It is true that part of the paper is in form an order; but we can have no doubt that, taking the whole together, it shows an agreement to purchase. As was said by Mansfield, C. J., in Allen *v.* Bennet, 3 Taunt. 169, "The defendant's counsel distinguishes between an order and an agreement to buy; but if I go to a shop and order goods do not I agree to buy them?"

The only defect, then, is the want of the signature of the defendants or that of their authorized agent. If this had been the only paper executed, it would deserve serious consideration, whether, if shown to have been made as a memorandum of a bargain concluded between the parties, delivered as such by the plaintiffs, and accepted as such by the agent of the defendants, the printed name of the defendants would not have been sufficient, upon the authorities, to answer the requirements of the statute as a signature by them. Saunderson *v.* Jackson, 3 Esp. R. 180; s. c. 2 B. & P. 238. But we do not put the case on this ground, because the counterpart of the contract, delivered by the defendants to the plaintiffs, is signed by them through their agent Betteley. As a separate paper, that is in its turn defective, by reason of not containing the name of the purchaser. But the two papers were prepared at one time, and delivered simultaneously as parts of the same transaction. The one produced by the plaintiffs is signed so as to charge the defendants. They gave to the defendants one by which they were themselves bound. The two show clearly, when construed by their own language as applied to the existing circumstances, which party was the seller, and which the purchaser. And we can see no reason upon principle or authority why they should not have the same effect, as if both the signatures were to the same paper. The intrinsic evidence which they afford that they refer to the same transaction is very strong, and competent for the consideration of a jury; and, in the absence of all proof that a precisely similar contract was made by either party with any other person, would be extremely cogent.

The case does not much resemble any of those cited for the defendants, in which the doctrine has been stated that when the memorandum is made out from several papers they must be shown upon their face to have a mutual relation to each other; and that this relation cannot be established by extrinsic evidence. This is the rule of the text-books; 2 Kent Com. (6th ed.) 511; Browne on St. of Frauds,

§ 350; and its general correctness is well settled. Morton *v.* Dean, 13 Met. 385. Most of the cases to which we have been referred have been those of sales at auction, where the conditions of sale were not contained in or annexed to the memorandum which was signed. Here the whole terms and conditions of the bargain are stated alike in the two copies of the memorandum, one of which is signed by each party.

There are, however, two specific objections which deserve attention. In each paper the statement is made, "We will send our own vessels;" and as they are signed, one by the plaintiffs and the other by the defendants, it is urged that the meaning of the word "we" becomes uncertain, or that the two parts of the memorandum are made contradictory. Besides this, one part of the contract was altered by the additional agreement written by the defendants' agent and signed by the plaintiffs, "to be shipped immediately if vessels are not sent;" and no corresponding alteration has been signed by the defendants.

The first difficulty seems to be capable of a satisfactory solution. The printed part of the memorandum clearly contemplates that the shipment of the coal is to be made in vessels to be furnished by the vendors; although they assumed no responsibility about the vessels except reasonable diligence in procuring them. The insertion of the written clause, "we will send our own vessels," could only be explained as importing a change in this respect. In the part of the contract signed by the plaintiffs "we" would mean the purchaser. In the other part the phrase follows the expression "your wharves," when speaking of the wharves of the defendants; and "we" is thus used in contradistinction from "you," the vendors. The agent of the vendors signs the paper; but still, if not with perfect grammatical correctness of expression, it is sufficiently obvious that in using the word "we" he means the purchasers.

The additional clause written upon the part of the memorandum retained by the defendants presents a more difficult question, though it shows very clearly who were meant by "we" in the part of the contract just considered. But it is obvious that it was not meant to impair the contract which had been made. It is an additional stipulation to take effect upon a contingency which has not happened. The evidence showed that vessels were sent by the plaintiffs. And if the contingency had happened, it was only the substitution of a new mode of performance, of which the defendants or plaintiffs might have availed themselves, even if made only by parol. Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cush. 31. If it were not binding on the defendants, because no memorandum of it was signed by them, it could not prevent the plaintiffs from enforcing the original contract. It is obviously inadmissible for the defendants to set it up as changing the contract, as evidenced by the completed memorandum, and at the same time to deny its obligation for want of their own signature.

It was held by the English Court of Exchequer, in the recent case of Black *v.* Gompertz, 7 Welsb. Hurlst. & Gord. 862, that where a correction was made upon the memorandum of a contract by the defendant, and signed only by the plaintiff, the original signature of the defendant was a sufficient signing under the statute. That decision would be applicable to the present case, if the memorandum had been contained in one paper, or if the indorsement had been made upon the part containing the signature of the defendants' agent. It is more doubtful whether it can be held to have the same effect where the memorandum is contained on separate papers, and we do not put the decision on that ground.

The other grounds of exception taken at the trial have not been insisted on by the plaintiff's counsel, and are clearly untenable.

Exceptions sustained.[1]

ALBERT H. HAYES *v.* CHARLES E. JACKSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, DECEMBER 8, 1892–SEPTEMBER 6, 1893.

[*Reported in* 159 *Massachusetts*, 451.]

HOLMES, J. This is an action upon a contract for the sale of land. The judge has found for the plaintiff, and the only question is whether the memorandum was sufficient to satisfy the Statute of Frauds. Pub. Sts. c. 78, sec. 1, cl. 4. The memorandum was as follows:

"BOSTON, April 6, 1889.

"Received of Albert H. Hayes one hundred dollars on account of sale of estate number 379 Columbus Avenue, for the sum of $14,140, subject to a mortgage of 8,000 dollars on 4½ per cent interest, and I agree to pay the 140 dollars as commission to James C. Tucker. Rents and insurance and interest to be adjusted to date. Title to be passed within ten days from date.

"C. E. JACKSON."

On the face of it this discloses no defect. But as the defendant and the plaintiff agreed in their testimony that the assumption of the mortgage of $8,000 was part of the consideration, and went to make up the sum of $14,140 mentioned, we assume that the judge found accordingly, and that it is open to the defendant to argue that the memorandum does not agree with the fact, but sets forth an agreement which was never made to pay $14,140 for the equity of redemption. Whether this argument is sound or not we do not consider, because it seems to be disposed of by sec. 2 of our statute, that the consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith. This section was inserted in the Rev. Sts. c. 74, sec. 2, for the purpose of adopting and confirming the judgment of this court in Packard *v.*

[1] White *v.* Breen, 106 Ala. 159; Strouse *v.* Elting, 110 Ala. 132, 140, *acc.*

Richardson, 17 Mass. 122, declining to follow Wain *v.* Warlters, 5 East, 10. That case concerned a promise to pay the debt of another, a subject on which there has been much controversy in this country (Browne on St. Frauds, secs. 390 *et seq.*), and went on the broad ground that it was not necessary to state the consideration. Marcy *v.* Marcy, 9 Allen, 8, 10; Wetherbee *v.* Potter, 99 Mass. 354, 362. The rule laid down in Wain *v.* Warlters was altered by statute in England, St. 19 & 20 Vict. c. 97, sec. 3, "because it was found, in practice, that it led to many unjust and merely technical defences to actions upon guarantees." 2 Smith Lead. Cas. (8th ed.) 262, 263, note to Wain *v.* Warlters. The second section of our statute goes further, and applies to all the contracts mentioned in sec. 1, no doubt for similar reasons among others. The defendant is sufficiently protected if all that he is to do is required to be in writing.

Of course it may be said that, in a bilateral contract like the present, the contemporaneous payment of the price is a condition of the promise, and therefore that the promise cannot be set forth truly unless the consideration is stated. But the language of the section is general, and should be read as no doubt it was meant. The only effect is that a promise set forth as absolute may be subject to an implied condition of performance on the other side. When such an implied condition exists it will be construed into the writing, and knowledge of the law gives notice of its possible existence. In some cases it has been held unnecessary to state the consideration, even when there is no provision like our sec. 2, although the consideration was executory. Thornburg *v.* Masten, 88 N. C. 293; Miller *v.* Irvine, 1 Dev. & Bat. 103; Ellis *v.* Bray, 79 Mo. 227; Violett *v.* Patton, 5 Cranch, 142; Camp *v.* Moreman, 84 Ky. 635. In Howe *v.* Walker, 4 Gray, 318, Thomas, J., plainly indicated the opinion that sec. 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sustain an action.

The only case at all opposed to our conclusion, so far as we know, is Grace *v.* Denison, 114 Mass. 16. That was a bill for specific performance; not of the original agreement, but of the written document set forth, which document showed that a mortgage was to be given by the purchaser, but did not state what part of the purchase money was to remain secured in that way. Specific performance was refused, and in the judgment a brief reference was made to the Statute of Frauds, citing Browne on St. Frauds, secs. 376, 381; Fry on Spec. Perf. secs. 221, 222, and note 7. These sections state in general terms that the memorandum must contain the price, and do not apply in this State, so that the inference is that sec. 2 of our statute was overlooked by the court. It was not mentioned in the briefs of counsel, or in the judgment. The decision cannot overrule the statute, and is no authority for a distinction under it. So far as it went on the doctrines of specific performance only, as would seem from the reference to Fry on Spec.

Perf. sec. 222, note 7, stating Baker *v.* Glass, 6 Munf. 212, and to Boston & Maine Railroad *v.* Babcock, 3 Cush. 228, 232, and from the fact that Mr. Justice Wells, who delivered the opinion of the court in Grace *v.* Denison, also wrote the decision in Wetherbee *v.* Potter, 99 Mass. 254, 362, it has no bearing on the case at bar.

Exceptions overruled.[1]

FIELD, C. J. I do not assent to the opinion of the court. The agreement or receipt signed by the defendant purports to set out the price, and apparently contains all the terms of the contract. It is argued that one term of the contract was that "the tenant should be allowed to remain," but the exceptions recite that there was "conflicting evidence upon the point as to whether or not it was a part of the oral agreement that the tenant should be allowed to remain." The court, trying the case without a jury, has found for the plaintiff, and has refused to rule according to three requests made by the defendant.[2] For aught that appears, the court may have found that it was not a part of the contract that the tenant should be allowed to remain. But if there was such an agreement, it was an agreement to be performed by the plaintiff after he received the conveyance, and seems to be collateral to the contract of purchase and sale, rather than a part of it.[2] The real difficulty in the case is, that the writing is ambiguous in regard to the price, and one question in the case might have been whether oral evidence was competent to remove the ambiguity, but no such question appears to have been raised. The evidence of the usage of real estate brokers with respect to the amount of their commissions, if competent, had some tendency to show that the writing should be construed as both the plaintiff and the defendant testified the contract really was. The opinion of the court proceeds solely on the ground that under our Statute of Frauds the contract of sale or a memorandum of the sale of land signed by the vendor, need not contain the price, or any of the other terms of the sale; that it is enough if the writing shows that the defendant has agreed to sell certain designated land to the plaintiff on some terms unexpressed, or if it contains an acknowledgment that such an agreement has been made. The reasons given for this opinion are, that by our statute, Pub. Sts. c. 78, sec. 2, "The consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence." This provision was introduced in the Revised Statutes in consequence of the decision in Packard *v.* Richardson, 17 Mass. 122; Rev. Sts. c. 74, sec. 2. In the report of the commissioners appointed to make the

[1] White *v.* Dahlquist Mfg. Co., 179 Mass. 427, *acc.*

[2] The rulings requested were as follows: "1. Upon all the evidence in this case, the plaintiff is not entitled to maintain this action. 2. The memorandum relied upon in this case is not, upon all the evidence in this case, a sufficient memorandum to satisfy the requirements of the Statute of Frauds. 3. Upon the pleadings and all the evidence in the case, there is no sufficient memorandum to satisfy the requirements of the Statute of Frauds, and entitle the plaintiff to maintain this action."

revision, they say: "This section is new in terms, and is proposed for the purpose of adopting and confirming the judgment of the Supreme Judicial Court upon the construction of the statute now in force. 17 Mass. Rep. 122." The decision in Packard *v.* Richardson was upon a written promise on the back of a promissory note signed by the defendants, as follows: "We acknowledge ourselves holden as surety for the payment of the within note." In the opinion it is said: "The consideration existing was, that these defendants were members of the company which made the note; and that a suit, which had been commenced, was stopped by the plaintiff, at their request. But this consideration was proved by parol, and the writing acknowledges no consideration whatever." 17 Mass. 128. The court declined to follow the decision in Wain *v.* Warlters, 5 East, 10. See Saunders *v.* Wakefield, 4 B. & Ald. 595. All these cases arose upon contracts of guaranty or contracts to pay the debt of another, and the consideration of the promise was executed. When these cases were decided it was not questioned that the memorandum of a contract of sale must contain the terms of the contract, and that one term of every contract of sale is the price. Many of the United States have passed statutes on this subject similar to ours; viz. Illinois, Indiana, Kentucky, Maine, Michigan, Nebraska, New Jersey, Virginia, and West Virginia. See Wood on St. Frauds, sec. 105, Appendix, 892–922. As it may be suggested that decisions in England and in States where no similar statutes exist are not applicable, I shall confine my citations chiefly, if not wholly, to our own decisions, and to the decisions of the courts of those States whose statute on this subject is similar to ours. It is substantially conceded that Grace *v.* Denison, 114 Mass. 16, is directly opposed to the opinion of the court in the present case, but it is said that the second section of our Statute of Frauds was overlooked by the court. It was a bill in equity against a vendor, for the specific performance of an agreement to convey land. The case arose on a demurrer for the cause "that such contract as the plaintiff alleges to be in writing and signed by the defendant is not sufficient to enable a court of equity to decree specific performance thereof." The only ground on which the demurrer was sustained was, that the memorandum of the agreement was not sufficient to satisfy the Statute of Frauds. The court say: "The memorandum of agreement indicates that a part of the purchase money was agreed to be secured by mortgage of the premises to be conveyed. But it does not disclose nor furnish any means for the court to ascertain what part or amount is to remain upon mortgage, and what paid in cash upon delivery of the deed. . . . The writing being incomplete in one of its essential terms, and the court having no means to which it can lawfully resort to supply the defect, specific performance must fail."

Atwood *v.* Cobb, 16 Pick. 227, was assumpsit by the vendee against the vendor on an agreement to convey land signed by both parties. The agreement was "in consideration of the same sum which I paid him [the vendee] for the same, with interest from the time I purchased

the same till I paid for it (supposed about six months), with the expense of the deed, also the taxes for one year." One defence was the Statute of Frauds. On this the court say: "The principal uncertainty is as to the price to be paid. . . . As the amount paid for an estate is usually determined by the consideration expressed in the deed of conveyance, or by some receipt or memorandum, it is impossible to pronounce this contract void under the statute, because it does not express with sufficient certainty the price to be paid for the estate."

Morton *v.* Dean, 13 Met. 385, was an action of assumpsit by the vendor of land against the vendee; the memorandum was signed by an auctioneer who was the agent of both parties; and in the opinion in that case it was said: "But the memorandum of sale must refer to the conditions of sale, or the case will be within the statute. Where the connection between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. The terms of the agreement, which are material, must be stated in writing."

In Waterman *v.* Meigs, 4 Cush. 497, an action to recover the price of merchandise sold, the court say: "The statute [of frauds] requires 'some note or memorandum in writing of the bargain.' This letter alludes to plank bought, and to be delivered; but it does not state any one of the elements of a contract, price, quantity, quality, time, place, or anything to inform us what the nature of the contract was, and is clearly not a sufficient memorandum." Coddington *v.* Goddard, 16 Gray, 436, was an action of contract to recover damages for not delivering 200,000 pounds of copper, alleged to have been sold by the defendant to the plaintiff. The same doctrine was announced.

Riley *v.* Farnsworth, 116 Mass. 223, was an action of contract by the vendee of land against the vendor. The memorandum was signed by auctioneers who were agents of both parties. It described the land and the price, and it acknowledged the receipt of a deposit, and contained an agreement that the vendor should fulfil the conditions of sale. These conditions were not in writing. The court say: "The memorandum in writing required by the Statute of Frauds must contain all the essential terms of the contract, so that the court can ascertain the rights of the parties from the writing itself without resorting to oral testimony."

Ashcroft *v.* Butterworth, 136 Mass. 511, was an action of contract for breach of a written agreement to sell goods. The court say: "In this case it does not appear that the price is made certain by any writing signed by the defendants. The present price is indeed 8½*d.* per pound; but the prices generally are to be the same as those paid by the Ashcroft Manufacturing Company, and it does not appear that those prices are contained in any writing signed by the defendants, to which this offer of the defendants refers. The Statute of Frauds has been pleaded. We think the ruling cannot be supported." See also Elliot *v.* Barrett, 144 Mass. 256; Fogg *v.* Price, 145 Mass. 513.

In Freeland v. Ritz, 154 Mass. 257, the court say: "It is a well-settled rule of law, that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself, or from some other paper or papers therein referred to." The agreement concerned an interest in land.

In White v. Bigelow, 154 Mass. 593, the court say: "To satisfy the statute [of frauds], the agreement or memorandum must, either by its own terms or by reference to some other writing, express with reasonable certainty all the conditions and essential elements of the bargain." The agreement was alleged to have been made upon consideration of marriage. See Callanan v. Chapin, 158 Mass. 113.

I do not know whether the majority of the court intend to make a distinction between contracts of sale described in the first section of Pub. Sts. c. 78, and contracts of sale described in the fifth section. While some of the cases cited above are suits against the vendee and some suits against the vendor, it seems to me that this court has always held, in both classes of cases, that, in a contract to convey land or other property executory on both sides, the contract or memorandum, although it need be signed only by the party to be charged, must contain all the essential terms of the contract or bargain, and that the price agreed to be paid is an essential term. To say that the court in the decision of Grace v. Denison overlooked a well-known provision of our Statute of Frauds concerning consideration is, I think, unwarranted.

Some of the decisions in other States whose statutes on this subject are similar to ours are cited below. O'Donnell v. Leeman, 43 Maine, 158; Williams v. Robinson, 73 Maine, 186. In the last case the court say: "But while, as before seen, the memorandum need not necessarily mention the consideration, that being proved by parol testimony, nevertheless, in order that the court may ascertain the rights of the parties from the writing itself, without resort to oral testimony (Riley v. Farnsworth, 116 Mass. 223, 225, 226), to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to (if any), without any aid from parol testimony." Gault v. Stormont, 51 Mich. 636; Norton v. Gale, 95 Ill. 533; Farwell v. Lowther, 18 Ill. 252; Nibert v. Baghurst, 2 Dick. 201; Schenck v. Spring Lake Beach Improvement Co., 2 Dick. 44. See Williams v. Morris, 95 U. S. 444; Reed on St. Frauds, secs. 398 *et seq.*; Browne on St. Frauds, secs. 376–385.

In Camp v. Moreman, 84 Ky. 635, an opinion is expressed which accords with the opinion of a majority of the court in the present case, although perhaps it was not necessary to the decision. See Freeland v. Ritz, 154 Mass. 257; Thornburg v. Masten, 88 N. C. 293; and Miller

v. Irvine, 1 Dev. & Bat. 103, were decided under a Statute of Frauds copied from the English statute of 29 Car. II. c. 3, which contained no provision concerning consideration similar to ours. Ellis *v.* Bray, 79 Mo. 227, appears to have been decided on the ground that, "when a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence," — a doctrine to which I think this court is not committed.

When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promisee has actually received $1,000 is not the same as a promise to convey land if the promisor will pay $1,000 on receiving the conveyance, and a promise to convey land for $1,000 to be paid on the delivery of the deed is not the same as a promise to convey land for $10,000 to be paid on the delivery of the deed. The conditions on which the vendor agrees to convey are often many and complicated, and involve the assumption of mortgages and the performance of other acts. If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee on terms which are not expressed is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money and gives or assumes mortgages, the condition qualifies the promise and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in great part to nullify the statute. I have not considered whether the judgment of the court may not be sustained on some other ground than that stated in the opinion.[1]

Mr. Justice Knowlton concurs in this opinion.[1]

[1] It is generally held that where a price was part of the contract, the price must appear in the memorandum, as it is an essential element of the contract. Browne, sec. 376 *b*, *et seq.*

The authorities on the much disputed question whether the consideration of the promise must appear in the memorandum are discussed, *ibid.* sec. 386 *et. seq.*

PATRICK DOHERTY *v.* SARAH A. HILL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 16–MAY 9, 1887.

[*Reported in* 144 *Massachusetts*, 465.]

CONTRACT for breach of an agreement to convey to the plaintiff certain real estate in Stoneham. Answer, the Statute of Frauds.

Trial in the Superior Court, before BLODGETT, J., who allowed a bill of exceptions, in substance as follows:

J. H. Green, who claimed to act as agent for the defendant, and who executed the contract declared on, testified, for the plaintiff, that the estate referred to in said contract was placed in his hands by the defendant in May, 1884, at which time the defendant instructed him to sell it for the sum of $1,300; that on May 28, 1885, in reply to a telegram from him inquiring at what price she would sell, the defendant sent him the following telegram, signed by her: "Eleven hundred and fifty cash, if possible try for more;" that on May 30, 1885, the defendant wrote the witness a letter, which contained the following: "As I telegraphed you, I will sell the house in Lincolnville for $1,150; will pay last year's taxes and throw in insurance, which lasts until 1887. . . . I will make terms easy for the party purchasing it, say three or four hundred down and the other payments satisfactorily secured by mortgage;" and that, on June 1, 1885, and after receiving this letter, the witness received from the plaintiff $100 in cash, and executed and gave to the plaintiff the following paper, being the same declared on: "$100. Stoneham, June 1st, 1885. Rec'd of Patrick Doherty one hundred dollars to bind sale of estate on Congress Street owned by Sarah A. Hill. $350 cash. $850 in mortgage at 6 per cent. J. Horace Green, agent for Sarah A. Hill."

The witness further testified, that he had never paid back to the plaintiff the $100 received; and that he told the plaintiff he would pay interest on it, and that the plaintiff could have the money whenever he called for it. The plaintiff offered the contract of sale in evidence, to which the defendant objected; but the judge admitted it.

There was also evidence tending to show that the defendant, by her agent, one Kimball, sold said estate, on June 11, 1885, to one Almy, and delivered to Almy a deed thereof.

The defendant testified, and upon this point her testimony was not controverted, that in addition to the estate claimed to have been sold to the plaintiff, and which consisted of a lot of land with a dwelling-house on it, she owned, on June 1, 1885, several lots containing two or three acres in all, and all in one parcel, of other land on said Congress Street, upon the other side of the street and nearly opposite to the land in question; and that this parcel of land had no buildings upon it.

The plaintiff offered to show that the estate named in the agreement

was the lot with the dwelling-house on it. The defendant requested the judge to rule that it could not be shown by extrinsic evidence to which of the defendant's estates on Congress Street the written memorandum referred; but the judge declined so to rule.

The plaintiff offered in evidence a draft of a deed from the defendant to him of the estate which the plaintiff claimed to have purchased, which draft was made by Green and sent by him to the defendant to be executed, and which the defendant refused to execute. To the admission of this draft in evidence the defendant objected; but the judge admitted it.

The defendant, for the purpose of showing the value of the estate as affecting the question of damages, offered to prove that said estate had been, since December, 1885, in the hands of a real estate agent in Stoneham, with authority to sell it for $1,200, but no purchaser had been found. The judge excluded the evidence offered.

The jury returned a verdict for the plaintiff in the sum of $200; and the defendant alleged exceptions.

A. V. Lynde, for the defendant.

E. B. Powers & J. C. Kennedy (*S. L. Powers* with them), for the plaintiff.

HOLMES, J. The memorandum would have satisfied the Statute of Frauds, if the evidence had shown that there was only one "estate on Congress Street owned by Sarah A. Hill," in Stoneham, where the memorandum is dated.[1] Hurley *v.* Brown, 98 Mass. 545; Scanlan *v.* Geddes, 112 Mass. 15; Mead *v.* Parker, 115 Mass. 413. But the evidence shows that there were more than one. The plaintiff argues that this is an ambiguity introduced by parol, and that therefore it may be removed by parol. 98 Mass. 548. But the statement seems to us misleading. The words show on their face that they may be applicable to one estate only, or to more than one. If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case, the words used must be translated into things and facts by parol evidence. But if, when so translated, they do not "identify the estate intended, as the only one which would satisfy the description," they do not satisfy the statute. See Slater *v.* Smith, 117 Mass. 96, 98; Potter *v.* Duffield, L. R. 18 Eq. 4, 7.

[1] "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; Reuss *v.* Picksley, L. R. 1 Ex. 342; Stewart *v.* Eddowes, L. R. 9 C. P. 311; 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; Wilkinson *v.* Taylor Mfg. Co., 67 Miss. 231; 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; Himrod Co. *v.* Cleveland Co., 22 Ohio St. 451; Thayer *v.* Luce, 22 Ohio St. 62; Lee *v.* Cherry, 85 Tenn. 707; Lowber *v.* Connit, 36 Wis. 176; Hawkinson *v.* Harmon, 69 Wis. 551, *acc.* Compare 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; Atlee *v.* Bartholomew, 69 Wis. 43.

The letter from the defendant to her agent did identify the estate, we will assume, as the only one owned by her which had a house upon it. But, of course, this letter was not of itself a sufficient memorandum. It has been held that an offer in writing, afterwards accepted orally, satisfies the statute. Sanborn *v.* Flagler, 9 Allen, 474; Browne, St. of Frauds (4th ed.), § 345 *a*. But this letter was only an authority to offer. It does not appear to have been exhibited to the plaintiff, as in Hastings *v.* Weber, 142 Mass. 232, and plainly was not intended to be. We express no opinion whether it would have been sufficient, if it had been shown and its terms had been accepted.

Again, the letter cannot be used to help out the memorandum, on the ground that the latter impliedly incorporates it. The memorandum, it is true, purports to be signed by an agent, and therefore may be said to refer by implication to some previous authority. But this implied reference is at most rather an implied assertion that authority exists (which may be oral), than a reference to documents containing the authority. Jefts *v.* York, 10 Cush. 392, 395; Boston & Albany Railroad *v.* Richardson, 135 Mass. 473, 475. It would hardly be argued as a defence to an action of deceit, against a person who had assumed to act as agent without authority, that the memorandum signed by him impliedly referred to and incorporated the written communications from his alleged principal, and that therefore the plaintiff must be taken to have known them, and that they did not confer the authority assumed. In this case, the agent had authority by telegram before he received the letter; the argument, therefore, would have to go the length of saying that all documents of authority were tacitly incorporated.

In Hurley *v.* Brown, *ubi supra*, it was held that a memorandum of an agreement to sell "a" house on a certain street should be presumed to mean a house belonging at the time to the contractor. It may be asked whether there is not at least as strong a presumption that a memorandum signed by an agent refers to property which he is authorized to sell. But unless the document of authority is specifically incorporated, then the memorandum is only of a sale of a house which the agent is authorized in some way to sell, and, so far as the memorandum goes, his authority may as well be oral as written. The difference may be one of degree, but the distinction is none the less plain between an identification by extrinsic proof of the usually manifest, external, and continuing fact that the party owned but one house on a certain street, and that by similar proof of possibly oral communications between principal and agent, which is precisely the kind of identification the statute seeks to avoid. See Whelan *v.* Sullivan, 102 Mass. 204, 206; Rossiter *v.* Miller, 3 App. Cas. 1124, 1141; Potter *v.* Duffield, *ubi supra;* Jarrett *v.* Hunter, 34 Ch. D. 182.

The same considerations would apply to an attempt to help out the memorandum by evidence that the estate intended was the only one which the plaintiff knew of as belonging to the defendant.

The remaining exceptions become immaterial. The draft of a deed

of the premises was admissible, in connection with proof that it was offered to the defendant for execution, to show a breach, but not to aid the memorandum. The deed was not referred to by the previously executed memorandum, nor were its contents governed by the signature of the latter.

Evidence that a real estate agent had not sold the land for $1,200 was not evidence of its value.

Exceptions sustained.[1]

[1] In Ryder *v.* Loomis, 161 Mass. 161, 162, Morton, J., said:

"The defendant objects that the description of the property in the memorandum on which the plaintiff relies is insufficiently within the Statute of Frands. What was sold is described as 'my right in Benjamin Ryder's (my father) estate.' The report finds that the only real estate which Benjamin Ryder owned was his homestead in Yarmouth, Mass., and that he devised it in equal shares to the plaintiff and the defendant Mary. It is well settled that parol evidence may be introduced for the purpose of showing the positions of the parties and their relation to any property that will satisfy the description contained in the memorandum. Farwell *v.* Mather, 10 Allen, 322; Hurley *v.* Brown, 98 Mass. 545; Mead *v.* Parker, 115 Mass. 413; Doherty *v.* Hill, 144 Mass. 465, 468; Murray *v.* Mayo, 157 Mass. 248. Viewed in the light of surrounding circumstances, the description is as if it read 'my undivided half in the homestead belonging to the estate of Benjamin Ryder in Yarmouth, Mass.' Such a description clearly would be sufficient. Atwood *v.* Cobb, 16 Pick. 227; Nichols *v.* Johnson, 10 Conn. 192. Cases *supra*."

In Mead *v.* Parker, 115 Mass. 413, it was held that the words "a house on Church Street" sufficiently described the property. See also Hurley *v.* Brown, 98 Mass. 545, and Slater *v.* Smith, 117 Mass. 96. In Hodges *v.* Kowing, 58 Conn. 12, "his place in Stratford, containing about 15 acres" was held a sufficient description, but in Andrew *v.* Babcock, 63 Conn. 109, "a tract of land with all the buildings thereon, adjoining the New Haven and Derby R. R., in the town of Orange, and containing some twenty acres more or less," was said to be insufficient, though apparently the seller owned no other property answering the description. In Fortesque *v.* Crawford, 105 N. C. 29, "his land" was held "too vague and indefinite to admit parol evidence to locate the land." See also Lowe *v.* Harris, 112 N. C. 472. In Falls of Neuse Manufacturing Co. *v.* Hendricks, 106 N. C. 485, "his land where he now lives" was held sufficient if susceptible of identification by extrinsic evidence. In Jones *v.* Tye, 93 Ky. 390, "land adjoining the McKebly land" was held insufficient, the seller having two parcels answering that description. In Holmes *v.* Evans, 48 Miss. 247, "a piece of property on the corner of Main and Pearl Streets, city of Natchez, county of Adams, State of Mississippi," was held insufficient because there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. In Mellon *v.* Davidson, 123 Pa. 298, "a lot of ground fronting about 190 feet on P. R. R. in the 21st ward Pittsburgh, Pa.," was held insufficient, though the seller owned but one piece of land in the ward named.

See also Ogilvie *v.* Foljambe, 3 Mer. 53; Bleakley *v.* Smith, 11 Sim. 150; Newell *v.* Radford, L. R. 3 C. P. 52; Sbardlow *v.* Cotterell, 20 Ch. D. 90; Rineer *v.* Collins, 156 Pa. 342; Cunningham *v.* Neeld, 198 Pa. 41, 45; Seymour *v.* Cushway, 100 Wis. 580; and an article by F. Vaughan Hawkins in 2 Juridical Society Papers, 298, especially 326 *et seq.*

NOBLE *v.* WARD and Others.

In the Exchequer, January 12, 1866.

[*Reported in Law Reports*, 1 *Exchequer*, 117.]

In the Exchequer Chamber, February 8, 1867.

[*Reported in Law Reports*, 2 *Exchequer*, 135.]

Action for non-acceptance of goods. The first count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should sell and deliver to them, and that they should accept from him, within a certain agreed period, which had elapsed before action, a quantity of cloth at certain prices therefore to be paid by the defendants, and then agreed upon between the plaintiff and the defendants; yet the defendants refused to accept or pay for the cloth, although all things were done, &c., whereby the plaintiff lost the difference between the agreed price and the lower price to which the goods sold fell. The second count was for money payable for goods bargained and sold, goods sold and delivered, and for money due on accounts stated.

The defendants, as to the first count, pleaded (1) *Non assumpsit.* (2) Traverse that the plaintiff was ready and willing to deliver the cloth within the agreed period. (3) That it was one of the terms of the alleged agreement, that the cloth agreed to be sold and delivered should be of the same material, and as well made, as a sample piece then shown and delivered by the plaintiff to the defendants; and that the plaintiff was not ready and willing to deliver cloth of the same material and as well made as the sample piece. (4) Rescission of the alleged agreement. (5) To the second count, never indebted. Issues thereon.

The cause was tried before Bramwell, B., at the Manchester Summer Assizes, 1865, when the following facts were proved: —

The plaintiff is a manufacturer, and the defendants are merchants, at Manchester. On the 12th August, 1864, the defendants gave to the plaintiff's agent an order for 500 pieces of 32-inch grey cloth at 38*s.* 9*d.*, and 1000 pieces of 35-inch grey cloth at 42*s.* 1½*d.*, the deliveries to commence in three weeks, and to be completed in eight to nine weeks. On the 18th of the same month a second order[1] was given by the defendants for 500 pieces of 32-inch grey cloth at 39*s.* and 100 pieces of 35-inch grey cloth at 42*s.* 3*d.*, to be delivered "to follow on after order given 12th instant, and complete in ten to twelve weeks." The plaintiff, on the 10th and 19th September made a first and second delivery on account of the first order. Considerable discussion ensued, both as to the time of delivery and as to the quality of the goods delivered; and eventually, on the 27th September, the

[1] There was a memorandum in writing. s. c. 14 Weekly Rep. 397.

plaintiff had an interview with the defendants, at which it was agreed that the goods delivered under the first order should be taken back, that that order should be cancelled, and that the time for delivering the goods under the second order should be extended for a fortnight. Goods were tendered to the defendants by the plaintiff in time either for the fulfilment of the agreement of the 18th August or of that of the 27th September; but the defendants refused to accept them on various grounds — amongst others, on the ground that they were not of the stipulated quality. The plaintiff thereupon brought this action. The declaration was framed so as to fit either the agreement of the 18th August or that of the 27th September. The learned judge directed a nonsuit to be entered, being of opinion that the contract of the 18th August was no longer in existence, the parol agreement of the 27th September having rescinded it; and that the latter agreement could not be resorted to, not being in writing, in accordance with sec. 17 of the Statute of Frauds (29 Car. II. c. 3). That section provides that "no contract for the sale of any goods, wares, or merchandises for the price of 10*l.* sterling or upwards shall be *allowed to be good* . . . unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

A rule *nisi* was obtained in Michaelmas term, 1865, for a new trial, on the ground that the plaintiff was entitled to recover on the contract of the 18th August.

Holker and *Baylis* showed cause:

Mellish, *Q. C.*, in support of the rule.

Jan. 12. The judgment of the Court (POLLOCK, C.B., BRAMWELL, CHANNELL, and PIGOTT, B.B.) was delivered by

BRAMWELL, B.[1] This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants also at a future day was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed, verbally, to rescind, or do away with, contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract, call it C. It was a contract in which all that was to be done

[1] This judgment was read by CHANNELL, B.

and permitted on one side was the consideration for all that was to be done and permitted on the other. See per Parke, B., in Marshall *v.* Lynn, 6 M. & W. 117. It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes, and my recollection of my ruling, are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the Statute of Frauds, or not. If not, there was no need for a writing; if yes, it was because it was a contract for the sale of goods, and so within the seventeenth section of the statute. That says that no contract for the sale of goods for the price of 10*l.* or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression "allowed to be good" is not a very happy one, but whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold. First, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once — was all one transaction, one bargain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts.

I think, therefore, that on principle it was wrong to hold that the old contract was gone. Moore *v.* Campbell, 10 Ex. 323, 23 L. J. (Ex.) 310, is an authority to the same effect. It is true that case may be distinguished on the facts, namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The cases of Goss *v.* Lord Nugent, 5 B. & Ad. 58; Stead *v.* Dawber, 10 Ad. & E. 57, and others, only show that the new contract C cannot be enforced, not that the old contract B is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract, and not the plaintiff, the plaintiff would be bound to the old and the defendants to the new. Or, if in the course of the cause a writing turned up signed by the plaintiff, then they could first rely on the old, and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

But then, it was said before us that the plaintiff was now ready and willing to deliver under contract B. Probably not, and he supposed contract C was in force. In answer to this the plaintiff contended

before us that this point was not made at the trial, to which the defendants replied, — neither was the point that the old contract was in force. My recollection is so, — that the case was opened and maintained as on the new contract, — but I agree with Mr. Mellish, that a nonsuit ought to be maintained on a point not taken at the trial only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute, but under the circumstances the costs of both parties of the first trial ought to abide the event of the second.

CHANNELL, B. The case, in my brother BRAMWELL'S opinion, turning on what was his own impression, he was desirous that this judgment should be read as his own judgment. But I am authorized by the Lord Chief Baron, and by my brother PIGOTT, to say that, although I have read it as the judgment of my brother BRAMWELL, it is a judgment in which we all agree.

Rule absolute.

The defendants appealed to the Exchequer Chamber.

WILLES, J. This is an appeal from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptanee of goods pursuant to a contract dated the 18th of August, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial, they established that, on the 27th of September, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of the 12th of August should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of the 27th of September, however, was invalid, for want of compliance with the formalities required by sec. 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of the 18th of August; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as a change in the mode of carrying out a contract can be said to be a rescission of it; but the defendants maintained that the effect was the same, although the contract was invalid. In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the

contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind simpliciter, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind — whether the transaction was one which could not otherwise operate according to their intention; and a material fact on that point is, that, while they expressly rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of Doe d. Egremont *v.* Courtenay, 11 Q. B. 702, and Doe d. Biddulph *v.* Poole, 11 Q. B. 713, overruling the previous decision of Doe d. Egremont *v.* Forward, 3 Q. B. 627; see 11 Q. B. 723, to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by Moore *v.* Campbell, 10 Ex. 323, 23 L. J. (Ex.) 310, where, upon a plea of rescission, the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established. With reference to his argument that the contract was rescinded, Parke, B., said, 10 Ex. at p. 332: "We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new valid agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, their being neither note in writing, nor part payment, nor delivery, nor acceptance, of part or all;" and he adds: "this was decided by the cases of Stead *v.* Dawber, 10 Ad. & E. 57, and Marshall *v.* Lynn, 6 M. & W. 109." As to the cases cited from East, too much importance has been attached to them. The first case, Hill *v.* Patton, 8 East, 373, amounts to no more than this, that the court was bound to construe the contract before it without regard to the stamp, and having done so, then to see how the Stamp Acts operated upon it. In the second case, French *v.* Patton, 9 East, 351, it was held that, although the Stamp Acts operated to prevent the plaintiff from recovering upon the policy as altered, that circumstance could not enable him to recover upon it in its original form, when he had himself consented to the alteration of the written words.

BLACKBURN, MELLOR, MONTAGUE, SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

HICKMAN *v.* HAYNES.

IN THE COMMON PLEAS, JULY 9, 1875.

[*Reported in Law Reports*, 10 *Common Pleas*, 598.]

JULY 9. The judgment of the Court (Lord COLERIDGE, C. J., GROVE, ARCHIBALD, and LINDLEY, JJ.) was delivered by

LINDLEY, J. This was an action for not accepting certain iron agreed to be sold by the plaintiff to the defendants. The contract for sale of the iron was in writing, and was required so to be by the 17th section of the Statute of Frauds. The bought-note was as follows: —

"TIPTON, 6th March, 1873.

"Bought of Alfred Hickman, Esq., one hundred tons of Grey Forge Mine pig iron, at 7*l.* 10*s.* per ton. Delivered at Tividale Street Mills, Tipton. Payment in cash, less 2½ discount, monthly. Delivery twenty-five tons this month, and twenty-five tons per month during April, May, and June next.

"The Tividale Iron Company. J. P. HAYNES."

Pursuant to this contract the plaintiff delivered and the defendants accepted and paid for seventy-five tons of the iron; but, owing to the circumstances stated below, the plaintiff did not deliver the last twenty-five tons, for the price of which the action is brought.

It appears from the evidence taken at the trial, that, on the 2d of June, and again in the middle of June, the defendant Haynes saw the plaintiff, and verbally requested him to allow the delivery of the last twenty-five tons to stand over, and that the plaintiff verbally assented to this request; and accordingly nothing further was done by either side until the 1st of August, 1873, when plaintiff wrote to defendants as follows: "Permit me to call your attention to your contract with me for pig iron, of which twenty-five tons remain to be delivered. I have held them until now, as you requested, and shall be glad to know when you propose to take delivery. If it is not convenient for you to take the iron, I shall be glad to know if you will be willing to pay the difference in price, if I instruct Mr. Lewis to sell them."

This led to some correspondence, which was terminated by a letter written by the defendants on the 9th of August, asking for more time. The plaintiff again waited for a reasonable time, but without result. On the 20th of October, 1874, the writ was issued.

The case was sent for trial in the Dudley County Court, and was tried there on the 28th of May, 1875, when a verdict was found for the plaintiff, damages 25*l.*, with leave for the defendants to move for a nonsuit, or for a reduction of the damages. Pursuant to the leave thus reserved, a rule was obtained to show cause why a nonsuit should not be entered, on the ground that the parol agreement to postpone delivery of the iron was invalid under the Statute of Frauds, or why the damages should not be reduced to 21*l.* 17*s.* 6*d.*, or to 7*l.* 5*s.*, if the Court should

be of opinion that they ought to be assessed on the 30th of June, 1873, or on the 2d of June, 1873.

The declaration was framed upon the contract above set forth, and averred as a breach, that, although the defendants had accepted and paid for seventy-five tons, they would neither accept nor pay for the last twenty-five tons; alleging also that the defendants had exonerated the plaintiff from delivering the twenty-five tons at the Tividale Street Mills, as agreed.

Amongst other pleas, the defendants traversed the alleged exoneration, and also pleaded, thirdly, that the plaintiff was not ready and willing to deliver the said twenty-five tons according to the terms of the agreement; and, fifthly, that before breach the plaintiff discharged the defendants from further performance of the agreement.

In this state of the record, and upon the evidence above set forth, it was contended before us that there was in fact a new and substituted agreement for delivery and acceptance of the last twenty-five tons of iron at a time subsequent to that originally agreed upon, which was sufficient to exonerate the defendants from the further performance of the original agreement, but which, not being in writing, could not be enforced, by reason of the Statute of Frauds, and that no amendment of the declaration, therefore, would enable the plaintiff to maintain his action; and also that the plaintiff's verbal assent to postpone the delivery of the twenty-five tons until the 1st of August established conclusively that he was not ready and willing to deliver in June, according to the terms of the written contract, and therefore he was not in a condition to recover upon the original contract as set out in the declaration.

It is to be observed that there was no plea, in terms, of a new and substituted contract. The defendants' contention was based upon the fifth plea, *i.e.* of a discharge before breach, relying upon the evidence also in support of the plea alleging absence of readiness and willingness to deliver pursuant to the written agreement. The argument, in substance, was, that the plaintiff was not in fact ready and willing to deliver the iron according to the written contract, and that in point of law it was immaterial that he would have delivered or been ready and willing to deliver the iron according to the written contract, had it not been for the previous verbal request of the defendants not to deliver it. It was frankly admitted by the defendants' counsel that this defence was quite beside the real merits of the case; but it was strenuously contended that, having regard to the Statute of Frauds, and to the decisions of Noble *v.* Ward, Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135; Stead *v.* Dawber, 10 A. & E. 57; and Goss *v.* Lord Nugent, 5 B. & Ad. 58; the plaintiff could not maintain his action, and ought to be nonsuited.

The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and

if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the Court to countenance such a doctrine.

The Statute of Frauds contains no enactment to the effect contended for. The utmost effect of the 17th section is to invalidate any verbal agreement for the sale of goods in certain cases; and, even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute, — as to which see per Martin, B., in Tyers *v.* Rosedale and Ferryhill Iron Co., Law Rep. 8 Ex. 305; in error, Law. Rep. 10 Ex. 195; and Leather Cloth Co. *v.* Hieronimus, Law Rep. 10 Q. B. 140, the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement, which was in writing.

The case of Noble *v.* Ward, Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135, merely shows that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not rescind, vary, or in any way affect such written contract, and cannot in point of law be substituted for it. In Stead *v.* Dawber, 10 A. & E. 57, there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified day; and the Court came to the conclusion that the parties intended to substitute the later verbal agreement for the previous written agreement. But, in the case now before the Court, there was no fresh agreement at all for the delivery of the twenty-five tons which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff in June of the last twenty-five tons of iron; and it should seem that in Stead *v.* Dawber, *supra*, the Court would have been in favor of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another. Marshall *v.* Lynn, 6 M. & W. 109, was a somewhat similar case decided on similar grounds.

Goss *v.* Lord Nugent, 5 B. & Ad. 58, turned on the 4th and not on the 17th section of the statute; but we do not think this important. The plaintiff had agreed in writing to sell certain property to the defendant, and to make a good title to the whole; but this the plaintiff was unable to do. He never could, therefore, have maintained an action on the original written contract, if nothing further had been done. But the defendant verbally agreed to waive his right to call for a good title to part of the land; and, having afterwards declined to complete the purchase, he was sued by the plaintiff, and it was held that the action did not lie. The ground of this decision was, that the plaintiff was in truth seeking to enforce an agreement relating to land, and which agreement was partly in writing and partly verbal, which by the statute he could not do. The Court in this case also regarded

the parties as having entered into a new verbal contract as to part of the property, and as having substituted this contract for the original written contract; and in this view of the case the plaintiff could not recover.

In Stowell *v.* Robinson, 3 Bing. (N.C.) 928, it was held that the time for performing a contract in writing for the sale of land could not be enlarged by parol. In that case the defendant set up the parol agreement in answer to the plaintiff's action for the recovery of his deposit, and, the Court holding the parol agreement to be invalid, the plaintiff recovered.

The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. The county court judge finds that the plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute, and that the voluntary withholding delivery at the request of the defendants was usual in the ordinary course of dealings of a similar kind in the iron trade. This finding, in fact, shows that at any time in June either party could have changed his mind, and required the other to perform the contract according to its original terms: see Tyers *v.* Rosedale and Ferryhill Iron Co., Law Rep. 10 Ex. 195, as decided in error, reversing the decision below. Law Rep. 8 Ex. 305.

The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another, was pointed out and recognized in Ogle *v.* Lord Vane. Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272. In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price of the iron and the market price, not at the time of the defendants' breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement; but the Court held otherwise, and that, as the plaintiff had merely forborne to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience. Mr. Justice Blackburn, Law Rep. 2 Q. B. at p. 282, pointed out very clearly the distinction to which we are now adverting, and came to the

conclusion that in Ogle *v.* Lord Vane there was no substitution of one contract for another, and that all that the parties did was this: "The plaintiff was willing to wait at the request of the defendant for the defendant's convenience, and he did wait for a long time, till February; but, if he had lost patience sooner, and refused to wait longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not of alteration in the contract; and the length of time can make no difference." In that case, the request for forbearance was made by the vendor after the contract had been broken: in this case the request for time was made by the purchasers both before and after the time for completing the contract had expired: but this distinction does not appear to us to be material: see Tyers *v.* Rosedale and Ferryhill Iron Co., Law Rep. 8 Ex. 305; in error, Law Rep. 10 Ex. 195.

In conclusion, we think that, although the plaintiff assented to the defendants' request not to deliver the twenty-five tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary. The plaintiff not having bound himself by any valid agreement to give further time, but having for the convenience of the defendants waited for a reasonable time after the letter of the 9th of August, to enable the defendants to perform the contract on their part, is entitled on the expiration of that time to treat the contract as broken by the defendants at the end of June, when in truth it was broken.

The question whether the damages ought to be estimated at 21*l.* 17*s.* 6*d.*, *i. e.* according to the price of iron at that time, or at 25*l.*, *i. e.* according to the price at the end of a reasonable time after the letter of the 9th of August, was admitted to be immaterial; but, on the principle of Ogle *v.* Lord Vane, Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272, we think the plaintiff was entitled to have the damages assessed according to the price at the later date. For these reasons, therefore, we are of opinion that this rule to set aside the verdict, and to enter a nonsuit, or to reduce the damages, ought to be discharged. *Rule discharged.*

EDWARD J. WALTER *v.* VICTOR G. BLOEDE CO.

MARYLAND SUPREME COURT, NOVEMBER 22, 1901.

[*Reported in* 94 *Maryland*, 80.]

PEARCE, J.,[1] delivered the opinion of the Court.

On October 27th, 1899, the appellee entered into a written contract with the appellant to purchase of him 50 tons of 2,240 pounds each, of tapioca flour of a certain brand, to be shipped by steamer from Europe, and to be delivered at Canton, Baltimore, ten tons monthly, from

[1] A portion only of the opinion is printed.

November, 1899, to March, 1900, both inclusive. Payment to be made in cash, at the rate of 4¼ cents per pound upon arrival of each lot; and this action was brought by the appellant to recover damages for the alleged breach of this contract by the appellee in refusing to accept and pay for part of the flour thus purchased.

About 7½ tons were delivered November 27th, 1899, which the appellee accepted and paid for, but no further deliveries have been made by the appellant.

The declaration set out the contract fully, and the delivery made as above, and then averred that on December 18th it was agreed between the parties that the shipments of the remaining 42½ tons should be monthly during January, February, March, and April, 1900, instead of December, 1899, and January, February, and March, 1900, as stipulated in the written contract; and that still later, on February 2d, 1900, plaintiff informed defendant that for reasons then explained, and beyond his control, there would be still further delay in the monthly shipments from Europe, and that he would not be able to make deliveries as agreed upon December 18th, and that defendant then waived the monthly deliveries as agreed upon December 18th, and agreed to accept the same as they arrived. The defendant pleaded the general issue, and the case was tried before the court without a jury, the verdict and judgment being for the defendant. Four exceptions were taken by the plaintiff to rulings upon the testimony and one to the ruling upon the prayers, the main question in the case being whether a verbal agreement for the extension of time for the deliveries fixed by the contract is admissible in evidence. [The trial judge excluded the evidence.]

It is settled that at common law the parties to a written agreement, not under seal, before any breach has occurred, may, by a mere oral agreement vary one or more of the terms of the contract, or wholly waive, or annul it, and thus make a new contract resting partly in writing and partly in parol, and as such remaining obligatory upon the parties. Browne on the Statute of Frauds, 5th ed., sec. 409; Kerr's Benjamin on Sales, sec. 240.

But the question here is, whether this rule is applicable in this State to contracts required to be in writing by the provisions of the Statute of Frauds. In England it was held by Lord Ellenborough, in Cuff *v.* Penn, 1 Maule & Selwyn, 21, that the rule was applicable there. In that case there was a written contract for the purchase of 300 hogs of bacon to be delivered at fixed times, and in specified quantities. After part delivery defendant requested plaintiff not to press delivery of the residue as sale was dull, to which plaintiff assented, and the Court said this was only a parol dispensation of performance of the original contract in respect to the times of delivery, and was not affected by the Statute of Frauds; thus distinguishing between the *contract itself*, as being the only thing required by the statute to be in writing, and the *performance* of the contract as something distinct from the contract, and to which the statute has no

application. But the authority of that case does not appear to have been ever fully accepted in England, and has long been regarded there as overruled by later cases. In Stead *v.* Dawber, 10 Ad. & El. 57, it was distinctly doubted by Lord Denman, who declined to follow it, though not overruling it otherwise than by the course of his reasoning. In Marshall *v.* Lynn, 6 Meeson & Welsby, 109, the point to be decided, as stated in the opinion, was, where a written contract for the sale of goods within the statute, stated a time for the delivery of the goods, whether an agreement to substitute another day for that purpose, if made by parol, could be binding; and it was held in an opinion by Baron Parke, that it could not. In the course of that opinion he said, "as the case of Cuff *v.* Penn, which had before been very much doubted, appears to have been overruled by Stead *v.* Dawber, we do not think it necessary to do so," and the rule thus laid down has been firmly established by later cases as the law in England. Browne on the Statute of Frauds, sec. 411; Kerr's Benjamin on Sales, sec. 240.

In this country there is some divergence of opinion among the States, though the weight of authority seems to be decidedly with the English rule, and the Supreme Court of the United States is in full accord therewith.

In Swain *v.* Seamens, 9 Wall. 271 (76 U. S.), it is said: "Views of the complainants are that an agreement, though in writing and under seal, may in all cases, be varied as to time or manner of its performance, or may be waived altogether, by a subsequent oral agreement; but the Court is of a different opinion, if the agreement to be modified is within the Statute of Frauds. . . . Reported cases may be found where that rule is promulgated without any qualification; but the better opinion is that a written contract falling within the Statute of Frauds, cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of Marshall *v.* Lynn is that the terms of a contract for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol." And to the same effect are the cases of Emerson *v.* Slater, 22 Howard, 28; P. W. & B. R. R. Co. *v.* Trimble, 10 Wallace, 367 (77 U. S.); The Delaware, 14 Wallace, 579 (81 U. S.); Hawkins *v.* United States, 96 U. S. 689.

But the appellant contends that in Maryland a contrary rule has been declared in three cases, which it will therefore be necessary to consider carefully.

[The Court here examined the cases of Watkins *v.* Hodges, 6 H. & J. 37; Reed *v.* Chambers, 6 G. & J. 490; Franklin *v.* Long, 7 G. & J. 417, and disapproved any implication in these cases that a parol agreement extending time for performance was valid.]

Judgment affirmed with costs.[1]

[1] Plevins *v.* Downing, 1 C. P. D. 220; Lawyer *v.* Post, 109 Fed. Rep. 512; Bradley *v.* Harter, 156 Ind. 499; Clark *v.* Fey, 121 N. Y. 470, *acc.*

GEORGE CUMMINGS *v.* SMITH ARNOLD AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1842.

[*Reported in* 3 *Metcalf*, 486.]

ASSUMPSIT on the following agreement: "October 26th 1838. This is to show that I agree to furnish and deliver to Cummings, Hildreth & Co. of Boston, all the printing cloths which I make in my looms, which are on 35 inch cloths, and which make 150 pieces of cloth per week; the quality to be the same as those sold by H. Power to Cummings, Hildreth & Co. on my account; the warp being 64 picks to the inch, the filling 60 picks or threads to the inch. These goods, to the amount of one hundred and fifty pieces per week, I agree to deliver to Cummings, Hildreth & Co. in Boston, up to March 1st, 1839, at eight and one quarter cents, say 8¼ yd. on eight months' credit. Smith Arnold & Co." The declaration averred that the plaintiffs had always been ready and desirous to receive and pay for said goods, according to the terms of said agreement, yet that the defendants had not delivered and furnished the same.

The defendants filed the following specifications of defence: 1. "That it was agreed [by parol] between the plaintiffs and defendants, at the time when the above contract was entered into, and after its execution and delivery, that the plaintiffs should give, in payment for the goods, satisfactory promissory notes, such as would be discounted at the bank where the defendants did business; which notes were not given, as agreed, but were refused." 2. "That after the making of the above agreement, a proposition was made by the plaintiffs to pay cash for the goods, at five per cent discount: That Arnold, one of the defendants, to whom this proposition was made, then being in Boston, told the plaintiffs he thought the defendants should accept the offer, but wished to consult with his partner; for which purpose time was allowed him; that he went home and consulted his partner, and wrote immediately to the plaintiffs that they (the defendants) should accept the proposition; but that the plaintiffs afterwards refused to adhere to the bargain, as it was not closed at the time the proposition was made."

At the trial before PUTNAM, J., the defendants offered to prove the oral agreements mentioned in their specification, and that they were made on a legal and valid consideration. But the judge refused to admit the proof, and a verdict was returned for the plaintiffs. The defendants moved for a new trial.

This case was argued at the last March term.

B. Sumner, for the defendants.

Codman, for the plaintiffs.

WILDE, J. This case comes before us on exceptions to the rulings of the court at the trial, whereby the evidence offered by the defend-

ants was rejected, on the ground that the facts offered to be proved would not constitute a legal defence. The action is founded on a written contract, by which the defendants undertook to deliver to the plaintiffs, at a stipulated price, a certain quantity of cloths for printing, from time to time, between the 26th day of October, 1838, and the first of March following.

The defendants admit that the written contract was not performed by them according to the terms of it; and they rely on two oral agreements, made subsequently to the execution of the written contract, by the last of which it was agreed that the plaintiffs should pay cash for the goods to be sent to them by the defendants — they discounting 5 per cent on the stipulated price, whenever the goods sent should amount to the value $1,000, not before paid for; that, under this last verbal agreement, the defendants delivered 150 pieces of goods, and that the plaintiffs refused to perform said agreement on their part. The defendants also offered to prove that each of these verbal agreements was made on a legal and good consideration. The question is, whether these facts, if proved, would constitute a legal defence to the action.

The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.[1]

But the plaintiffs' counsel contends, that however the general principle may be, as to the effect of a parol agreement on a previous written contract, it is not applicable to the present case, the parol agreement being void by the statute of frauds; and that to allow a parol agreement to be engrafted upon a written contract, would let in all the inconveniences which were intended to be obviated by the statute. In considering this objection, we have met with many conflicting decisions, but for which, we should have had but little difficulty in disposing of the question raised. And notwithstanding the doubts excited by some of these decisions, we have been brought to a conclusion, which coincides, as we think, with the true meaning of the statute. The language of the 4th section (Rev. Sts. c. 74), on which the question depends, is peculiar. It does not require that the note or memorandum in writing of the bargain should be signed by both the contracting parties, but only "by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

"The principal design of the statute of frauds was," as Lord Ellenborough remarks, in Cuff *v.* Penn, 1 M. & S. 26, "that parties should

[1] Some authorities cited here by the court are omitted.

not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." The statute, therefore, 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. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defence in this action. So if the plaintiffs had paid for the goods, according to the oral agreements to pay cash or give security, and the defendants had thereupon completed the delivery of the goods contracted for, it would have been a good performance of the written contract. This has been prevented (if the defendants can prove what they offered to prove), by the plaintiffs' refusal to perform on their part a fair and valid contract. And it is a well-settled principle, that if two contracting parties are bound to do certain reciprocal acts simultaneously, the offer of one of the parties to perform the contract on his part, and the refusal of the other to comply with the contract on his part, will be equivalent to a tender and refusal; and in the present case, we think it equivalent to an accord and satisfaction, which was prevented by the fault of the plaintiffs, who agreed, for a valuable consideration — if what the defendants offered to show be true — to vary the terms of the written contract as to the time of payment, and afterwards refused to comply with their agreement. If the defendants on their part had refused to perform the verbal agreement, then indeed it could not be set up in defence of the present action; for the party, who sets up an oral agreement for a substituted performance of a written contract, is bound to prove that he has performed, or has been ready to perform, the oral agreement.

This distinction avoids the difficulty suggested in some of the cases cited, where it is said, that to allow a party to sue partly on a written and partly on a verbal agreement, would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. We think, therefore, that the evidence of the oral agreements, offered at the trial, should have been admitted; the same not being within the statute of frauds, and the evidence being admissible by the rules of law.

In support of this view of the case, I shall not attempt to reconcile all the conflicting opinions which have been held in similar or nearly similar cases, some of which appear to have been decided on very subtle and refined distinctions. I will, however, refer to a few decisions which bear directly on the present case. The case of Cuff v.

Penn, 1 M. & S. 21, is a strong authority in favor of the defendants, as the facts, on which the decision in that case depended, are in all respects substantially similar to those offered to be proved in this action. That was an action of assumpsit for not accepting a quantity of bacon, which by a written contract the defendant agreed to purchase of the plaintiff, to be delivered at certain fixed times. After a part of the bacon had been delivered, the defendant requested the plaintiff, as the sale was dull, not to press the delivery of the residue, and the plaintiff assented. The defendant afterwards refused to accept the residue, and set up the statute of frauds in defence; but the court held, that there was a parol dispensation of the performance of the written contract as to the times of delivery, which was not affected by the statute of frauds. Lord Ellenborough says, "I think this case has been argued very much on a misunderstanding of the statute of frauds, and the question has been embarrassed by confounding two subjects quite distinct; namely, the provision of the statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract." "It is admitted," he adds, in another part of his opinion, "that there was an agreed substitution of other days than those originally specified for the performance of the contract; still the contract remains. Suppose a delivery of live hogs instead of bacon had been substituted and accepted; might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance."

The principle on which the case was decided is laid down in several other cases, some of which have been already cited on the other point of defence.

At the argument of the case of Goss *v.* Lord Nugent, Parke, J., remarked, that "in Cuff *v.* Penn, and some other cases relating to contracts for the sale of goods, above 10*l.*, it has been held, that the time in which the goods, by the agreement in writing, were to be delivered, might be extended by a verbal agreement. But I never could understand the principle on which those cases proceeded; for the new contract to deliver within the extended time must be proved partly by written and partly by oral evidence." But there is no necessity for the plaintiff to declare partly on the written and partly on the oral agreement. He may always, as before remarked, declare on the written contract, and the defendant will be bound to prove a performance according to the terms of it, or according to the terms of a substituted performance; and performance in either way may be proved by parol evidence. 2 Watts & Serg. 218.

Lord Denman, who delivered the opinion of the court in Goss *v.* Lord Nugent, does not question the correctness of the decision in Cuff *v.* Penn; and his remarks on another branch of the statute of frauds seem to be confirmatory of the principle laid down by Lord Ellenborough in the latter case. "It is to be observed," he says, "that the statute does not say in distinct terms, that all contracts or agree-

ments concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and there is no clause which requires the dissolution of such contracts to be in writing." In that action, however, the plaintiff declared partly on the written and partly on the verbal contract, and on that ground it was rightfully enough decided that the action could not be maintained.

In Stowell *v.* Robinson, 3 Bing. N. R. 928, and 5 Scott, 196, it was held, that the time for the performance of a written contract for the sale of lands could not be enlarged by a subsequent oral agreement, although that agreement was pleaded by the defendant as a bar to the action. The plea was, that at the time stipulated for the performance of the written contract, neither party was ready to complete the sale; and the time for the performance was agreed by the parties to be postponed. That decision seems to be founded on the doubt suggested by Parke, J., in Goss *v.* Lord Nugent, and upon the decision in that case, without noticing the distinction in the two cases. And it appears to us, that the case of Stowell *v.* Robinson was decided on a mistaken construction and application of the statute of frauds; and that the distinction between the contract of sale, which is required to be in writing, and its subsequent performance, as to which the statute is silent, was overlooked, or not sufficiently considered by the court; otherwise, the decision perhaps might have been different. We think there is no substantial difference, so far as it relates to the statute of frauds, between the plea in that case and the plea of accord and satisfaction, or a plea that the written contract had been totally dissolved, before breach, by an oral agreement; either of which pleas would have been a good and sufficient bar to the action. We are aware that the principle on which Stowell *v.* Robinson was decided is supported by other English cases cited; but the principle on which the case of Cuff *v.* Penn was decided is in our judgment more satisfactory, and better adapted to the administration of justice in this and similar cases.

It is to be observed in the present case, that the oral agreements, offered to be proved by the defendants, did not vary the terms of the written contract as to its performance on their part; the only alteration was as to the time of payment by the plaintiffs. Such an alteration, made on a good consideration, and before any breach of the contract, may, we think, be proved, without any infringement of the statute of frauds or any principle of law.

New trial granted.[1]

[1] Smiley *v.* Barker, 83 Fed. Rep. 684 (C. C. A.); Smith *v.* Loomis, 74 Me. 503; Lee *v.* Hawks, 68 Miss. 669, *acc.* *Conf.* Wiessner *v.* Ayer, 176 Mass. 425. See also Browne, § 411, *et seq.*

CHAPTER V.

PERFORMANCE OF CONTRACTS.

SECTION I.

EXPRESS CONDITIONS.

A. — Conditions Precedent.

CONSTABLE *v.* CLOBERIE.

In the King's Bench, Hilary Term, 1626.

[*Reported in Palmer*, 397.]

Covenant upon a charter-party. The plaintiff covenanted that his ship should go a voyage to Cadiz with the next wind; and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much for the voyage. The defendant traversed that the ship went with the next wind, and upon demurrer the traverse was overruled, for the substance of the covenant was that the ship should go, and not that she should go with the next wind, for that may change every hour; and this is proved by the covenant of the defendant, viz., "if the ship went the intended voyage;" and this was the primary intention of the parties, and not that she should go with the next wind. But, per Justice Jones, if the defendant had covenanted that if the plaintiff went to Cadiz with the next wind, he would pay, &c., there the plaintiff ought to aver that he went with the next wind.

WORSLEY *v.* WOOD and Others, *Assignees of* Lockyer and Bream, *Bankrupts;* in Error.

In the King's Bench, June 7, 1796.

[*Reported in* 6 *Term Reports,* 710.]

This was an action of covenant brought in the Court of Common Pleas.[1] The declaration stated that by a policy of insurance made before Lockyer and Bream became bankrupts, namely, on the 9th of March, 1792, it was witnessed that Lockyer and Bream had paid 11*l.* 16*s.* to the Phœnix Company, and had agreed to pay to them, at their office, the sum of 11*l.* 16*s.* on the 25th of March, 1793, and the like sum yearly on the said day during the continuance of the policy for insurance from loss or damage by fire, not exceeding the sum of 7,000*l.* That Worsley covenanted with L. and B. that, so long as the assured should pay the above premium, the capital stock and funds of the Phœnix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned, not exceeding 7,000*l.*, according to the tenor of the printed proposals delivered with the policy. That in the printed proposals referred to by the policy it is declared that the company would not be accountable for any loss by fire caused by foreign invasions, civil commotion, &c.; and also that all persons assured sustaining any loss by fire should forthwith give notice to the company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts, or other vouchers as should be reasonably required, and should procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the company touching any loss, such difference should be submitted to the judgment of arbitrators indifferently chosen, whose award should be conclusive, &c., and when any loss should have been duly proved, the assured should immediately receive satisfaction to the full amount of the same. The declaration then stated that on the 1st of July, 1792, a loss happened by fire in the house of L. and B., in which all their books of accounts were destroyed, to the amount of 7,000*l.* That L. and B. on the same day gave notice of it to the company, and on the same day delivered to the company as particular an account of their

[1] See 2 H. Bl. 574. — Ed.

loss as the nature of the case admitted, and were then and there also ready and willing and then and there tendered to make proof of the loss by their oath, and to produce such vouchers as could be reasonably required in that behalf; that on the same day they procured and delivered to the said company a certificate under the hands of four reputable householders of the parish, to the effect required in the printed proposals, and applied to E. Embry, the minister, and H. Hutchins and J. Bellamy, the churchwardens of the parish, to sign such certificate, but that they, without any reasonable or probable cause, wrongfully and unjustly refused and have ever since refused to sign it. The declaration then stated that the funds of the company were sufficient to pay this loss, yet the company have not paid it, either to the bankrupts or to their assignees; nor have the company submitted the said difference to the judgment of such arbitrators, &c.

There was another count, in which it was not averred that the bankrupts either offered to make proof of the loss, or procured a certificate, or applied to the minister, &c., for one; and the breach in this count was, that the company had not submitted the said difference to the judgment of such arbitrators, &c.

The defendant pleaded (to the first count) that the bankrupts were not interested in the house or goods, &c., at the time of the loss, on which issue was taken in the replication. 2d. That the loss was occasioned by the fraud and evil practice of the bankrupts; on which issue was taken, &c. 3d. That the minister and churchwardens did not refuse wrongfully and injuriously, and without any reasonable or probable cause, to sign the certificate; on which issue was taken. To the second count. 1st. That the bankrupts were not interested, &c.; on which issue was taken. 2d. That the loss was occasioned by fraud, &c. (as above); on which issue was taken. 3d. That neither the bankrupts or their assignees procured such certificate under the hands of the minister and churchwardens and respectable inhabitants, &c., as required in the printed proposals.

To the last of these pleas, the plaintiffs replied, that the bankrupts as soon as possible after the loss, namely, on the 1st of July, 1792, procured and delivered to the company such certificate as is required in the printed proposals under the hands of four respectable inhabitants, &c., but that the minister and churchwardens wrongfully refused to sign it without any reasonable or probable cause for so doing.

The rejoinder stated that the minister and churchwardens did not wrongfully refuse, &c.; on which issue was taken in the surrejoinder.

The jury found all the issues for the plaintiffs, and gave a verdict for 3,000*l.*

The defendant below removed the record into this Court by writ of error, and assigned for error that the declaration, the replication, and the other pleadings of the plaintiffs below, were not sufficient in law to maintain the action.

This case was twice argued in this Court, the first time in last Easter

Term by *Wood* for the plaintiff in error and *Lambe* for the defendants, and now by *Law* for the former and *Gibbs* for the latter.

Lord Kenyon, C. J.[1] The second point respecting the *venire de novo*[2] is now for the first time started, no notice having been taken of it on the first argument here, or on the motion to arrest the judgment in the Court of Common Pleas; if there appeared to be any ground for it, we would desire to have the case farther investigated; but it seems to me to have no foundation, because the objection that the procuring of the certificate is a condition precedent is as applicable to the second as to the first count of the declaration.

This case requires our serious consideration, because the Court of Common Pleas have already given their opinion on it in favor of the plaintiff's claim, though it has been suggested that it was not the unanimous opinion of that Court.[3] We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended, that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favor of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence, therefore, suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phœnix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss, and procure a certificate under the hands of the minister and churchwardens, and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation, this very case is sufficient to convince us; for it appears on the record, that soon after the fire the assured delivered in an account of their loss, which they said amounted to 7,000*l.*, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the loss did not exceed 3,000*l.*; and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7,000*l.*, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals

[1] Ashhurst, Grose, and Lawrence, JJ., delivered concurring opinions.

[2] It was argued that the plaintiff might recover on the second count where the breach assigned was refusal to arbitrate, and that therefore a *venire de novo* must issue to assess damages on that count.

[3] Mr. J. Heath differed from the rest of the Court of C. B.

that it was their intention that it should precede payment. What is a condition precedent, or what a condition subsequent, is well expressed by my brother Ashhurst in the case of Hotham *v.* The East India Company, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. If the condition be, that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord Coke to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition did not arise. In the case of Hesketh *v.* Gray, which has been cited as a determination in this court, there was also an application to the Great Seal, at the time when Lord Chief Justice Willes was the first commissioner, to dispense with the condition, which was, that the Bishop of Chichester should accept the resignation of a living; but it was held, that there was no ground for a court of equity to interfere. This Court also held, when the case came before them, that it was a condition precedent, and must be performed.

In this case, however, it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy pres.* But I confess, I do not see how the terms *cy pres* are applicable to this subject; the argument for the plaintiffs below goes to show that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of Campbell *v.* French, we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals; they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens, and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that the minister and churchwardens may obstinately refuse to certify, the insurers answer, "We will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been effected; and, therefore, I am clearly of opinion, that there is no foundation for the action, and that the judgment below must be reversed.[1]

[1] Prot. Ins. Co. *v.* Pharson, 5 Ind. 417; Johnson *v.* Phoenix Ins. Co., 112 Mass. 49; Audette *v.* Union St. Joseph, 178 Mass. 113; Lane *v.* St. Paul, 50 Minn. 227; Logan *v.* Commercial Union Ins. Co., 13 Can. S. C. 270, *acc.* See also Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507; Aetna Ins. Co. *v.* People's Bank, 62 Fed. Rep. 222; Daniels *v.*

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* KEARNEY.

SUPREME COURT OF THE UNITED STATES, NOVEMBER 7, 1900–JANUARY 7, 1901.

[*Reported in* 180 *United States*, 132.]

THE case is stated in the opinion of the court.

Mr. *E. S. Quinton*, for plaintiff in error.

Mr. *A. C. Cruce* and Mr. *W. I. Cruce*, for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover the amount alleged to be due on two policies of fire insurance issued by the Liverpool and London and Globe Insurance Company — one dated June 15, 1894, for $2,500, and the other dated February 11, 1895, for $1,000 — each policy covering such losses as might be sustained by the insured Kearney & Wyse, in consequence of the destruction by fire of their stock of hardware in the town of Ardmore, Indian Territory.

Each policy contained the following clause, called the iron-safe clause: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The insurance company insisted in its defence that the terms and conditions contained in this clause of the policies had not been kept and performed by the insured.

There was a verdict and judgment in favor of the plaintiffs in the United States Court for the Southern District of the Indian Territory, and that judgment was affirmed in the United States Court of Appeals for that Territory.

Equitable Fire Ins. Co., 50 Conn. 551; Leadbetter *v.* Etna Ins. Co., 13 Me. 265; Kelly *v.* Sun Fire Office, 141 Pa. 10; Osewalt *v.* Hartford Fire Ins. Co., 175 Pa. 427.

O'Neill *v.* Massachusetts Benefit Assoc., 63 Hun, 292, 143 N. Y. 73; Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 46, *contra*.

See also American Central Ins. Co. *v.* Rothchild, 82 Ill. 166; German Am. Ins. Co. *v.* Norris, 100 Ky. 29; Home Fire Ins. Co. *v.* Hammang, 44 Neb. 566, 576; Schmurr *v.* State Ins. Co., 30 Oreg. 29.

The insurance company sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the judgment. 94 Fed. Rep. 314.

The controlling facts are thus (and we think correctly) stated in the opinion of Judge Thayer, speaking for the court below: "On the night of April 18, 1895, between the hours of one and three A. M., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of plaintiffs, or either of them. The trial judge charged the jury that the set of books which had been kept and which were produced on the trial 'were substantially in compliance with the terms of the policy upon that subject,' and no exception was taken by the defendant to this part of the charge."

It was also said in the same opinion: "The books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced."

The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policies. But the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. It was well said by Nelson, C. J., in Turley *v.* North American Fire Insurance Co., 25 Wend. 374, 377, referring to a condition of a policy of insurance requiring the insured, if damage by fire was sustained, to produce a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire setting forth certain facts in

regard to the fire and the insured, that "this clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form — following words rather than ideas."

To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted. National Bank *v.* Insurance Co., 95 U. S. 673, 678–9; Moulor *v.* American Life Ins. Co., 111 U. S. 335, 341.

Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement "to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business," should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, "all purchases and sales, both for cash and credit." There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

That of which the company most complains is that the insured did not produce the last inventory of their business, and removed the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects and capable of withstanding any fire however extensive and fierce, it should have used words expressing that thought.

Nor do the words "or in some secure place not exposed to a fire which would destroy the house where such business is carried on" necessarily mean that the place must be absolutely secure against any

fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and if, under such circumstances, they had not removed them to some other place and the books or inventory had been burned while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed "in some secure place not exposed to a fire" that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice.

We perceive no error in the view taken by the court below; and having noticed the only questions that need to be examined, its judgment is

Affirmed.

THE GLOBE MUTUAL LIFE INSURANCE ASSOCIATION OF CHICAGO *v.* DORA WAGNER.

ILLINOIS SUPREME COURT, DECEMBER 20, 1900.

[*Reported in* 188 *Illinois*, 133.]

ACTION by the appellee upon a policy of insurance on the life of her son, Richard Wagner. The plaintiff recovered judgment and the appellant appealed successively to the Court of Appeals and to this court. Further facts appear in the opinion.

Hoyne, O'Connor & Hoyne, for appellant.

Francis T. Colby, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court.

The chief ground urged by appellant for a reversal of the judgment of the Apellate Court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and answer appear: "Q. — How many brothers dead? Ans. — None." The medical examination is certified to by the medical examiner, as follows:

"I certify that I have, this 7th day of October, 1895, made a personal examination of the above named person, (Richard Wagner,) and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence.

"M. J. MCKENNA, M.D."

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the application on the other side hereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract of insurance is issued it shall not be binding on the company unless, upon its date and delivery, I shall be in sound health." On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefor, make the agreement as to agency, and all other agreements, and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that, whether he knew of it or not, the statement that none of his brothers were dead is a warranty, and being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. (Moulor *v.* American Life Ins. Co., 111 U. S. 335.) Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guarantee absolutely that none of his brothers were dead would be unreasonable, in the absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or a part of his relations, and to hold him to absolutely guarantee that they were living, in order that he might obtain insurance, would sometimes be to require an impossibility, and would be almost absurd.

What is said in Moulor *v.* American Life Ins. Co., *supra*, is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those classes in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense, the word 'true' is often used as a synonym of honest; sincere; not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear — certainly the contrary cannot be confidently asserted — that what the company required of the applicant as a condition precedent to any binding contract was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements

were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

Judgment affirmed.

SHADFORTH *v.* HIGGIN.

At Nisi Prius, coram Lord Ellenborough, Hilary Term, 1813.

[*Reported in* 3 *Campbell*, 385.]

Assumpsit upon the following agreement signed by the plaintiff and defendant: —

"James Shadforth, part-owner of the ship Fanny, of 300 tons, coppered and armed, agrees to despatch said vessel immediately in ballast direct to Jamaica, and, on her arrival at Rio Nova Bay, Salt Gut, and St. Ann's, receive a full and complete cargo of produce, consisting of sugar, rum, coffee, and pimento. In return Messrs. Higgin & Co. agree to provide a cargo at the above shipping places, to be taken on board in the usual manner, in time for July convoy, provided she arrives out and ready by the 25th of June, and the freight to be at the current rate as given to other vessels loading at the same time and same ports."

The declaration alleged that the plaintiff did immediately despatch the vessel in ballast to Jamaica, and that, on her arrival at Rio Nova Bay, she was afterwards, to wit, on the 3d of July, and from thence for a long space of time, to wit, for the space of three months from thence next ensuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann's, aforesaid, a full and complete cargo of produce, according to the form and effect of the said agreement; yet that the defendant did not nor would provide a cargo for the said vessel at the above shipping places, or any or either of them, according to the form and effect of the said agreement, whereby the said ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3d of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th of June, this was to be done in time to enable her to sail with the July convoy. The condition of

her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any accident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to despatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

Lord Ellenborough. I think the arrival of the ship by the 25th June was a condition precedent. The freighter might know that, if she arrived by that day, he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore compelled to load on board another vessel. It would be a great hardship upon the freighter, if he were bound to provide a freight for a vessel which arrives at a season of the year when there is no produce ready for shipping in the island. If the freighter is liable, although the ship does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the instrument is that, unless the ship arrived by the 25th June, the defendant's liability was to be at an end.

The plaintiff likewise failed in establishing another agreement declared upon for the loading of the ship, and submitted to be nonsuited.[1]

MORGAN *v.* BIRNIE.

In the Common Pleas, April 17, 1833.

[*Reported in* 9 *Bingham*, 672.]

This was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and workmanlike manner, and with good, sound, and well-seasoned materials, and be completed to the reasonable satisfaction of A. B. Clayton, or other the architect for the time being of the defendant, his executors or administrators, on or before the twenty-ninth day of October next ensuing the date thereof, or such further day as the said A. B. Clayton, or such other architect, and the said plaintiff should mutually agree upon. It was further provided, that no additions or alterations should be admitted unless directed by the defendant, his

[1] Smith *v.* Dart, 14 Q. B. D. 105; The Austin Friars, 71 L. T. 27, *acc.*

In the Austin Friars, *supra*, the charterers had the option of cancelling "if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th of October." The vessel arrived at 11 P.M. on that day, but no one could leave or visit the ship until the health officer had inspected her on the following morning. It was held that the charterers were justified in refusing a cargo.

executors or administrators, or his or their surveyor, in writing; nor should any additions to or alterations of the works thereby contracted for, and contained in the particulars therein specified, vitiate or vacate the contract thereby made, but the price or allowance to be made in respect of any agreed additions or alterations should be added to or deducted from the moneys that should become payable by virtue of the said memorandum of agreement as the case might require, such price or allowance being first estimated or settled by the surveyor or architect of the said defendant, who should be sole arbitrator in settling such price or allowance, and all disputes that should or might arise in or about the premises: And the defendant thereby promised and agreed, in consideration of the buildings and works to be done and executed by the said plaintiff, in manner in the said memorandum of agreement mentioned, that the defendant would pay, or cause to be paid, to the plaintiff, the sum of 1,250*l.* in manner following, that is to say, that he would pay or cause to be paid such a sum of money as would be equal to three-fourth parts of the price of the works thereby contracted for, which should have been executed and performed according to the true intent and meaning of the said memorandum of agreement, upon receiving a certificate in writing signed by the said A. B. Clayton, or other the architect of the defendant, testifying that the flooring-joists of the first story of the said dwelling-house had been actually laid, and his approval of the works so executed; such further sum of money as would be equal to three-fourth parts of the price or value of the further works that should have been done subsequently to the date of the architect's said certificate, upon the completion of the carcase of the dwelling-house; and the balance or sum which should be found due to the plaintiff, after deducting the two previous payments, within two calendar months after receiving the said architect's certificate that the whole of the buildings and works thereby contracted for had been executed and completed to his satisfaction.

The work having been completed, the plaintiff sought by this action to recover his charges for some additional work not contained in the original contract.

At the trial it appeared that Mr. Clayton, the architect, had examined and approved of the plaintiff's charges for the buildings mentioned in the agreement, and had written the following letter to the defendant, more than two months before the action: —

With this you will receive Mr. Morgan's account. My private statement, showing the variations of prices and qualities, shall be copied and forwarded to you. As regards to when and where executed, my only data exist in my measuring book, which shall be open for your inspection at any time at my office. I also forward you the drawings marked 6 and 7, and the original elevation and plan submitted to the commissioners of woods and forests.

I remain, &c. A. B. CLAYTON.

March 24, 1832.

This letter contained an account, headed, "Final statement of extras and omissions of the carcase of a house for George Birnie, Esq., by T. Morgan, builder."

A letter was also put in, addressed to Clayton by the defendant, April 4, 1832, in which he asked for Clayton's private statement of prices and quantities; expressed himself anxious to have the matter speedily settled, and made no objection on the ground of not having received a certificate. But as it did not appear that Mr. Clayton had ever given any certificate of his satisfaction as to the mode in which the work had been executed, Tindal, C. J., directed a nonsuit, on the ground that the delivery of such a certificate was a condition precedent to the plaintiff's right of action.

Spankie, Serjt., now moved to set aside this nonsuit on the ground that the agreement did not require the certificate touching the additions to be in writing; and that Mr. Clayton's allowance of the plaintiff's charges must be deemed an implied certificate, for he could not allow the charges to be correct without implying thereby that the building had been executed to his satisfaction. Besides, it might be doubtful whether any certificate were requisite with respect to charges for additional work; the certificate was to apply only to the building as originally contracted for, and the defendant had never objected to pay on the ground that a proper certificate had not been rendered.

TINDAL, C. J. I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. Clayton was a condition precedent to the bringing this action. The agreement stipulates, that the price of additions or alterations should be added to the sum contracted for by the agreement, such price being first settled by the architect of the defendant, who should be sole arbitrator in settling such price, and all disputes that should arise about the premises. Then follows the stipulation for payment in proportion to the work done at two different periods upon receiving a certificate in writing of Mr. Clayton's approval, and for payment of the balance of the whole within two calendar months after receiving the said architect's certificate that the whole of the buildings contracted for had been executed to his satisfaction. That appears to involve not only the original but the additional or extra works. Unless the letter and delivery of the plaintiff's account, and the checking that account by Clayton, amount to a certificate, no certificate has been given. It appears to me, that the effect of a certificate would be altogether different; applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges.

The rest of the Court concurring, the rule was *Refused.*[1]

[1] De Worms *v.* Mellier, L. R. 16 Eq. 554; Hudson *v.* McCartney, 33 Wis. 331; Bannister *v.* Patty, 35 Wis. 215, *accord.* Compare Wyckoff *v.* Meyers, 44 N. Y. 143.

CLARKE, *Assignee of the Estate and Effects of* FRANCIS AYRES, *a Bankrupt*, AND OTHERS *v.* WATSON AND ANOTHER.

IN THE COMMON PLEAS, JANUARY 25, 1865.

[*Reported in* 18 *Common Bench Reports, New Series*, 278.]

THE first count of the declaration stated, that theretofore and before the said Francis Ayres became bankrupt, to wit, on the 9th of October, 1862, by an agreement in writing then made and entered into between the said Francis Ayres, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned in conformity with certain plans, drawings, and sections therein mentioned; and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for 312*l.* 15*s.*, to be paid as follows: 156*l.* 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they, the contractors, had duly and efficiently performed and completed such portion of the work as according to the judgment of the said surveyor should be not less than three-fourth parts thereof in extent and value; 78*l.* 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid, that the whole of the works mentioned and referred to in the said plans, drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion; provided the thereinmentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair and in perfect and sound condition in all respects; it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion by and at the sole cost and expense of the said contractors; and the defendants thereby agreed with the said Francis Ayres, William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of 312*l.* 15*s.* at the times and in the manner thereinbefore mentioned. Averment: that although 156*l.* 7*s.* 6*d.*, part of the said sum of 312*l.* 15*s.*, had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants, that the

whole of the works in the said plans, drawings, and specifications had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them; yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate; and that, although more than four months since the said surveyor ought to have given such certificate had elapsed, and although all things had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of 78*l.* 3*s.* 9*d.*

The defendants demurred to this count, and the plaintiffs joined in demurrer.

Henry James, in support of the demurrer.[1] Two breaches are alleged in the declaration. The first is, that the defendants have not paid the 78*l.* 3*s.* 9*d.* The answer to that is, that, by the terms of the contract, it was payable only upon production of the surveyor's certificate, which has not been produced. The second breach is, that the surveyor has wrongfully and improperly withheld his certificate. No fraud, however, or collusion is charged. It is not even alleged that the conduct of the surveyor was fraudulent; the allegation that he wrongfully and improperly neglected and refused to grant his certificate would be satisfied by showing that he had been guilty of a mere error in judgment. Scott *v.* The Corporation of Liverpool, 1 Giffard, 216, is precisely in point. . . .[2]

Parry, Serjt., contra.[3] Substantially, this is an action for a tort. The plaintiff complains of a wrong done by the agent of the defendants. Lambert was not acting for the plaintiffs, but for the defendants alone, to protect them against overcharges by the contractors. The contract in effect is that the defendants will employ Lambert, "or other their

[1] The points marked for argument on the part of the defendants were as follows: 1. That the first count discloses no cause of action against the defendants; 2. That the plaintiffs are not entitled to recover without obtaining the several certificates of the surveyor; 3. That the defendants are not liable for the surveyor not giving such certificates; and that in the absence of such certificates, no breach of the agreement is shown.

[2] The learned counsel here stated that case.

[3] The points marked for argument on the part of the plaintiffs were as follows: 1. That the surveyor is the agent of the defendants, and they are bound to employ him to certify according to the said agreement; 2. That the surveyor is responsible to the defendants for improperly certifying or omitting to certify; and they are responsible to the plaintiffs; 3. That the wrongful refusal of the defendant's agent to certify is a dispensation of the condition precedent, and equivalent to the defendant's preventing the certificate being granted.

surveyor for the time," to perform the duties of surveyor rightfully and honestly; and the defendants are responsible if the person so employed shall wrongfully or improperly withhold his certificate. [WILLES, J. The declaration states that the work was done to the satisfaction of the surveyor.] Yes. In Pawley *v.* Turnbull, 7 Jurist, N. S. 792, Vice-Chancellor Stuart held the conduct of the architect in withholding certificates to amount to improper conduct, and decreed payment of the money notwithstanding their absence. The defendants must be held to have dispensed with the condition of an engineer's or surveyor's certificate, if they appoint a man who wrongfully abstains from acting. [WILLES, J., referred to Harrison *v.* The Great Northern Railway Company, 11 C. B. 815, and The Great Northern Railway Company *v.* Harrison, 12 C. B. 576.] In Milner *v.* Field, 5 Exch. 829, there were negative words in the contract: the proviso was, that "no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant, that the works were performed according to the specifications." Batterbury *v.* Vyse, 2 Hurlst. & Colt. 42, is in reality an authority for the plaintiff, though the declaration alleged that the surveyor, in neglecting to certify, acted in collusion with the defendant and by his procurement. The point marked for argument on the part of the plaintiff there was, "that the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

James was not called upon to reply.

ERLE, C. J. I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make; and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important, in a case of this description, that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done, according to the contract and specification. Here the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his satisfaction, and that the said surveyor had "wrongfully and improperly" neglected and refused so to do. That, in my opinion, is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld,

they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate any thing of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiffs to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not in my judgment such as to entitle them to succeed.

WILLIAMS, J. I am of the same opinion. Notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

WILLES, J. I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment, or he may have refused to exercise any judgment; in which case the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

KEATING, J., concurred. *Judgment for the defendants.*

BATTERBURY *v.* VYSE.

IN THE EXCHEQUER, APRIL 22, 1863.

[*Reported in* 2 *Hurlstone & Coltman*, 42.]

DECLARATION. For that heretofore, to wit, on, &c., the plaintiff and the defendant agreed that the defendant should employ the plaintiff to do and provide for him, and that the plaintiff should do for the defendant certain specified works, and provide for the defendant certain specified materials, at No. 125 Oxford Street, upon the following terms and conditions, that is to say: "All the works hereinbefore described (meaning the description contained in a certain specification of the said works) are to be executed in the very best and most workmanlike manner, with the very best quality of materials of every description, under the superintendence and to the satisfaction of Mr. Vyse and his architect. The works described are intended to embrace every thing that may be necessary for the perfect completion of the several alterations. If, therefore, through any error or inadvertence, any matter or thing which may be deemed by the architect as essential to this end be omitted, it is to be supplied and performed by the contractor in like manner as if it had been particularly specified; and if in the course of the work it should be found necessary to make any addition to or omission from the said works, such deviation is not in any way

to vitiate the contract, but the value of such works shall be estimated by the architect, and the value thereof added to or deducted from the contract sum as the case may be, the decision of the architect being final and conclusive in all matters affecting the proposed works. The amount of the contract will be paid by instalments equal to the value of 80*l.* per cent of the value of the works executed, the balance within one month after final completion to the architect's satisfaction, but no payment will be considered due unless upon production of the architect's certificate." Then followed an agreement by the defendant to execute the works for 610*l.* Averments: That pursuant to the contract the plaintiff did the specified works and provided the materials, with the exception of certain omissions which were duly required by the defendant and his architect; and that he also did divers and very many additional works which were duly required to be done by the defendant and his architect; and that the value of the said works and materials amounted to a large sum, to wit, 1,000*l.*, whereof the defendant had due notice; and although the defendant paid to the plaintiff 600*l.*, on account of the said works, leaving a large balance, to wit, 400*l.*, of the fair and reasonable value of the said works, estimated according to the said contract, unpaid; and although the plaintiff had done all things necessary on his part to entitle him to have the value of the said extras and omissions estimated by the said architect, and to entitle him to the said architect's certificate for payment; and although he had completed the said works to the satisfaction of the defendant's architect; and although more than a month from such time had elapsed; and although the defendant and his architect had, at all times since the doing of the said works and the providing of the said materials, full knowledge that the plaintiff was entitled to be paid by the defendant a large sum of money over and above the money so paid; and although a reasonable time for the said architect to estimate the value of the said additions and omissions, and to certify as aforesaid, and for the defendant to pay for the said works, had long since elapsed; yet the architect had not estimated the value of the said additions and omissions, nor had he certified as aforesaid, but wholly neglected so to do, and had unfairly, improperly, and contrary to the true intent and meaning of the said contract, neglected to estimate the value of the said additions and omissions, and neglected to certify as aforesaid, and had so neglected in collusion with the defendant and by his procurement. By means of which premises the plaintiff has been unable to obtain payment of the balance justly due to him for the said works, and the said balance still remains wholly due and unpaid to the plaintiff.

Demurrer, and joinder therein.

Gates, in support of the demurrer. The declaration is bad. The production of the architect's certificate is a condition precedent to the plaintiff's right to claim any payment. [MARTIN, B. This is, in substance, a declaration in case, alleging that the defendant, acting in

collusion with the architect, procured him unfairly and improperly to withhold his certificate.] Treated as an action of contract, the plaintiff cannot recover, because he has not complied with the condition which entitled him to payment; and it is not an action on the case, because it does not charge fraud, or allege any duty on the part of the defendant which he has neglected to perform. However unreasonable and oppressive a stipulation or condition may be, a court of law is bound to give effect to the terms agreed upon between the parties. Stadhard *v.* Lee.[1] [BRAMWELL, B. That case does not touch this. Here the complaint is not that something has been done, and done wrongly, but that there has been an improper refusal to do that which ought to have been done.] The opinion of Erle, J., in Scott *v.* The Corporation of Liverpool,[2] is an express authority that, in the absence of fraud, the withholding the certificate by the architect affords no right of action against the defendant, either on the ground of a waiver of the condition, or the substitution of a new contract, or on the ground of a wrong. This is an attempt to obtain indirectly that which the plaintiff is not entitled to by the terms of his contract. If, indeed, the certificate was withheld by fraud, the plaintiff might have a remedy by action. Milner *v.* Field. But it is consistent with every allegation in this declaration that the architect was requested by the defendant not to certify, because he was dissatisfied with the work. [WILDE, B. The declaration contains an averment that the plaintiff had done all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the defendant's architect; and that, although the defendant and his architect had knowledge that the plaintiff was entitled to be paid, the architect neglected to certify, "in collusion with the defendant and by his procurement."] There is no allegation that the works were done to the satisfaction of the defendant. [WILDE, B. There is an averment that the plaintiff had done all things necessary to entitle him to the certificate.] The word "collusion" does not necessarily imply fraud. [POLLOCK, C. B. In Webster's Dictionary one definition of "collusion" is "a secret agreement for a fraudulent purpose."]

J. Brown appeared in support of the declaration, but was not called upon to argue.[3]

POLLOCK, C. B. We are all of opinion that the declaration is good, and that the plaintiff is entitled to judgment.

MARTIN, B., and BRAMWELL, B., concurred.

Judgment for the plaintiff.[4]

[1] 3 B. & S. 364, 372. [2] 1 Giff. 216, 223.

[3] The point for argument was: "That the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

[4] St. Louis, &c. R. R. Co. *v.* Kerr, 153 Ill. 182; Crawford *v.* Wolf, 29 Ia. 567; Smith *v.* White, 5 Neb. 405; Whelen *v.* Boyd, 114 Pa. 228; Mills *v.* Paul (Tex. Civ. App.), 30 S. W. Rep. 558, *acc.*

See also Linch *v.* Paris Lumber Co., 80 Tex. 23; Markey *v.* Milwaukee, 76 Wis. 349.

Fraud or refusal to exercise an honest judgment, though without collusion of the

TULLIS *v.* JACSON.

IN THE CHANCERY DIVISION, JULY 7, 1892.

[*Reported in* [1892] 3 *Chancery*, 441.]

E. R. HARRIS, by his will, bequeathed the residue of his estate to trustees, and directed that they should erect a free public library and museum at Preston, and apply such part of his estate as should be necessary in the building of such library and museum.

By an order dated the 24th of June, 1882, made in an action intituled, "In the Matter of the Estate of E. R. Harris. Jacson *v.* Governors of Queen Anne's Bounty [1878 H. 189]," a scheme for the erection of the free public library was approved, and the defendants, Charles Roger Jacson, Charles Harrison Wood, and David Irvin, the trustees of the will, were, together with other persons, the survivors of whom were also defendants, appointed a committee to carry out the scheme.

The committee advertised for tenders for the execution of the work to be erected, and the tender of the plaintiffs, who were contractors at Preston, was accepted, and an agreement, dated the 27th of November, 1883, was entered into between the committee, of the one part, and the plaintiffs, of the other part, with regard to the execution of the works, and the payment to the plaintiffs of the amounts due to them, pursuant to the architect's certificates, out of the funds in court, to the credit of Jacson *v.* Governors of Queen Anne's Bounty. The agreement provided that the committee were to be under no personal liability to the plaintiffs.

The defendant Hibbert was afterwards appointed architect, and was to be paid out of the same funds. The defendant Walmsley was also employed by the committee and was to be paid out of the same funds. The plaintiffs claimed priority against both Hibbert and Walmsley.

Questions as to the validity of the final certificate given by the architect, which was disputed on the ground of fraud, having arisen, this action was commenced, amongst other things, for an account of what was due to the plaintiffs under and by virtue of the agreement, and for labour and materials supplied at the request of the defendants. No relief was asked at the trial against Hibbert.

defendant, has also been held an excuse for failure to produce a certificate. North American Ry. Const. Co. *v.* R. E. McMath Surveying Co., 116 Fed. Rep. 169; Michaelis *v.* Wolf, 136 Ill. 68; McDonald *v.* Patterson, 186 Ill. 381; Foster *v.* McKeown, 192 Ill. 339; Eldridge *v.* Fuhr, 59 Mo. App. 44; Chism *v.* Schipper, 51 N. J. L. 1; Bradner *v.* Roffsell, 57 N. J. L. 32.

See also Arnold *v.* Bournique, 144 Ill 132; Bean *v.* Miller, 69 Mo. 384; Justice *v.* Elwert, 28 Oreg. 460.

The plaintiffs alleged, in par. 13 of their statement of claim, that the defendant Hibbert, the architect (as the committee well knew), had not *bonâ fide* certified the amount due to the plaintiffs, but had knowingly certified for a smaller sum than was, in fact, due to the plaintiffs, in order to have a larger sum available for the sum claimed by him.

The only point in the case calling for a report was as to the validity of the 31st clause of the agreement, which, so far as is material, was as follows: —

"That in case of any doubts, disputes, or differences arising or happening touching or concerning the works to be executed by the said contractors, or any of such works . . . such doubts, disputes, or differences shall from time to time be referred to and left to the sole and absolute arbitrament and decision of the said architect, and his decision shall be final and binding on all parties . . . and the directions, decisions, admeasurements, valuations, certificates, orders, and awards of the said architect . . . shall be final and binding upon the committee and the contractors respectively, and shall not be set aside or attempted to be set aside by reason or on account of any technical or legal defects therein or in the contract, or on account of any informality, omission, or delay, or error of proceeding in or about the same or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy."

Levett, Q. C., and *T. R. Hughes*, for the plaintiffs: —

The 31st clause is a despotic clause, and it is against public policy, and the court will not listen to any such stipulation in any contract, however solemn.

[CHITTY, J.: — Does not the clause mean that you must not charge fraud against Hibbert, whose character is well known to you?]

Hibbert has abused his powers by endeavoring to extort money from us.

[They referred to Kemp *v.* Rose, 1 Giff. 258; Kimberley *v.* Dick, Law. Rep. 13 Eq. 1; Stevenson *v.* Watson, 4 C. P. D. 148.]

Whitehorne, Q. C., and *Church*, for the defendants, the committee: —

No case of fraud is opened as against us, and no fraud is alleged except in paragraph 13 of the statement of claim, and clause 31 was inserted to provide against fraud on the part of the architect.

Farwell, Q. C., and *George Henderson*, for the defendant Hibbert.

T. B. Napier, for the defendant Walmsley.

CHITTY, J. (in the course of his judgment, and having read the 31st clause as set out above, proceeded): —

The trustees (the committee) are not now charged with, and have not been guilty of, fraud. It is said that the latter part of the clause is void on the ground of public policy. Whenever public policy is mentioned, it is the duty of the court to look carefully into the matter,

and not arbitrarily extend the rules upon which certain decisions have turned in regard to public policy. It is said that the clause is void as being against public policy, because in substance it is an agreement on the part of the plaintiffs and defendants through the committee not to set up fraud, and the argument proceeds in this way. "The court will not listen to any such stipulation to be found in any contract however solemn." To some portion of this argument I accede. If a contract was obtained by fraud, and in the contract itself there was the term inserted that neither party should impeach the contract on the ground of fraud, it may well be that such a term would not stand, and the reason is obvious, that the court would set aside that contract, because it was obtained by fraud, and setting aside the contract, it would set aside the stipulation. That is a case I put by way of illustration, of fraud between the parties to the contract in its inception. It may well be also, that if there was some stipulation where some subsequent things had to be done which went to fraud on the part of either of the contracting parties, such a clause as that would not hold. But the case I have to deal with appears to me to be an entirely different one. Those who frame clauses in building contracts, which some years ago were stringent, have by degrees kept on making them more and more stringent by reason of the consequences that follow from opening a certificate, and the enormous cost and litigation that arises where the work is a large work like a railway or a large public building from any court of justice endeavouring to take the account, an account of thousands and thousands of items on every one of which skilful advisers may raise some issue, whether the amount should stand for the sum charged, or for some less sum, or for some greater sum. A litigation of that kind it is almost impossible to bring to a conclusion in a court of justice where the parties are entitled to be heard, and to insist on every possible objection. It does appear to me that those who deal in matters of this kind are wise in making the clauses more and more stringent. It is of course for the contractor when he enters into a contract of this kind to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific; but they do it as business men, they do it for better or worse, and they think on the whole it is very unlikely that any architect selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject. Then it appears to me that the policy of the law does not require that I should hold, in the case I am now dealing with, a clause like the present to be void. To put an illustration, suppose a gentleman who is going to have a house built for him enters into a complex agreement with the contractor, in the performance of which innumerable questions may arise, says, "Will you agree with me (for if you will, I will agree with you) that nothing on earth shall upset the certificate that is given?" Why is that unfair or against public policy? The late Master of the Rolls (Sir G. Jessel), in the case of

the Printing and Numerical Registering Co. *v.* Sampson, Law Rep. 19 Eq. 462, 465, says this: "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 entered 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." Entirely agreeing as I do with these remarks, I myself can see no reason why grown-up men should not be allowed to contract in these terms. "Neither of us," each says to the other, and each agrees with the other, "will ever raise the charge of fraud." Persons will shrink very often from charges of this kind, and those who are persistent, will, by making charges, induce persons to come to terms of compromise. It seems to me that this clause is addressed to get out of what the parties may consider evils, and which I have endeavoured to describe. The clause therefore stand thus: "both of us agree," to our advantage or disadvantage as it may turn out, "that every certificate given by the gentleman named shall stand firm and good and shall not be questioned even for fraud." That that is the meaning of the clause I have no doubt. Mr. *Levett* argued that the word "charge" must mean unfounded charge, and he said that because he found the words "pretence" (which he says means something not true) "suggestion" (something that you dare not state openly), and "insinuation" (something else that you dare not state, will not state, and have not the courage to state). But "charge" was his difficulty, and he said the word "charge" is coloured by all the other three words there. But the answer, I think, is plain. "Charge" is the word which has been, I think, deliberately inserted here, because, with great respect to the learned counsel who advanced it, to put in "unfounded charge" is almost to make nonsense of it. Any man who makes an unfounded charge of fraud fails in it, and no protection is required. Consequently, if that were the meaning of the clause it would have no operation whatever.

The sum of my judgment is this, that the parties meant what they have said, and that the term "charge" here is used deliberately, "We will have no question of this kind raised as against the certificate." I need hardly say that if the case had been that the trustees themselves had been party in any way to the fraud it would have been very different, and it may be that Mr. *Levett's* argument (and as at present advised I think it would have been so) would have succeeded. The trustees are not even insisting on a certificate which they believe to be fraudulent. That disposes of the main point in the action, and it shows that the action is not justified as against the defendants, whom I have shortly called the trustees.

Mr. Hibbert, the architect, is charged with fraud, and on such a claim as this the charge of fraud cannot be entered upon, because

this is not an action against him to recover damages from him for an alleged fraud or for a fraud. The allegations of fraud as against him were inserted merely for the purpose of founding the relief against the trustees. Still, although no relief is asked against him, these allegations in the statement of claim do stand against him, and the case has been so shaped that I cannot even enter upon them as between him and the plaintiffs. It necessarily follows that I must dismiss the action as against him with costs so far as relate to these allegations of fraud.

[His Lordship then disposed of the action as against Walmsley, and then dismissed the whole action with costs as against the Committee and the defendant Hibbert.][1]

MICHAEL NOLAN ET AL., RESPONDENTS, *v.* CORDELIA C. WHITNEY, APPELLANT.

NEW YORK COURT OF APPEALS, FEBRUARY 7–28, 1882.

[*Reported in* 88 *New York*, 648.]

IN July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the City of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2,700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his

[1] Compare Redmond *v.* Wynne, 13 N. S. Wales (Law), 39.

agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

The court say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith *v.* Brady, 17 N. Y. 189; Thomas *v.* Fleury, 26 id. 26; Glacius *v.* Black, 50 id. 145; Johnson *v.* DePeyster, 50 id. 666; Phillip *v.* Gallant, 62 id. 256; Bowery Nat. Bank *v.* The Mayor, 63 id. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable; and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

Oscar Frisbie, for appellant.

N. H. Clement, for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.[1]

[1] In Vought *v.* Williams, 120 N. Y. 253, an action for breach of a contract to buy real estate which provided that the title was to be passed upon by a lawyer or conveyancer to be designated by the defendant, the court, while refusing specific performance on the ground that the plaintiff's title was defective, said: "The provision that the title was to be passed upon by the defendant's lawyer or conveyancer did not make the decision of the conveyancer that the title was good, a condition precedent to the right of the plaintiff to enforce the performance of the contract. If a decision to that effect was refused unreasonably, the failure to obtain it would not defeat a recovery, and it would have been unreasonably refused if, in fact, beyond all dispute the title was good. Folliard *v.* Wallace, 2 Johns. 395; Thomas *v.* Fleury, 26 N. Y. 26; City of Brooklyn *v.* B. C. R. R. Co., 47 N. Y. 475; B. N. Bank *v.* Mayor, etc., 63 N. Y. 336; D. S. B. Co. *v.* Garden, 101 N. Y. 388; Doll *v.* Noble, 116 N. Y. 238."

See also Van Keuren *v.* Miller, 71 Hun, 68; Anderson *v.* Imhoff, 34 Neb. 335; Thomas *v.* Stewart, 132 N. Y. 580, 586; Macknight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72, 86; Whelen *v.* Boyd, 114 Pa. 228; Sullivan *v.* Byrne, 10 S. C. 122; Norfolk, &c. Ry. Co. *v.* Mills, 91 Va. 613; Washington Bridge Co. *v.* Land & River Improvement Co., 12 Wash. 272; Bentley *v.* Davidson, 74 Wis. 420; Wendt *v.* Vogel, 87 Wis. 462.

In Van Clief *v.* Van Vechten, 130 N. Y. 571, the court, referring to a building con-

THURNELL *v.* BALBIRNIE.

In the Exchequer, Trinity Term, 1837.

[*Reported in* 2 *Meeson & Welsby*, 786.]

The first count of the declaration stated, that before and at the time of making the agreement and the promise and undertaking of the de-

tract, said: "The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission. Woodward *v.* Fuller, 80 N. Y. 312; Nolan *v.* Whitney, 88 id. 648; Phillip *v.* Gallant, 62 id. 256, 264; Glacius *v.* Black, 50 id. 145; s. c. 67 id. 563, 566; Johnson *v.* DePeyster, 50 id. 666; Sinclair *v.* Tallmadge, 35 Barb. 602. But when, as in this case, there is a wilful refusal by the contractor to perform his contract and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. While slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful the difference between substantial and literal performance is bounded by the line of *de minimis*. Smith *v.* Brady, 17 N. Y. 173; Cunningham *v.* Jones, 20 id. 486; Bonsteel *v.* Mayor, etc., 22 id. 162; Walker *v.* Millard, 29 id. 375; Glacius *v.* Black, 50 id. 145; Catlin *v.* Tobies, 26 id. 217; Husted *v.* Craig, 36 id. 221; Flaherty *v.* Miner, 123 id. 382; Hare on Contracts, 569; Leake on Contracts, 821."

In Chicago, Santa Fé and California Railroad Company *v.* Price, 138 U. S. 185, an action for breach of a contract to pay for certain construction, the court said: "The written contract between the parties in this case does not materially differ from the one before this court in Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549, 553. In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to the prices established by the parties; which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such a certificate by the engineer whose determination was made final and conclusive, entitled the contractor to sue the company on the contract. It was held, in accordance with the principles announced in Kihlberg *v.* United States, 97 U. S. 398, and Sweeney *v.* United States, 109 U. S. 618, that the declaration was fatally defective in that it contained 'no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him.' Some observations in that case are pertinent in the present one. It was said: 'We are to presume from the terms

fendant thereinafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, &c., of the plaintiff, of great value, to wit, of, &c.; and thereupon heretofore, to wit, on the 26th of December, 1836, it was agreed by and between the plaintiff and the defendant in manner following, that is to say: the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire; and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the said Mr. Matthews by and on behalf of the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, &c., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice; but that the defendant and Matthews then and thence continually neglected and refused so to do. And the plaintiff further said, that he, the plaintiff, afterwards, to wit, on the 2d of February, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at

of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith.'"

In Chism *v.* Schipper, 51 N. J. L. 1, the court, while holding fraud on the part of an architect an excuse for non-performance of a condition precedent that his certificate should be procured, said: "Nor does it seem to me that by the adoption of the foregoing theory of explication these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities; they cannot be impeached for want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons; such awards can be vitiated by fraud alone, and which must be proved to the satisfaction of a jury under a watchful judicial supervision."

See also Kennedy *v.* United States, 24 Ct. Cl. 122: Dingley *v.* Greene, 54 Cal. 333; Fowler *v.* Deakman, 84 Ill. 130; Gilmore *v.* Courtney, 158 Ill. 432; Merrill *v.* Gore, 29 Me. 346; Baltimore & Ohio R. R. Co. *v.* Brydon, 65 Md. 198; Palmer *v.* Clark, 106 Mass. 373; Beharrell *v.* Quimby, 162 Mass. 571; Shaw *v.* First Baptist Church, 44 Minn. 22.

any time within ten days from the said 2d of February which the defendant might fix, to value the said goods, &c., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, &c., or to let the same be valued, according to his said agreement and promise. And thereupon the said Mr. Newton afterwards, and after the lapse of a reasonable period of time, to wit, one month from the day and the year last aforesaid, proceeded to value and did then value the said goods, &c., and the price thereof upon such valuation reasonably amounted to the sum of 500*l.*, whereof the defendant had notice, and was requested to pay the same to the plaintiff. And the plaintiff further says, that he hath always from the time of making such valuation as aforesaid been ready and willing to sell and deliver to the defendant the said goods, &c., and to receive payment by him of the value thereof, whereof the defendant hath always had notice; yet the defendant, not regarding, &c., did not nor would, although often requested, take the said goods, &c., so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby, &c.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count assigning, amongst other causes, the following: that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is alleged by way of breach that the defendant refused to take the goods, &c., agreed by him to be taken, and that he also refused to pay to the plaintiff the value of the said goods, &c., and no agreement or promise is stated in the said count to take the said goods, &c., at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire. Joinder in demurrer.

Kelly, in support of the demurrer. There are many objections in point of form to this count; but the substantial question is, where two persons are by agreement appointed to make a valuation of goods, and one refuses, can either party be liable for a breach of the agreement? How could the defendant be bound to take or pay for the goods until they had been valued according to the agreement? [GURNEY, B. It is not said that Matthews omitted to value by the procurement of the defendant.] It is just as if an action were brought against a party to a submission, because one of the arbitrators refuses to make an award.

The Court here called upon

Hoggins, to support the declaration. It is specifically averred in the

count that the defendant had notice that the plaintiff's appraiser was ready to value, and the breach assigned is, that he then wholly refused to let the goods be valued according to the agreement. It is submitted that that is sufficient to render him liable for the price. In Hotham *v.* East India Company it was held, that where the defendant by his neglect and default prevented the performance of a condition precedent in a charter-party, that was equivalent to a performance by the plaintiffs. In Raynay *v.* Alexander, where the plaintiff declared in assumpsit for non-delivery of fifteen tods of wool purchased by him out of seventeen, of which the defendant was possessed, the declaration was held bad for want of an allegation that the plaintiff had selected fifteen tods of the seventeen, which was an act to be first performed by him; but the Court said if the defendant would not have permitted the plaintiff to see the wool, that he might make election, that had excused the act to be done by the plaintiff, and had been a default in the defendant. If these cases be law, the facts alleged in this declaration make the defendant liable as for goods bargained and sold.

Lord Abinger, C. B. I am of opinion that this count is bad. The agreement stated is an agreement to purchase the goods on the valuation of Newton and Matthews. There is no distinct allegation that the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued, according to his agreement, and that he has refused to value the goods or to let them be valued according to his agreement; all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

Bolland, B., concurred.

Alderson, B. I should refer the words "or to let the same be valued," &c., to the defendant's letting the goods be valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.

Gurney, B., concurred.

Leave to amend on payment of costs; otherwise judgment for the defendant.[1]

[1] As to the effect of the death of a valuer, see Firth *v.* Midland Ry. Co., L. R. 20 Eq. 100.

In insurance policies an appraisal or valuation of the injury is frequently made a condition precedent to a right of action. In Brock *v.* The Dwelling House Ins. Co. 102 Mich. 583, it was held this condition was excused by the unreasonable action of the appraiser appointed by the company. The court say (p. 593): "It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit brought will not bar an action on the policy. McCullough *v.* Insurance Co., 113 Mo. 606; Bishop *v.* Insurance Co., 130 N. Y. 488; Uhrig Insurance Co., 101 id. 362; Bradshaw *v.* Insurance Co., 137 id. 137."

Compare Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

COOMBE *v.* GREENE.

IN THE EXCHEQUER, MAY 8, 1843.

[*Reported in* 11 *Meeson & Welsby,* 480.]

COVENANT. The declaration stated, that theretofore, to wit, on the 23d of April, 1832, by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part (profert), the plaintiff, for the considerations therein mentioned, did demise, &c., to the defendant, his executors, &c., all that messuage or tenement, with the barn, stable, and buildings, and several closes of land, &c., therein described, for the term of ten years, at the rent of 100*l.* by four quarterly payments. And the defendant did, for himself, his heirs, executors, &c., thereby covenant with the plaintiff, her heirs, executors, &c., that he, the defendant, his executors, &c., should and would lay out and expend the sum of 100*l.*, being equivalent to the first year's rent for the said demised premises, in substantial and beneficial improvements of and additions to the said messuage or dwelling-house, and in the substantial and permanent repairs thereof, under the direction or with the approbation of some competent surveyor, to be named by and on the part of the said plaintiff, her heirs and assigns. The lease also contained a general covenant to repair, which was set out. Breach, that the defendant did not nor would, after the making of the said indenture and during the continuance of the said demise, or at any other time, lay out and expend the sum of 100*l.*, or any part thereof, in substantial and beneficial improvements of and additions to the messuage or dwelling-house, or in the substantial and permanent repairs thereof, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the said plaintiff, her heirs or assigns, or otherwise according to the covenant in that behalf, but on the contrary thereof, the defendant, after the making of the said indenture, and during the continuance of the said demise and since, wholly neglected and refused so to do, although the said plaintiff always during the said term was ready and willing to appoint a competent surveyor to approve of such substantial and beneficial improvements of and additions to the said messuage, of which the said defendant during all that time had due notice.

Special demurrer, assigning for causes, *inter alia*, that it is not alleged in the said count, that the plaintiff has ever named a competent or any surveyor, under whose direction or approbation the defendant might or could have laid out and expended the said sum of money in repairing the said premises according to the said covenant; that it is not alleged or shown that the plaintiff was ready and willing to name a surveyor according to the said covenant; that it is not alleged that the plaintiff

ever offered to name a surveyor, to direct or approve of the laying out and expenditure of the said money by the defendant, &c.

Joinder in demurrer.

The defendant's points marked for argument were as follows: —

The defendant will contend that the breach is bad, because, inasmuch as the improvements of and additions to the messuage mentioned in the declaration were to be done under the direction of a surveyor to be named by the plaintiff, the naming of the surveyor by the plaintiff was a condition precedent to the performance of the covenant on the part of the defendant, and that the said first breach is bad for not averring performance, or some dispensation of performance, by the plaintiff, of such condition precedent. That if the naming of a surveyor by the plaintiff was not a condition precedent to the defendant's performance of the covenant, still, if any improvements or additions were made by the defendant, the naming of a surveyor by the plaintiff, and the disapproval of such improvements or additions by such surveyor, were conditions precedent to any right of action in the plaintiff on the said covenant; and, on the other hand, if no improvements or additions whatever were made, the said first breach is too large, uncertain, and ambiguous.

The plaintiff's points for argument were: The plaintiff will contend that the naming of a surveyor by the plaintiff was not a condition precedent, and that it was not necessary to aver performance or dispensation of performance by the plaintiff of the said supposed condition precedent; but that the breach assigned is good in all respects, and not open to the objections or any of them set forth in the demurrer and points for argument made by the defendant.

Bovill, in support of the demurrer. The objection is, that the declaration does not show that any surveyor was appointed, and, until a surveyor was appointed, there could be no breach on the part of the defendant. The money was to be laid out under the direction of a surveyor to be appointed by the plaintiff, which was a condition precedent, and, until he was so appointed, the covenant could not be performed by the defendant; and it is not enough to aver a readiness and willingness to appoint a surveyor, because the defendant had nothing to do with the appointment: it ought to have been shown distinctly that an appointment had been made. As it is, the declaration does not show that the defendant has broken his covenant.

Ogle, contra. The general covenant to repair is not controlled by the appointment of a surveyor; and there might be circumstances under which the plaintiff might be entitled to maintain an action, although a surveyor had not been appointed. Suppose the defendant had wilfully damaged or pulled down any part of the dwelling-house, could not the landlord have maintained an action for dilapidations, without a surveyor having been appointed? In such a case the tenant would be bound to rebuild it, and, in the event of his neglecting to do so, he would be liable to an action on the covenant.

PER CURIAM. The plaintiff has declared on a covenant by which the defendant undertook to expend the sum of 100*l.* in substantial improvements of and additions to the dwelling-house, and in the substantial repair thereof, under the direction and with the approbation of a surveyor. Now the appointment of a surveyor was a preliminary step, for until one was appointed he could not give directions as to how the money was to be expended. The defendant could not fulfil his part of the contract without the approbation of a surveyor, who was to direct and approve of his proceedings. The appointment of a surveyor is, therefore, a condition precedent to his liability to expend the 100*l.*; and, as the declaration does not aver any such appointment to have taken place, it is bad, and there must be *Judgment for the defendant.*[1]

GARDNER C. HAWKINS *v.* JOHN C. GRAHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 22 — MAY 11, 1889.

[*Reported in* 149 *Massachusetts*, 284.]

CONTRACT for breach of an agreement in writing, which was as follows: —

Philadelphia, December 21, 1885.

MR. JOHN C. GRAHAM:

I do hereby agree that for and in consideration of the sum of fifteen hundred and seventy-five (1,575) dollars, to be paid me upon the satisfactory completion of the following system of heating to be established in your new mills, located at the northeast corner of Nineteenth and Hamilton streets, Philadelphia, Penn., as follows, viz.: to furnish and set up (no foundations included) in complete and first-class working order, one steam fan, having an engine affixed thereto of $6\frac{1}{2}$ × 7 inch cylinder of first-class workmanship and material, together with a heater containing a sufficient and ample quantity of one-inch wrought-iron steam piping, properly applied on the inside of a wrought-iron casing, all of which to be erected in proper working order in such portions of the buildings, where found most convenient for the establishment and where directed by yourself.

The system of heating to be entirely dependent upon the exhaust steam from your engine at an indication of 40 H. P., and to be of such construction as to readily as well as easily heat or raise the temperature, at any point or portion of the entire buildings into which heat from said heater may be conducted, to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced; and further, that the application of said system is to avoid any back pressure upon the

mill engine, or not increase any that may exist when my heater is attached, and that the erection and construction of the vertical pipes (we have arranged for one line of pipes from the vertical standpipes already 12″ decimetres and shall not attach any more unless found necessary, as explained to you, they being the only kind required) shall be executed in accordance with the plans and specifications prepared by myself and under my personal supervision and direction.

Further, the entire work is to be finished within eighteen (18) days from date of this contract, either by permanent or temporary means; if temporary, no extra charge whatsoever to be made, excepting such charges on the temporary machine as regards freight to and from our works, and clearing up. It is further declared, and distinctly understood, that in the event of my not being able to properly heat every portion of the buildings as hereinbefore provided for, and in accordance with the requirements as above set forth, upon a ten (10) days' notice from yourself to the effect that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter, I shall and will at my own expense remove all the machines and appurtenances belonging to the system, leaving the entire mill in a condition equal to that prior to the introduction of the same. In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of $1,575 as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated.

GARDNER C. HAWKINS.

At the trial in the Superior Court, before Brigham, C. J., there was evidence that the plaintiff made the offer contained in the above agreement, and that the defendant accepted such offer.

The defendant contended that all the words of the contract were to be taken into consideration in its interpretation; that, in addition to the other requirements of the contract, the system of heating must prove satisfactory to the defendant; and that not till the satisfactory completion of the system and its proving satisfactory to the defendant was anything due to the plaintiff; and the defendant offered evidence, not only that the system would not and did not do the heating as guaranteed, but that it did not prove satisfactory to the defendant, and that it had not been completed satisfactorily to him, and such acknowledgment had never been made by him.

The judge ruled that this contract did not come within the scope of the case of Brown v. Foster, 113 Mass. 136, and similar cases, and that if the plaintiff had fulfilled his contract in the other particulars required, he was entitled to recover, notwithstanding the dissatisfaction of the defendant; that under the contract the plaintiff was not bound to make the system satisfactory to the defendant, and that evidence on

that point was immaterial; and that the trial should proceed on the theory that the satisfaction of the defendant was substantially eliminated from the case.

The plaintiff's evidence showed that the temperature of the different stories of the defendant's mill, which was one hundred and ninety-six feet long by fifty feet wide, and seventy-five feet high, varied, and that the temperature near where the hot air entered the rooms was higher by several degrees, in some instances as much as ten degrees, than in the more remote portions of the rooms, the hot air being introduced into the rooms at only one place, at the end of each room.

The judge gave no instructions to the jury on the question of satisfaction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. Hemenway & F. L. Washburn, for the defendant.

S. Lincoln, for the plaintiff.

HOLMES, J. The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. 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 (Hunt *v.* Livermore, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. Brown *v.* Foster, 113 Mass. 136; Gibson *v.* Cranage, 39 Mich. 49; Wood Reaping & Mowing Machine Co. *v.* Smith, 50 Mich. 565; Zaleski *v.* Clark, 44 Conn. 218; McClure Bros. *v.* Briggs, 58 Vt. 82; Exhaust Ventilator Co. *v.* Chicago, Milwaukee, & St. Paul Railway, 66 Wis. 218; Seeley *v.* Welles, 120 Penn. St. 69. Singerly *v.* Thayer, 108 Penn. St. 291; Andrews *v.* Belfield, 2 C. B. (N. S.) 779.[1]

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, 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 party. In doubtful cases, courts have been

[1] 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; Hallidie *v.* Sutter St. Ry. Co., 63 Cal. 575; Goodrich *v.* Nortwick, 43 Ill. 445; Buckley *v.* Meidroth, 93 Ill. App. 460; Platt *v.* Broderick, 70 Mich. 577; Fire Alarm Co. *v.* Big Rapids, 78 Mich. 67; Housding *v.* Solomon, 127 Mich. 654; McCormick Machinery Co. *v.* Chesrown, 33 Minn. 32; Magee *v.* Scott Lumber Co., 78 Minn. 11; Gwynne *v.* Hitchner, 66 N. J. L. 97; Hoffman *v.* Gallaher, 6 Daly, 42; Tyler *v.* Ames, 6 Lans. 280; Gray *v.* Central R. R. Co., 11 Hun, 70; Moore *v.* Goodwin, 43 Hun, 534; Haven *v.* Russell, 34 N. Y. Supp. 292; Rossiter *v.* Cooper, 23 Vt. 522; McClure *v.* Briggs, 58 Vt. 82; Exhaust Ventilator Co. *v.* Chicago, &c. Ry. Co., 66 Wis. 218, 69 Wis. 454, *acc.*

inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. Sloan *v.* Hayden, 110 Mass. 141, 143; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 799; Dallman *v.* King, 4 Bing. N. C. 105.

By the written proposition which was accepted by the defendant the plaintiff agrees, "in consideration of the sum of fifteen hundred and seventy-five dollars, to be paid me upon the satisfactory completion of the following system of heating . . . in your new mills, . . . to furnish and set up, . . . in complete and first-class working order," certain things. Then follow conditions, tests, and other undertakings. Then "it is further declared . . . that in the event of my not being able to properly heat every portion of the buildings . . . in accordance with the requirements as above set forth," upon ten days' notice "that the buildings are not properly and sufficiently heated, and I cannot so heat it in ten days thereafter," the plaintiff will remove the machines at his own expense. "In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of fifteen hundred and seventy-five dollars as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated."

The last words, "or the work demonstrated," offer an alternative to the owner's acknowledgment. They imply that, if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all the requirements," tend the same way. The ten days' notice contemplated is not a notice that the owner is dissatisfied, but that the buildings "are not being properly and sufficiently heated," and the right to give it is conditioned upon the plaintiff's "not being able to properly heat every portion of the buildings," etc. Taking these phrases with the test prescribed, that the system is "to readily as well as easily heat or raise the temperature at any point . . . to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced," etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant.

Exceptions overruled.

CHARLES DOLL ET AL., RESPONDENTS, *v.* WILLIAM NOBLE, APPELLANT.

NEW YORK COURT OF APPEALS, JUNE 26 — OCTOBER 8, 1889.

[*Reported in* 116 *New York*, 230.]

BROWN, J. This action was brought to recover a balance due upon a written contract, by which the plaintiffs were to do polishing, staining, and rubbing on the woodwork of two houses owned by the defendant, and also for certain extra work upon the same houses. The defendant denied that the contract had been performed by the plaintiffs, or that anything was due them from him.

The contract provided that the work was to be done "in the best workmanlike manner, under the supervision of William Packard, superintendent, and to the entire satisfaction of William Noble, the party of the first part, owner." The court submitted the case to the jury under a general charge, to which no exception was taken, and which in substance instructed the jury that "if the work under the contract was done in the best workmanlike manner, the plaintiffs would be entitled to recover, and that the defendant could not defeat such recovery by unreasonably, and in bad faith, saying the work was not done to his satisfaction;" that while the contract provided that it was to be done to the owner's satisfaction, that clause must be regarded as qualified by the other provisions of the contract that it was to be done in the best workmanlike manner; and that was the test of a correct and full performance of the contract.

The evidence was conflicting upon the question whether the work under the contract was done in a workmanlike manner, and also as to the extra work. The jury, however, found a verdict for the full amount claimed, and we must assume that the result was correct unless the court erred in its construction of the written agreement. While no exception was taken to the charge of the court to which I have referred, the defendant at the close of the charge requested the court to instruct the jury that the defendant was entitled under the contract to have plaintiffs do the work "to his entire satisfaction before the plaintiffs became entitled to the final payment." To which the court responded, "I so charge, subject to the qualification which I have already made. He must not attempt to defeat a just claim by arbitrarily and unreasonably saying he is not satisfied. The work must be done according to the contract." To this ruling the defendant excepted, and this exception presents the principal question in the case.

The ruling of the court was correct. The question was directly presented in the case of Bowery National Bank *v.* Mayor, &c., 63 N. Y. 336. In that case the certificate of the "water purveyor" that the stipulations of the contract were performed was made a condition precedent to payment. It was conceded that the contract was completed

and performed, but the "water purveyor" declined to give a certificate. The plaintiff was defeated in the Supreme Court, but in this court the judgment was reversed, the court saying, "It was necessary for them (the plaintiffs) either to prove upon the trial the making of such certificate, or to show that it was refused unreasonably and in bad faith. It was unreasonable to refuse it if it ought in the contemplation of the contract to be given. In such contemplation it ought to have been given, when, in any fact and beyond all pretence of dispute, the state of things existed to which the water purveyor was to certify, to wit, the full completion of the contract in each and every one of its stipulations."

That when the parties have made the certificate of a third person of the performance of the work a condition precedent to payment, such certificate must be produced or its absence explained is the general rule. Smith *v.* Briggs, 3 Denio, 74. But all the authorities recognize the exception that when such certificate is refused in bad faith or unreasonably the plaintiff may recover upon proof of performance of the contract. Smith *v.* Brady, 17 N. Y. 176; Thomas *v.* Fleury, 26 id. 26; Wyckoff *v.* Meyers, 44 id. 145; Nolan *v.* Whitney, 88 id. 648; United States *v.* Robeson, 9 Peters, 328; Smith *v.* Wright, 4 Hun, 652; Whiteman *v.* Mayor, &c., 21 id. 121.

The reason for the exception applies with much greater force where the work is to be done to the satisfaction of the party himself than to cases where the certificate of a third party is required. A party cannot insist on a condition precedent when he has himself defeated a strict performance. Butler *v.* Tucker, 24 Wend. 449.

In this case Judge Bronson well says: "The defendant does not set up that part of the covenant which requires the work to be done to *his* satisfaction. As to that it would probably be enough for the plaintiff to aver that the work was in all other respects completed in pursuance of the contract; for if the defendant was not satisfied with such a performance it would be his own fault." See also Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387.

None of the cases cited by the appellant hold a different rule. Many of them recognize the exception I have pointed out, and those that do not are easily distinguishable from the case under consideration. It is not deemed necessary to refer to them more specifically.

We have examined the other questions raised by the exceptions, but none of them are of sufficient importance to require discussion.

The judgment should be affirmed, with costs.

All concur. *Judgment affirmed.*[1]

[1] Keeler *v.* Clifford, 165 Ill. 544; Boyd *v.* Hallowell, 60 Minn. 225; Barnett *v.* Sweringen, 77 Mo. App. 64; Hummel *v.* Stern, 164 N. Y. 603; Richeson *v.* Mead, 11 S. Dak. 639, *acc.*

WORK ET AL *v.* BEACH.

NEW YORK SUPREME COURT, GENERAL TERM, MARCH 13, 1891.

[*Reported in* 13 *New York Supplement*, 678.]

APPEAL from special term, New York County.

Action by Frank Work, William E. Strong, George Wood, and Frank K. Sturgis against Miles Beach. Defendant and one Marston had a joint account with plaintiffs, who were stock-brokers, arising out of purchases of stocks for them by plaintiffs, and defendant had also an individual account with plaintiffs of the same nature. Plaintiffs brought an action against defendant and Marston on such joint account, alleging that they had advanced more money thereon than the value of the securities held by them. Defendant and Marston appeared in the action, and contested the liability. Pending the action, the plaintiff Sturgis and defendant had an interview, in which, after defendant had explained his embarrassed financial condition, Sturgis proposed that, if defendant would authorize plaintiffs in writing to sell the securities held by them in both the accounts, and consolidate the two into one account, and would then in writing admit the correctness of the debit balance on that account, and agree individually to pay that balance when he should be able to do so, plaintiffs would discontinue the action on the joint account, would sell the securities, and consolidate the accounts, and would allow the consolidated account to stand until defendant should be able to pay such balance. At this time the securities held by plaintiffs on defendant's individual account were worth much more than the amount due to plaintiffs on that account. As a result of the interview, defendant wrote to plaintiffs a letter, saying: "It is my wish that you should sell, when favorable opportunity offers, the following securities in my accounts;" and after specifying the securities, continued as follows: "When this is done, please consolidate my two accounts into the one standing in my own name, and let me have a statement of my indebtedness to your firm. I will then write a letter to you, stating my obligations to pay this sum when I can do so, in accordance with our agreement on Saturday last." This letter was drafted by Sturgis, and was copied and signed by defendant as drafted, except that defendant added the final clause, "in accordance with our agreement on Saturday last." Plaintiffs sold the securities, and sent defendant a final statement of his account, showing the amount due them as $14,570.68; and in their letter to him inclosing this statement, wrote: "Will you now, as formerly agreed, write to us a letter stating your liability for this debit balance, joining with it an assurance that when able you will discharge the debt? We beg to add that we will be glad to listen to any proposition looking to a final adjustment of the account." Some 10 days later plaintiffs again wrote to defendant: "We are without any reply from you to our letter of recent date. Will

you kindly write to us, as previously agreed, and state the facts of the terms on which our financial relations now stand?" To this defendant replied: "I have received your final statement of account, showing balance your due, in accordance with our agreement. To further complete compliance, I write to say that I will pay such balance when I shall be able to do so." Nearly three years thereafter plaintiffs made a demand on defendant for payment, and, no payment being made, brought this action. The original complaint contained no averment that defendant was then able to pay, and a demurrer thereto was sustained. See former decision, 6 N. Y. Supp. 27. The complaint was amended, and, on trial by the court, a jury having been waived, it appeared that defendant, at the time the promise to pay was given, and continuously since that time, received a salary as judge of $1,250 per month, out of which he saved nothing. Judgment was rendered for defendant, dismissing the complaint. See decision, 12 N. Y. Supp. 12. From this judgment plaintiffs appeal.

Argued before VAN BRUNT, P. J., and DANIELS and O'BRIEN, JJ.

Henry S. Bennett, for appellants.

Augustus C. Brown, for respondent.

O'BRIEN, J. The appellants claim that it was error upon the part of the trial judge to assume that the promise made by the defendant is the cause of action, and insist that the pleadings and the proof show it to be an action upon an account stated and settled. This precise question was presented upon a former appeal in this case (6 N. Y. Supp. 27), and it was held by this court, upon an examination then of the complaint, as it now more clearly is made to appear by the proof offered upon the trial to sustain the allegations of the amended complaint, "that the original debt was discharged and a new obligation created, and that the promise to pay 'when able to do so,' upon which this action is founded, was conditional; and that, to entitle the plaintiffs to recover thereon, they must plead and prove the fact of such ability." Upon the lines thus indicated the learned trial judge proceeded with the trial, and correctly ruled that plaintiffs were not entitled to judgment upon pleadings as upon an account stated, settled, and admitted; and in an opinion remarkable for its force and clearness he points out the error into which the plaintiffs seem to have fallen "in completely ignoring the valuable consideration which upon the settlement the plaintiffs received from the defendant for their acceptance of this very conditional promise." We might well be content to allow this appeal to stand upon the decision and opinion of the learned trial judge, who, in our judgment, correctly disposed of every question presented. It would be useless to go over the ground traversed by him, and discuss the principles laid down in the cases cited in support of his rulings, and which, with a single exception, included all the decisions that could be found, both American and English, bearing upon the issues between the parties. This exception (the case of Tebo *v.* Robinson, 100 N. Y. 29, 2 N. E. Rep. 383) seems formerly to have been overlooked by

counsel, for it was not called to the attention of this court upon the former appeal, nor to the attention of the judge upon the trial. The course of reasoning pursued by the latter is nevertheless directly in the line taken by the court of appeals in Tebo *v.* Robinson, *supra*, which thus becomes an argument and an authority to support the judgment rendered. The action of Tebo *v.* Robinson was brought upon a promise contained in a letter written by defendant to plaintiff in October, 1872. Of so much of the letter as is material the following is a copy: "You will find enclosed one hundred dollars, with interest, which you so kindly loaned me one year ago; and I hope and trust that I shall shortly be able to inclose you one thousand dollars, which you also kindly loaned me, hoping at the same time you may have no need of it until such time as I shall be able to pay it; and you may rest assured you shall have the money the moment I am able to pay it." The complaint averred ability to pay prior to the commencement of the suit. This was not denied in the answer. The sole defence set up in the answer was the statute of limitations. In writing the opinion of the court, Andrews, J., says: "The cause of action on this promise accrued as soon as the defendant had the pecuniary ability to pay his debt. Proof that the defendant at a particular time, subsequent to October 19, 1872, had property equal to or greater than the amount of the plaintiff's debt, would not conclusively show that he was able to pay the debt within the meaning of the promise so as to give a right of action. This fact might be consistent with utter insolvency on the part of the defendant, or the property might be of such a character that to deprive him of it would take away his means of livelihood as effectually as depriving a mechanic of his tools would deprive him of means of support. A promise to pay when able is to be reasonably interpreted. On the one hand, it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business; while, on the other hand, ability to pay cannot be fairly implied while the debtor, although he may be in possession of property sufficient to pay the particular debt, is plainly insolvent, or when payment, if enforced, would strip him of his means of support. The creditor or a promisee of this kind, reposes very much on the good faith of the promisor. He generally relies upon the debtor's making known any change in his pecuniary circumstances which enables him to pay the debt, although there is no duty of voluntary disclosure. It is not contemplated by the parties that the debtor will pay the debt out of earnings necessary for the support of himself or his family, or that he will pay the particular debt to the prejudice of other creditors whose debts are absolute and unconditional." In language of similar import Mr. Justice Barrett in this case says: "What is here meant by 'ability to pay?' . . . It may fairly be deduced from the cases that the plaintiffs were bound to prove the defendant's ability to pay at the commencement of the action, and that such ability could be shown by circumstances as well as by direct evidence. Beyond this there is no

fixed rule. Each case must depend upon the terms of the contract, read in the light of the surrounding circumstances. Substantial proof of ability within the intent and meaning of the parties must be given; and, although that proof may, in the nature of things, be difficult, it is none the less requisite. By taking a conditional obligation — the condition itself being founded upon a valuable consideration — the obligee accepts the burden imposed upon him of establishing the fulfilment of the condition before he can recover. . . . The understanding undoubtedly was that the defendant should be required to pay only when his circumstances were changed for the better, either by an acquisition of fortune or a decrease of obligation." 12 N. Y. Supp. 16. It was therefore correctly ruled that it was incumbent on plaintiffs to show some change for the better in defendant's circumstances at a period subsequent to the time when the promise was given. Such a construction, finding support, as it does, both upon principle and authority, was given to the contract between the parties upon the trial. No evidence was presented to warrant the conclusion that defendant's circumstances had improved, or showing his ability to pay. He was in receipt of his salary as judge when the contract was made. He received it then, as now, monthly; and the testimony shows that out of it he saved nothing. It is useless to speculate as to what defendant could or should have done; the question being, did the plaintiffs prove defendant's ability to respond within the meaning of the contract? The conclusion reached was justified by the proof.

Assuming, however, that the principles of law were correctly applied, it is claimed that the court erred in permitting the introduction and giving effect to evidence varying the written contract as set forth in the letters, by allowing, after objection, the introduction of the complaint in the original action by plaintiffs on the joint account, and by incorporating in the fifth finding the conversation between the parties as evidence of what the agreement was; thus modifying, as claimed, the letters which the parties wrote, and in which they intended to express the agreement which they made. In other words, the claim is that the court thus interpolated the conversation which led to the original agreement into the agreement itself. In answer to this objection it is only necessary to remember that in the letter of December 15, 1884, written by the defendant to the plaintiffs, in which he directs them to sell the securities mentioned in the letter, he thus concludes: "When this is done, . . . I will then write a letter to you, stating my obligation to pay this sum when I can do so, in accordance with our agreement on Saturday last." It will thus be seen that in the letter itself, which is one of the letters referred to by the appellants as containing the agreement between the parties, it would appear that the agreement itself was made on that Saturday; that the letters did not embody the entire contract, and this justified the reception of evidence tending to prove what was the entire agreement. The effect of the construction given to the agreement by the judge necessarily resulted in excluding testi-

mony offered by the plaintiffs tending to show how much the defendant could have paid, if anything, less his personal expenses, and as to whether he was not during that period able to save sufficient from his salary to pay any portion of the claim, and why he did not devote any portion of the difference between his individual expenses and the amount of his salary to pay this obligation. As already said, what he might, could, or should have done was not the question at issue. By the agreement between the parties it was an essential part of plaintiffs' cause of action to show ability to pay. Therefore, after a careful examination of the case and exceptions, we are of opinion that no error was committed justifying a reversal, and that the judgment should be affirmed, with costs and disbursements. All concur.[1]

EDGE *v.* BOILEAU and Others.

In the Queen's Bench Division, November 20, 1885.

[*Reported in* 16 *Queen's Bench Division*, 117.]

Motion for a new trial or to enter judgment for the defendants.

The action, which was tried before Mathew, J., at the last Birmingham Assizes, was for breach of a covenant for quiet enjoyment contained in a lease of premises, comprising several sets of offices and business chambers, by the defendants to the plaintiff. The facts were as follows :—

The lease contained covenants by the plaintiff to pay the rent reserved and to keep the premises in repair, and provided for re-entry by the lessors, if rent should be in arrear for twenty-one days, and if on demand thereof there should not be sufficient distress on the premises, or if the lessee should not duly observe the covenants on his part after three months' notice in writing so to do. The covenant

[1] 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 ; Everson *v.* Carpenter, 17 Wend. 419 ; Re Knab, 78 N. Y. Supp. 292 ; Nelson *v.* Von Bonnhorst, 29 Pa. 352 ; Salinas *v.* Wright, 11 Tex. 572, *acc.*

Kincaid *v.* Higgins, 1 Bibb, 396, *contra.* See also Nunez *v.* Dautel, 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.

In Denney *v.* Wheelwright, 60 Miss. 733, 744, the court said : " The fault of [the instruction] given for the plaintiffs is that it required the defendants to prove not only that the condition had happened upon which the promises of the plaintiffs became absolute, but that it continued up to the commencement of the suit. If the promise of the plaintiffs was to pay these notes when or if they became able, then when they became able the promise became absolute, and a right of action existed in favor of the defendants which would not be lost by the subsequent insolvency or inability of the plaintiffs to pay the debt. The question was not whether the plaintiffs were at the institution of their suit able to pay the debts, but whether at any time after their promise it became absolute by the happening of the condition."

See also Waters *v.* Thanet, 2 Q. B. 757.

for quiet enjoyment was in the usual terms, to the effect that the lessee paying the rent when due, and observing the covenants on his part to be observed, should peaceably and quietly hold and enjoy the said premises without interruption from the lessors or persons claiming through them. The plaintiff's rent being in arrear and the premises being out of repair, the defendants' agent, by their authority, served notices in writing on the plaintiff's sub-tenants of the demised premises requiring them not to pay to the plaintiff any rent due or thereafter to become due to him, but to pay the same to the defendants, and threatening legal proceedings in default of compliance with the notice. The plaintiff, having paid the rent in arrear, requested the defendants to withdraw the notices, complaining that they would occasion him great difficulty in obtaining his rents from his sub-tenants, but the defendants refused to do so because the plaintiff had not executed certain repairs which they required him to do. The defendants, however, ultimately, after an interval of about two months, withdrew the notices. In the meantime one of the plaintiff's sub-tenants paid his rent to the defendants.

The plaintiff brought his action as above-mentioned, alleging loss of rent and damage to the value of his property, by reason of his title being impugned.

The defendants in their defence (*inter alia*) denied the breach of covenant, pleaded non-performance by the plaintiff of conditions precedent, and paid into court the rent so received by them plus five shillings in satisfaction of plaintiff's claim. The learned judge left the case to the jury, who found a verdict for the plaintiff for 100*l.* damages.

Channell, Q. C., and *Graham*, for the defendants.

Hugo, *Young*, and *Lindsell*, for the plaintiff.

POLLOCK, B. The plaintiff claims damages for breach of a covenant for quiet enjoyment. The defendants deny that any such breach has taken place, and say further that there was a failure to perform conditions precedent, rent being in arrear, and the covenant to repair not being performed. In my judgment there is sufficient evidence to show that there has been a breach of the covenant for quiet enjoyment. The covenant is in the usual terms. The facts are these. During the plaintiff's term, there being some rent in arrear, the agent for the defendants, the plaintiff's lessors, by their authority sends to the tenants of the plaintiff a notice desiring them not to pay their rents to the plaintiff, but to pay them to the defendants, and threatening them with legal proceedings in default of compliance with the notice. It is obvious what the probable results of such a notice would be. It is impossible, as it seems to me, to hold that, under the circumstances of this case, and having regard to what actually followed, this notice can be treated as no more than a mere false and idle claim or threat of which no notice might be taken. To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the

property demised. The case of Whichcot *v.* Nine, Brownlow & Goldsborough, 81, is the only authority to which we were referred on this subject. When the report of that case is looked at, it is very short and simply comes to this, that the mere telling a tenant not to pay his rent is not necessarily a breach of the covenant for quiet enjoyment. There is nothing said as to the circumstances under which the man was told not to pay his rent, and it appears that he did pay his rent notwithstanding the notice. I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat and as not amounting to a breach of the covenant for quiet enjoyment because there was no substantial interference with the enjoyment. Here I think that there is a substantial interference with the rights of the plaintiff, and one which might very well seriously affect the value of his property. Then it was contended that the covenant for quiet enjoyment and the covenants to be performed by the plaintiff were not to be read independently, but as dependent covenants, and that the payment of rent and repairing were therefore conditions precedent. I should have thought that point very clear even without authority. But there appears to be a case directly in point, viz., Dawson *v.* Dyer, 5 B. & Ad. 584. In that case the same argument was put before the court as in the present case, and the court held the argument untenable. That case seems to be conclusive in favor of the plaintiff on this point. For these reason I think the application must be refused.

MANISTY, J., concurred.

Rule refused.[1]

B. — CONDITIONS SUBSEQUENT.

WILLIAM GRAY *v.* OLIVER GARDNER AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1821.

[*Reported in* 17 *Massachusetts Reports*, 188.]

ASSUMPSIT on a written promise to pay the plaintiff $5,198.87, with the following condition annexed, viz.: "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places in whaling vessels on or within the same term of time the last year, then this obligation to be void." Dated April 14, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note, unconditional, had been given by the defendants for the value of the oil, esti-

[1] Hays *v.* Bickerstaffe, 2 Mod. 34; Dawson *v.* Dyer, 5 B. & Ad. 584; De Lancey *v.* Ganong, 9 N. Y. *acc.* Anonymous, 4 Leon. 50, *contra.*

mated at sixty cents per gallon; and the note in suit was given to secure the residue of the price, estimated at eighty-five cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice, the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on the first day of October, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants; and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October, in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had; otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman, for the defendants. As the evidence at the trial was contradictory, the question on whom the burden of proof rested became important. We hold that it was on the plaintiff. This was a condition precedent. Until it should happen, the promise did not take effect. On the non-occurrence of a certain contingent event, the promise was to be binding, and not otherwise. To entitle himself to enforce the promise, the plaintiff must show that the contingent event has not actually occurred.

On the other point saved at the trial, the defendants insist that it was not required by the terms of this contract that the vessel should be moored. It is not denied that such would be the construction of a policy of insurance containing the same expression. But every contract is to be taken according to the intention of the parties to it, if such intention be legal and capable of execution. The contemplation of parties to a policy of insurance is, that the vessel shall be safe before she shall be said to have arrived. So it is in some other maritime contracts. But in that now in question, nothing was in the minds of the parties, but that the fact of the arrival of so much oil should be known within the time limited. The subject-matter in one case is safety, in the other it is information only. In this case the vessel would be said to have arrived, in common understanding, and according to the meaning of the parties.

F. C. Gray, for the plaintiff.

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event, viz., the arrival of a certain quantity of oil, at the specified places, in a given time. It is like a bond with a condition: if the obligor would avoid the bond, he must show performance of the condition. The defendants, in this case, promise to pay a certain sum of

money, on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them; and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before twelve o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor, or is moored. She may sink, or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance; and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

MOODY *v.* INSURANCE COMPANY.

OHIO SUPREME COURT, OCTOBER 16, 1894.

[*Reported in* 52 *Ohio State*, 12.]

WILLIAMS, J.[1] The policy of insurance upon which the plaintiff sought to recover in the action below, provides, among its many conditions, that "no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or non-occupany be indorsed hereon." The answer alleges that the house insured by the policy was burned while it was unoccupied; and, though that allegation was denied, the court required the plaintiff to take the burden of proving that the building was occupied. That action of the court is assigned for error, and presents the first question for consideration.

The court went upon the theory that the provision of the policy above quoted constitutes a condition precedent, the performance of which was put in issue by the denial of the averments of the petition. In an action on a policy of fire insurance the plaintiff may plead generally, as was done in this case, the due performance of all the conditions precedent, on his part, and when the allegation is controverted the burden is undoubtedly upon him to show such performance. But we do not understand the clause of the policy in question to be a condition of that kind. An unexpired policy of fire insurance, which has been regularly issued, and remains uncancelled, must, in the absence of a showing to the contrary, be regarded as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs, and the steps necessary to establish it have been taken; and hence, the conditions

[1] A portion of the opinion is omitted.

precedent in such a policy include only those affirmative acts on the part of the assured, the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be, in some cases, other steps of a like nature. Those clauses usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or omission to do some act, are not in any proper sense conditions precedent. If they may be properly called conditions, they are conditions subsequent, and matters of defence, which, together with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defence, if controverted, is, of course, upon the party pleading it. This precise question has not heretofore received the consideration of this court, but it has been raised in other states under various clauses of insurance policies. In the case of Lounsbury *v.* Insurance Co., 8 Conn. 459, the question was presented in an action on a policy of fire insurance which provided "that the insurers would not be liable for loss or damage, happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; also, that if the building insured should be used, during the term of insurance, for any occupation, or for the purpose of storing therein any goods, denominated hazardous or extra-hazardous in the conditions annexed to the policy (unless otherwise specially provided for), the policy should cease and have no effect." It was held, these were not conditions precedent to the plaintiff's right of recovery, but were matters of defence to be taken advantage of by pleading. The court in that case say: "All these conditions, if such they may be called, are inserted in the policy by way of proviso, and not at all as conditions precedent. They are introduced for the benefit of the defendants; and they must be taken advantage of, if at all, by pleading." In Newman *v.* Insurance Co., 17 Minn. 123, it is held that: "Under a stipulation in a policy, that if the risk be increased by any means whatever, within the control of the insured, the insurance shall be void, the assured is not to plead and prove, affirmatively, that it has not been thus increased, but if it has, it is a matter of defence to be alleged and proved by defendant." And in Daniels *v.* Insurance Co., 12 Cush. 426, Chief Justice Shaw lays down the rule in general terms, that if the insurers rely "either upon the falsity of a representation, or the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact for the jury, in either aspect."

The following among other cases hold the same doctrine: Insurance Co. *v.* Carpenter, 4 Wis. 20; Mueller *v.* Insurance Co., 45 Mo. 84; Insurance Co. *v.* Crunk, 91 Tenn. 376; Spencer *v.* Insurance Association, 37 N. E. Rep. 617; Insurance Co. *v.* Sisk, 36 N. E. Rep. 659.

Any other rule would be highly inconvenient, if not impracticable. The clause of the policy under which the defendant sought to be relieved from liability is but one of a great number of conditions, for the violation of any of which the insurer might also claim to be relieved; and if the issue raised by the denial that the plaintiff performed all the conditions precedent on his part, imposed upon him the burden of proving there had been no violation of that particular clause, it also imposed upon him the burden of proving there was no breach of either of the other conditions, and for want of such proof as to either, he must fail, although in fact neither was the subject of any real controversy. This would be an unreasonable requirement, not only operating as a hardship on the plaintiff, but in most cases unnecessarily prolonging the trial. Especially should the rule be as we have stated it, under our code system of pleading, a prominent object of which was to so simplify the issues, that the evidence might be confined to the real matter of dispute, thus expediting the trial of causes and facilitating the business of the courts. The vacancy, or want of occupancy of a building is as much an affirmative fact as its occupancy, and as capable of proof; and the burden upon that subject, under the issues in this case, was, we think, upon the defendant.

SEMMES *v.* HARTFORD INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1871.

[*Reported in* 13 *Wallace*, 158.]

IN error to the Circuit Court for the District of Connecticut.

Semmes sued the City Fire Insurance Company, of Hartford, in the court below, on the 31st of October, 1866, upon a policy of insurance, for a loss which occurred on the 5th day of January, 1860. The policy as declared on showed as a condition of the contract, that payment of losses should be made in sixty days after the loss should have been ascertained and proved.

The company pleaded that by the policy itself it was expressly provided that no suit for the recovery of any claim upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And that the plaintiff did not commence this action against the defendants within the said period of twelve months next after the loss occurred.

To this plea there were replications setting up, among other things,

that the late civil war prevented the bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi and the defendant of Connecticut during all that time.

The plea was held by the court below to present a good bar to the action, nothwithstanding the effect of the war on the rights of the parties.

That court, in arriving at this conclusion, held, first, that the condition in the contract, limiting the time within which suit could be brought, was, like the statute of limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. And ascertaining this by a reference to certain public acts of the political departments of the government, to which it referred, found that there was, between the time at which it fixed the commencement of the war and the date of the plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

Judgment being given accordingly in favor of the company the plaintiff brought the case here.

The point chiefly discussed here was when the war began and when it ceased; Mr. *W. Hamersley*, for the plaintiff in error, contending that the court below had not fixed right dates, but had fixed the commencement of the war too late and its close too early, and he himself fixing them in such a manner as that even conceding the principle asserted by the court to be a true one, and applicable to a contract as well as to a statute of limitation, the suit was still brought within the twelve months.

The counsel, however, denied that the principle did apply to a contract, but contended that the whole condition had been rendered impossible and so abrogated by the war, and that the plaintiff could sue at any time within the general statutory term, as he now confessedly did.

Mr. *R. D. Hubbard*, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is not necessary, in the view which we take of the matter, to inquire whether the Circuit Court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years 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.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law

imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was therefore necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's

claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, that judgment must be

Reversed and the case remanded for a new trial.[1]

[1] See also New York Life Ins. Co. *v.* Statham, 93 U. S. 24; Thompson *v.* Phenix Ins. Co., 136 U. S. 287; Steel *v.* Phenix Ins. Co., 51 Fed. Rep. 715 (C. C. A.); Jackson *v.* Fidelity Co., 75 Fed. Rep. 359 (C. C. A.); Earnshaw *v.* Sun Mut. Aid Soc., 68 Md. 465; Eliot Nat. Bank *v.* Beal, 141 Mass. 566; Mutual Benefit Life Ins. Co. *v.* Hillyard, 37 N. J. L. 444.