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PRINCIPLES

OF THE

ENGLISH LAW OF CONTRACT

AND OF

AGENCY IN ITS RELATION TO CONTRACT

ANSON

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PRINCIPLES

OF THE

ENGLISH LAW OF CONTRACT

AND OF

AGENCY IN ITS RELATION TO CONTRACT

BY

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PREFACE TO THE FIRST EDITION.

THIS book is an attempt to draw such an outline of the principles of the law of Contract as may be useful to students, and, perhaps, convenient to those who are engaged in the teaching of law. To some of those who are so engaged it has seemed that there is need of an elementary treatise which should deal with the subject of Contract in its entirety; and the existence of such a need is my excuse for the production of the present work.

The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end.

In thus sketching the history of a contract, I have striven to maintain a due proportion in my treatment of the various parts of the subject, and to avoid entering into the detail of the special kinds of contract. The history and antiquities of the subject have, of necessity, been dealt with only so far as was absolutely necessary to explain existing rules, and I have placed in Appendices what I have to say on two matters the treatment of which seemed to be unavoidable and yet out of place in any part of a merely general outline.

One of these is the 'contract implied in law,' or quasi-contract. The effect of this legal relation has been fully

explained by Mr. Leake (part 1. c. 1. s. 2), and it seemed to be only necessary to point out the general character of the obligation which it creates, and to sketch the history of the mode in which, for the convenience of pleading, it figured for a while in the outward form of contract.

The other subject is the special contract of Agency: this too I regarded as a matter alien to a general discussion of the principles of contract, but the constant recurrence of the relation of Principal and Agent made it needful to give a brief outline of the chief rules regarding Agency.

On one or two points, interesting in themselves, or open to discussion, I have dwelt at a length disproportionate perhaps to my general plan. The somewhat slender authority for some of the often-quoted rules relating to past consideration, the various effects of innocent misrepresentation, the questionable validity of a bare waiver of contractual rights, are points to which I have called the attention of the reader. The intricate subject of the discharge of contract by breach, and its effects, together with the kindred subject of conditional and independent promises, would seem to need a fuller analysis than it has yet received in the books on Contract. Conditions are usually dealt with in connection with the promise when made, whereas their full effect can only be ascertained when they are regarded as affecting the promise when broken.

Another object which I have striven to attain is that of inducing the student to refer to the cases cited in illustration of the rules laid down, and to form for himself a clear notion of the law as it has been expounded from the Bench. The law of contract, so far as its general principles go, has been happily free from legislative interference: it is the product of the vigorous common sense of English

Judges; and there can hardly be a healthier mental exercise than to watch the mode in which a judicial mind of a high order applies legal principles to complicated groups of fact.

The student, to whom a text-book is not, as it is to the practising barrister, a repository of cases for reference, but a collection of rules and principles which he desires to learn, is too apt to take these upon trust unless the cases from which they are drawn are thrust upon his notice. For this reason I have avoided the citation of numerous cases, I have endeavoured to select such as form the most vivid illustrations of the rules which I have laid down, and I have placed the references to those which I have cited—where I thought they would be most conspicuous—in the margin. This is my excuse for a departure from the ordinary arrangement of references in foot-notes.

To the able Treatise of Mr. Pollock and the exhaustive digest of Mr. Leake I have made frequent references, but these do not express the extent of my obligations to those learned authors. Their books must needs enter largely into the composition of such a work as mine professes to be.

I have also occasionally referred the reader to works of a more special character, and in particular to the great work of Mr. Benjamin for all points connected with the contract of Sale of Personalty. But for the reason which I stated above I have avoided the accumulation of a mass of authority, and have often run the risk of seeming to dogmatise lest a numerous collection of references should disincline the student to the process of verification.

W. R. A.

1 Brick Court, The Temple,
Feb. 1879.

PREFACE TO THE SECOND EDITION.

In the second edition of this book I have, besides some minor additions and corrections, rewritten the chapter on Offer and Acceptance, and the part relating to Agency. The first of these changes was made necessary, partly because I was dissatisfied with the arrangement of the chapter as it stood, partly because some important decisions in the last three years have settled the law on points where it had been open to question. I have had the advantage of Mr. Pollock's comments on these decisions in the third edition of his work on Contract.

In dealing with Agency I have thought it well to attempt a more thorough treatment of a matter on which, in my first edition, I had written briefly, and, I fear, in a somewhat perfunctory way. I have now tried to give the student, in an elementary form, a coherent outline of the subject in its entirety.

It is a difficult subject for various reasons. Our legal terminology is so defective that there is no convenient phrase to indicate the man who contracts with the principal through the agent; the words 'third party' are elsewhere used for one who is outside the contract altogether, and the expression 'other party' though correct is somewhat clumsy and unmanageable.

Again, there is a reluctance among the authorities on the subject to recognise in Representation by means of agency a form of Employer's liability, combined with a disposition

to use the word agency as signifying employment merely, and not employment for the special purpose of representation. The constant intervention of mercantile usage to modify the liability of an agent acting as such for an unnamed principal, and the fineness of the distinctions drawn in some of the recent cases, add to the difficulties of the subject; while on some points relating to the determination of the agent's authority the law is admitted to be unsettled.

At any rate, I hope I may have done something to diminish, for the student, the confusion which overhangs the subject; and even the failure of good intentions may be not uninstructive in suggestion or warning.

The history of the Law of Contract has acquired a new interest from its treatment in the lectures of Mr. O. W. Holmes on the Common Law; but in a work which aims at being elementary and practical I have not ventured to do more than refer the reader to such portions of Mr. Holmes' work as bear directly on the matter with which I have to deal.

In conclusion, I must thank the many legal friends who have helped me to correct the errors and improve the arrangement of my first edition.

W. R. A.

ALL SOULS COLLEGE,
August, 1882.

PREFACE TO THE THIRD EDITION.

In preparing this book for a third edition I have found that some changes were rendered necessary by the legislation of the years 1882 and 1883, by the Married Women's Property Act, the Bills of Exchange Act, and the Bankruptcy Act.

I have also dealt more fully with the topic of the communication of the terms of an Offer, the decisions on this point having been recently summarized in the case of *Watkins v. Reymill.* I have examined, and re-stated the principles which support the much abused rule that 'the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt;' and I have re-considered, in the light of the recently reported cases of *Britain v. Rossiter* and *Maddison v. Alderson*, some effects of the 4th and 17th sections of the Statute of Frauds.

Some other necessary changes and corrections have been made, and I have tried so to make them as to prevent an increase in the bulk of my book, or a departure from its character of an elementary text-book.

W. R. A.

All Souls College,
Feb. 1884.

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A. & E.	Adolphus and Ellis	Q. B. 1834–1841
B. & Ad.	Barnwall and Adolphus	K. B. 1830-1834
B. & Ald.	Barnwall and Alderson	K. B. 1817–1822
B. & C.	Barnwall and Cresswell	K. B. 1822–1830
B. & S.	Best and Smith	Q. B. 1861–1865
Beav.	Beavan	Rolls Court, 1838-1866
Bing.	Bingham	... ... C. P. 1824–1840
Bing. N. C.	Bingham's New Cases	
Burr.	Burrows	K. B. 1756–1772
Camp.	Campbell	K. B. & C. P. nisi prius, 1807–1818
C. B.	Common Bench	... ... C. P. 1845–1865
C. B., N. S.	Common Bench, New Series	
Cl. & F.	Clark and Finelly ...	House of Lords, 1831–1846
C. & M.	Crompton and Meeson ...	... Ex. 1834–1836
C. M. & R.	Crompton, Meeson, and Roscoe	
Co. Rep.	*Coke's Reports*	*Eliz. and James*
Cowp.	Cowper	*K. B. 1774–1778*
Cro. Eliz. or 1 Cro.	*Croke, of the reign of Elizabeth.*	
Cro. Jac. or 2 Cro.	,, ,, *James.*	
D. & J.	De Gex and Jones	Ch. App. 1857–1859
D. F. & J.	De Gex, Fisher, and Jones	,, 1859–1862
D. M. & G.	De Gex, Macnaghten, and Gordon ...	,, 1851–1857
Dr. & Sm.	Drewry and Smale ...	V. C. Kindersley, 1859–1866
Dr. & War.	Drury and Warren	Chancery, 1841–1843
E. & B.	Ellis and Blackburn	Q. B. 1852–1858
E. & E.	Ellis and Ellis	Q. B. 1859–1861
Esp.	Espinasse	K. B. & C. P. nisi prius, 1793–1806
Exch.	Exchequer	1847–1856
F. & F.	Foster and Finlason ...	Cases at Nisi Prius, 1856–1867
H. Bl.	Henry Blackstone	C. P. 1786–1788
H. & C.	Hurlstone and Coltman	Ex. 1862–1865
H. & N.	Hurlstone and Norman	Ex. 1856-1862
H. L. C.	House of Lords' Cases	1846–1866
Ir. C. L.	Irish Common Law Reports.	
J. & H.	Johnson and Hemming	V. C. Page Wood, 1859–1862

[1] References to the Law Journal reports have not been given throughout the ensuing pages because the system of marginal references imposed certain limits as to space. The reports cited are accessible to any student at Oxford, and it is hoped that the information given as to the Court in which the case was decided, and the date of the report to which reference is made, will enable those who can only refer to the Law Journal to discover the cases with little difficulty.

PART I.

INTRODUCTION.

THE PLACE OF CONTRACT IN JURISPRUDENCE.

Outline of the subject.

At the outset of an inquiry into the principles of the law of Contract it is well to state the main objects of the inquiry and the order in which they arise for discussion.

Nature of contract.

The first thing to consider is the relation of Contract to other legal conceptions: the ascertainment of this will define, and to some extent explain, the subject of our inquiry.

Its formation.

Having ascertained what a contract is, we next ask how it is made. What are the various elements needful to the Formation of a valid contract?

Its operation.

When a contract is made it follows to inquire whom it affects, or can be made to affect? What is the Operation of contract?

Its interpretation.

Then we must consider the mode in which the Courts deal with the terms of a contract when it comes before them for consideration; or the rules for the Interpretation of contract.

Its discharge.

Finally, we must deal with the Discharge of contract, the various processes by which the contractual tie is unfastened and the parties remitted to the relation in which they stood to one another before the contract was made.

And first as to the nature of Contract.

Contract is Agreement resulting in Obligation.

Contract results from a combination of the two ideas of Agreement and Obligation. Contract is that form of agreement which directly contemplates and creates an Obligation: the contractual Obligation is that form of Obligation which

springs from Agreement. We should therefore try to get a distinct idea of these two conceptions, and to this end Savigny's analysis of them may advantageously be considered with reference to the rules of English Law.

§ 1. *Agreement.*

Nature of Agreement.

System, § 140. 4.

1. Agreement requires for its existence at least two parties. There may be more than two, but inasmuch as Agreement is the outcome of consenting minds the idea of plurality is essential to it.

2. The parties must have a distinct intention common to both. Doubt or Difference are incompatible with Agreement. The proposition may be illustrated thus:—

Doubt. 'Will you buy my horse if I am inclined to sell it?'

'Very possibly.'

Difference. 'Will you buy my horse for £50?'

'I will give £20 for it.'

3. The parties must communicate to one another their common intention. A secret acceptance of a proposal cannot constitute an agreement. For instance, *A* writes to *X* and offers to buy *X*'s horse for £50. *X* makes up his mind to accept, but never tells *A* of his intention to do so. He cannot complain if *A* buys a horse elsewhere.

See dicta of Lord Blackburn, L. R. 2 App. Ca. 691[1].

4. The intention of the parties must refer to legal relations. To use a phrase adopted by Mr. Pollock as a short and convenient mode of expressing the idea intended to be conveyed, an agreement must be *an act in the law*: it must have reference to the assumption of legal rights and duties as opposed to engagements of a social character. For the

Principles of Contract, p. 2.

[1] In the case of *Brogden v. Metropolitan Railway Company* in the House of Lords. The Case is unreported in the Courts below, but it appears from the report referred to that Lord Coleridge, C. J., and Brett, J., had in giving judgment in the Common Pleas used language suggesting that a mere mental consent uncommunicated to the other party might create a binding agreement. Lords Selborne and Blackburn express their dissent from such a proposition, the latter very fully and decidedly.

purposes of English law we may accept, as a test of this, that the intention of the parties must relate to 'something which is of some value in the eye of the law,' something which can be assessed at a money value.

5. The consequences of Agreement must affect the parties themselves. Otherwise, the verdict of a jury or the decision of a court sitting *in banco* would satisfy the foregoing requisites of Agreement.

Agreement then is the expression by two or more persons of an intention to affect the legal relations of those persons.

Agreement a wider term than Contract.

But Agreement as thus defined seems to be a wider term than Contract. It includes acts in the law of two kinds besides those which we ordinarily term Contracts. These are:—

It may not

(1) Agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent. Such are Conveyances and Gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no obligation subsisting between them.

As to Gift, see Hill v. Wilson, L. R. 8 Ch. 868.

Or may

(2) Agreements which create obligations incidental to transactions of a different and wider sort. These have the characteristic just alluded to of effecting their main object immediately upon the expression of the intention of the parties; but they differ from simple conveyance and gift not only in creating outstanding obligations between the parties, but sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement.

Marriage, for instance, effects a change of status from the moment the consent of the parties is expressed before a competent authority; at the same time it creates obligations between the parties which are incidental to the transaction and to the immediate objects of their expression of consent.

So too a settlement of property in trust, for persons born and unborn, effects much more than the mere conveyance of a legal estate to the trustee; it imposes on him incidental

obligations some of which may not come into existence for a long time; it creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of Agreement. Yet they are not Contract.

We need not pause to consider Agreements which, though intended to affect legal relations, fail to do so because they fail to satisfy some requirement of the municipal law of the country in which they are made. We have here to do with Agreements which are acts in the law. It remains to ascertain the characteristic of Contract as distinguished from the forms of Agreement which we have described.

A promise essential to contract.

We are in the habit of considering as the essential feature of Contract a *promise* by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. We are further in the habit of using the word *promise* to signify a binding promise as opposed to an offer of a promise, or, to use the cumbrous terminology of Austin, a *pollicitation*. An offer differs from a mere statement of intention in that it imports a willingness to be bound to the party to whom it is made, who by acceptance turns the offer into a promise. Thus if *A* says to *X* 'I mean to sell one of my sheep if I can get £5 for it,' there is nothing which could be turned into an agreement: but if *A* says to *X* 'I will sell you whichever of my sheep you like to take for £5,' we have an offer, and if *X* says 'Agreed,' there is a contract consisting of mutual promises which the law regards as an obligation.

dence, 939.

Nature of an offer.

Of a promise.

There are then three stages needful to the making of that sort of agreement which results in contract; there must be an offer, there must be an acceptance of the offer, resulting in a promise[1], and the law must attach a binding force to the promise so as to invest it with the character of an obligation. Or we may say that it is an expression of intention by one of

[1] It will be shown on page 12 that an offer may be of an act, and that the promise resulting from acceptance may be made by the acceptor.

two parties, of expectation by the other, wherein the law requires that the intention should be carried out and the expectation fulfilled according to the terms of its expression.

Contract then differs from other forms of Agreement in having for its object the creation of an Obligation between the parties to the Agreement.

It follows that we must consider the nature of Obligation.

§ 2. *Obligation.*

Nature of Obligation. Savigny, Obl. ch. 1. ss. 2 4.

Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group.

Its characteristics seem to be these.

A control

1. It consists in a control exerciseable by one or both of two persons or groups over the conduct of the other. They are thus bound to one another, by a tie which the Roman lawyers called *vinculum juris*, until the objects of the control are satisfied, when their fulfilment effects a *solutio obligationis*, an unfastening of the legal bond.

needing two parties.

2. Such a relation as has been described necessitates two parties, and these must be definite. There must be two, because a man cannot be under an obligation to himself, or even to himself in conjunction with others. Where a man borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. 'The covenant to my mind is senseless,' said Pollock, C. B. 'I do not know what is meant in point of law by a man paying himself.'

Faulkner v. Lowe 2 Ex. 595.

The parties must be definite.

And the persons must be definite. A man cannot be obliged or bound to the entire community: his liabilities to the political society of which he is a member are matter of public, or criminal law. Nor can the whole community be under an *obligation* to him: the correlative right on his part would be a right *in rem*, would constitute Property as opposed to Obligation. The word Obligation has been unfortunately

used in this sense by Austin and Bentham as including the general duty, which the law imposes on all, to respect such rights as the law sanctions. Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call Property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right *in rem*. But it is of the essence of Obligation that the liabilities which it imposes are imposed on definite persons, and are themselves definite: the rights which it creates are rights *in personam*.

Holland, Jurisprudence, p. 108.

The liabilities also definite.

3. The liabilities of Obligation relate to definite acts or forbearances. The freedom of the person bound is not generally curtailed, but is limited in reference to some particular act or series or class of acts. A general control over the conduct of another would affect his status as a free man, but Obligation, as was said by Savigny, is to individual freedom what *servitude* is to *dominium*. One may work out the illustration thus: I am owner of a field; my proprietary rights are general and indefinite: my neighbour has a right of way over my field; my rights are to that extent curtailed by his, but his rights are very definite and special. So with Obligation. My individual freedom is generally unlimited and indefinite. As with my field so with myself, I may do what I like with it so long as I do not infringe the rights of others. But if I contract to do work for *A* by a certain time and for a fixed reward, my general freedom is abridged by the special right of *A* to the performance by me of the stipulated work, and he too is in like manner obliged to receive the work and pay the reward.

The matter reducible to a money value.

4. The matter of the obligation, the thing to be done or forborne, must possess or must be reducible to a pecuniary value. It must have some ascertainable value in order to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can the annoyance or disappointment caused by the breach of a social engagement; and Courts of law can only

deal with matters to which the parties have attached an importance estimable by the standard of value current in the country in which they are.

Obligation then is a control exerciseable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.

We may note here the various sources of Obligation.

Sources of Obligation.

1. Obligation may arise from Agreement. Here we find that form of Agreement which constitutes Contract. An offer is made by one, accepted by another, so that the one consents to intend, the other to expect the same thing; and the result of this agreement is a legal tie binding the parties to one another in respect of some future acts or forbearances.

Agreement.

2. Obligation may arise from Delict. This occurs where a primary right to forbearance has been violated; where, for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrong-doer is bound to the injured party to make good his breach of Duty in such manner as is required by law. Such an obligation is not created by the free-will of the parties, but springs up immediately on the occurrence of the wrongful act.

Delict.

But see Holland, Jurisprudence, 161–162.

3. Obligation may arise from Breach of Contract. While *A* is under promise to *X*, *X* has a right against *A* to the performance of his promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But if *A* breaks his promise, the right of *X* to performance has been violated, and, even if the contract is not discharged, a new obligation springs up, a right of Action, precisely similar in kind to that which arises upon a delict or breach of a Duty.

Breach of Contract.

4. Obligation may arise from the Judgment of a Court of competent jurisdiction ordering something to be done or forborne by one of two parties in respect of the other. It is an obligation of this character which is unfortunately styled a Contract of Record in English Law. The phrase is unfortunate

Judgment.

because it suggests that an obligation springs from Agreement which is really imposed upon the parties *ab extra*.

Quasi-Contract.

5. Obligation may arise from Quasi-Contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, *A* has paid something which *X* ought to pay, or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled; and in some cases of this sort, which will be dealt with later, the practice of pleading has assumed a promise by *X* to *A* and so invested the relation with the semblance of contract.

Acts springing from Agreement but wider than Contract.

6. Lastly, Obligation may spring from Agreement and yet be distinguishable from Contract. Of this sort are the Obligations incidental to such acts in the law as marriage or the creation of a trust.

It is no doubt possible that contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale, and is so easily distinguishable that one may deal with it as a Contract. But in cases of Trust or Marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent or at any rate remote from its main purpose or immediate operation.

To create an obligation is the one object which the parties have in view when they enter into that form of Agreement which is called *Contract*[1].

[1] In a previous edition I discussed the views of Mr. Justice Holmes as to the *nature* of the contractual obligation, and of Professor Holland as to *its source*: but these topics are better suited to a treatise on Jurisprudence than to an elementary book on the law of contract, and I now omit them from the text.

Mr. Holmes regards a contract as 'the taking of a risk.' He rigorously insists that a man must be held to contemplate the ultimate legal consequences

Law, p. 300.

Definition of Contract.

And so we are now in a position to attempt a definition of Contract, or the result of the concurrence of Agreement and Obligation: and we may say that it is an *Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.*

of his conduct, and in making a promise to have in view, not its performance but the payment of damages for its breach. I cannot think it desirable to push legal analysis so far as to disregard altogether the aspect in which men view their business transactions. At the same time I feel it difficult to do justice to the argument of Mr. Justice Holmes within the limits which I could assign to myself here.

Jurisprudence, 194-196.

I may say the same of Professor Holland's view that the law does not require contracting parties to have a common intention but only to seem to have one, that the law 'must needs regard not the will itself, but the will as expressed.' Our difference may be shortly stated. He holds that the law does not ask for 'a union of wills' but only for the phenomena of such a union. I hold that the law does require the wills of the parties to be at one, but that when men present all the phenomena of agreement they are not allowed to say that they were not agreed. For all practical purposes our conflict of view is immaterial.

PART II.

THE FORMATION OF CONTRACT.

HAVING ascertained the particular features of contract as a juristic conception, the next step is to ascertain how contracts are made. A part of the definition of contract is that it is an agreement enforceable at law: it follows therefore that we must try to analyse the elements of a contract such as the law of England will hold to be binding between the parties to it.

Elements necessary to a valid contract.

These elements appear to consist:—

1. In a distinct communication by the parties to one another of their intention; in other words, in Offer and Acceptance.

2. In the possession of one or other of the marks which the law requires in order that an agreement may affect the legal relations of the parties and be an act in the law. These marks are Form, and Consideration.

3. In the Capacity of the parties to make a valid contract.

4. In the Genuineness of the consent expressed in Offer and Acceptance.

5. In the Legality of the objects which the contract proposes to effect.

Results of their absence.

Where all these elements co-exist, a valid Contract is the result: where any one of them is absent, the agreement is in some cases merely unenforceable, in some voidable at the option of one of the parties, in some absolutely void. A discussion on the meaning of these three terms will be more conveniently introduced when we conclude the subject of the Formation of Contract.

CHAPTER I.

Offer and Acceptance.

Agreement

EVERY expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer. In speculative matters this would take the form, 'Do you think so and so?' 'I do.' In practical matters and for the purpose of creating obligations it may be represented as, 'Will you do so and so?' 'I will.' If *A* and *X* agree that *A* shall purchase from *X* a property worth £50,000, we can trace the process to a moment at which *X* says to *A*, 'Will you give me £50,000 for my property?' and *A* replies, 'I will.' If *A* takes a sixpenny book from *X*'s book-stall the process may be represented thus. *X* in displaying his wares says in act though not in word, 'Will you buy my goods at my price?' and *A*, taking the book with *X*'s cognizance, virtually says 'I will.' And so the law is laid down by Blackstone: 'If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value[1].'

offer and acceptance.

Comm. bk. 2. c. 30.

For the making of a contract, or voluntary obligation, this expression of a common intention must arise from an offer made by one party to another who accepts the offer made, with the result that one or both are bound by a promise or obligatory expression of intention. Let us now see what forms this process of offer and acceptance may assume.

[1] Mr. Pollock in the third edition of his 'Principles of Contract' suggests that there are modes of forming agreement otherwise than by question and answer. A discussion on this point, even if profitable in itself, would be out of place in the present treatise. But I still think that question and answer, in however elliptical a form, are the inevitable mode of coming to agreement.

pp. 4, 5.

How offer and acceptance must be made in order to form a contract.

The simplest and most obvious form of offer and acceptance is applicable in English law only to such contracts as are made under seal. For in English law no promise, which is not under seal, is binding unless the promisor obtains some benefit in return for his promise, and this benefit is called 'Consideration.'

Bearing this necessity in mind, we may say that proposal may assume two forms, the offer of a promise, and the offer of an act. Acceptance may assume three forms, simple assent, the giving of a promise, or the doing of an act.

And thus a contract may originate in one of four ways.

1. In the offer of a promise and its acceptance by simple assent: this, in English law, applies only to contracts under seal.

2. In the offer of an act for a promise; as if a man offers services which when accepted bind the acceptor to reward him for them.

3. In the offer of a promise for an act; as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer.

4. In the offer of a promise for a promise, in which case when the offer is accepted by the giving of the promise, the contract consists in outstanding obligations on both sides.

Some simple illustrations will explain these forms of proposal and acceptance.

Illustrations.

1. *A* promises *X* under seal that he will do a certain act or pay a certain sum. When *X* has assented to the proposal both are bound, and there is a contract. Till he has assented there is an offer, which, as will be noted presently, is irrevocable so far as *A* is concerned, owing to the particular form in which it was made, though it cannot bind *X* until he has assented to it. For a man cannot be forced to accept a benefit.

See on this point Xenos v. Wickham, L. R. 2 H. L. 296.

Townson v. Tickell, 3 B. & Ald. 37.

2. A man gets into a public omnibus at one end of Oxford Street and is carried to the other. The presence of the omnibus is a constant offer by its proprietors of such services upon certain terms; they offer an act for a promise; and

the man who accepts these services promises by his acceptance to pay the fare at the end of the journey.

3. A man who loses his dog offers by advertisement a reward of £5 to any one who will bring the dog safe home; he offers a promise for an act; and when *X* brings the dog safe home the act is done and the promise becomes binding.

4. *A* offers *X* to pay him a certain sum of money on a future day if *X* will promise to perform certain services for him before that day. When *X* makes the promise asked for he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to make the payment.

Difference between contracts on executed and executory considerations[1].

It will be observed that cases 2 and 3 differ from 4 in an important respect. In 2 and 3 the contract is formed by one party to it doing all that he can be required to do under the contract. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In 4 each party is bound to some act or forbearance which, at the time of entering into the contract, is future: there is an outstanding obligation on each side.

Where the benefit, in return for which the promise is given, is done contemporaneously with the promise acquiring a binding force; where it is the doing of the act which concludes the contract; then the act so done is called an *executed*[1] or present consideration for the promise. Where

[1] The words *executed* and *executory* are used in three different senses in relation to Contract, according to the substantive with which the adjective is joined.

Executed *consideration* as opposed to *executory* means *present* as opposed to *future*, an *act* as opposed to a *promise*. Leake on Contract, p. 612.

Executed *contract* means a contract performed wholly on one side, while an executory contract is one which is either wholly unperformed or in which there remains something to be done on both sides. Parke, B., in Foster v. Dawber, 6 Exch. 851.

Executed *contract of sale* means a *bargain and sale* which has passed the property in the thing sold, while executory contracts of sale are contracts as opposed to conveyances, and create rights *in personam* to a fulfilment of their terms instead of rights *in rem* to an enjoyment of the property passed. Benjamin on Sales, p. 227.

a promise is given for a promise, each forming the consideration for the other, such a consideration is said to be *executory* or future.

We may now lay down briefly the rules which govern Offer and Acceptance, or the communication of the common intention to create an obligation.

§ 1. *An Offer or its Acceptance or both may be communicated either by words or by conduct, but it is essential to their operation that they should be communicated.*

Contract may arise from conduct.

From what has been said as to the possible forms of offer and acceptance it will have been seen that conduct may take the place of written or spoken words in the making of contracts.

If *A* ask *X* to work for him for hire, *X* may accept simply by doing the work, unless *A* has in his offer prescribed any form of acceptance.

Or, again, if *A* allows *X* to work for him under such circumstances that no reasonable man would suppose that *X* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer, the permission to do it or the acquiescence in its being done is the acceptance.

Paynter v. Williams, 1 C. & M. 810; and see Leake, p. 57.

On the same principle, if *A* sends goods to *X*'s house and *X* accepts or uses the goods, *X* will be liable on an implied contract to pay what the goods are worth. The offer is made by sending the goods, the acceptance by their use or consumption, which is in fact a promise to pay their price. And this rule has been applied to a case where there has been a verbal offer and acceptance invalid for want of compliance with the requirements of the Statute of Frauds. A part performance of such an agreement has been held to create a binding contract to pay for so much as has been accepted of the performance. The original agreement is invalid; the performance under it creates a fresh offer, the acquiescence in such performance a fresh acceptance to the extent of the

Hart v. Mills, 15 M. & W. 87.

Mavor v. Pyne, 3 Bing. at p. 288.

performance. Thus a fresh and binding contract takes the place of the first invalid agreement.

But there must be communication alike of offer and acceptance, and where conduct is relied upon as constituting acceptance it must be something more than mere silence, it must be silence under such circumstances as to amount to acquiescence.

But there must be communication of the acts relied on.

It is impossible that such acquiescence can be presumed from silence where the offer is not communicated to the party to whom it is intended to be made. In the case of *Taylor v. Laird*, the plaintiff, who had been engaged to command the defendant's ship, threw up his command in the course of the expedition but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence 'of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to accept or refuse the services.*' But in this case the defendant never had the option of accepting or refusing the services while they were being rendered, and did in fact repudiate them when he became aware of them. The plaintiff's offer being uncommunicated, did not admit of acceptance, and could give him no rights against the party to whom it was addressed.

Silence does not give consent, where offer is not communicated.

25 L. J. Ex. 329.

Pollock, C.B.

Nor can an acceptance, which does not go beyond an uncommunicated mental determination, create a binding contract either by reason of any form in which the offer is framed or because the intention to accept did in fact exist. *A* offered by letter to buy *X*'s horse for £30 15*s*., adding, 'if I hear no more about him I consider the horse is mine at £30 15*s*.' No answer was returned to the letter, and it was held that there was no contract, though it appeared that *X* had made up his mind to accept the sum offered. A person making an offer may, as will appear, prescribe a form of acceptance, but he may not turn the absence of communication into an acceptance, and compel the recipient of his

where acceptance is not communicated.

Felthouse v. Bindley, 11 C. B., N. S. 869.

See post, p. 21.

offer to refuse it at peril of being construed to have accepted it.

In a case of the reign of Edward IV it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the contract was concluded and the property passed when he had seen and approved of the matter of the sale. But Brian, C. J., said, 'It seems to me the plea is not good without shewing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased you then you should signify it to such an one, then I grant you need not have done more, for it is matter of fact.'

Year Book, 17 Ed. IV, 1. Blackburn on Sales, 190, App. Ca. 2. 672.

And the rule thus laid down admits of further illustration in the case of offers which consist of various terms. If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included in it; unless it appear that he knew of those terms, or had their existence brought to his knowledge and was capable of informing himself of their nature. Cases which illustrate this rule arise when a contract has been made with a Railway Company for the safe carriage of the plaintiff, or of his luggage; or for the deposit or bailment of luggage in a cloak-room; or, as in the last reported case on the subject, where a contract has been made for the deposit of an article and for its sale upon commission. In each case the document or ticket delivered to the plaintiff contained terms modifying the liability of the defendant, the offerer, as carrier or bailee: in each case the plaintiff, the acceptor, alleged that the terms were not brought to his notice so as to form part of the offer which he accepted.

Where terms are uncommunicated, the contract being otherwise complete.

The law applicable to these cases is thus laid down by Mellish, L. J. 'If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then

he is bound by the conditions; if he knew there was writing on the ticket but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering to him of the ticket in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.'

Parker v. S. E. Railway Co. 2 C. P. D. 423.

An illustration of the first case is supplied by *Henderson v. Stevenson*. The plaintiff purchased of the defendant Company a ticket by steamer from Dublin to Whitehaven. On the face of the ticket were these words only, 'Dublin to Whitehaven;' on the back was an intimation that the Company incurred no liability for loss, injury, or delay to the passenger or his luggage. The vessel was wrecked by the fault of the Company's servants and the plaintiff's luggage lost. The House of Lords decided that the Company was liable to make good the loss, since the ticket was a complete contract upon the face of it, and that the plaintiff could not be held to have assented to a term 'which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him.'

L. R. 2 H. L. Sc. App. 470.

Terms not known to exist.

Harris v. G. W. Railway Company is an illustration of the second of these cases. The plaintiff deposited luggage in the cloak-room of the defendant Company and received a ticket having written on its face, among other words, 'subject to the conditions on the other side.' One of these conditions limited the liability of the Company to £5 for each package. The luggage was lost, and the plaintiff sought to get damages at a higher rate than that fixed by the condition: he admitted a knowledge that the ticket contained some conditions, but he had not read them. He was held to be bound by them.

1 Q. B. D. 515.

Terms known to exist but not read.

Parker v. South Eastern Railway Company was a like case of deposit of luggage in a cloak-room on terms contained in a ticket. The conditions limiting the liability of the Company were printed on the back of the ticket and were referred to by the words 'See back' on the face of the ticket. The plaintiff,

2 C. P. D. 416.

Knowledge of existence or matter of terms uncertain.

while he admitted a knowledge that there was writing on the ticket, denied all knowledge that the writing contained conditions. His position thus differed from that of the plaintiff in the case above cited, who knew that there was a condition, but did not know its purport. It was held by the Court of Appeal that he was bound by the condition if a jury was of opinion that the ticket amounted to a reasonable notice of its existence.

But in all these cases the question is the same. Have the terms of the offer been fully communicated to the acceptor? And the tendency of judicial decision is towards a general rule, that if a man accepts a document which purports to contain the terms of an offer, he is bound by all the terms, though he may not choose to inform himself of their tenor or even of their existence.

Burke v. S. E. Railway Co. 5 C. P. D. 1. v. 10 Q. B. D. 178.

Exception in case of offer under seal.

There is one exception to the inoperative character of an uncommunicated offer; this is the case of an offer under seal. Yet the position of the party making such an offer is, not that he is bound by contract, for this can only be when an offer is accepted, but, that he has made an offer which he cannot withdraw; and so the matter is best dealt with under the head of the revocation of offers.

§ 2. *The offer must be intended to create, and capable of creating, legal relations.*

Offer must be intended to create legal relations,

In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though it be acted upon by the party to whom it was made. Thus in the case of *Week v. Tibold*, the defendant told the plaintiff that he would give £100 to him who married his daughter with his consent. Plaintiff married defendant's daughter with his consent, and afterwards claimed the fulfilment of the promise and brought an action upon it. It was held not to be reasonable that a man 'should be bound by general words spoken to excite suitors.'

Roll. Abr. p. 6.

On a like footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot in all cases decline to regard such engagements as contracts on the ground that they are not reducible to a money value. The acceptance of an invitation to dinner or to play in a cricket match forms an agreement in which the parties incur expense in the fulfilment of their mutual promises. The damages resulting from breach might be ascertainable, but the Courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.

And a proposal must be capable of affecting legal relations, that is to say it must not be so indefinite or illusory as to make it hard to say what it was that was promised. Thus where *A* bought a horse from *X* and promised that 'if the horse was lucky to him he would give £5 more or the buying of another horse,' it was held that such a promise was too loose and vague to be considered in a court of law.

and capable of creating them.

Guthing v. Lynn, 2 B. & Ad. 232.

And so where *A* agreed with *X* to do certain services for such remuneration as should be deemed right, it was held that there was no promise on the part of *X* which was sufficiently definite to be capable of enforcement. 'It seems to me,' said one of the judges, 'to be merely an engagement of honour.'

Taylor v. Brewer, 1 M. & S. 290.

§ 3. *Acceptance must be absolute, and identical with the terms of the offer.*

Unless this is so the intention expressed by one of the parties is either doubtful in itself or different from that of the other. If *A* offers to *X* to do a definite thing and *X* accepts conditionally, or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is in effect a counter proposal.

Acceptance must

A proposed to sell a property to *X*, *X* accepted 'subject to the terms of a contract being arranged' between his solicitor and *A*'s. Here it was held that there was no agreement, for

v. Marryat, 6 H. L. C. 112.

the acceptance was not final, but subject to a discussion to take place between the agents of the parties.

Hyde v. Wrench, 3 Beav. 336.

and identical with the terms of the proposal.

A proposed to sell a farm to *X* for £1000, *X* said he would give £950. *A* refused this offer, and then *X* said that he was willing to give £1000. *A* was no longer ready to adhere to his original proposal and *X* endeavoured to obtain specific performance of the alleged contract. But it was held that his offer to buy at £950 in answer to *A*'s offer to sell for £1000 was a refusal of the offer of *A* and a counter-proposal, and that he could not after this hold *A* to his original offer.

§ 4. *An offer unaccepted creates no rights, but may be revoked or lapse before acceptance.*

Offer may be determined,

From what has been already said it will be understood that acceptance, for our purposes, can only mean communicated acceptance: it follows therefore that an offer, unaccepted, cannot constitute agreement or bind the party making it to the party to whom it is made. Since, however, an offer is liable to be turned into a contract by acceptance, therein differing from a mere statement of intention, it is important to know how this liability can be terminated.

by revocation;

(*a*) An offer may be revoked before acceptance. We may lay down this rule generally, subject to an exception in the case of offers made under seal. But the rules relating to revocation depend to some extent upon those which determine the moment when acceptance becomes binding. We will therefore postpone their consideration for a while.

by efflux of prescribed time;

(*b*) An offer may lapse by the efflux of a specified time for acceptance. An offer to sell goods 'receiving your answer in course of post' would lapse on failure to accept in course of, i. e. by return of post, and a subsequent acceptance would be inoperative.

This is the true construction of promises to keep an offer open for a given number of hours, days, or weeks. Such a promise is not binding for want of consideration. It could only

become binding if the party making the offer were to get some benefit by keeping it open, such as a higher price or better terms in the event of acceptance.

Cook v Oxley, 3 T. R. 653.

A may say to *X*, 'If I have to make up my mind now, I must refuse to buy your horse; but if I may have a week to decide, then, if I do accept, I will give you £5 more than you now ask.' There is authority for supposing that if *X* assented to this offer on the part of *A* he would be bound to keep the horse out of the market for a week.

G. N. Railway Co. v Witham, L. R. 9 C. P. 16.

If there be no such consideration for a promise to keep an offer open, the proposer is free to revoke his offer within the prescribed time, but in default of revocation an acceptance within the limits allowed creates a binding contract.

v. Grant, 4

(*c*) Where the party making the offer has not prescribed or specified a time within which it may be accepted, the offer is determined by lapse of a reasonable time. What is a reasonable time must needs depend on the nature of the proposal. The case which best illustrates the rule is *The Ramsgate Hotel Company v. Montefiore*. The defendant offered to purchase shares by letter on the 28th of June; no communication was made to him until the 23rd of November, when he was informed that shares were allotted to him. He declined to accept them, and it was held that the proposal had lapsed, without notice of revocation, by efflux of a reasonable time for acceptance.

by efflux of reasonable time;

L. R. 1 Exch 109.

(*d*) Failure to comply with a condition in the offer as to the mode of acceptance may also cause the offer to lapse.

A offered to sell flour to *X*, the answer to be sent by return of the wagon which brought the offer: *X* sent a letter of acceptance by mail to another place, which was not the destination of the wagon, having reason to think that so his answer would reach *A* more speedily. It was held that *A* was not bound by an acceptance so sent.

by breach of pre-conditions;

(*e*) The death of either party before acceptance causes the offer to lapse. An acceptance communicated to the representatives of the maker of an offer cannot bind them. Nor can

party before acceptance.

the representatives of a deceased person to whom an offer has been made accept it on behalf of his estate.

5. *Acceptance turns an offer into a Contract and is irrevocable.*

Acceptance operates from moment of communication,

An offer, as we have seen, can be revoked before acceptance. Acceptance supplies the element of agreement which binds the party making the offer to a fulfilment of its terms. It changes the character of the offer, making it a promise; and it must needs be irrevocable, since if the parties are ever to be bound at all it must be from the moment when they both become aware of their common intention.

It is therefore very important to ascertain the moment of communication; and though this is not difficult, except as a question of fact, when the contract is formed by spoken words or conduct, difficulties have arisen and are but lately settled in cases where contracts are made by correspondence.

moment of communication is moment of despatch.

It is now settled that the acceptance is made when the acceptor has done all that he can to communicate his intention. In other words, acceptance is communicated from the moment of its despatch. An acceptance once despatched is irrevocable, for the contract is then made.

1 B. & Ald. 681.

Cases determining moment of communication.

The general rule to this effect is laid down in *Adams v. Lindsell*. In that case the defendant offered to sell wool to the plaintiff by letter dated Sept. 2nd, 1817. The letter was misdirected, and so did not reach the plaintiff till Sept. 5th: he accepted by letter posted that evening, but the defendant had in the meantime sold the wool to others. The plaintiff sued for non-delivery of the wool, and it was argued on behalf of the defendant that no contract could arise until the plaintiff's answer reached him. 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 concluded by the acceptance of it by the latter.*'

The case would seem to have established that the post office is the agent for the party making the offer, and that in the language of Thesiger, L. J., in a later case, 'As soon as the letter of acceptance is delivered to the post office the contract is 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.*' But there has been some hesitation in applying this rule in cases where the letter of acceptance was lost or delayed in transmission, and though the matter is now settled it is worth noting the stages by which the present result has been attained.

Household Ins. Co. v. Grant, 4 Ex. D. 221.

In *Dunlop v. Higgins* Lord Cottenham held, though it was not necessary to the decision of the case, that the posting of a letter of acceptance concluded the contract whatever might afterwards befall the letter. But the Court of Exchequer in a later case tried hard to escape the consequences of the rule, and Kelly, C. B., laid it down that the contract was not binding till the letter of acceptance was received, but that when it was received its operation related back to the moment of its posting.

1 H. L. C. 381

British and American Telegraph Co v. Colson, L. R. 6 Ex 108.

This decision was virtually overruled in *Harris' Case*, as to the moment when the contract was complete, but Mellish, L. J., said that though 'complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted.' But it is now settled, in the *Household Fire Insurance Company v. Grant*, that the parties are bound, from the moment the letter is put in course of transmission, by a contract the existence of which is unaffected by the subsequent fate of the letter, The con-

L. R. 7 Ch p. 587.

Position of parties if letter of acceptance is lost.

4 Ex. D. 216.

tract does not remain, up to the moment the acceptance is received, in the state of suspended animation contemplated by Kelly, C. B.: nor is it subject to the condition subsequent suggested by Mellish, L. J.

L. R. 6 Ex. at p. 116.

The law is thus clearly stated by Thesiger, L. J.: 'The acceptor, in posting the letter, has, to use the language of Lord Blackburn, "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?'

v. Metropolitan Railway Co., 2 App. Ca. 691.

Household Ins. Co. v. 223.

Rule of Indian Code.

The Indian Contract Act adopts a different rule:—

'The communication of an acceptance is complete as against the proposer when it is put in course of transmission to him so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.'

This rule enables an acceptor to revoke his acceptance under certain circumstances: if, for instance, he can anticipate the letter of acceptance by a telegram of revocation. But the position of the parties where a letter of acceptance is lost is a strange one. The offerer is bound by an acceptance which he has not received, the acceptor is free from all liability under the contract. The rule is a somewhat clumsy contrivance for securing a power of revocation to the acceptor, without much regard to general principle, or even to general convenience.

§ 6. *Until the moment of acceptance an offer is revocable.*

Offer can be revoked before acceptance,

An offer, unaccepted, creates no legal rights, it follows therefore that it may be withdrawn before acceptance; but before considering the rules which relate to the communication of a withdrawal we must note an exception to the rule.

It seems that an offer made under seal cannot be revoked, and that even though uncommunicated to the party to whom

it is intended to be made, it remains open for his acceptance when he becomes aware of it.

unless made under

There is no doubt that a grant under seal may be binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if it has been duly delivered. And it seems equally true that a deed which purported to create an outstanding obligation would be upon the same footing. 'If *A* make an obligation to *B* and deliver it to *C*, this is the deed of *A* presently. But if *C* offers it to *B*, then *B* may refuse it *in pais* and thereby the obligation will lose its force.'

5 B. & C. 671.

Butler & Baker's Case, Coke, Rep. iii. 26 b.

The point was much discussed in *Xenos v. Wickham*, in which a policy of marine insurance 'signed, sealed and delivered' by the defendants, the insurers, was never accepted by the plaintiff, the insured, but remained in the defendants' office. The House of Lords held that the assent of the insured was not necessary to entitle him, when he became aware of the loss of his ship, to the benefit of the policy. Blackburn, J., in giving an opinion which the House of Lords adopted, said, 'It is clear on the authorities, as well as on the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay even before he knows of it; though of course if he has not previously assented to the making of the deed the obligee may refuse it.' The position of the parties in such a case is anomalous. Agreement there can be none where there is no mutual assent, but he who has made and delivered the deed is in the position of a man who has made an offer which he may not revoke but which is not a contract till assented to by the promisee.

L. R. 2 H. L. 296

It remains to lay down as a general rule that revocation, like offer and acceptance, must be communicated. We shall have further to consider whether there are any exceptions to this rule, and, if so, whether these exceptions can be brought into accord with any intelligible principle.

Notice of revocation must be c c

Revocation must be communicated, and as the cases in which the law upon this point has been most clearly settled

are cases in which the parties are dealing with one another by correspondence, we will limit our remarks in the first instance to such cases.

And here we must note a difference in the meaning of the word communication according as it is used for acceptance or revocation. An acceptance is communicated when it is despatched, a revocation is not communicated till it is received.

5 C. P. D. 344.

In *Byrne v. Van Tienhoven* the defendant at Cardiff on October 1st wrote an offer to the plaintiff at New York asking for a reply by cable. On the 11th the plaintiff received the letter and at once accepted the offer in the mode requested. On the 8th the defendant had posted a letter revoking his offer.

Thus two questions arose, as stated by Lindley, J.: '1. Whether a withdrawal of an offer has any effect until it is communicated to the party 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?' And it was held 'that both legal principle 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 upon both parties.' The rule thus laid down had long been settled law in America, but was not established in England until the year 1880.

Byrne v. Van Tienhoven, 5 C. P. D. 349.

Tayloe v. Merchant Fire Insurance Co., 9 Howard, 290.

Moment of communication is moment of receipt.

It would however appear to follow naturally from what has been said as to the moment of acceptance in contracts made by correspondence. The law regards the offerer as making his offer during every instant of time that his letter is travelling and during the period which may be considered as a reasonable time for acceptance. The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he hears to the contrary, and that his acceptance concludes a binding contract.

Nor can the revocation be held to be communicated merely because it has been put in course of transmission. The post is used by the offerer as his messenger to take the offer and

bring back the acceptance. Therefore the acceptance is communicated to him when put into the charge of his instrument of communication. But his revocation cannot be considered to be communicated till it is received, for it is better to regard the post office or telegraph wire, not as the agent of both parties, but as the messenger employed by the offerer for the purpose of offer and acceptance.

It is true that the minds of the parties are not *ad idem* in the case of a contract concluded by an acceptance despatched after a revocation has been already posted, and it must be admitted that where parties are contracting at a distance from one another the *consensus ad idem* can only be arrived at by some such artificial process as the theory of the continuing offer, and that the rule as established in *Byrne v. Van Tienhoven* is in accord with sense and convenience.

Cases conflicting with the rule.

But there are two cases which conflict with this rule, and these need examination.

3 T. R. 653.

In *Cook v. Oxley* the defendant offered to sell specific goods to the plaintiff on certain terms and to keep the offer open until 4 o'clock that day. Cook averred that he did agree within the time allowed, but that Oxley failed to deliver. The Court held that the promise to keep the offer open till 4 o'clock was not binding for want of consideration, and that 'the promise can only be supported on the ground of a new contract made at 4 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 the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale, *or even that the goods were kept till that time.*' The case turned on the pleadings, that is to say it was decided on the ground that the plaintiff's declaration did not disclose a good cause of action by alleging a contract. But it certainly would seem that the Court not only regarded Oxley as free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice.

per Buller, J.

The judgments are even open to the construction that they regard Oxley's offer as no more than an invitation to do business on certain terms within a certain time; and not as an offer which, unless revoked, might be turned by acceptance into a binding contract.

2 Ch. D. 463. A more recent case is *Dickinson v. Dodds*, a suit for specific performance of a contract under the following circumstances. On the 10th June, 1874, Dodds gave to Dickinson a memorandum in writing as follows:—'I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling and out-buildings thereto belonging, situated at Croft, belonging to me, for the sum of £800. As witness my hand this 10th day of June, 1874.

£800 (*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.'

On the 11th of June he sold the property to another person without notice to Dickinson. As a matter of fact Dickinson was informed of the sale, though not by any one authorised to give such information by Dodds. He gave notice after the sale, but before 9 o'clock on the 12th, that he accepted the offer to sell, and sued for specific performance of what he alleged to be a contract.

The Court of Appeal held that there was no contract. James, L. J., after stating that the promise to keep the offer open could not be binding, and that at any moment before a complete acceptance of the offer one party was as free as the other, goes on to say, '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." *I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retractation.* It must to constitute a contract appear that the two minds were one at the same moment of time, that is, that there was an offer

continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing.'

Both Lords Justices James and Mellish lay great stress on the fact that Dickinson knew at the time of his acceptance that the land was actually sold, and do not appear to consider it material that the information reached him accidentally and not by authority of Dodds.

It must be admitted that the language of James, L. J., is in direct antagonism to the rule laid down by Lindley, J., in *Byrne v. Van Tienhoven*, and unless the cases can be distinguished this decision of three Lords Justices of Appeal must throw doubt on the ruling of a single Judge in a Divisional Court.

Ante, p. 26.

Three grounds of distinction may be suggested.

(1) We may regard the knowledge of the acceptor as a good notice of revocation, and say with Mr. Pollock that 'the case decides that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation.' But this is dangerous ground. In *Dickinson v. Dodds* the matter of the contract was the sale of specific land, and the plaintiff knew that the property had been passed to another and that the defendant had no longer the power to fulfil his offer. But would the same rule apply in the case of an offer of personal services and notice from a stranger that the offerer had made an inconsistent engagement? Or would it apply if before the plaintiff in *Byrne v. Van Tienhoven* had telegraphed his acceptance, a stranger had telegraphed to him that a letter of revocation was on its way? The conduct of business would surely be impeded by such a rule, for the acceptor would not know whom to believe, or how far he could venture to act on a contract which he might otherwise have concluded by acceptance.

Principles of Contract, pp. 27, 28.

Is notice from any source sufficient?

5 C. P. D. 349.

Besides, the distinction is not enough to meet the very explicit language of James, L. J., italicised above.

(2) The distinction may be found in the fact that in both the cases just cited the matter of the contract was the sale of

Is there a difference in case of

sale of specific thing?

a specific thing; and it may be that a sale to another, by which the property is passed to him, is a sufficiently overt act to amount to notice of revocation. This is suggested by the reporter in the headnote to *Dickinson v. Dodds* and is apparently regarded as an important feature in that case by Mellish, L. J., but his language does not take the matter beyond the range of a suggestion.

At pp. 474, 475.

or in case of parties being in direct communication?

(3) Some part of the language of James, L. J., would almost warrant the view that where parties are in direct communication, and are not dealing with one another by correspondence, the theory of the 'continuing offer' does not hold. But in business there must be many offers which do not contemplate, perhaps do not admit of, an immediate answer; in these cases a reasonable time is allowed during which the offer is open or 'continuing,' and a mere mental revocation would not avail against an acceptance made within a reasonable or a prescribed time.

Perhaps the cases may be reconciled by a combination of the last two distinctions, and it may be that where parties are in direct communication an offer to sell a specific thing on certain terms may be revoked by selling the thing and passing the property in it to a third person without notice to the party to whom the offer has been made. There can be no doubt that Mellish, L. J., attached considerable importance to the fact that the property had passed to a third party before the offer of sale was accepted, for he compares the effect of such a transfer of the subject-matter of the contract to the case of a man making an offer and dying before it is accepted. In such a case no notice is needed to determine the offer.

In all transactions by correspondence the argument from convenience as well as from principle is irresistible in favour of the rule in *Byrne v. Van Tienhoven*; but we must deal with the cases as we find them, and there can be no doubt that the decision in *Dickinson v. Dodds* raises a difficulty which is as yet unsolved.

§ 7. *An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.*

The proposition is best understood by an illustration. The proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

An offer may be made to all the world. A contract cannot arise it til... accepted by one.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world. This would be contrary to the notions both of Agreement and Obligation, which we have ascertained to co-exist in Contract. Agreement is the expression of a common intention, and there can be none while intention is expressed on one side only; nor can we say that Obligation in the sense of a *vinculum juris* exists between a definite proposer, and the indefinite mass of persons to whom it is open to accept his proposal. The matter would have seemed beyond doubt if it were not that Savigny considered that an obligation of this indefinite character was created by such a proposal as we have described. From the difficulties which would arise, owing to the obligation being incurred to unascertained persons, he would allow no right of action to accrue, but, upon the performance of the condition, he put the promisor in the position of a man who owes a debt of honour which is not recoverable in a Court of Law. This view has never been seriously entertained in English law; the promise is regarded as being made, not to the many who *might* accept the offer, but to the person or persons who *do* accept it. One may think, with submission to the great authority of Savigny, that his mode of dealing with this subject arises

Savigny's view.

Sav. Obl. 2. sect. 61.

from a disregard or forgetfulness of the principle that the pre-eminent feature of Obligation is the binding together of definite persons by a *vinculum juris*; that until the parties have emerged from the mass of mankind the bond cannot attach to them.

Difficulties in English law.

The difficulties which have arisen in English law are of a somewhat different character, but are capable, it should seem, of a satisfactory solution. They spring from two sources. (1) The acceptor may not, at the time of his doing what amounts to an acceptance, realise all the terms of the offer. Can he afterwards take advantage of them? (2) It is sometimes difficult to distinguish representations of intention to act in a particular way, from invitations which, if accepted, become binding promises.

(1) Motive of acceptance.

The first difficulty is well illustrated by the case of *Williams v. Carwardine*. Reward was offered by the defendant for information which the plaintiff supplied, though not with a view to the reward. It was held that the defendant was liable as upon a contract concluded by the supply of the information asked for.

4B. &Ad. 621.

If it appeared clearly from the facts of this case as reported that the plaintiff was unaware of the defendant's offer, it might be asked, whether that could be an agreement in which one of the parties knew nothing of the intention of the other. But the only point urged in the argument for the defendant was that the reward was not the motive which induced the plaintiff to supply the information, and the Court held that the motive was immaterial, and that 'there was a contract with the person who performed the condition mentioned in the advertisement.'

Intimation of course of conduct as distinct from invitation.

The second difficulty arises where we have to distinguish statements of intention which can result in no liability *ex contractu* from general offers the acceptance of which by individuals constitutes a contract. It has been asked, in substance, whether an acceptance of the general offer in such a case binds the proposer to fulfil all its terms. For instance,

on
, 17.

does the existence of its published time-table bind a railway company to carry passengers according to its terms?

But the only difficulty in such cases is to ascertain, among the various surroundings of the contract, which of these amount to terms, and which are merely matters of inducement. Everything which can be regarded as a term in the offer becomes a promise on the acceptance of the offer. Whether the promise is absolute or qualified is important, but not here. Part V. ch iii. § 2.

In some cases the distinction above mentioned is not easy to draw.

Thus in *Harris v. Nickerson* an advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale. Blackburn, J., said: 'Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable.' Of a sale by auction. L. R. 8 Q. B. 286.

On the other hand, the advertisement of a sale *without reserve* was held, in *Warlow v. Harrison*, to create a binding contract between the auctioneer and the highest bidder that the goods should be knocked down to him. 'The sale,' said Martin, B., 'was announced by them (the auctioneers) to be "without reserve." This, according to all the cases both at law and in equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not.' We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided 1 E. & E. 295. Thornett v. Haines, 15 M. & W. 367.

that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve.' Such was the opinion of the majority of the Court of Exchequer Chamber.

Denton v. G. N. Railway Co., 5 E & B. 860.

Warlow v. Harrison, 1 E. & E. 316.

The substantial difference between the cases seems to lie in this, that not merely the number, but the intentions of the persons who might attend the sale must be unascertainable, nor could it be certain that their legal relations would be eventually altered by the fact of their attendance. *A* might come intending to buy, but might be out-bid; *B* might come with a half-formed intention of buying if the goods went cheaply; *C* might come merely for his amusement. It would be impossible to hold that an obligation could be established between the auctioneer and this indefinite body of persons, or that their losses could be ascertained so as to make it reasonable to hold him liable in damages. The highest bidder, on the other hand, is an ascertained person, fulfilling the terms of a definite offer. The distinction therefore bears out the proposition laid down at the commencement of this discussion.

CHAPTER II.

Form and Consideration.

Necessity for them in law.

We have now dealt with the mode in which the common intention of the parties should be communicated by the one to the other so as to form the basis of a contract. But it is not enough that such communication should be made as we have described, or even that the parties should intend it to refer to legal consequences. Most systems of law require some further evidence of the intention of the parties, and in default of such evidence mere intention will not avail to create an obligation. In English law this evidence is supplied by Form and Consideration; sometimes one, sometimes the other, sometimes both are required to be present in a contract to make it enforceable. By Form we may be taken to mean some peculiar solemnity attaching to the expression of Agreement which of itself gives efficacy to the contract; by Consideration some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee.

History of the matter.

Alike in English and Roman law, Form, during the infancy of the system, is the most important ingredient in Contract. The Courts look to the formalities of a transaction as supplying the most obvious and conclusive evidence of the intention of the parties, and Consideration is an idea which, if not unknown, is at any rate imperfectly developed. It would not be desirable here to enter upon an antiquarian discussion, which is nevertheless of considerable interest. It is enough to say that English law, and probably also Roman law, starts with two distinct conceptions of Contract. One, that any

Common features in history of

promise is binding if expressed in Form of a certain kind: the other, that the acceptance of benefits of a certain kind implies an enforceable promise to repay them. The theory that the Roman Contracts developed out of Conveyance in an order of moral progression seems to rest on no sure evidence; and there is reason to believe that the earliest of them were those with which we are familiar as the contracts *Verbis* and *Re*. The solemnities of a promise by formal question and answer bound the promisor to fulfil an intention thus expressed, and the re-adjustment of proprietary right where money or goods had been lent for consumption or use, led to the enforcement of the engagements known as Mutuum and Commodatum. In English law we find that before the end of the thirteenth century two analogous contracts were enforceable: one Formal, the contract under seal; one informal, arising from sale and delivery of goods, or loan of money, in which the consideration had been executed upon one side, and an implied or express promise to repay would support an action of Debt. Beyond this, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by the act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

The Formal Contract of English law is the *Contract under Seal*. In no other way than by the use of this Form could validity be given to executory contracts, until the doctrine of consideration began to make way. We have to bear in mind that it is to the Form only that the Courts look in upholding this contract; the *consensus* of the parties has not emerged from the ceremonies which surround its expression. Courts of Law will not trouble themselves with the intentions of parties who have not couched their agreement in the solemn Form to which the law attaches legal consequences. Nor, on the other hand, where Form is present will they ask for further evidence as to intention. Later

on, owing in great measure we may suspect to the influence of the Court of Chancery, the Courts begin to take account of the intention of the parties, and the idea of the importance of Form undergoes a curious change. When a contract comes before the Courts, evidence is required that it expresses the genuine intention of the parties; and this evidence is found either in the solemnities of the Contract under Seal, or in the presence of Consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred by the latter in return for the promise of the former. Gradually Consideration comes to be regarded as the important ingredient in Contract, and then the solemnity of a deed is said to make a contract binding because it 'imports consideration,' though in truth it is the Form which, apart from any question of consideration, carries with it legal consequences.

Before considering in detail the classes of contract which English law recognises, it is well to conclude the historical outline of the subject of Form and Consideration.

We have stated that the only contracts which English law originally recognised, were the Formal contract under Seal, and the informal contract in which Consideration was executed upon one side. How then do we arrive at the modern breadth of doctrine that any promise based upon Consideration is binding upon the promisor? This question resolves itself into two others. How did informal executory contracts become actionable at all? How did Consideration become the universal test of their actionability?

Remedies for breach of promise in Bracton.

To answer the first question we must look to the remedies which, in the early history of our law, were open to persons complaining of the breach of a promise, express or implied. The only actions of this nature, during the thirteenth and fourteenth centuries, were the actions of Covenant, of Debt, and of Detinue. Covenant lay for breach of promises made under Seal: Debt for liquidated or ascertained claims, arising either from breach of covenant, or from non-payment of a sum certain due for goods supplied, work done, or

money lent: Detinue[1] lay for the recovery of specific chattels kept back by the defendant from the plaintiff. These were the only remedies based upon contract. An executory agreement therefore, unless made under seal, was remediless.

The remedy by which such promises were eventually enforced is a curious instance of the shifts and turns by which practical convenience evades technical rules. The breach of an executory contract, until quite recent times, gave rise to a form of the action of Trespass on the case.

Chancery i. 241.

This was a development of the action of Trespass: Trespass lay for injuries resulting from immediate violence: Trespass on the case lay for the consequences of a wrongful act, and proved a remedy of a very extensive and flexible character.

Origin of action of

This action came to be applied to contract in the following way. It lay originally for a malfeasance, or the doing an act which was wrongful *ab initio*: it next was applied to a misfeasance, or improper conduct in doing what it was not otherwise wrongful to do, and in this form it applied to promises part-performed and then abandoned or negligently executed to the detriment of the promisee: finally, and not without some resistance on the part of the Courts, it came to be applied to a non-feasance, or neglect to do what one was bound to do. In this form it adapted itself to executory contracts. The first reported attempt so to apply it was in the reign of Henry IV, when a carpenter was sued for a non-feasance because he had undertaken, *quare assumpsisset*, to build a house and had made default. The judges in that case held that the action, if any, must be in covenant, and it did not appear that the promise was under seal. But in course of time the desire of the King's Bench to extend its jurisdiction, the

Reeves, ed. Finlason, ii. 395, 396.

Pollock, 155.

Reasons for its extension.

[1] The Court of Appeal has decided that the action of Detinue is founded in *tort, Bryant v. Herbert.* But though the wrongful detention of goods is the cause of action, the remedy may apply to cases in which the possession of the goods originated in the contract of Bailment. [See judgment of Brett, L. J., at p. 392.]

3 C. P. D.

fear that the Common Pleas might develope the action of Debt to meet the case of executory promises, or that the Court of Chancery might extend its extraordinary powers, and by means of the doctrine of consideration, which it had already applied to the transfer of interests in land, enlarge its jurisdiction over contract, operated to produce a change in the attitude of the Common Law Courts. Before the end of the reign of Henry VII it was settled that the form of Trespass on the case known henceforth as the action of Assumpsit would lie for the non-feasance, or non-performance of an executory contract; and the form of writ by which this action was commenced, continued to perpetuate this peculiar aspect of a breach of a promise until recent enactments for the simplification of procedure.

It is not at all improbable that the very difficulty of obtaining a remedy for breach of an executory contract led in the end to the breadth and simplicity of the law as it stands at present. If the special actions *ex contractu* had been developed to meet purely executory informal engagements, they would probably have been applied only to engagements of a particular sort, and a class of contracts similar to the consensual contracts of Roman law, privileged to be informal, might have been protected by the Courts, as exceptions to the general rule that Form or executed Consideration was needed to support a promise.

But the conception that the breach of a promise was something akin to a wrong, the fact that it could be remedied only by a form of action which was originally applicable to wrongs, had a somewhat peculiar result. The cause of action was the non-feasance of that which one had undertaken to do, not the breach of a particular kind of contract; it was therefore of universal application. Thus all promises would become binding, and English law was saved the technicalities which must needs arise from a classification of contracts. Where all promises may be actionable it follows that there must be some universal test of action-

ability, and this test was supplied by the doctrine of Consideration.

Origin of consideration as a test of actionability is uncer-

It is a hard matter to say how Consideration came to form the basis upon which the validity of informal promises might rest. Perhaps it may suffice for our present purposes to say that the '*quid pro quo*,' as it is styled in some of the early reports, was probably borrowed by the Common Law Courts from the Chancery.

But see Holmes, Common Law,

For the Chancellor was in the habit of enquiring into the intentions of the parties beyond the Form, or even in the absence of the Form in which, by the rules of Common Law, that intention should be displayed, and he would find evidence of the meaning of men in the practical results to them of their acts or promises. It was thus that in the region of conveyance, the Covenant to stand seised and the Bargain and Sale of Lands came to be enforced in the Chancery before the Statute of Uses; and the doctrine once applied to simple contract was found to be of great practical convenience. When a promise came before the Courts they asked no more than this, 'Was the party making the promise to gain anything from the promisee, or was the promisee to sustain any detriment in return for the promise?' if so, there was a '*quid pro quo*' for the promise, and an actior might be maintained for the breach of it.

Gradual growth of doctrine.

So silent was the development of the doctrine that Consideration was the universal requisite of contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple application, that Lord Mansfield was able in the middle of the last century to raise the question whether, in the case of commercial contracts made in writing, there was any necessity for Consideration to support the promise. In the case of *Pillans v. Van Mierop* he held, and the rest of the Court of King's Bench concurred with him, that the custom of merchants would give efficacy to a written promise for which no consideration could be shown. The case was decided on another

3 Burr. 1672.

point, and the doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords, in *Rann v. Hughes*; but the question raised serves to show that the breadth of the law upon this subject was, until comparatively recent times, hardly realised by those who had to administer it.

T. R. 35

CLASSIFICATION OF CONTRACTS.

Contracts are Formal, or Simple.

There is but one Formal Contract in English law, the Deed or Contract under seal; all others are simple contracts depending for their validity upon the presence of Consideration. The Legislature has, however, imposed upon some of these simple contracts the necessity of some kind of Form, and these stand in an intermediate position between the *Deed* to which its Form alone gives legal force, and the *Simple Contract* which rests upon Consideration and is free from the imposition of any Statutory Form. In addition to these a certain class of Obligation has been imported into the Law of Contract under the title of Contracts of Record, and though these obligations are wanting in the principal features of Contract, it is necessary, in deference to established authority, to treat of them here.

The Contracts known to English law may then be divided thus:—

Classification.

A. *Formal.* *i.e.* dependent for their validity upon their Form.	1. Contracts of Record.	
	2. Contract under Seal.	
B. *Simple.* *i.e.* dependent for their validity upon the presence of Consideration.	3. Contracts required by law to be in some form other than under Seal.	
	4. Contracts for which no form is required.	

It will be best to deal first with the essentially formal contracts, then with those forms which are superimposed upon simple contracts, and then with Consideration, the requisite common to all simple contracts.

Formal Contract.

§ 1. *Contracts of Record.*

The obligations which are styled Contracts of Record are Judgment, Recognizance, Statutes Merchant and Staple, and Recognizances in the nature of Statute Staple. Contracts of Record.

And first as to Judgment. The proceedings of Courts of Record are entered upon parchment rolls, and upon these an entry is made of the judgment in an action when that judgment is final. A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. This obligation may come into existence as the final result of litigation when the Court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. Where it is so created the obligation results from a contract for the making of which certain formalities are required; this contract is either a *warrant of attorney*, by which one party gives authority to the other to enter judgment upon terms settled, or a *cognovit actionem*, by which the one party acknowledges the right of the other in respect of the pending dispute and then gives a similar authority. (1) Judgment. How it originates.

The characteristics of an obligation of this nature may be shortly stated as follows:— Its characteristics.

1. Its terms admit of no dispute, but are conclusively proved by production of the record.

2. So soon as it is created the previously existing rights with which it deals merge, or are extinguished in it: for instance, *A* sues *X* for breach of contract or for civil injury: judgment is entered in favour of *A* either by consent or after trial: *A* has no further rights in respect of his cause of action, he only becomes creditor of *X* for the sum awarded.

3. The creditor, as we may conveniently call the party in whose favour judgment is given, has certain advantages

which an ordinary creditor does not possess. He has a double remedy for his debt; he can take out execution upon the judgment and so obtain directly the sum awarded, and he can also bring an action for the non-fulfilment of the obligation. For this purpose the judgment not only of a Court of Record, but of any Court of competent jurisdiction, British or foreign, is treated as creating an obligation upon which an action may be brought for money due.

Williams v. Jones, 13 M. & W. 628.

He had also before 27 and 28 Vict. c. 112 a charge upon the lands of the judgment debtor during his lifetime; but since the passing of that statute lands are not affected by a judgment until they have been formally taken into execution.

(2) Recognizance.

Recognizances have been aptly described as 'contracts made with the Crown in its judicial capacity.' A recognizance is a writing acknowledged by the party to it before a judge or officer having authority for the purpose, and enrolled in a Court of Record. It may be a promise, with penalties for the breach of it, to keep the peace, or to appear at the assizes.

(3) Statutes Merchant and Staple.

Statutes Merchant and Staple and Recognizances in the nature of a Statute Staple are chiefly of interest to the student of the history of Real Property Law. They have long since become obsolete, but they were once important, inasmuch as they were acknowledgments of debt which, when made in accordance with Statutory provisions and enrolled of Record, created a charge upon the lands of the debtor.

It will easily be seen how little there is of the true nature of a contract in the so-called Contracts of Record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon their direct promulgation by the sovereign authority acting in its judicial capacity. *Recognizances* are promises made to the sovereign with whom, both by the technical rules of English

Law and upon the theories of Jurisprudence, the subject cannot contract. Statutes Merchant and Staple share the characteristics of judgments. We may therefore dismiss these obligations altogether from our consideration.

§ 2. *Contract under Seal.*

The only true Formal Contract of English law is the *Contract under Seal*, sometimes also called a Deed and sometimes a Specialty. It is the only true *Formal Contract*, because it derives its validity from its Form alone, and not from the fact of agreement, nor from the consideration which may exist for the promise of either party. It will be convenient in dealing with the Contract under Seal to consider (1) how it is made; (2) what are its chief characteristics as distinguished from simple contracts; (3) under what circumstances it is necessary to contract under seal.

Contract under Seal.

Ante, p. 25.

(1) *How a Contract under Seal is made.*

A deed must be in writing or printed on paper or parchment. It is often said to be executed, or made conclusive as between the parties, by being 'signed, sealed, and delivered.' Of these three the signature is a matter as to the necessity of which there is some doubt, though no one, unless ambitious of giving his name to a leading case, would omit to sign a deed. But that which identifies a party to a deed with the execution of it is the presence of his *seal*; that which makes the deed operative, so far as he is concerned, is the fact of its *delivery* by him. Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing. In the execution of a deed under ordinary circumstances, seals are affixed beforehand, and the party executing the deed signs his name, places his finger on the seal intended for him, and

Sheppard, Touchstone, 53.

Signed.

Goodman, 2 Q. B. 597.

Sealed.

Delivered.

Xenos v. Wickham, L. R. 2 H. L. 296.

utters the words 'I deliver this as my act and deed.' Thus he at once identifies himself with the seal, and indicates his intention to deliver, that is, to give operation to the deed.

Escrow.

A deed may be delivered subject to a condition; it then does not take effect until the condition is performed: during this period it is termed an *escrow*, but immediately upon the fulfilment of the condition it becomes operative and acquires the character of a deed. There is an old rule that a deed, thus conditionally delivered, must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs verbal conditions. But the modern cases appear to show that this technical rule will not be adhered to, if the intention of the parties is clear that the deed should be delivered conditionally.

Touch. 59.

Hudson v. Revett, 5. 387.

Indenture and deed poll.

The distinction between a *Deed Poll* and an *Indenture* is no longer important since 8 and 9 Vict. c. 106. s. 5. Formerly a deed made by one party had a polled or smooth-cut edge, a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called Indentures. The statute above mentioned provides that an indented edge shall not be necessary to give the effect of an Indenture to a deed purporting to be such.

(2) *Characteristics of Contract under Seal.*

(a) Estoppel.

(*a*) Statements made in a simple contract, though strong evidence against the parties to the contract, are not absolutely conclusive against them. Statements made in a deed are absolutely conclusive against the parties to the deed in any legal proceedings between them taken upon the deed. 'The principle is that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted.' Such a prohibition to deny facts is termed an *estoppel*.

Per Taunton, J., in Bowman v. Taylor, 2 A. & E. 278.

(*b*) Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is *merged* in the deed and becomes extinct. This extinction of a lesser in a higher security, like the extinction of a lesser in a greater interest in lands, is called *merger*. (*b*) Merger.

(*c*) A right of action arising out of simple contract is barred if not exercised within six years. (*c*) Limitation of actions.

A right of action arising out of a contract under seal is barred if not exercised within twenty years.

These general statements must be taken with some qualifications to be discussed hereafter. See Part V. ch. iii. § 4.

(*d*) Remedies have been and are possessed by the creditor by deed against the estate of the debtor, which are not possessed by the creditor of a simple contract debt, and which mark the importance attached to the Formal contract. In administering the *personal* estate of a testator or intestate person, creditors by specialty were entitled to a priority over creditors by simple contract. Their privilege in this respect is taken away by 32 & 33 Vict. c. 46. (*d*) Remedies against debtor's estate.

As regards the *real* estate of a debtor, the creditor by specialty was also preferred. If the debtor bound himself and his heirs by deed, the Common Law gave to the creditor a right to have his debt satisfied by the heir out of the lands of his ancestor; the liability thus imposed on the heir was extended to the devisee by 3 & 4 Will. & Mary, c. 14. s. 2. This statute was repealed by 11 Geo. IV. & 1 Will. IV. c. 47, only for the purpose of extending the creditor's remedy to some cases not provided for by the previous Act. During the present century, however, creditors by simple contract have also acquired a right to have their debts satisfied out of the lands of the debtor; but it should be noted that the creditor by specialty can claim against heir or devisee of real estate without the intervention of the Court of Chancery, the creditor by simple contract must get the estate administered in Chancery in order to make

good his claim. When the estate is so administered the creditor by specialty has, since 32 & 33 Vict. c. 46, no priority over the simple contract creditor, whether it be realty or whether it be personalty that is administered by the Court.

(c) Gratuitous promise under seal is binding.

(*e*) A gratuitous promise, or promise for which the promisor obtains no consideration present or future, is binding if made under seal, is absolutely void if made verbally, or in writing not under seal. It has already been mentioned that this characteristic of contracts under seal is often accounted for on the ground that their solemnity imports consideration, and that this supposition is historically untrue, inasmuch as it is the Form alone which gives effect to the deed. The doctrine of Consideration is, as we have seen, of a much later date than that at which the Contract under Seal was in full efficacy, an efficacy which it owed entirely to its Form. And the doctrine of Consideration, as it has developed, has steadily tended to limit the peculiarity of the Contract under Seal with which we are now dealing, and to introduce exceptions to the general rule that a gratuitous promise made by deed is binding.

Mallan v. May, 11 M.

Even at Common Law, in the case of contracts made in restraint of trade, consideration is necessary, though the contract be under seal. This instance is exceptional, but the rule is general that if there be a consideration for a deed, it is open to the party sued upon such a contract to show that the consideration was illegal, or immoral, in which case the deed will be void.

Collins v. Blantern, 1 Sm. L. C. p. 369.

But it is in the Court of Chancery that we find this privilege most encroached upon. The idea of Consideration as a necessary element of Contract as well as of Conveyance, if it did not actually originate in the Chancery, has always met with peculiar favour there. It was by the weight given to the presence of Consideration, or by inferences drawn from its absence, that the Covenant to stand seised, the Bargain and Sale of lands, and the Resulting Use first acquired

Equitable view of absence of consideration.

validity. And in the department of Contract, Equity has developed similar principles.

It would not extend its peculiar remedy of specific performance to gratuitous promises, even though they were under seal. It was prepared to exercise its peculiar power of declaring a contract void if absence of Consideration combined with other evidence amounted to proof that Fraud or Undue Influence had been brought to bear upon the promisor.

See Part V. ch. iii. § 3.

Specific performance of a gratuitous promise, where that remedy is applicable, is not granted, whether the promise is or is not made by deed. And absence of Consideration is corroborative evidence of the presence of Fraud or Undue Influence, sufficient proof of which will avoid the deed.

Bonds.

The best illustration of a gratuitous promise under seal is supplied by a *Bond*. A Bond may be technically described as a promise defeasible upon condition subsequent; that is to say, it is a promise by *A* to pay a sum of money, which promise is liable to be defeated by a performance by *A* of a condition stated in the bond. The promise, in fact, imposes a penalty for the non-performance of the condition which is the real object of the bond. The condition desired to be secured may be the payment of a sum of money or the doing or forbearing from some act. In the first case the instrument is called a common money bond: in the second a bond with special conditions.

A promises *X* that on the ensuing Christmas Day he will pay to *X* £500; with a condition that if before that day he has paid to *X* £250 the bond is to be void.

A promises *X* that on the ensuing Christmas Day he will pay to *X* £500; with a condition that if before that day *M* has faithfully performed certain duties the bond is to be void.

Legal aspect of a

Common law has differed from Equity in its treatment of bonds much as it did in its treatment of mortgages.

Equitable aspect.

Common law took the Contract in its literal sense and

enforced the fulfilment of the entire promise upon breach of the Condition.

Equity looked to the object which the bond was intended to secure, and would restrain the promisee from obtaining more than the amount of money due under the condition or the damages which accrued to him by its breach.

8&9 Will. III. c. 11. 4 & 5 Anne, c. 16. 23 & 24 Vict. c. 126.

The rights of the promisee are now limited by Statute to the amount of loss actually sustained by breach of the condition, and the rules of Common law as regards penalties have been assimilated to the practice of Equity.

(3) *When it is essential to employ the Contract under seal.*

Though usually a matter of choice it is in some cases necessary by Statute or at Common Law to employ the form of a deed.

Statutory requirements.

Thus a deed is necessary by 8 & 9 Vict. c. 106, for making such leases as the Statute of Frauds requires to be in writing: by 54 Geo. III. c. 56, for an agreement for the sale of sculpture with copyright: by the Companies Clauses Act, 8 & 9 Vict. c. 16, for the transfer of shares in companies governed by that Act: by the Merchant Shipping Act, 1854, for the transfer of a British Ship.

17 & 18 Vict. c. 104. § 55.

Common law requirements.

There are two cases in which Common Law demands that a contract should be made under seal.

Gratuitous promises

(*a*) A gratuitous promise or contract for which there is no consideration must be made by deed, otherwise it will be void. This has already been shown to furnish a distinguishing characteristic of Formal as opposed to simple Contracts.

Contract with corporation.

(*b*) The general rule as to contracts made with corporations is that a *corporation aggregate can only be bound by contracts under the seal of the corporation.* A corporation is a fictitious, not a natural person; and some evidence is required that the aggregate of individuals composing it is really bound to that which the contract purports to promise. This evidence is supplied by the use of the seal common to the corporation.

There are, however, numerous exceptions to the general rule; exceptions which may be classified under two heads, as (1) cases in which the rule would defeat the objects for which the corporation was created, and (2) cases in which the operation of the rule would occasion great and constant inconvenience.

The first head applies more particularly to *trading* corporations, which as the law now stands may through their agents enter into simple contracts relating to the objects and purposes for which the body was incorporated; and if these objects make it expressly necessary, may even issue negotiable instruments.

South of Ireland Colliery Co. v. Waddle, L.R. 3 C. P. 469.

The second head applies more particularly to non-trading cases, and may be taken to include:—

Matters of trifling importance or daily necessary occurrence, as the hire of an inferior servant, or the supply of coals to a workhouse.

Nicholson v Bradfield Union, L. R. 1 Q. B. 620.

Matters of urgent necessity, admitting of no delay; as where a municipal corporation possessed a dock and made agreements from time to time for the admission of ships, it was held that such agreements need not be under seal.

Wells v. The Mayor of Kingston upon Hull, L. R. 10 C. P. 402.

In addition to these exceptions at Common Law, the Legislature has in some cases freed corporations from the necessity of contracting under seal, and provided special forms in which they may express their common assent.

It has been questioned whether, when a corporation enters into a contract not under seal, and the contract has been executed in part, such execution gives rights to the parties which they would not have possessed if the contract had remained executory. Where a corporation has done all that it was bound to do under a simple contract it may sue the other party for a non-performance of his part. But there is no doubt that a part-performance of a contract by a corporation will not take the case out of the general rule, and entitle it to sue.

Fishmongers' Company v. 5 M. & Gr. 192.

Mayor of Kidderminster Ha L. R. 24.

Per Bramwell, L. J., Hunt v. Wimbledon

Nor can a corporation be sued on contracts not under seal of which it has enjoyed a partial benefit: indeed it would seem that entire performance by the plaintiff will only give him a remedy where the amount is small and the work necessary.

p. 53.

Simple Contract.

§ 3. *Simple Contracts required to be in writing.*

Simple contracts.

We have now dealt with the contract which acquires validity by reason of its Form alone, and we pass to the Contract which depends for its validity upon the presence of Consideration. In other words, we pass from the Formal to the Simple Contract, or from the Contract under seal to the *parol* Contract, so called because, with certain exceptions to which reference will now be made, it can be entered into by word of mouth.

All require consideration.

Some are required in addition to be expressed in certain form.

There are certain simple contracts which the law will not enforce unless written evidence of the terms of the agreement and of the parties to it is produced; but Form is here needed, not as giving efficacy to the contract, but as evidence of its existence. Consideration is as necessary as in those cases in which no writing is required: 'if contracts be merely written and not specialties, they are parol and consideration must be proved.'

See post, p. 69.

These are therefore none the less Simple Contracts, because written evidence of a certain kind is required concerning them.

Common law requirements.

The only requirement of form in simple contract which can be said to exist at Common Law is in the case of Bills of Exchange, which by the custom of merchants, adopted into the Common Law, must be in writing.

The statutory requirements of form in simple contract are mainly to be found in the 29 Car. II. c. 3, the famous Statute of Frauds. There are some others, however, and we may deal with them shortly.

Statutory requirements.

1. The acceptance of a bill of exchange must be in writing; 20 Vict. c. 97. § 6; 41 Vict. c. 13. § 1.

2. Assignments of copyright must be in writing. This subject is dealt with by numerous statutes.

3. Contracts of Marine Insurance must be made in the form of a policy; 30 Vict. c. 23.

4. The transfer of shares in a company is usually required to be in a certain form by the Acts of Parliament which govern companies generally or refer to particular companies. Lindley on Partnership, i. 703.

5. An acknowledgment of a debt barred by the Statute of Limitation must be in writing signed by the debtor, 9 Geo. IV. c. 14. § 1 (Lord Tenterden's Act), or by his agent duly authorised, 19 and 20 Vict. c. 97. § 13 (Mercantile Law Amendment Act).

6. The Statute of Frauds, 29 Car. II. c. 3, contains two sections, the 4th and the 17th, which affect the form of certain simple contracts and which require careful consideration. Statute of Frauds.

The 4th section enacts, 'That *no action shall be brought* whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.' Section 4.

The discussion of these sections falls naturally into three heads.

(1) The form required by the section.

(2) The nature of the contracts specified in it.

(3) The effect upon such contracts of a non-compliance with its provisions.

(1)

The form required by the terms of the section is the first point to be considered. What is meant by the requirement that 'the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some other person thereunto by him lawfully authorised'?

We may, with regard to this part of the subject, lay down the following rules[1].

The form is merely evidentiary.

(*a*) The Form required does not go to the existence of the Contract. The Contract exists though it may not be clothed with the necessary form, and the effect of a non-compliance with the provisions of the statute is simply that no action can be brought until the omission is made good.

Thus the memorandum or note in writing may be made, so as to satisfy the statute, at any time between the formation of the contract and the commencement of an action.

Stewart v. Eddowes, L. R. 9 C. P. 314

So too a party to the contract may sign a rough draft of its terms, and acknowledge his signature when the draft has been corrected and the contract is actually concluded.

v. Picksley, L. R. 1 Exch. 342

Or again, a proposal containing the names of the parties, and the terms of the suggested contract, and signed by the proposer will bind him though the contract is concluded by a subsequent parol acceptance. In the former of these two cases the signature of the party charged—in the latter not the signature only but the entire memorandum—was made before the contract was concluded. This is perhaps sufficient to show that the Form is an evidentiary matter only, and is not, as in the case of a deed, an integral part of the contract itself.

The parties must

(*b*) The memorandum of the contract must show who are the parties to it. For instance, *A* promised *X* that he would answer for the debt or default of *M*: the memorandum of the

[1] With the exception of rule (*d*), what is said under this head may be taken to apply to the 17th as well as to the 4th section.

promise, though signed by *A*, did not contain the name of *X*: it was held to be insufficient. 'No document,' it was said in that case, 'can be an agreement or a memorandum of one, which does not show on its face who the parties making the agreement are.'

Williams v. Lake, 2 E. & E. 349

It is settled, however, that a description of one of the contracting parties, though he be not named, will let in parol evidence otherwise inadmissible to show his identity. This may occur where *A* as agent for *M* enters into a contract with *X* in his own name: *X* may prove that he has really contracted with *M*, who has been described in the memorandum in the character of *A*. On the other hand, *A* is not permitted to prove that he is not the real party to the contract.

Trueman v. Loder, 11 A. & E. 589.

Higgins v. Senior, 8 M. & W.

(*c*) The memorandum may consist in various letters or papers, but they must be *connected*, *consistent*, and *complete*.

The terms may be collected from various documents: but must be connected on face of the documents.

The only signature required is that of the party to be charged: it is not therefore the *fact* of agreement, but the terms, and all the terms, of the agreement that the statute requires to be expressed in writing.

The terms need not all be expressed in the same document, and it is permissible to prove a memorandum from several papers, or from a correspondence, but the connection of the various terms must be made out from the papers themselves, and may not be shown by parol evidence.

Reuss v. Picksley, L. R. 1 Exch. 342.

A issued a prospectus of illustrations of Shakespeare, to be published on terms of subscription therein set out. *X* entered his name in a book entitled 'Shakespeare Subscribers, their signatures,' in *A*'s shop. *X* afterwards refused to subscribe. He was sued upon his promise to do so, and it was held that there was no documentary evidence to connect the subscription book with the prospectus, so as to make a sufficient memorandum of the contract, and that the deficiency might not be made good by parol evidence.

Boydell v. Drummond 11 East, 142.

To say that the terms of the contract must be consistent with one another is merely to reiterate what has been said

Must be consistent.

under the head of offer and acceptance. But although the various documents in which the terms of a contract are found must be perfectly consistent with one another, yet if the contract is fully set out in writing it will not be affected by a repudiation of it, contained in the same writing, by one of the parties. They have agreed, the statutory evidence is supplied, a repudiation is not within the power of either to make, and its expression is wholly nugatory.

Buxton v. Rust, L. R. 7 Exch. 279.

Must be complete.

Again, the terms must be complete in the writing. Where a contract does not fall within the statute, the parties may either (1) put their contract into writing, (2) contract only by parol, or (3) put some of the terms in writing and arrange others by parol. In the latter case, although that which is written may not be varied by parol evidence, yet the terms arranged by parol are proved by parol, and they then supplement the writing, and so form one entire contract. But where a contract falls within the statute, all its terms must be in writing, and parol evidence of terms not appearing in the writing would altogether invalidate the contract, as showing that it was something other than that which appeared in the written memorandum.

Consideration must appear in writing.

(*d*) The consideration must appear in writing as well as the terms of the promise sued upon. This rule does not extend to the 17th section, but it has been settled with regard to the 4th since the year 1804.

Wain v. Warlters, 5 East, p. 10.

But an exception has been made in the case of the 'promise to answer for the debt, default or miscarriage of another' which by 19 & 20 Vict. c. 97. § 3 (Mercantile Law Amendment Act) shall not be

> 'Deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.'

Signature of party or agent.

(*e*) The memorandum must be signed by the party charged or his agent.

The contract therefore need not be enforceable at the suit of both parties; it may be optional to the party who has not signed to enforce it against the party who has. The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle. S ... Sales, pp. 188–19

But it must be intended to be a signature, and as such to be a recognition of the contract, and it must govern the entire contract.

These rules are established by a number of cases turning upon difficult questions of evidence and construction. The principal cases are elaborately set forth in Benjamin on Sales, pp. 188–196, but a further discussion of them would here be out of place. 2nd ed.

Thus much for the form required under the 4th section for all the contracts included therein. We will now note the characteristics of the five sorts of contract specified in the section.

Special promise by an executor or administrator to answer damages out of his own estate.

The liabilities of an executor or administrator in respect of the estate of a deceased person are of two kinds. At Common Law he may sue and be sued upon obligations devolving upon him as representative of the deceased. In Equity he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket: his liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, or for any other reason, he choose to promise *to answer damages out of his*

own estate, that promise must be in writing together with ... consideration for it, and must be signed by him or his agent. It is almost needless to add that in this, as in all other contracts under the section, the presence of writing will not atone for the absence of consideration.

Hughes, 7 T. R. 350.

Any promise to answer for the debt, default, or miscarriage of another person.

We should note these features of the contract of suretyship in its relation to the Statute.

The promise differs from indemnity.

(*a*) It must be distinguished from an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor.

In other words, there must be three parties in contemplation; *M*, who is actually or prospectively liable to *X*, and *A*, who in consideration of some act or forbearance on the part of *X* promises to answer for the debt, default, or miscarriage of *M*.

Reader v. Kingham, 13 C. B., N.S. 344.

X, a bailiff, was about to arrest *M*. *A* promised to pay a sum of £17 on a given day to *X* if he would forbear to arrest *M*. This was held an independent promise of indemnity from *A* to *X* which need not be in writing.

Necessitates primary liability of third party,

(*b*) There must be a liability actual or prospective of a third party for whom the promisor undertakes to answer. If the promisor makes himself primarily liable the promise is not within the statute, and need not be in writing.

'If two come to a shop and one buys, and the other, to gain him credit, promises the seller "*If he does not pay you, I will,*" this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, "*Let him have the goods, I will be your paymaster,*" or "*I will see you paid,*" this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant.'

Per Curiam in Birkmyr v. Darnell, 1 Sm. L. C. 310.

and a real liability,

(*c*) The liability may be prospective at the time the promise is made, as a promise by *A* to *X* that if *M* employs *X* he (*A*) will go surety for payment of the services rendered. Yet

it must come into existence at some time: else there is no suretyship, and the promise, though not in writing, will nevertheless be actionable. Thus if *X* says to *A* 'If I am to do certain work for *M* I must be assured of payment by some one,' and *A* says 'do it and I will see you paid,' there is no suretyship.

Mountstephen v. Lakeman, L. R. 7 H. L. 17, and see judgment in Exch. Cham. L. R. 7 C 202.

(*d*) If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertake to be answerable for it, still the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability. In other words, the liability of the third party must be a continuing liability in order to bring the promise within the statute. A promise to a creditor to pay a debt in consideration of his doing that which would extinguish his claims against the original debtor, would be an illustration of the kind of promise here spoken of.

and continuous.

Goodman v. Chase, 1 B. & Ald. 297

(*e*) The debt, default, or miscarriage spoken of in the statute will include liabilities arising out of wrong as well as out of contract. So in *Kirkham v. Marter*, *M* wrongfully rode the horse of *X* without his leave, and killed it. *A* promised to pay *X* a certain sum in consideration of his forbearing to sue *M*, and this was held a promise to answer for the *miscarriage* of another within the meaning of the statute.

May arise from wrong.

2 B. & Ald. 61.

(*f*) This contract is an exception to the general rule that 'the agreement or some memorandum or note thereof,' which the statute requires to be in writing, must contain the consideration as well as the promise: 19 & 20 Vict. c. 97. s. 3.

Consideration need not be expressed.

See p. 56.

Agreement made in consideration of Marriage.

It is sufficient to note that the agreement here meant is not the promise to marry, (the consideration for this is the promise of the other party,) but the promise to make a payment of money or a settlement of property in consideration of, or conditional upon a marriage actually taking place.

Not a promise to marry.

Contract or sale of lands or hereditaments or any interest in or concerning them.

What is an interest in land.

It is not always easy to say what is an interest in land within the meaning of this section, but it is perhaps safe to say that the contract must be for a substantial interest in land, and not for arrangements preliminary to the acquisition of an interest, or for a remote and inappreciable interest.

An agreement to pay costs of an investigation of title would not be within the operation of the section; nor would an agreement to transfer shares in a railway company which, though it possesses land, does not give any appreciable interest in that land to its individual shareholders. The whole subject is one which belongs to the sale and purchase of Real Property rather than to the law of Contract.

Fructus industriales et naturales.

The principal question of interest with special reference to the subject relates to the sale of crops. A distinction has been drawn as to these between what are called emblements or *fructus industriales*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*.

Fructus industriales do not under any circumstances constitute an interest in land. *Fructus naturales* are considered to do so if the sale contemplates the passing of the property in them before they are severed from the soil. Where property is to pass after severance both classes of crops are goods, wares, and merchandise within the meaning of section 17 of the Statute of Frauds, but where property in *fructus industriales* is intended to pass before severance, it is doubtful whether they fall within the meaning of section 17, though it is certain that the sale is not governed by section 4.

See Benjamin on Sales, p. 100, 2nd ed.

Agreement not to be performed within the space of one year from the making thereof.

It must contemplate non-performance within the year;

Two points should be noted with regard to this form of agreement.

(*a*) In order to fall within the section the parties must

contemplate that it should not be performed within the year. The fact that it may not be, or is not performed within the year does not bring it within the operation of the statute unless 'it appears by the whole tenour of the agreement that it is to be performed after the year.'

Peter v. Compton, 1 Sm. L. C. 335.

(*b*) The agreement does not fall within the section if that which one of the parties is to do, is all to be done within the year. So where *A* being tenant to *X* under a lease of 20 years promised verbally to pay an additional £5 a-year during the remainder of the term in consideration that *X* laid out £50 in alterations, *A* was held liable upon his promise, the consideration for it having been executed within the year.

and by both parties.

Donellan v. Read, 3 B. & Ad. 899.

(3)

It remains to consider what is the position of parties who have entered into a contract specified in section 4, but have not complied with its provisions. The terms of the section do not render such a contract void, but they prevent it being enforced by action. The contract therefore, though it cannot be sued upon, is yet available for some purposes. Two illustrations will suffice to explain this.

The contract, if writing, is not void;

In the case of *Leroux v. Brown*, the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*. The procedure however, in trying the rights of parties under a contract, is governed by the *lex fori*, and the mode of proof would thus depend on the law of the country where action was brought. If, therefore, the 4th section avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the 4th section affected

12 C. B. 801.

but cannot be proved.

procedure only, the contract, though not void, was incapable of proof.

The plaintiff tried to show that his contract was void by English law, in which case he would have been successful, for there would have then been nothing to hinder his proving first the contract, and then the French law which made it valid. But the Court of Common Pleas held that the 4th section dealt with procedure only, that the existence of the contract was not affected by it, but that it was rendered incapable of proof, and the plaintiff therefore could not recover.

The second illustration of the rule that a contract which does not fulfil the requirements of the statute is not void, but merely unenforceable, is to be found in the mode in which Courts of Equity have dealt with such contracts.

They were accustomed to dispense with the evidence required by the statute when one of the parties had, under certain conditions, performed his part of the contract.

Very recent decisions have narrowed these conditions, and laid down in very explicit terms the limits within which part performance takes a contract out of the operation of the statute. It may now be considered settled, that proof of such a contract will only be admitted where the contract is for an interest in land.

11 Q. B. D. 123. In *Britain v. Rossiter* a contract of service, not to be performed within the year, was broken by the employer, who discharged the plaintiff after some months of service. An action was brought for wrongful dismissal; and the Court of Appeal held that the equitable doctrine of part performance was inapplicable. 'The true ground of the doctrine,' said Cotton, L. J., 'is, that if the Court found a man in occupation of land, or doing such acts with regard to it as would *primâ facie* make him liable to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken.'

Hence the provisions of the Judicature Act, which enable all the Divisions of the High Court to recognize and administer equitable rights and remedies, would not make this remedy generally applicable to contracts falling under 29 Car. II. c. 3. s. 4. S. 24. sub-s. 4. 7.

And even in the case of contracts relating to land, it is not enough that services should have been rendered in consideration of a promise to grant lands, or even that the price should have been paid wholly or in part. 'The acts relied on as part performance, must be unequivocally and in their own nature referable to some such agreement as is alleged.' Per Lord Selborne, C., in Maddison v. Alderson.

So in *Maddison v. Alderson* the House of Lords, affirming the judgment of the Court of Appeal, held that where a promise of a gift of land was made to the plaintiff in consideration of her remaining in the service of the promisor during his lifetime, the continuance of service for the required period could not be regarded as exclusively referable to the promised gift. It might have rested on other considerations, and so the Statute excluded the admission of parol evidence of the promise. 8 App. Ca. 479. 7 Q. B. D. 174.

Contracts within the seventeenth section.

The seventeenth section enacts 'that no contract for the sale of any goods, wares, and merchandises for the price of £10 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 authorised.' Section 17.

The same questions present themselves here as presented themselves under the fourth section. (1) The form required, (2) the nature of the contract specified, (3) the effects of a non-compliance with the statutory requirements.

Difference as to form from sec. 4

With regard to the form required, where, in absence of a part acceptance and receipt, or part payment, a note or memorandum in writing is resorted to, it is sufficient to say that the rules applicable to contracts under section 4 apply to contracts under section 17, with one exception.

It is not necessary under section 17 that the consideration for the sale should appear in writing. Since the 17th section only applies to contracts for the sale of goods, it will be presumed, in the absence of a specified consideration for the sale, that there is a promise or undertaking to pay a reasonable price, provided always that there has been no express verbal agreement as to price which would rebut such a presumption.

Hoadley v. M'Laine, 10 Bing. 482.

Nature of Contract of Sale.

We must not enter here into a discussion on the nature of a contract for the sale of goods, wares, and merchandise in English law, but these points may be borne in mind.

Bargain and Sale.

The Contract of Sale in English law has the effect of a conveyance, it passes the property in the thing sold; but in order to have this effect, the chattel agreed to be sold must be ascertained and specific, and nothing must remain to be done by the vendor to complete the chattel, or to ascertain its price by weighing, measuring, or testing. Such a contract is called an *executed* contract of sale.

Executory agreement to sell.

It is quite possible, however, that a contract may be made for the sale of goods which are not specific—*A* agrees to buy any 10 sheep out of *X*'s flock: or which are not complete—*A* orders a table which he sees making in *X*'s shop: or of goods to which something remains to be done by way of ascertainment of price—*A* buys *X*'s stack of hay, the price to be determined as the hay is taken down and weighed.

In these cases the property does not pass, the buyer does not acquire a right *in rem* to the thing agreed to be sold,

but only a right *in personam* against the seller. In like manner, the seller holds at his own risk the chattels sold; he is not divested of his property. This is called an *executory* contract of sale.

When it becomes executed.

But such a contract may become executed and the property pass, and with the property the risk, to the purchaser, when the chattel is completed or its price ascertained, or when specific goods are appropriated to the contract by the vendor.

So where an order is given for a quantity of goods, and the vendor has to *appropriate the goods to the contract*, the moment of appropriation becomes as important to determine as the moment of acceptance in a contract made by correspondence. The appropriation passes the property just as the acceptance concludes the contract. And the difficulty is to ascertain in each case 'whether the selection made by the vendor is a mere manifestation of his intention which may be changed at his pleasure, or a determination of his right conclusive on him and no longer revocable.' But the question is not one which we can profitably discuss further here.

Benjamin on Sales, 264, 2nd ed.

Does sec. 17 apply to executory contracts of sale?

It was long questioned whether the 17th section applied to the executory contract of sale, and the matter was not set at rest till more than 150 years after the passing of the Statute of Frauds. Lord Tenterden's Act, 9 Geo. IV. c. 14. § 7, recites,

'That it has been held that the said recited enactments (29 Car. II. c. 3. § 17) do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief intended to be remedied;' and then enacts that the provisions of § 17 'shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.'

The effect of this clause is to bring executory contracts for the sale of goods within the 17th section of the Statute of Frauds.

Difference between contracts of sale and for work and labour.

A further question has arisen, in cases where skilled labour has to be expended upon the thing sold before the contract is executed and the property transferred, whether the contract is one for work and labour, which would not fall under the 17th section; or for goods, wares, and merchandise within the meaning of the section. After some conflict of judicial opinion it has been laid down in *Lee v. Griffin* that the contract is a sale of goods if it contemplates the ultimate delivery of a chattel. And Blackburn, J., said, 'I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been none the less for the sale of a chattel.'

B. & S. 272.

(3)

Does § 17 differ in effect from § 4?

It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing, the section declares that the contract shall not 'be allowed to be good.' As to the meaning of these words there are conflicting dicta but no direct decision.

9 C. B., N. S. 843.

In *Bailey v. Sweeting* a letter admitting a purchase of goods was held to be a sufficient memorandum to satisfy the statute. This points to the conclusion that the requirements of the statute do not affect the validity of the contract but only the proof of it: for if the statute avoided a contract which did not satisfy its terms, a subsequent note of a void transaction must needs be of none effect.

12 C. B. 801.

Yet the Court in *Leroux v. Brown* assumes that the words of s. 17, unlike those of s. 4, go to the existence of the contract, and judges and text-book writers have accepted this distinction.

Against this we may set a clear expression of opinion by Brett, L. J., in *Britain v. Rossiter*, and by Lord Blackburn, in the very recent case of *Maddison v. Alderson*, that there

11 Q. B. D. 123.

. Ca. 479.

is no difference in the effect of the two sections. And so it may not be rash to say, having regard to the decision in *Bailey v. Sweeting* and to the dicta just referred to, that the words of the 17th section do not, any more than the words of the 4th, relate to the existence of the contract, but solely to the evidence of its existence which the Courts are bidden to require[1].

9 C. B., N. S. 843.

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§ 4. Consideration.

Consideration has already been touched upon so far as regards the history of the doctrine in English law, and it has been stated that it is the universal requisite of contracts not under seal. What has now to be said must therefore be understood to apply to those contracts the discussion of which has just been concluded, those contracts which, though not under seal, are required by law to be expressed in certain forms.

Definition of consideration

It will be well perhaps to take some general definition of consideration which may serve to explain in outline what it is which we are now proposing to discuss, and then to lay down certain principles upon which the doctrine has been dealt with in English law. The fullest definition of consideration is that given by the Court of Exchequer Chamber in *Currie v. Misa*. 'A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'

L. R. 10. Exch. 162.

Such being the definition of consideration, we may proceed to state—

General rules as to consideration.

1. That consideration is necessary to the validity of every promise not under seal.

[1] The case of *Coombs v. Bristol and Exeter Railway Company* cited by Mr. Pollock in support of the assumption in *Leroux v. Brown* does no more than show that an executory contract of sale which does not satisfy the requirements of § 17 is not brought within the section by delivery of the thing sold to a common carrier.

3 H. & N. 510.

2. That Courts of law *will not* inquire whether the consideration is adequate to the promise, but *will* insist that it should be something of some value in the eye of the law.

3. That consideration must be legal.

4. That consideration may be present or future, executed or executory, but must not be past.

Consideration necessary to every simple contract.

1. *Consideration is necessary to the validity of every simple contract.*

3 Burr. 1663. Doubt as to the doctrine.

The peculiar case of *Pillans v. Van Mierop* has already been noticed, and it will be remembered that Lord Mansfield, C. J., and Wilmot, J., there expressed an opinion that, among merchants, a promise put into writing was binding without consideration. That case was decided in 1765; and not many years afterwards, in 1778, a somewhat similar point arose in the case of *Rann v. Hughes*. There the

Settled in Rann v. Hughes.

7 T. R. 350. defendant, as administratrix of the estate of one J. Hughes, promised in writing 'to answer damages out of her own estate.' There was no consideration for the promise, and it was contended that the writing required by 29 Car. II. c. 3. § 4 rendered consideration unnecessary. The view en-

3 Burr. 1663. couraged by Lord Mansfield in *Pillans v. Van Mierop* appears to have been, that the presence of consideration was one mode among others for supplying evidence of the intention of the parties to form a contract; and that, if the terms of the contract were reduced to writing either by reason of commercial custom or of statutory enactment, such evidence was sufficient without consideration. But this view of the law was, once for all, declared to be incorrect by Skynner, C. B., delivering the opinions of the judges in the House of Lords in *Rann v. Hughes*.

7 T. R. 350. '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 whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law. . . . . All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. *If they be merely written and not specialties, they are parol and a consideration must be proved.*'

Bills of exchange and promissory notes are an apparent but not a real exception to the universality of this rule. In contracts of this nature consideration is presumed to exist and need not be proved by the plaintiff. The burden of proof rests on the party disputing the validity of the contract. If, however, he can show that, as between himself and the party suing, no consideration was given for the making or endorsement of the bill or note, the promise fails, as it would do in any other case of simple contract under like circumstances.

Bills of exchange and promissory notes no real exception.

2. *Courts of law will not inquire whether or no the consideration be adequate to the promise, but they will insist that it be something of some value in the eye of the law.*

In other words, consideration need not be adequate, but must be real. So long as a man gets what he has bargained for, Courts of law will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise given in return. This would be 'the law making the bargain, instead of leaving the parties to make it.' Further than this, they will not ask whether the thing which forms the consideration does in fact benefit the promisor, 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.

Adequate, but must be real.

Bainton v. 15 M. & W. 660.

Adequacy of consideration.

The following cases will illustrate this principle.

Firmstone v. Firmstone, 8 A. & E. 743.

A gave permission to *X* to weigh two boilers, the property of *A*, and *X* in consideration of this permission promised *A* to return them in as good condition as he received them. *A* sued *X* for non-fulfilment of this promise; *X* had in fact taken the boilers to pieces in order to weigh them, and had returned them in this condition.

It was argued that the permission to weigh the boilers was neither detriment to the plaintiff nor benefit to the defendant, and so was no consideration which would support *X*'s promise. But Lord Denman, C. J., said 'the defendant had some reason for wishing to weigh the boilers; and he could only do so by obtaining permission from the plaintiff, which permission 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 permission.'

10 A. & E. 109.

A like authority is *Haigh v. Brooks*. The defendant in that case promised payment of certain bills accepted by *M* in consideration that the plaintiff would return to the defendant a guarantee which he had given for the payment of £10,000 by *M* to the plaintiff. The guarantee was returned: it then turned out to be unenforceable under 29 Car II. c. 3. § 4, and the defendant argued that it was therefore no consideration for his promise. Lord Denman, however, in giving judgment for the plaintiff, said, 'Whether or no the guarantee could

5 East, 10.

have been available within the doctrine of *Wain v. Warlters*, 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 motives

to 309.

and objects, and of their weight he was the only judge.'

Adequacy considered in granting equitable remedies.

But adequacy of consideration is taken into account in granting the use of the equitable machinery for the enforcement or setting aside of contracts. It has been held that inadequacy of consideration is a ground upon which specific performance may be resisted. There is some conflict of judicial opinion upon this point, but it is probably safe to adopt the view of Lord Eldon, that mere inadequacy of consideration, unless so gross as 'to shock the conscience and amount in itself to conclusive evidence of fraud,' is not alone a sufficient ground for refusing specific performance. Undoubtedly if a contract is sought to be avoided on the ground of Fraud or Undue Influence, inadequacy of consideration is regarded as corroborative evidence in support of the suit.

Coles v. Trecothick, 9 Ves. 234.

and see Pollock, 589.

Inadequacy of consideration in equity.

Consideration must be real.

Although Courts of Law will not inquire into the adequacy of consideration, they will insist that it should not be illusory or unreal. At first sight this looks like saying that a consideration must be a consideration; but it may not be useless to inquire into some of the various forms which consideration may assume, and to note the grounds upon which certain alleged considerations have been held to be of no real value in the eye of the law.

Consideration is an act, forbearance, or promise.

The consideration for a promise may be an act or a forbearance, or a promise to do or to forbear.

A promise, or executory consideration.

When a promise is given for a promise the contract is said to be made upon an executory consideration; the obligations created by it rest equally upon both parties; each is bound to a future act. The simplest illustration of such a contract is the case of mutual promises to marry, in which the consideration for *A*'s promise to marry *X* is *X*'s promise to marry *A*, while *A*'s promise forms in like manner the consideration for *X*'s.

An act or forbearance, or consideration exe-

When the consideration for a promise is an act or forbearance, the contract is said to be made upon consideration executed. This arises when either the offer or the acceptance is signified by one of the parties doing all that he is

bound to do under the contract so created. The validity of consideration, as regards its relation to the promise in time, may be discussed presently: we are at present concerned with the *nature* of consideration.

Contingent contracts.

Where the consideration for a promise is a promise, the whole contract may be contingent and may never come into effect save at the will of one of the parties. For instance, *A* offers to supply at a certain price such goods as *X* may choose to order. *X* accepts this offer. If *X* calls upon *A* to supply goods on the terms fixed, *A* cannot refuse to do so on the ground that *X* was not bound to order any goods at all. The contract may be put in this form:—In consideration that *X* promises to pay *A* a certain price for his goods if he requires them, *A* promises to supply goods at that price if called upon to do so [1].

G. N. Railway Co. v. Witham, L. R. 9 C. P. 16.

The peculiarity of the case just cited consists in the option given to one of the parties to bring the contract into operation, or to leave it dormant irrespective of the wishes of the other. But the consideration is not altogether illusory. The promisee need not bring the contract into effect at all, but, if he do so, he is bound by its terms as to price.

Conditional promises.

Similar in character are the considerations which consist in conditional promises. *A* promises to do something for reward, but *X* only binds himself to pay for it upon the happening of an event which may not be under the control of either party. Such would be the case in a building contract, where the promise to pay for work to be done is made conditional on the certified approval of an architect. Or again, the promise may be conditional on something not

Excepted risks.

[1] The American law is different from ours upon this point (see Benjamin upon Sales, p. 55). It is noticeable that Brett, J., in his judgment in the case cited in the text leaves it uncertain whether he regards the contract as based upon mutual promises dependent upon a contingency for their coming into effect, or whether he rests it upon an outstanding offer to supply goods which each successive order accepts and so turns into a contract *pro tanto*. Mr. Leake, ed. 2, p. 46, takes the latter view.

happening; such are the promises in a charter party which are not to take effect if certain specified risks occur.

In the one case the promise depends for its fulfilment upon a condition precedent, in the other it is liable to be defeated by a condition subsequent: in neither case does its contingent or conditional character prevent it from forming a good consideration for promises given in return.

But consideration need not necessarily consist of acts or promises which the party furnishing the Consideration was not otherwise liable to do or make: it may consist in a forbearance or promise to forbear from doing what he was otherwise entitled to do.

Forbearance.

Thus the abandonment of a right, or a promise to forbear from exercising it, is good consideration for a promise. The right may be legal or equitable, certain or doubtful; it may exist against the promisor, or against a third party; but it must at least be doubtful; forbearance to enforce an unenforceable claim can be no consideration for a promise.

In *Jones v. Ashburnham* the plaintiff sued on a promise to pay money, the consideration being a promise by him not to sue for a debt due from a third party deceased. It did not appear from the pleadings that there was a representative of the deceased against whom the claim could be made, or assets out of which it could be satisfied. 'How,' said Lord Ellenborough, '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 natura* was liable to him? No right can exist in this vague abstract way.'

4 East, 46

Compromise of suits.

The commonest form in which a forbearance appears as consideration for a promise is in the compromise of an action. *A* the plaintiff promises *X* the defendant that in consideration of certain things to be done by *X* he will forbear to prosecute his suit; and this is good consideration for the act or promise of *X*. But here, in order to make the for-

bearance a consideration, the plaintiff must believe in his case. In *Wade v. Simeon* it was held that forbearance to proceed in an action knowingly brought without cause is no consideration for a promise.

2 C. B. 548.

Plaintiff must believe in his case.

Therefore the plaintiff must believe that he has a case and must intend *bonâ fide* to maintain it by action. If he does so, the fact that he has in truth no cause of action, and that the defendant knows that he has none, will not invalidate a compromise, whether made before or after the commencement of litigation. Where a man was threatened with legal proceedings because the plaintiff believed that he was liable, and he, though he knew that he was not liable, gave promissory notes to avoid being sued, he was held to be bound by his promise. The plaintiff had abandoned a claim which he believed to be enforceable and meant to try and enforce: the defendant escaped the inconvenience and anxieties of litigation, and the compromise was deemed to be a sufficient consideration for the notes. In a later case the law upon the subject is thus stated by Cockburn, C. J. 'If a man *bonâ fide* believes he has a fair chance of success he has a reasonable ground for suing, and his forbearance to do so 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. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it: in that case his conduct would be fraudulent.'

Cook v. Wright, 1 B. & S. 559.

Callisher v. Bischoffsheim, L. R. 5 Q. B. 449.

Questions have been raised as to the length of time over which a forbearance to sue must extend in order to constitute a consideration. It has even been held that a promise of forbearance for an unspecified time was no consideration. But it may now be regarded as settled that a promise of forbearance, in order to form a consideration, need not be a promise of absolute forbearance, nor even of forbearance for

Semple v. Pink, 1 Exch. 74.

a definite time; where no time is mentioned, a reasonable time will be implied, and where no express promise is made, an actual 'staying of the hand of the creditor' is consideration for the transfer of documents of title. The most recent authority for this proposition is the case of *Leask v. Scott.*

v. King, 2 H. & N. 517

2 Q. B. D. 376.

The defendants were vendors of a cargo of nuts. *X*, the purchaser of the cargo, was indebted in large sums to the plaintiffs, and, on applying for a further advance, he was told that it could only be made if he would promise to give cover, i.e. security. *X* promised cover, received an advance, and some days after deposited with the plaintiff, among other securities, the bill of lading for the cargo of nuts. *X* became insolvent, and the defendants sought to stop the nuts *in transitu*. The right of stoppage *in transitu* cannot be exercised against the transferee of a bill of lading for consideration. It was urged for the defendants that the consideration in this case was past, being the advance made some days previous to the assignment of the bill of lading: but the Court of Appeal held that there was a present consideration for the assignment. 'An action would lie for not covering. Therefore the assignor for such a consideration as this always gets the benefit of performing his contract and so saving himself from a cause of action. The consideration for the assignment of the bill of lading was in effect a forbearance to sue for an indefinite and unspecified time: the assignment being part performance of a contract on which action might be brought at any time, it stayed the hand of the creditor[1].'

Extent of forbearance needed.

[1] The case cited, though a good illustration of forbearance as a consideration, is by no means free from difficulty. If 'the creditor' was entitled to an immediate performance of the promise to give cover, the debtor, in indorsing to him the bill of lading, did no more than he was legally bound to do. If this be so, there was no consideration for the forbearance, and the whole of the contract, in which the forbearance is the consideration for the assignment of the bill of lading, seems to fall to pieces. It might have seemed a more simple solution of the difficulty to have regarded the performance of the promise to give cover as a part of the consideration for the advance, for although it took place as a matter of fact on a later day, it was substantially part of the same transaction.

Bailment.

Among cases where an act is the consideration for a promise, it is worth while to notice the kind of contract which arises upon the mere placing or leaving of property in the hands of a bailee or depositary. This will create an implied promise to use reasonable care in the safe custody of the property, and will support an express promise to undertake certain services in respect of it. Thus, where *A* allowed two bills of exchange to remain in the hands of *X*, and *X* promised to get the bills discounted and to pay the money to *A*'s account, this promise was held to be made upon good consideration, namely the permission given to the defendant to retain the bills.

Hart v. Miles, 4 C. B., N. S. 371.

To discuss further the forms which consideration may assume would be to enter upon an analysis of the possible subjects of contract. It remains to point out certain semblances of consideration which the Courts have refused to allow to support a promise. They may be said to fall, roughly speaking, under three heads.

Unreal considerations.

(a) Motive. (*a*) Cases in which motive has been confounded with consideration, that is to say, cases where a man has promised to do a thing, not for any benefit to himself, but because he wished it to be done or thought that it ought to be done.

(b) Impossibility and vagueness. (*b*) Cases in which the alleged consideration has been a promise to do a thing obviously impossible in fact or in law; or a promise the performance of which, from its vague and illusory character, it is impossible to secure.

(c) Offering a man what he can demand. (*c*) Cases in which the alleged consideration has been the doing or promising to do what a man was already bound to do, so that the promisor got nothing but what he was already entitled to get before the consideration was offered.

(a) Motive. (*a*) Cases have arisen which make it necessary to distinguish motive from consideration. '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.' The confusion between motive and consideration has taken two forms; the distinction which once existed between *good* and *valuable* consideration; and the view once maintained that a moral obligation was sufficient to support a promise.

Patteson, J., in Thomas v. Thomas, 2 Q. B. 851.

The first of these probably originated in the Chancery, where a covenant to stand seised was held (before the Statute of Uses) to raise a use, if the person in whose favour the covenant was made stood within a certain degree of consanguinity to the covenantor. Such relationship was of itself a consideration for the covenant, and blood or *good* consideration came to be distinguished from *money* or valuable consideration which supported the use arising from Bargain and Sale. At the present day, although a covenant to stand seised would, by virtue of the Statute of Uses, create a legal estate, an estate cognisable by the Common Law Division of the High Court, the consideration of *blood* or *good* consideration is still required to support the covenant.

Good consideration.

2 c. 10.

In the case of covenant to stand seised.

Hayes on Conveyancing, 1. 89 n.

In some early cases it was attempted to extend this principle to the law of contract. The mere existence of natural affection as a motive for a promise was never held to amount to a consideration: 'natural affection is not sufficient to raise an assumpsit without a *quid pro quo*.' But it was at one time laid down that where *A* made a binding promise to *X* to do something for the benefit of *X*'s son or daughter, the nearness of relationship would entitle the person in whose favour the contract was made to sue upon it.

As applied to contract.

Bret v. J. S., and 1 Cro. 755.

Dutton v. Poole, 2 Lev. 210.

This, however, is no longer law. Nearness of relationship to one of two contracting parties, and the fact that the contract was made for the benefit of the plaintiff, give no cause of action if the plaintiff was no party to the contract.

Tweddle v. Atkinson, 1 B. & S. 398, and see Part III. ch. i.

The point is connected rather with the effect of a contract, than with the nature of consideration, but it serves to illustrate the form which the doctrine of *good* consideration took in the Common Law Courts, and to explain the saying quoted

above, that consideration *must move from the plaintiff*. The phrase means no more than this, that when a man sues upon a promise he must show that the consideration for which the promise was made was some benefit conferred or detriment sustained by himself; in other words, that strangers to a contract do not acquire a right to sue upon it because they happen to be interested in its performance.

Moral obligation

Moral obligation, under certain aspects, was once regarded as a consideration for a promise. A man may believe himself to be under a moral obligation either because he has received actual benefits in the past, or from motives of piety, delicacy, or friendship. Now a past consideration is in truth no consideration at all, inasmuch as the promisor does not receive a benefit, nor the promisee incur a detriment, in return for the promise. There are certain cases, however, in which an advantage derived in the past will support a subsequent promise. These shall be dealt with when we come to draw

arising from past benefits,

See p. 88. the distinction between executed and past consideration.

It is sufficient to say here that the validity of such promises will be found to rest upon another basis than that of moral obligation, and that the phrase, which was of common use in the Common Law Courts at the end of the last and beginning of the present century, has had an unhappy and obscuring influence upon this branch of the law of contract. The question was settled once for all in the case of *Eastwood* 11A.&E.438. *v. Kenyon*, and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation which rested on the promisor. 'The doctrine,' said Lord Denman, '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.'

arising from honourable or conscientious scruples.

If the actual receipt of a benefit in the past does not constitute consideration for a subsequent promise, still less will such duties of honour, conscience, or friendship as a man may conceive to be incumbent on him. A man may be said

to be morally bound to support his children in a manner suited to his own condition and expenditure, but the law creates no such obligation, and it is conceived that a promise by a father to his son to pay the son's debts would not be binding. A man is bound in honour to pay money lost in a wager, but inasmuch as the law has declared wagers to be void, a promise to pay such a debt would be unenforceable for want of consideration: and in like manner a pious wish on the part of executors to carry out what they knew to be the intentions of the testator affords no consideration for a promise made by them for such an object.

Mortimore v. Wright, 6 M. & W. 482. R. v. Downes, 1 Q. B. D. 25.

8 & 9 Vict. c. 109. § 18.

Patteson, J., in Thomas v. Thomas, 2 Q. B. 851

It is worth noting that the Indian Contract Act, in dealing with this subject, differs from the rule of English law in two particulars. It upholds promises made in consideration of natural love and affection where the parties are nearly related and the promise written and registered. It also upholds informal promises to make compensation to persons who have already conferred some benefit upon the promisor, or voluntarily done something which the promisor was legally compellable to do. It thus recognises the motives of natural affection (subject to certain forms) and gratitude as forming consideration for a promise.

Indian Contract Act, § 25.

In French law, *cause* the equivalent for consideration, has a yet wider meaning; it includes not merely motives of gratitude, but sentiments of honour and scruples of conscience. It may, however, be regarded as certain that, in English law, motive, whether it take the form of natural affection, gratitude for past services, feelings of honour or of piety, is in no case such consideration as will support a simple contract.

Dalloz, Repertoire, vol. 33. p. 152.

(*b*) Courts of law will also hold a consideration to be unreal if it be impossible upon the face of it or so vague in its terms as to be practically impossible to enforce.

Impossi-

In dealing with impossibility regarded from this point of view, we must guard against being understood to mean any-

Per Brett, J., in Clifford v. thing more than a *primâ facie* legal impossibility, or a thing physically impossible 'according to the state of knowledge of the day.' Practical impossibility unknown to the parties when they entered into their contract may avoid it on the ground of Mistake. Impossibility of performance arising subsequent to the making of the contract may under certain circumstances operate as a Discharge. But we are here concerned with promises to do a thing so obviously impossible that the promise can form no real consideration.

2 Lev. 161. For a legal impossibility we may take the case of *Harvey v. Gibbons*. There the plaintiff was bailiff to *J. S.* and the defendant was debtor to *J. S.* to the amount of £20. The defendant in consideration that the plaintiff would discharge him the £20 due to *J. S.* promised to lay out £40 on a barge of the plaintiff. The Court held that the consideration was 'illegal,' for the servant cannot discharge a debt due to his master. By illegal we must understand legally impossible, for illegality, in the strict sense of the term, there was none.

Of contracts void because the consideration for the promise involves a physical impossibility we can furnish no decided case. We may take an illustration from Gaius:—

Gaius, 3. 97. 'Si quis rem quae in rerum natura non est aut esse non potest velut hippocentaurum stipuletur, inutilis est stipulatio.'

Or from the Indian Contract Act:—

Ind. Cont. Act, § 56. *A* agrees with *X* to discover treasure by magic. The agreement is void.

Vagueness. Again, a consideration may be unreal on the ground of impossibility where it is a promise so vague as to be virtually unenforceable. The case of *White v. Bluett* exemplifies this rule. This was an action brought by executors upon a promissory note made payable to the testator by his son, the defendant in the action. The son pleaded a promise made by his father to discharge him from all liability in respect of the note in consideration of his ceasing to make certain

23 L. J. Exch. 36.
2 C.L.R. 301.

complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children. It was said by the Court that the promise given by the son was no more than a promise 'not to bore his father,' and was too vague to support the father's promise to discharge the son from liability on the note. 'A man might complain that another person used the highway more than he ought to do, and that other might say "do not complain and I will give you £5." It is ridiculous to suppose that such promises could be binding.'

Per Parke, B.

Per Pollock, C. B.

Another form of unreality of consideration has arisen where the alleged consideration is a promise to do, or actually doing what a man is already bound by law to do for the promisor. The promisor gets nothing more than he is already entitled to. Thus where in the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided among them, this promise was held not to be binding. 'The agreement,' said Lord Ellenborough, 'is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port.'

Promise to do what a man is bound to do.

Stilk v. Meyrick, 2 Camp. 317.

Here then the sailors promised no more than their contract already bound them to do. It would have been otherwise if risks had arisen which were not contemplated in the contract. For instance, such a contract as that which the seamen had entered into in the case just cited contains an implied condition that the ship shall be seaworthy. So where a seaman

Hartley v. Ponsonby, 7 E. & B. 872.

had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his contract was held to be binding.

Turner v. Owen, 3 F. & F. 177.

Promise not to do what a man

We have spoken hitherto of cases in which a man has promised to do that which he is already, under contract or otherwise, legally bound to do: it must be borne in mind that a promise not to do what a man legally cannot do is an equally bad consideration for a promise. The case of *Wade v. Simeon*, cited in discussing forbearance as a consideration, is a sufficient illustration of this point.

2 C. B. 548.

ante, p. 74.

Doing that which a man is bound to do.

The actual performance of that which a man is legally bound to do, stands on the same footing as his promise to do that which he is legally compellable to do. The rule seems an obvious result of the doctrine of consideration, but some applications of it have met with severe criticism.

The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt[1]. It is in fact doing no more than a man is already bound to do, and it is no consideration for a promise, express or implied, to forego the residue of the debt. There must be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in making the consideration good, for if the Courts were to say that the thing done in return for a promise was not sufficiently unlike that to which the promisor was already bound, they would in fact be determining the adequacy of the consideration. Thus, the giving a negotiable instrument for a money debt, or 'the gift of a horse, a hawk or a robe, in satisfaction, is good. For it shall be intended that a horse, a hawk or a

That which is done must be different:

1 Sm. L. C. 341.

[1] It is strange that this rule should still be spoken of as the rule in *Cumber v. Wane*. In that case it was held that a promissory note for £5 was no satisfaction for a debt of £15, not because there was *no* consideration (for a negotiable instrument was given for a debt) but because the satisfaction was inadequate. Such a decision would hardly be supported now (see editor's note to the case at p. 350).

robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.'

Pinnel's case, 5 Co Rep. 117.

It would seem plain that if a man wishes to make a binding promise, otherwise than under seal, to forego legal rights, such a promise must needs depend for its validity upon the rules common to all promises. But it is well to look at a promise of this sort when it is made before, or again when it is made after, the contract is broken: for different rules are applicable to the two cases.

Else where is the consideration

If a contract is wholly executory, if the liabilities of both parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.

Contract executory.

A contract in which *A*, one of the parties, has done his part, and *X*, the other, remains liable, cannot (except in the case of bills of exchange or promissory notes) be discharged by mere consent, but it may be discharged by the substitution of a new agreement. *A* has supplied *X* with goods according to a contract. *X* owes *A* the price of the goods. If *A* waives his claim for the money, where is the consideration for his promise to waive it? If *A* and *X* substitute a new agreement, to the effect that *X* on paying half the price shall be exonerated from paying the remainder, where is the consideration for *A*'s promise to forego the payment of half the sum due to him? The new agreement needs consideration: there must be some benefit to *A* or detriment to *X* in return for *A*'s promise. Detriment to *X* there can be none in paying half of a sum the whole of which he may at any time be compelled to pay; and benefit to *A* there can be none in receiving a portion of a sum the payment of which he can at any time compel. Unless *A* receives something different in kind, a chattel, or a negotiable instrument, or a fixed for an uncertain sum, his promise is gratuitous and must be made under seal.

Contract executed.

Foster v. Dawber, 6 Ex. 839. See Part V. ch. i

Goddard v. O'Brien, 9 Q. B. D. 37.

Contract broken.

We now come to cases where the contract is broken and a promise made to forego the right arising from the breach.

Right in dispute:

Where the right itself is in dispute the suit may be compromised as described on page 74.

right admitted

Where the right is undisputed, the amount due may be uncertain or certain.

damages uncertain: Wilkinson v. Byers, 1 A. & E. 106.

If it is uncertain, the payment of a liquidated or certain sum would be consideration for foregoing a claim for a larger though uncertain amount.

right admitted and damages certain.

If it is certain, the promise to forego the claim or any portion can only be supported by the giving of something different in kind, or by a payment at an earlier date.

And whether the sum due is of certain or uncertain amount the consideration for the promise to forego must be *executed*. It is not enough that the parties are agreed, their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out it is an *accord and satisfaction*, where it has not been carried out it is an *accord executory*. As is said in an old case, '*accord executed* is satisfaction: *accord executory* is only substituting one cause of action for another which might go on to any extent.' It is strange that while the somewhat arbitrary rule that an accord, to be a good defence, must be executed, has passed without criticism, judges and text-book writers have commented with marked severity on the rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt.

Lynn v Bruce, 2 H. Bl. 319.

Watkin Williams, J., in Bear v. Foakes, 11 Q. B. D. 223.

on at p. 224.

There seems no difference between a promise by *A* to *X* to give him £45 on demand, and a promise by *A* to *X* to excuse him £45 out of £50 then due. If consideration is needed in the one case, it is needed in the other, and there can be no reason why the law should favour a man who is excused money which he ought to pay, more than a man who is promised money which he has not earned.

Apparent exceptions.

There are some apparent exceptions to this rule which it

may be well to discuss, if for no other reason, on the ground that they illustrate the rule itself.

Composi

A composition with creditors appears at first sight to be an infraction of the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. But the promise to pay, or the payment of a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case of *Fitch v. Sutton*. There the defendant, a debtor, compounded with his creditors and paid them 7*s.* in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him 'from the beginning of the world to that day.' The plaintiff subsequently brought an action for the residue of his claim; the defendant pleaded the acceptance of 7*s.* in the pound in full of all demands: but this was held to be no answer to the plaintiff's claim. 'It is impossible,' said Lord Ellenborough, 'to contend that acceptance of £17 10*s.* is an extinguishment of a debt of £50. There must be some consideration for a 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*.'

Consi tf composition is an agreement between different parties. 2B & Ad 328.

The consideration in a composition with creditors must therefore be something other than the mere acceptance of a smaller sum in satisfaction of a larger: it is the substitution of a new agreement with new parties and a new consideration.

The Common Law on this point (apart from the various Bankruptcy Acts) was settled in the case of *Good v. Cheesman*. There the defendant, a debtor who had compounded with his creditors, set up as against an individual creditor suing for the whole of his debt, not a separate promise by that creditor to forego the residue, but a composition made with all the creditors. The composition was held to be a good defence to the action, and the consideration which

supported each creditor's promise to accept a lesser sum in satisfaction of a greater was thus stated by Parke, J.:—'Here each creditor entered into a new agreement with the defendant (the debtor), the consideration of which, to the creditor, was a forbearance by all the other creditors, who were parties, to insist upon their claims.' It is not the payment of a portion of the debt, which forms the consideration in the case of a composition with creditors, but the substitution of a new agreement with different parties for a previous debt.

Good v. Cheesman, 2 B. & Ad. 335.

1 H. & N. 938. Slater v. Jones, L. R. 8 Ex. 193.

The composition with creditors is therefore no exception to the general rule, inasmuch as the debtor not only pays the creditor a portion of the sum due, but procures a promise by each of his other creditors, or by a certain number of them, that each will be content with a similar proportionate payment if the others will forbear to ask for more. And creditor *X* not merely gets payment of 10*s.* in the pound from his debtor *A*, but gets a promise from creditors *Y* and *Z* that they too will be content with a payment of 10*s.* in the pound.

Promise to perform existing contract.

It is a far more difficult task to reconcile with the general rule those cases in which it has been held that a contract is binding which is made in consideration of a performance or promise of performance by one of the parties, of a contract already subsisting between himself and a third party. The circumstances under which such a case may arise may be stated thus:—'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.'

Per Wilde, B., in Scotson v. Pegg, 6 H. & N. 295.

The matter is not very easy to understand upon principle; it has been said that the promise is based on the creation 'of a new and distinct right' for the promisor, in the performance of the contract between his promisee and the third party. But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad.

Pollock, 195.

In *Shadwell v. Shadwell* the question arose thus:—The plaintiff had been under promise of marriage to *X*: his uncle promised in writing that if he would perform his engagement he should receive during his (the uncle's) lifetime £150 a year. The plaintiff married *X*; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The Court differed as to the existence of the consideration for the uncle's promise. Erle, C. J., and Keating, J., thought that the marriage would support the promise, which was in fact an offer capable of becoming a binding contract when the marriage took place. Byles, J., held that the plaintiff had only done what he was legally bound to do, in performing his promise to marry; that this was no consideration for the uncle's promise; and he dissented from the majority of the Court. 9 C. B., N. S. 159.

Whether the promise is conditional on the performance of the contract, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration for it is the detriment to the promisee in exposing himself to two suits instead of one for the breach of his contract, we beg the question, for we assume that an action would lie on such a promise. If we say that the consideration is the fulfilment of the promisor's desire to see the contract carried out, we run the risk of confounding motive and consideration. The judgment of Wilde, B., in *Scotson v. Pegg*, seems to leave no doubt that in the opinion of the learned Baron a promise is binding which is made on such a consideration; the difficulty is to reconcile these decisions with the general principle laid down above and constantly affirmed by the Courts. H. & N. 705

Possible explanation of Shadwell

The case may however be put in this way: that an executory contract may always be discharged by agreement between the parties; that *A* and *M*, parties to such an agreement, may thus put an end to it at any time by mutual consent: that if *X* says to *A*, 'do not exercise this power; insist on the performance by *M* of his agreement with you,

and I will give you so and so,' the carrying out by *A* of his agreement, or his promise to do so, would be a consideration for a promise by *X*. *A* in fact agrees to abandon a right which he might have exercised in concurrence with *M*, and this, as we have seen, has always been held to be consideration for a promise.

p. 74.

3. *Consideration must be legal.*

Legality of consideration.

It is well to state this rule, as indicating a necessary element in consideration, but inasmuch as the consideration for a promise is the object for which one of the parties makes the contract, the legality of consideration must form a part of a subsequent discussion; it will be treated when we come to consider, as an element in the Formation of Contract, the legality of the objects for which the parties to a contract enter into it.

4. *Consideration may be executory or executed, it must not be past.*

ration

executory,

executed,

We now come to deal with the relation of the consideration to the promise in respect of time. The consideration for a promise may be *executory*, and then it is a promise given for a promise; or it may be *executed*, and then it is an act or forbearance given for a promise, the act or forbearance constituting at once the proposal or acceptance and the consideration for the promise given in respect of it; or it may be *past*, and then it is a mere sentiment of gratitude or honour prompting a return for benefits received; in other words, it is no consideration at all.

and past.

Executory consideration:

ante, p. 71.

As to *executory* considerations, nothing remains to be added to what has been said with regard to the nature of considerations in general. It has been shown that a promise on one side is good consideration for a promise on the other.

Executed consideration.

A contract arises upon executed consideration when one of the two parties has either in the act which amounts to

a proposal or the act which amounts to an acceptance done all that he is bound to do under the contract, leaving an outstanding liability on one side only. The two forms of consideration thus suggested are described by Mr. Leake as 'acceptance of an executed consideration,' and 'consideration executed upon request.' They arise when, as described above, the proposal is an offer of an act for a promise, or an offer of a promise for an act.

Contracts, p. 23.

See, on Offer and Acceptance, ante, p. 12.

In the first case a man offers his labour or goods under such circumstances that he obviously expects to be paid for them, the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them. 'If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value.' So in *Hart v. Mills* the defendant had ordered four dozen of wine and the plaintiff sent eight, the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles. 'The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part. *What is it but a new contract as to the part he keeps?*'

Offer of an act for a

Per Tindal, C. J., in Hoadley v M'Laine, 10 Bing 482.

Hart v Mills, 15 M. & W. 87.

It must, however, be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance which he cannot help will not bind him. For instance, *A* agreed with *X* to command his ship during a voyage; in the course of the voyage he threw up his command but helped to work the vessel home. Afterwards he sued *X*, among other things, for service thus rendered in bringing back the ship. But the Court would not admit a claim for such services: evidence

Taylor v. Laird, 25 L.J. Exch. p. 329.

of 'a recognition or acceptance of services may be sufficient to show an implied contract to pay for them if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The defendant did not know of the services until the return of the vessel, and it was then something past which would not imply—perhaps would not support—a promise to pay for it.' And the difficulty which would arise, should such an enforced acceptance create a promise, is forcibly stated by Pollock, C. B.:—'Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?'

Offer of a promise for an act.

The 'consideration executed upon request,' or the contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services which makes a binding promise to give the reward when the service is rendered. Under these circumstances it is not the offerer, but the acceptor, who has done his part as soon as he becomes a party to the contract. Thus if *A* makes a general offer of reward for information and *X* supplies the information, *A*'s offer is turned into a binding promise by the act of *X*, and *X* at once concludes the contract and does all that he is bound to do under it.

England v. Davidson, 11 A. & E. 856

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail certain liabilities and expenses. In such a case the request for such services implies a promise, which becomes binding when the liabilities or expenses are incurred, to make good his loss to the promisee. Thus where the defendant employed an auctioneer to sell her estate, and the auctioneer was compelled in the course of the proceedings to pay certain duties to the Crown, it was held that the fact of employment implied a promise by the defendant to repay the amount of the duties, and entitled the auctioneer to recover them. 'Whether the request be direct,

Brittain v. Lloyd, 14 M. & W. 762.

as where the party is expressly desired by the defendant to pay; or indirect, as where he is placed by him under a liability to pay, and *does pay*, makes no difference.'

It is probably on this principle, the implication of a promise in a request, that the case of *Lampleigh v. Braithwait* is capable of explanation. If so, we do not need the theory that a subsequent promise to make a return for things done on request relates back to the request and is embodied in it. But of this we shall speak shortly. 1 Sm. L. C 141

Present distinguished from consideration.

Having explained the nature of an executed consideration, it remains to distinguish present from past consideration.

A past consideration is, in effect, no consideration at all; that is to say, it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.

The rule that a past consideration will not support a subsequent promise is only another mode of saying that every promise, whether express or implied, must, in order to be binding, be made in contemplation of a present or future benefit to the promisor.

A purchased a horse from *X*, who afterwards, in consideration of the previous sale, promised that the horse was sound and free from vice. It was in fact a vicious horse. It was held that the sale created no implied warranty or promise that the horse was not vicious; that the promise must therefore be regarded as independent of the sale, and as an express promise based upon a previous transaction. It fell therefore 'within the general rule that a consideration past and executed

will support no other promise than such as would be implied by law.'

Thomas, 3 Q. B. 234.

To the general rule thus laid down certain exceptions are said to exist; and it is proposed to endeavour to ascertain the nature and limits of these exceptions, which are perhaps fewer and less important than is sometimes supposed.

Consideration moved by request.

(*a*) A past consideration will, it is said, support a subsequent promise, if the consideration was given at the request

1 Sm. L. C. 67.

In *Lampleigh v. Braithwait*, which is regarded as the leading case upon this subject, the plaintiff sued the defendant for £120 which the defendant had promised to pay to him in consideration of services rendered at his request. The Court here agreed 'that a mere voluntary courtesy will not have 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, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit.'

Hobart, 105.

The case of *Lampleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which go to show, more or less definitely, that a past consideration if moved by a previous request will support a promise. But from the middle of the seventeenth century until the present time no direct authority for the rule can be discovered, with the exception of the case of *Bradford v. Roulston*, decided in the Irish Court of Exchequer in 1858. The rule is frequently mentioned as existing, but in the few modern cases which have incidentally dealt with it, it appears to be regarded as open to question, or to be susceptible of a different interpretation to that which is placed upon it in text-books.

See cases collected in the note to Hunt v. Bate, Dyer, 272 a.

8 Ir. C. L. 468. Langdell, 450.

Thus in *Kaye v. Dutton*, Tindal, C. J., first lays down the rule that where a consideration executed implies a promise of a particular sort, a subsequent promise based on the same consideration is not binding. By this he means that when

7 M. & Gr. 807.

from the acceptance of consideration executed, the law implies a promise by the acceptor to make a return, the consideration is exhausted upon that promise. There is nothing further to support a subsequent and independent promise.

He then goes on to say, 'The case *may perhaps* be different where there is a consideration from which no promise would be implied by law: that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant at his request under circumstances which would not raise any implied promise. In such cases it appears to have been held *in some instances* that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. . . . But it is not necessary to pronounce any opinion on that point.' Kaye v Dutton, 7 M. & Gr 807

In ta the rule.

The interpretation of the rule which Tindal, C. J., regarded as open to question is further narrowed by Maule, J., in *Elderton v. Emmens.* 'An executed consideration will sustain only such a promise as the law will imply.' And again in *Kennedy v. Brown*, Erle, C. J., puts the case of *Lampleigh v. Braithwait* from a modern point of view. 'It was assumed,' he says, '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 a 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.*' 4 C B. 475

13 C B., N.S 677.

This would seem to be the *ratio decidendi* in *Wilkinson v. Oliveira*, where the plaintiff at the defendant's request gave him a letter for the purposes of a lawsuit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1000. 1 Bing. N. C 490.

Here the plaintiff evidently expected something in return for giving up the letter, and the defendant's request for it amounted in effect to an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed.

Regarded from this point of view the rule which we are discussing amounts to this: where a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum is either to be regarded as a part of the same transaction, or as evidence to assist the jury in determining what would be a reasonable sum.

8 Ir. C. L. 468.

Contr. 450.

In opposition to this view stands the case of *Bradford v. Roulston*, the only case in modern times in which the rule in *Lampleigh v. Braithwait* has come before the Courts for express decision. In that case Bradford, who had a ship to sell, was introduced by Roulston to two persons who were willing to purchase it. At the time of executing the bill of sale of the ship the purchasers were £55 short of the money agreed to be paid. Bradford nevertheless executed the bill of sale at the request of Roulston, and in consideration of this, Roulston upon a subsequent day guaranteed the payment of the balance of £55 still due. There seems to have been some evidence that the guarantee was given at the time of the sale and was subsequently put into writing, but the Court felt it necessary to give an express decision, on the supposition that the consideration was wholly past, to the effect that the execution of the bill of sale to third parties upon the request of the defendant was consideration for a subsequent promise by him to answer for their default. The authorities were elaborately reviewed and the rule in *Lampleigh v. Braithwait* was adhered to in its literal sense.

It is submitted, however, that this decision must be received with some hesitation. The *dictum* of Erle, C. J., in *Kennedy v. Broun* was not adverted to; the case of *Wilkinson v. Oliveira* was regarded as a direct authority for the rule in

its most extended sense, a view which, upon the facts of that case, is certainly open to question; and the great gap in the chain of express decisions on the point does not appear to have impressed the Court.

Practical difficulties

The practical difficulties to which such an interpretation of the rule would give rise are obvious. Is any limit to be assigned to the time which may elapse between the act done upon request and the promise made in consideration of it? This difficulty pressed upon the Court in one of the oldest cases upon this subject, *Halifax v. Barker*, where a promise was held not to be binding which was given upon consideration of a payment made upon request a year before. This suggests that the true solution is to be found in the supposition that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction.

3 Dyer, p. 272 a, note; but see Cro. Eliz. 741.

Another difficulty would arise as to the definition of 'a request.' Let us suppose that a man dangerously ill is informed by his physician that his state is so critical as to justify desperate remedies; the physician advises him to try a remedy which he believes may possibly restore him to health, but, if it does not do so, will probably kill him in a few hours; the remedy is of the physician's own invention, and he asks the patient in view of his desperate condition to allow him to make the experiment. The patient takes it and is cured; the fame of the cure makes the fortune of the physician, and a few years afterwards, finding himself in good circumstances, he promises to his former patient a sum of money in consideration of the acceptance of his remedy at his request. It is hardly possible to suppose that an action would lie upon such a promise. Yet it is a logical deduction from the decision of the Court in *Bradford v. Roulston*, and from the statement therein contained 'that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise.'

And so we are driven to the conclusion that, unless the *request* is virtually an offer of a promise the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as a part of the same transaction, the rule in *Lampleigh v. Braithwait* has no application. And it may not be presumptuous to say that in spite of the cases decided between 1568 and 1635, of the continuous stream of dicta in text-books, and of the decision in *Bradford v. Roulston*, the rule cannot be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.

And see Holmes' Common Law, pp. 295-6.

(*b*) There is equal doubt as to the reality of another so-called exception. We find it laid down that 'where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises,' he will be bound by such a promise.

Voluntarily doing what another was legally bound to do.

Smith, L. C. 1. 148.

It is submitted that the authority for this rule fails altogether so far as it rests on the cases which are habitually cited in support of it. Curiously enough, all turn upon the liability of parish authorities for medical attendance upon paupers who are settled in one parish but resident in another.

Watson v. Turner (1767) was decided on the ground that the moral obligation resting upon overseers of a parish to provide for the poor would support a promise made by them to pay for services previously rendered to a pauper by a medical man.

Buller, Nisi Prius, 147.

But see Selwyn's Nisi Prius, p. 51. n. 11.

In *Atkins v. Banwell* (1802) it was held that the moral obligation resting upon the parish in which a pauper is settled, to reimburse another parish, in which the pauper happened to be taken ill, for expenses incurred in medical attendance, is not sufficient to create a legal liability without an express promise.

2 East, 505.

In *Wing v. Mill* (1817), the pauper was also residing out of his parish of settlement; but that parish acknowledged its liability for his maintenance by making him a weekly allowance. The pauper fell ill and died: during his illness he was attended by the plaintiff, an apothecary, who, after the pauper's death, was promised payment of his bill by the defendant, overseer of the parish of settlement. The Court held the defendant liable. 1 B. & A. 105.

It is not easy to collect from the judgments of Lord Ellenborough, C. J., and Bayley, J., what were the grounds of their decision. Some sentences suggest that they held, on the authority of *Watson v. Turner*, that a moral obligation will support a promise; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi-contractual relation thus arose between the parties; others again suggest that the allowance made to the pauper by the parish of settlement showed a knowledge that the pauper was being maintained at their risk, and amounted to an implied authority for bestowing the necessary medical attendance. This last is the view entertained as to the *ratio decidendi* in *Wing v. Mill* by the Court of Exchequer in the only case remaining for examination. See chapter on Quasi-Contract.

In *Paynter v. Williams* (1833) the facts were similar to those in *Wing v. Mill*, with this very important exception, that there was no subsequent promise to pay the apothecary's bill. The defendant parish, the parish of settlement, was nevertheless held liable to pay for medical attendance supplied by the parish of residence. The payment of an allowance by the parish of settlement was held by Lord Lyndhurst, C. B., to amount 'to a request on the part of the officers that the pauper shall not be removed, and to a promise that they will allow what was requisite.' 1 C. & M. 810.

It would seem then, that in the cases which are said to furnish this supposed rule the promise was either based upon

446. a moral obligation, which, since the decision in *Eastwood v. Kenyon*, would no longer be sufficient to support it, or was merely an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties,—a liability which, on the authority of *Paynter v. Williams*, existed apart from the fact of a subsequent promise.

And this is stated to be the true ground upon which the decision in *Watson v. Turner* may be supported, in the note p. 51. n. 11. to *Selwyn's Nisi Prius* above referred to. 'The defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided: this was the consideration, and the subsequent promise by the defendants to pay for such assistance *was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants*, and consequently sufficient to support a general *indebitatus assumpsit* for work and labour performed by the plaintiff *for* the defendants, *at their request*.'

It may not be safe to say that the rule as habitually laid down is non-existent, but the cases cited in support of it seem to fail, on examination, to bear it out. It seems strange that it should have been so often reiterated upon such scanty and unsatisfactory authority.

It has however been adopted in the Indian Contract Act, § 25. subs. 2. which also, in its definition of consideration, includes the § 2. subs. (d). 'consideration executed upon request' of *Lampleigh v. Braithwait*. It is perhaps unfortunate that the framers of that Act should have so readily abandoned so satisfactory a test of the validity of simple contracts as the English doctrine of Consideration has proved itself to be.

Real exception to general rule.

(*c*) A more substantial exception to the general rule is to be found in the cases in which a person has been held capable of reviving an agreement by which he has benefited, but which by rules of law since repealed, incapacity to contract

no longer existing, or mere lapse of time, is not enforceable against him. The principle upon which these cases rest is, 'that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.' Parke, B., in Earle v. Oliver, 2 Exch. 71.

The following illustrations of the principle are to be found in the Reports.

A promise by a person of full age to satisfy debts contracted during infancy was binding upon him before 37 and 38 Vict. c. 62. Illustrative cases. Williams v. Moor, 11 M. & W. 263.

A promise made by a bankrupt, discharged from debts by a certificate of bankruptcy, to satisfy the whole or part of debts due to a creditor was binding before 12 and 13 Vict. c. 102. § 204[1]. Trueman v. Fenton, Cowp. 544.

A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it.

In *Lee v. Muggeridge* a married woman gave a bond for money advanced at her request to her son by a former husband. Afterwards, when a widow, she promised that her executors should pay the principal and interest secured by the bond, and it was held that this promise was binding. 5 Taunt. 36.

In *Flight v. Reed* bills of exchange were given by the defendant to the plaintiff to secure the repayment of money lent at usurious interest while the usury laws were in force. The bills were therefore void as between the plaintiff and defendant. After the repeal of the usury laws by 17 and 18 Vict. c. 90 the defendant renewed the bills, the consideration for renewal being the past loan, and it was held that he was liable upon them. 1 H. & C. 703.

[1] By 6 Geo. IV. c. 16. § 131 this promise had to be in writing. At the present day such a promise is only binding if there be new consideration. For the history and present state of the law on this point see *Jakeman v. Cook*, 4 Ex. D. 25.

Common elements in cases.

There are certain features common to all these cases. Each in its origin presents the essential elements of agreement, and in each of them one of the parties has got all that he bargained for. The other party cannot obtain what he was promised, either because he made an agreement with one who was incapable of contracting, or because a technical rule of law forbids the agreement to be enforced. If the party who has received the benefit which he expected from the agreement afterwards acquires capacity to contract, or if the rule of law is repealed, as in the case of the Usury Acts, or, as in the case of the Statute of Limitations, admits of a waiver by the person whom it protects, then a new promise based upon the consideration already received is binding.

They do not rest upon moral obligation.

The rule thus regarded seems a plain and reasonable exception to the general doctrine that a past consideration will not support a promise. Unfortunately, while the rule was in the course of establishment it rested for a time upon the support of the *moral obligation* which was supposed to bind the person benefited and to give efficacy to his promise.

It would have seemed enough to have said that when two persons have made an agreement, and one has got all the benefit which he expected from it, and is protected by technical rules of law from doing what he had promised to do in return, he will be bound if, when those rules have ceased to operate, he renews his original promise. But when once the law of contract was brought into the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced. The phrase was far larger than the circumstances needed, and the language used in some of the cases cited above was calculated to make the validity of

5 Taunt 36. contracts turn upon a series of ethical problems. In *Lee v. Muggeridge*, Mansfield, C. J., says, 'It has long been established, that where a person is morally and conscientiously bound 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.'

This case affords perhaps the strongest example of the mode in which the phrase was employed. Its effect, after it had undergone some criticism from Lord Tenterden, was finally limited by the decision in *Eastwood v. Kenyon*. The doctrine of the sufficiency of moral obligation to support a promise was there definitely called in question. The plaintiff, as guardian and agent of the defendant's wife, had, while she was a minor, laid out money upon the improvement of her property: he did this voluntarily, and in order to do so was compelled to borrow money, for which he gave a promissory note. When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise he was sued. The moral duty to fulfil such a promise was insisted on by the plaintiff's counsel, but was held by the Court to be insufficient where the consideration was wholly past. 'Indeed,' said Lord Denman in delivering judgment, '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.'

Lattlefield v. Shee, 1 B. Ad. & El. 811

11 A. & E. 446.

CHAPTER III.

Capacity of Parties.

Further subjects of inquiry.

We have hitherto dealt with the Contract itself and those elements in its structure which are essential to give it even a *prima facie* validity. Communication by offer and Acceptance, and Form, or Consideration are necessary to an agreement the effect of which is to be entertained by courts of law; but when we have constructed an apparently binding contract, it is necessary, before we can pronounce finally upon its validity, that we should look to the parties to it, and ask who made it, under what circumstances, and with what object. In other words, we have to inquire whether the parties were capable of contracting, whether their apparent consent was genuine, and whether their objects were such as the law will admit.

Capacity of

And, first, as to the capacity of parties.

There are certain persons whom the law regards as incapable, wholly or in part, of binding themselves by a promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:—

cted.

(1) Political or professional status.

(2) Youth which, until the age of 21 years, is supposed to imply an immaturity of judgment which the law will protect.

(3) Artificiality of construction, such as that of corporations, which being given a personality by law, take it upon such terms as the law imposes.

(4) The permanent or temporary mental aberration of lunacy or drunkenness.

(5) Until the 1st of January 1883 marriage effected a merger of the contractual capacity of the wife in that of her husband, subject to certain exceptions. The Married Woman's Property Act of 1882 is still so recent that it may be well to state briefly the old law and to note the extent to which it is changed.

§ 1. *Political or Professional*

An alien has all power of contracting which a natural-born British subject has, except that he cannot acquire property in a British ship. An alien.

An alien enemy, or British subject adhering to the king's enemies [1], cannot, without license from the Crown, make any fresh contract or enforce any existing contract during the continuance of hostilities; but his rights as to outstanding contracts made before the commencement of war are suspended, not annulled, and can be enforced upon the conclusion of peace. An alien enemy. O'Mealey v. Wilson, 1 Camp. 483.

Foreign States and sovereigns and their representatives, and the officials and household of their representatives, are not subject to the jurisdiction of the Courts of this country unless they submit themselves to it. A contract entered into with such persons cannot therefore be enforced against them unless they so choose, although they are capable of enforcing it. Foreign representatives. Taylor v. Best, 14 C. B. p. 487

A person convicted of treason or felony cannot, during the continuance of his conviction, make a valid contract; nor can he enforce contracts made previous to conviction; but Felon undergoing sentence.

[1] It does not seem to be clearly settled that anything short of residence in a hostile country for trading purposes constitutes adherence to the king's enemies. The case of *Roberts v. Hardy*, 3 M. & S. 533, exhibits the reluctance of the Courts to draw conclusions from the mere fact that a man was resident in a hostile country when it was possible for him to have removed.

33 & 34 Vict. c. 23. §§ 8, 9, 10.

these may be enforced by an administrator appointed for the purpose by the Crown.

Barrister.

A barrister cannot sue for fees due to him for services rendered in the ordinary course of his professional duties, whether the action be framed as arising upon an implied contract to pay for services rendered on request, or upon an express contract to pay a certain sum for the conduct of a particular business.

Kennedy v. Broun, 13 C. B., N. S. 677.

Physician.

A physician, until the year 1858, was so far in the position of a barrister that the rendering of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract: but now, by 21 & 22 Vict. c. 90, every physician may sue on such an implied contract, subject to the right of the College of Physicians to regulate this privilege by by-law.

c. 90. § 31.

§ 2. *Infants.*

The rules of law relating to the rights and liabilities of infants upon contracts entered into by them during infancy have been considerably modified by recent legislation. It will therefore be well to state the rules of Common Law upon the subject, and then to consider the modifications in historical order.

General rule of Common Law. Infant's contract voidable.

The general rule of Common Law is, that an infant's contract is voidable at his option, either before or after he has attained his majority. But the rule is thus limited:—

(1) The contract ceases to be voidable if it be ratified upon the attainment of 21 years of age.

(2) The contract cannot be avoided if it be for necessaries.

We will deal with these two exceptions in order.

(1) *Ratification.*

(1) Ratification. Pollock on Contracts, pp 51-56.

Mr. Pollock, in an exhaustive and convincing argument, has shown clearly that the better opinion has ever been that the contract of an infant is not void but voidable at his option. Being so voidable, the infant may (apart from

statutory restrictions) ratify his contract when he attains his majority, and assume the rights and liabilities arising from it. 'The general doctrine is,' said the Court in *Williams v. Moor*, 'that a party may, after he attains the age of 21 years, ratify and so make himself liable on contracts entered into during infancy.' It may be well to remind the reader that such a ratification is, or was, an illustration of the limited class of cases in which a past consideration has been allowed to support a subsequent promise.

11 M. & W. 256.

Ante, p. 90

But it would seem that ratification is of two kinds. And it may perhaps be said that, before the Infant's Relief Act, the ratification required to make the infant liable upon contracts entered into by him during infancy differed, in correspondence with a certain difference in kind in the contracts to which he became a party. Some of these are valid unless rescinded, others invalid until ratified. It would seem that where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract which involves continuous rights and duties, benefits and liabilities, and has taken benefits under the contract, he would be bound unless he expressly disclaimed the contract. On the other hand, a promise to perform some isolated act, or a contract wholly executory, would not be binding upon the infant unless he expressly ratified it upon coming of age.

Ratification of two kinds.

37 & 38 Vict. c. 62.

Contracts valid until rescinded.

Illustrations of contracts which required a special disclaimer to avoid them—which were valid unless rescinded—may be found in the following cases.

An infant lessee who occupies until majority is liable for arrears of rent which accrued during his minority. Shareholders who became possessed of their shares during infancy are liable for calls which accrued while they were infants. 'They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in truth, they are purchasers who have acquired an interest, *not in a mere chattel, but in a subject of a permanent nature*, either by contract with the company,

Interests in re

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or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have *elected to waive or disagree to the purchase altogether*, either during infancy or at full age, at either of which times it is competent for an infant to do so.'

3 Burr 1717.

N. W. R. Co v. Mc Michael, 5 Ex. 114.

in partnership.

Similarly an infant may become a partner, and at Common Law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy. Equity however would not allow an infant, in taking the partnership accounts, to claim to be credited with profits and not debited with losses. But what is important for our present purpose to note is, that unless on the attainment of majority there be an express rescission and disclaimer of the partnership, the partner will be liable for losses accruing after he came of age.

Lindley, 1. 81.

Where an infant held himself out as in partnership with *X*, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied *X* with goods.

Goode v. Harrison, 5 B. & Ald. 159.

'Here,' said Best, J., 'the infant, by holding himself out as a partner, contracted a *continual obligation*, and that obligation remains till he thinks proper to put an end to it. . . . If he wished to be understood as no longer continuing a partner, he *ought to have notified it to the world*.'

And so where shares were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that in the absence of any disclaimer of the shares the holder was liable as a contributory.

Case, 4 Ch. 31.

Although the liabilities incurred by the infant are somewhat different in these different cases, yet there is this feature common to all of them, that nothing short of express disclaimer will entitle a man, on attaining his majority, to be free of obligations such as we have described. It is otherwise in contracts which are not thus continuous in their operation. The infant is not bound unless he expressly ratify them. Such being the rules of Common Law upon the subject, let us consider how they have been affected by legislation.

Contracts invalid until ratified.

Lord Tenterden's Act requires that ratification, upon the attainment of majority, of contracts entered into during infancy should be in the form prescribed by the Act, enacting,

Lord Tenterden's Act on Ratification.

'That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.'

9 Geo IV. c. 14 § 5.

The Infant's Relief Act of 1874 went much further in the attempt to protect infants from the consequences of their attempts to bind themselves by contract. It appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority.

Infant's Relief Act.

'1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of Common Law or Equity enter, except such as now by law are voidable.

37 & 38 Vict. c. 62.

'2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any

promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.'

The effect of this enactment is—

Effect of Infant's Relief Act.

(*a*) To make certain sorts of contract absolutely void if entered into with infants.

To prevent any contract with an infant from becoming actionable as against him, by subsequent ratification.

And the second section must to taken to override the effect of 9 Geo. IV. c. 14. § 5.

Of sect. 1.

It has been pointed out before now that the first section of this somewhat off-hand piece of legislation is not very clear. If a contract for goods supplied or to be supplied is *void*, the consequence would be that no property in the goods would pass, at any rate under the contract.

If an infant pays for goods which have not been delivered, he can probably[1] recover his money back, and so he could have done previous to the Act by avoiding the contract.

But if the infant receives the goods and pays the price, can the tradesman recover the goods, and the infant his money, on the ground that the contract was void? We must take it that delivery of the goods with intention to pass the property would pass it; and that money paid for the goods (although, the contract being void, the payment is necessarily made without consideration) could not be recovered back because paid with full knowledge of facts. Hence it may be said that the transaction would stand, though it must be regarded as a gratuitous delivery of goods on the one side, and a voluntary payment of money on the other.

[1] It is difficult to suppose that no remedy would be available to the infant under such circumstances, but it is hard to see how any remedy is available *ex contractu*. If a contract had ever been in existence the infant could avoid it while still executory, and recover back money which he had paid under it; or he might recover the money as paid on a consideration which had wholly failed. But, since the Act, the contract is void; it never had an existence; and it would seem as though money paid under it was paid voluntarily.

A curious illustration of the effect of the Act is afforded by the case of *Reg. v. Wilson*. An infant who had contracted trading debts was convicted on an indictment charging him with having defrauded his creditors within the meaning of the Debtor's Act, 1869. But the conviction was quashed on the ground that the transactions which resulted in debts were void under the Infant's Relief Act. There were consequently no creditors to defraud. 5 Q. B. D. (C. C. R.) 28. 32 & 33 Vict. c. 62.

The second section requires also to be considered with reference to the class of contracts which have been described as 'valid unless rescinded.' It can hardly be supposed that such an implied ratification as continuance in a partnership, or retention of shares, would be affected by the provisions of the section; but the question must be regarded as open until it receives a judicial interpretation. Of sect. 2.

That the section is strong against ratification, such as makes the infant liable, appears from the decision in *Kibble's* case. There an infant drew a bill of exchange in favour of one of his creditors, and was sued upon it after he had attained his majority. He allowed judgment to go by default, and thus created a debt in the form which we have described as a Contract of Record, as solemn a form of ratification as well could be. The bill had been drawn before the Infant's Relief Act came into operation, the judgment was obtained after. The case came before the Court of Appeal in Bankruptcy, the question being whether the judgment debt so created was one upon which a man could be made a bankrupt. The Court held, 1st, that sitting in Bankruptcy it could look behind the judgment and inquire into the consideration for the debt; and, 2ndly, that the consideration being a contract entered into during infancy, and the judgment being in effect a ratification of the contract, the Infant's Relief Act prevented ratification, although the contract was entered into before the Act was passed. 'The effect of the 2nd section,' said Mellish, L. J., 'was to prevent any action being brought on the bill, although it might have been ratified L. R. 10 Ch. 373. 37 & 38 c. 62.

after the infant came of age. For I am of opinion that that section applies to all contracts made by any infants, provided the ratification is made after the passing of the Act, and that it is to be understood as saying that a debt contracted in infancy shall not in future in any case form a valid consideration upon which an action can be brought.'

The infant may enforce the contract.

It must be borne in mind that the section does not prevent an infant from enforcing a contract (other than those included under sec. 1); the contract is not void but voidable at his option. His ratification does not give any right to the party who has contracted with him, but his power of benefiting by the contract, if he choose, is not taken away. Equity however will not grant specific performance of a contract in which only one side is bound.

Necessaries—what are they.

(2) We must now consider the liability of an infant for necessaries.

And we must first ascertain what are 'necessaries.'

It has always been held that an infant may bind himself by contract for the supply to him not merely of the necessaries of life, but of such things as are suitable to his station in life and to his particular circumstances at the time. The best discussion of the subject of necessaries is to be found in the judgment of Bramwell, B., in *Ryder v. Wombwell*,—a judgment the conclusions of which were adopted by the Exchequer Chamber. The difficulty which has arisen in respect of them consists mainly in determining the provinces of the Court and the Jury in ascertaining them, and the rules applicable to the matter may perhaps be stated thus:—

L. R. 3 Exch. 90.

L. R. 4 Exch. 32.

(a) Evidence being given of the things supplied and the circumstances of the infant, the Court determines whether the things supplied can reasonably be considered necessaries at all; and if it comes to the conclusion that they cannot, the case may not even be submitted to the jury.

Things may obviously be incapable of being necessaries. A wild animal, or a steam roller, could hardly, under any circumstances, be considered to be such.

Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessaries. Elementary text-books might be a necessary to a student of law, but not a rare edition of 'Littleton's Tenures,' or eight or ten copies of 'Stephen's Commentaries.' Things necessary to a person in one station of life would not be necessary to a person in a different station; or, again, things not usually necessary may become so from the circumstances of the infant.

Medical attendance and expensive articles of food may ordinarily be dispensed with, but may become necessary in case of ill-health.

It does not follow therefore that, because a thing is of a useful class, a judge is bound to allow a jury to say whether or no it is a necessary under all the circumstances of the case.

Provinces of judge and jury:

(b) If the judge conclude that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessaries, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessaries as a fact. And the jury determines this point, taking into consideration the character of the things supplied, the extent to which the infant was already supplied with them, and the actual circumstances of the infant. We say 'actual circumstances,' because a false impression which the infant may have conveyed to the tradesman as to his station and circumstances will not affect his liability. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than in fact they are, he does so at his peril.

Brayshaw v Eaton, 7 Scott, at p. 167.

of Court in

(c) The ruling of the Court and the finding of the jury are both alike subject to review by a Divisional Court sitting in banc and by successive Courts of Appeal.

Infant may not be

An infant is liable for wrong, but a breach of contract may not be treated as a wrong so as to make the infant

upon contract framed as a tort, Jennings v. Rundall, 8 T. R. 335.

liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it. Thus where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence. Nor can an infant be made liable for goods sold and delivered by charging him in trover and conversion, a rule which it is not unimportant to bear in mind, inasmuch as the Infant's Relief Act makes a sale of goods to an infant absolutely void, and so would appear to prevent any property from passing to him.

but may for actual tort, though

But when an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable: for 'what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal.'

v. Haggis, 15 C. B., N.S. 45.

§ 3. *Corporations.*

A corporation is an artificial person created by law. Hence the limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express.

1. Necessary limits to its contractual capacity.

The very nature of a corporation imposes some necessary restrictions upon its contractual power, and the terms of its incorporation may impose others.

A corporation is an artificial entity, apart from the persons who compose it; their corporate rights and liabilities are something distinct from their individual rights and liabilities, and they do not of themselves constitute the corporation, but are only its members for the time being. Since then a corporation has this ideal existence apart from its members, it follows that it cannot personally enter into contracts, it must contract by means of an agent. It 'cannot act in its own person, for it has no person.'

Must contract through an agent.

Per Lord Cairns in Ferguson v. Wilson, 2 Ch. 89.

Cannot make negotiable instruments.

And the Common Law rule that a corporation can only contract under seal puts this further limit upon its contractual powers, that it cannot as a rule make negotiable instruments. For by the law merchant an instrument under seal is not negotiable, and therefore, unless the making of bills of exchange and promissory notes be part of the ordinary business of a trading corporation, they cannot be made by these artificial persons.

2. E limitations.

The express limitations upon the capacity of corporate bodies must vary in every case by the terms of their incorporation. Much has been and still may be said as to the effect of these terms in limiting the contractual powers of corporations, but it is not a part of the objects of this book to discuss the doctrine of 'Ultra vires.' The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed in the much litigated case of the *Ashbury Carriage Company v. Riche*, and the question was thus stated and answered by Blackburn, J.:—

L. R 7 H. L. 653

In L. R 9 Exch. 224.

'I take it that the true rule of law is, that a corporation at Common Law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at Common Law has a capacity to contract *to the extent given it by the instrument creating it and no further*, the question would be, Does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, *as incident to it, a general capacity to contract*, the question is, Does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to prohibit, and so avoid the making of a contract of this particular kind?'

The House of Lords appear not to have dissented from the view of the general powers of corporations expressed by Blackburn, J., but they differed from him and overruled his judgment upon the interpretation of the statute under consideration; holding that a company incorporated under the Companies Act of 1862 is so far bound by the terms of its memorandum of association that it may make no contracts which are either inconsistent with, or foreign to, the objects expressed in that memorandum.

Contracts *ultra vires* not void for illegality, but for incapacity.

A contract made *ultra vires* is void; it is sometimes said to be void on the ground of illegality, but Lord Cairns in the case above cited takes exception to this use of the term 'illegality,' pointing out that it is not the object of the contracting parties, but the incapacity of one of them, that avoids the contract.

§ 4. *Lunatic and drunken persons.*

The contract voidable:

The law with regard to contracts made with lunatics and persons in a state of intoxication may be said to be now settled as follows. The contract of a lunatic or drunken person is voidable at his option if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing and that the other party knew of his condition. It seems doubtful, even in the case of executory contracts, whether the transaction can be avoided on the ground of lunacy or drunkenness as against a contracting party who had no reason to suppose that he was dealing with an incapable person. But it seems settled that where a contract has been executed in part, so that the parties cannot be restored to their former positions, proof of the actual insanity of one of the parties at the time of making the contract, unaccompanied by any proof that the other knew of his condition, will not suffice to avoid the contract.

2 Exch. 489; 4 Exch. 17.

Thus in *Molton v. Camroux*, a lunatic purchased annuities of a society, paid the money, and died. His administratrix

sued the society to recover back the money on the ground that the contract was *void*. The jury found that at the time of the purchase the vendee was insane and incompetent to manage his affairs, but that there was nothing to indicate this to the company, and that the transaction was *bonâ fide*. It was held that the money could not be recovered. 'The modern cases show,' said Patteson, J., 'that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored to their original position.'

whether of lunatic;

4 Exch 19.

A lunatic, so found by commission[1], is not therefore absolutely incapable of contracting, but the presumption is very strong in such a case that the contract was not made during a lucid interval, and that the other contracting party was aware of the mental condition of the lunatic.

Per Lord Langdale, M. R., Snook v. Watts, 11 Beav. at p. 107. Hall v. Warren, 9 Ves. 605.

A contract made by a person in a state of intoxication may be subsequently avoided by him, but if confirmed is binding on him. In the case of *Matthews v. Baxter*, a man, while drunk, agreed at an auction to make a purchase of houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and when sued on the contract pleaded that he was drunk at the time he made it. But the Court held that although he had once had an option in the matter and might have avoided the contract, he was now bound by his affirmation of it. 'I think,' said Martin, B., 'that a drunken man, when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it so as to bind himself to a performance of it.'

or drunken person.

L. R. 8 Exch. 132.

The rules of equity are in accordance with those of common

[1] Commissions *de lunatico inquirendo* are no longer issued specially in each case of alleged insanity. A general commission is now, by 16 and 17 Vict. c. 70, issued from time to time, under the Great Seal, to Masters in Lunacy appointed by that Act, who conduct an inquiry in each case in a manner prescribed by the Act.

law in this respect. Under such circumstances as we have described, Courts of Equity will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

§ 5. *Married Women.*

Until the 1st of January 1883, it was true to state that, as a general rule, the contract of a married woman was void.

Yet there were exceptions to this rule: in some cases a married woman could make a valid contract, but could not sue or be sued apart from her husband; in others she could sue but could not be sued alone; in others she could both sue and be sued alone.

(1) A married woman might acquire contractual rights by reason of personal services rendered by her, or of the assignment to her of a *chose in action*. In such cases the husband might 'reduce into possession' rights of this nature accruing to his wife, but unless he did this by some act indicating an intention to deal with them as his, they did not pass, like other personalty of the wife, into the estate of the husband. They survived to the wife if she outlived her husband, or passed to her representatives if she died in his lifetime.

v. Buckingham and wife, Cro Jac. 77. Dalton v Mid Com. R. Co. 13 C B. 478.

(2) The wife of the king of England 'is of capacity to grant and to take, sue and be sued as a *feme sole*, at the common law.'

Co. Litt 133a.

(3) The wife of a man *civiliter mortuus*[1] had similar rights.

(4) The custom of the City of London enabled a married woman to trade, and for that purpose to make valid contracts. She could not bring or defend an action upon these unless her husband was joined with her as a party, but she did not thereby involve him in her trading liabilities.

[1] Civil death arises from outlawry, or from being under conviction for felony, and formerly from being 'professed in religion.'

(5) A group of exceptions to the general rule was created by the Divorce and Matrimonial Causes Act. 20 & 21 Vict. c. 85.

A woman divorced from her husband is restored to the position of a *feme sole*.

Judicial separation, while it lasts, causes the wife 'to be considered as a *feme sole* for the purpose of contract, and wrongs and injuries, and suing and being sued in any judicial proceeding.' § 26.

And a wife deserted by her husband, and having obtained a protection order from a Magistrate or from the Court, is 'in the like position with regard to property and contracts, and suing and being sued, as she would be under this Act if she had obtained a judicial separation.' § 21.

(6) The Married Women's Property Act (1870) specified various forms of property as the separate estate of married women. And by § 11 of the Act, a married woman could maintain an action in her own name 'for the recovery of any wages, earnings, money and property by that Act declared to be her separate property,' and she was given all remedies, civil and criminal, for its protection, which an unmarried woman would have had under the circumstances. A married woman might therefore make a contract for the exercise of her personal labour or skill, and maintain an action upon it alone. 33 & 34 Vict. c. 93.

The Act thus constituted a separate estate and gave power to contract in respect of it, and this separate estate became liable for the engagements entered into with a married woman on the faith of it. But, though the wife could sue alone for her separate property, she could not, with some minor exceptions, *defend alone* any action brought in respect of it, or on engagements entered into with her upon the faith of it. Her husband must be joined as a party to the suit.

(7) The nature of the equitable separate estate of married women, is set forth in the judgment of Turner, L. J., in *Johnson v. Gallagher*. 'Courts of Equity,' he says, 'have through the medium of trusts created for married women rights and interests in property, both real and personal, Equitable separate estate. 3 D. F. & J. 494.

separate from and independent of their husbands. *To the extent of the rights and interests thus created* a married woman has, in Courts of Equity, power to alienate, to contract, to enjoy. She is considered a *feme sole* in respect of property thus settled or secured to her separate use.'

But the limitations on this power should be noticed. The wife could not sue or be sued alone in respect of the separate estate.

She did not acquire 'a sort of equitable status of capacity to contract debts' in respect of any separate estate whensoever acquired. She could only bind such separate estate as was in her possession or control at the time the liabilities accrued. The presumption was extremely strong that every engagement entered into by a married woman was entered into on the faith of her separate estate, but she could not bind herself, nor could she create liabilities in excess of her estate, her creditor's remedy lay not against her but against her property.

v. Fitz-Gibbon, 17 Ch. D. 459.

'When she by entering into an agreement allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered, *not by reaching her, but by reaching her property.*'

Per Lord Hatherley in Picard v. Hine, 5 Ch. 277.

45 & 46 Vict. c. 75.

The Married Women's Property Act 1882 affects:—

(1) Every woman married after 1882.

(2) Every woman married before 1883 as respects property and *choses in action* acquired after 1882.

33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

It repeals the Married Women's Property Act 1870, and the amending Act of 1874; and its effect so far as relates to our present subject may be summarized as follows.

All property, real or personal, possessed by a woman before, or acquired after marriage, is her separate property. She can acquire, hold, and dispose of it by will or otherwise, 'as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.'

§ 1. subs. 1.

But property may still be settled upon her in trust, and she may be restrained from anticipating property so settled.

§ 19.

'In respect of and to the extent of her separate property,' a married woman may enter into contracts, and render herself liable thereupon us though she were *feme sole*. Every contract entered into by her, is to be deemed to be entered into in respect of her separate property, to bind it unless the contrary is shown, and not only the property which she is possessed of, or entitled to at the date of the contract, but all that she may subsequently acquire. And on such contracts she may sue and be sued, without joining her husband as a party to the suit.

§ 1. sub-s 2

§ 1. sub-s 3.

§ 1. sub-s 4.

The liability upon these contracts does not appear to be personal, but to rest upon the separate estate, and to be limited by the extent of such estate. Where a joint judgment is given against husband and wife, it is to be given 'against the husband personally, and against the wife as to her separate property:' and it is only in the case of a wife trading apart from her husband, that she is made subject to the bankruptcy laws in the same way as if she were *feme sole*.

The act therefore appears to be, as it has recently been described in the House of Lords, a large extension of the doctrine of separate estate. It is enough here to point out the general effect of its provisions, which will doubtless be illustrated and explained by abundant litigation in the future.

Per Lord Selborne in Cahill v. Cahill, 8 A at p

CHAPTER IV.

Reality of Consent.

The next feature in the Formation of Contract which has to be considered is Genuineness or Reality of Consent; and the question which, under this head, recurs in various forms is this: Given an apparent Agreement, possessing the element of Form or Consideration, and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention?

And where this question has to be answered in the affirmative there may be various causes for unreality of consent.

Mistake. (i) The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to the subject-matter of the agreement. This is Mistake.

Misrepresentation. (ii) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. This is Misrepresentation.

Fraud. (iii) These untrue conclusions may have been induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. This is Fraud.

Duress. (iv) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence. This is Duress.

(v) Circumstances may render one of the parties morally incapable of resisting the will of the other, so that his consent is no real expression of intention. This is Undue Influence. Undue influence.

And first let us deal with Mistake.

§ 1. Mistake.

We must preface our remarks on Mistake by distinguishing Mistake of intention from Mistake of expression. As regards the latter we may say that there are certain cases where the parties are genuinely agreed though the terms in which their agreement is expressed would hinder or pervert its operation. In such cases they may be permitted to explain or the Courts are willing to correct their error. Mi intention distinct from mistake of ex

But this is part of the interpretation of Contract. We are here concerned with its Formation and have to consider how far Mistake will vitiate an agreement which is, on the face of it, valid.

The cases in which it does so are exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement the law will hold that he has agreed.

The subject has been rendered confusing in two ways. One of these comes from a practice adopted even by the most learned and acute writers of blending the subjects of Mistake and Failure of Consideration. If a man alleges that a contract to which he was a party has not been duly performed, or has altogether failed of performance, the question is, not whether he contracted at all, but whether the terms of the contract justify his contention. A man who knows with whom he is dealing, and the nature of the transaction which he desires to effect, has only himself to blame if the terms of the contract do not bind the other party to carry out the

objects of agreement or to pay damages for non-performance. If it appears that they do not do so, then, though he may have thought otherwise, this is not Mistake. If it were so a contract would become no more than a rough draft of the intentions of the parties, to be explained by the light of subsequent events, and corrected by the Court and jury. The question in such cases is whether, or no, the performance corresponds to the terms of the contract, not whether, or no, the terms of the contract correspond to the intention of the parties [1].

The other source of confusion arises from attempts, inherited from Roman Law, to ascertain the state of mind of the parties and to distinguish error common to both from error which has misled one. We have only to look at the matter from the point of view of the party seeking to be relieved. If *A*'s mind never met *X*'s it is immaterial to what *X*'s mind was directed. The parties have not agreed, though it does not follow that they may not so have expressed themselves as to involve the consequences of agreement.

As a matter of fact community of error is merely an incident of certain forms of Mistake which the Courts will relieve.

Mistake as to the nature of the transaction.

Mistake as to nature of transaction.

This must needs be of rare occurrence, for men are not apt to enter into engagements as to the nature of which they are wholly in the dark. It must also arise almost of necessity from the misrepresentation of a third party. For if a man be capable of understanding the nature of a document, he

What makes it operative,

[1] Mr. Benjamin in his chapter on 'Mistake and Failure of Consideration' indicates that the Mistake therein described does not go to the Formation of Contract. Mr. Pollock, also, pp. 431-2, introduces the subject of Performance into his chapter on Mistake but without such warning, citing such cases as *Gompertz v. Bartlett*, *Conder v. Hall*, and *Kennedy v. Panama and Royal Mail Steam Co.*, which deal solely with the performance of terms agreed upon. I give reasons on page 127 for thinking that such references may mislead.

2 E. and B. 849.
2 C. B., N. S. 22.
L. R. 2 Q. B. 580.

cannot avoid its operation by saying that he did not apply his mind to its contents, or that he did not suppose that it would have any legal effect. He must therefore have been induced to contract by some deceit which ordinary diligence could not penetrate. And this, in order to result in Mistake, must, *ex vi termini*, proceed from some third party, for otherwise the contract would be voidable for misrepresentation or fraud, and would not be void on the ground of Mistake.

Hunter v. Walters, L. R. 7 Ch. 84.

and distinct from fraud.

The two following cases will be found to furnish the best illustrations of Mistake of this nature. In *Thoroughgood's* case the plaintiff executed a deed which he was told was a release of arrears of rent, though in fact it was a release of all claims. He was an illiterate man, the deed was not read to him, and when its effect was misrepresented to him in the manner described, he said, 'if it be no otherwise I am content,' and executed the deed. It was held that the deed was void.

Illustrations.

2 Co. Rep. 9.

In *Foster v. Mackinnon* the acceptor of a bill of exchange induced the defendant to indorse it, telling him that it was a guarantee. The plaintiff was a subsequent *bonâ fide* indorsee of the bill, for value. It was held that the defendant's signature did not bind him. The Court said that it was 'plain on principle and on authority that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature;* in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

L. R. 4 C. P. 704.

But it will be noted that the absence of negligence is strongly dwelt upon by the Court, and that the jury had expressly negatived its existence in the circumstances of this particular case. *Hunter v. Walters* seems to show that if a man executes a deed which he might have read and was capable of understanding, he cannot avoid it on the ground that he did not read it or was misinformed of its contents and intended application, or that he understood that it was a mere form.

L. R. 7 Ch. 81.

Mistake as to the person with whom the contract is made.

Mistake of this kind arises where *A* contracts with *X* believing that he is contracting with *M*. It can only arise where *A* has in contemplation a definite person with whom he desires to contract: it cannot affect general offers which any one may accept, as, for instance, contracts by advertisement, or sales for ready money.

Mistake of party.

Where *A* intends to contract with *M*, *X* cannot make himself a party to the contract by substituting himself for *M*. And the reason for this rule is twofold. *A* looks to the credit and character of *M*. If *X* is put in place of *M*, *A* does not get what he bargains for. And further *X* is never present to *A*'s mind in the formation of the contract. So *A* is no consenting party to a contract made with *X*.

Thus in a case in which *X*, by imitating the signature of *M*, induced *A B* to supply him with goods under the belief that they were supplying *M*, it was held that no contract had ever arisen between *A B* and *X*. 'Of him,' says Lord Cairns, 'they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between *him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.*'

Cundy v. Lindsay, 3 App. Cas. 465.

In the case referred to, the mistake was induced by fraud, but the case of *Boulton v. Jones* shows that innocent mistake may produce the same effects. There the plaintiff succeeded to the business of one Brocklehurst with whom the defendant had been accustomed to deal. The defendant sent an order for goods to Brocklehurst, and the plaintiff supplied the goods without any notification of the change. It was held that he could not recover their price. 'In order to entitle the plaintiff to recover he must show that there was a contract with himself.'

2 H. & N. 564.

Per Channell, B.

And it will be remarked that this was not like a case of an offer made by sending the goods and accepted by the use of them, else the defendant would have been liable for their price: but it was the acceptance by the plaintiff of a proposal addressed to Brocklehurst, so that the defendant had not the option of refusing an offer made by the plaintiff, but was allowed by him to act upon an acceptance which he supposed to have proceeded from Brocklehurst. It may therefore be laid down that where *X*, without any fraudulent intention, substitutes himself for *M* so that *A* contracts with *X* under the belief that he is contracting with *M*, the contract is void. If the Mistake be induced by the fraud of *X*, certain consequences flow from it, other than those in ordinary cases of fraud, and these shall be noticed hereafter.

Mistake as to the subject-matter of the contract.

If a man can show that, without any fault of his own, he has entered into a contract of a nature wholly different to anything that he intended, it is not difficult to see that the element of consent is entirely wanting in such a transaction. If, while intending to contract with *A*, he has been subjected to a substitution of *X* for *A* as the party with whom the contract is made, it is also clear that there has been no community of intention between him and *X*. But if a man

Mistake

knows the nature of the transaction and the party with whom he is entering into legal relations, it is, for the most part, his own fault if the subject-matter of the contract—the thing contracted for and the terms of the bargain—is not what he supposed.

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

Per Blackburn, J., in Smith v. Hughes, L. R. 6 Q. B., at p. 607.

why generally inoperative.

And so if the parties are agreed in clear terms and one of them does not get what he anticipates under the contract, this is, if anything, failure of Performance and not Mistake. It may be that the promisor offered more than he could perform under a mistaken impression as to his powers, his judgment or his rights. If he did so he is liable for his default.

For every one who enters into a contract must be presumed to believe that he can perform it, and that it is his interest to do so, and in like manner that the other party can and will perform it. If this belief is erroneous, the error will not avoid the contract, though non-performance on one side may relieve the other from his liabilities under the contract, and must entail payment of damages.

The question is not what the parties *thought*, but what they *said* and *did*. *A* sells to *X*, and *X* believes that he is buying this bar of gold—this case of champagne—this barrel of oysters. The bar turns out to be brass, the case to contain sherry, the barrel to contain oatmeal. The parties are honestly mistaken as to the subject-matter of the contract, but their mistake has nothing to do with their respective rights. These depend on the answer to the question. Did *A* sell to *X* a bar of metal or a bar of gold? a case of wine or a case of champagne? a barrel of provisions or a barrel of

oysters? A contract for a bar of gold is not performed by the delivery of a bar of brass. A contract for a bar of metal leaves each party to take his chance as to the quality of the thing contracted to be sold, but this again would not be performed by the delivery of a bar of wood painted to look like metal.

The cases cited in illustration of the rule that a man is not bound to accept a thing substantially different from that which he bargained for, have nothing to do with the Formation of Contract; and we must keep these questions of Mistake and Failure of consideration clearly apart. For Mistake prevents —what Failure of consideration implies—the existence of a contract.

Gompertz v. Bartlett, 2 E. & B. 849
Conder v. Hall, 3 C. B., N. S. 22.

It is hard enough, as we shall find hereafter, to determine whether Failure of consideration, that is, failure to perform the terms of a contract, is total or partial, and what are the rights of the parties injured by such a failure. The difficulty becomes intolerable, if, besides inquiring how far the performance falls short of the promise, we analyse the mental process by which an honest promisor came to make to an honest promisee a promise which he did not keep.

Mistake as to the subject-matter of a contract will only avoid it in three cases.

(*a*) The parties may be agreed but the subject-matter of their agreement unknown to them may have ceased to exist.

(*b*) The parties may have agreed in terms but *A* may be thinking of *M* as the subject-matter while *X* is thinking of *m*.

(*c*) One of the parties may knowingly allow the other to contract under a misapprehension as to the extent of his promise.

(*a*) *Mistake as to the existence of the subject-matter of a contract.*

to existence of subject-matter

If *A* agrees with *X* in respect of a thing which, unknown to both parties, is non-existent at the time of entering into

may amount to antecedent impossibility.

the contract, the mistake goes to the root of the matter and avoids the contract. Such mistake is in fact a phase of the subject of impossibility of performance. But, inasmuch as the thing agreed upon has ceased to be possible before the agreement was made, such impossibility prevents a contract from ever having arisen and does not operate, as impossibility arising subsequent to the contract will sometimes operate, as a form of discharge. One of the leading cases on this subject is *Couturier v. Hastie*, arising out of the sale of a cargo of corn which was supposed by the parties to be, at the date of sale, on its voyage from Salonica to England, but which had in fact, prior to the date of sale, become so heated on the voyage that it had to be unloaded and sold. It was held that the contract was void, inasmuch as it 'plainly imports that there was something which was to be sold at the time of the contract and something to be purchased,' whereas the object of the sale had ceased to exist.

5 H. L. C. 673.

7 Exch. 217.

So too in *Strickland v. Turner*, the plaintiff purchased an annuity which at the time of purchase had already failed owing to the death of the annuitant. It was held that he could recover the price which he had paid for the annuity.

Mistake as to existence of a right is not 'ignorance of law.'

In cases where the non-existence of a right is concerned, it may be suggested that mistake of this nature is mistake of law, and that to allow a man to avoid a contract on the ground that he mistook his right is an infringement of the rule *ignorantia juris haud excusat*. But a distinction is drawn by Lord Westbury in *Cooper v. Phibbs*, which was a case of mistaken rights, between two senses in which the word *jus* is used with reference to that rule. 'It is said *ignorantia juris haud excusat;* but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to

L. R. 2 H. L. 170.

their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.'

(*b*) *Mistake as to the identity of the subject-matter of a contract.*

Mistake of identity.

An agreement may be void where *A* agrees with *X* concerning *M*, thinking that *X* is referring to *M*, while *X* agrees with *A* concerning *m* and thinks that *A* refers to *m*.

Under such circumstances there is a mistake in the identity of the thing contracted for; the minds of the parties never really meet, and there is no true consent. Thus where *A* agreed to buy of *X* a cargo of cotton 'to arrive ex Peerless from Bombay,' and there were two ships of that name, and the buyer meant one and the seller the other, it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came 'ex Peerless from Bombay,' did not come in the vessel of that name which was present to his mind when he made the agreement.

Raffles v. Wichelhaus, 2 H. & C. 906

It is clear that if the buyer had meant a ship of a *different* name he would be bound by the terms of his contract; for unless the description of the subject-matter of the contract admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something other than that which he said; and this, as we have seen, he may not do. On the other hand, the case of *Ionides v. the Pacific Insurance Company* shows that a mere misnomer of the subject of the contract will not entitle either party to avoid it if the contract itself contains such a description of its subject-matter as practically identifies it.

distinct from mere confusion or misnomer.

L. R. 6 Q. B. 674

(*c*) *Mistake as to the nature of the promise known to the promising.*

This is the only form in which mistake as to the quality or quantity of the thing promised can affect the validity of

to promised.

Thornton v. Kempster, 5 Taunt. 786.

a contract. We must exclude from our consideration cases in which the offer and acceptance never agreed in terms, and so there was never the outward form of agreement: and cases in which the meaning of the terms is disputed and the Courts must settle whether the contract has, upon its true construction, been performed or broken.

Nor need we consider cases in which a promisee is unable to obtain specific performance of a promise offered in terms which are the result of a manifest inadvertence, and the parties are left to their legal rights and remedies. Where *A* offered to sell an estate to *X*, but by a mistake in adding up the prices of the various plots offered it for £1000 less than he meant, the Court would not enforce the contract. But it does not follow from this that the plaintiff could not have recovered by action such damages as he might have sustained.

Webster v. Cecil, 30 Beav. 62.

The quantity of an article bought, or the price to be paid for it, are points not usually misstated by contracting parties, but their statements must be taken to be conclusive against themselves. The quality of the article is a matter which the parties must look to for themselves: they cannot ask courts of law to correct their errors of judgment.

Responsibilities of buyer as to quality,

That an article should come up to a certain standard of quality must be the subject of express warranty. Where the buyer is unable to inspect the thing purchased, the law protects him by the introduction of implied warranties, which secure to him in substance that he shall obtain the kind of thing he bargained for, and that of a marketable quality; but anything more than this must be a question of terms. If the buyer cannot inspect the article before purchase, he must protect himself by the terms of his bargain; if he can inspect it, he must exercise his judgment; and if he has no confidence in his own judgment, he may further seek to bind the seller by terms. A seller is not bound to depreciate his wares even though he knows that the buyer is forming an undue estimate of their quality.

Jones v. Just, L. R. 3 Q. B. at p. 205.

Nor is the seller affected by such impressions as the buyer may form of the nature of his promise. If the buyer thinks he is being *promised* a quality of article which the seller does not intend to warrant, the contract will nevertheless hold. If the buyer wants to bind the seller to supply an article of a particular quality he should make it a term of the contract. But if the seller knows that the buyer understands his promise in a different sense from that in which he gives it, the case is different. The contract is void because the apparent consent indicated by the agreement of the parties to common terms is shown to be unreal, by the fact that one of the parties knew of the difference of intention between himself and the other. and as to quality *promised*.

Let us illustrate these propositions by an imaginary sale.

A sells *X* a piece of china. Illustrations.

(*a*) *X* thinks it is Dresden china, *A* thinks it is not. Each takes the consequences. *X* may get a better thing than *A* intended to sell, or he may get a worse thing than he intended to buy, and in neither case is the validity of the contract affected.

(*β*) *X* thinks it is Dresden china. *A* knows that *X* thinks so, and knows that it is not.

The contract holds. So long as *A* does nothing to deceive *X*, he is not bound to prevent *X* from deceiving himself as to the *quality* of the article sold.

(*γ*) *X* thinks it is Dresden china and thinks that *A* intends to sell it as Dresden china; and *A* knows it is not Dresden china, but does not know that *X* thinks that he intends to sell it as *Dresden* china. The contract says nothing of *Dresden* china, but is for a sale of china in general terms.

The contract holds. The misapprehension by *X of the extent of A's promise*, unknown to *A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.

(*δ*) *X* thinks it is Dresden china, and thinks that *A* intends to sell it as Dresden china. *A* knows that *X* thinks *he is*

promising Dresden china, but does not mean to promise more than china in general terms.

The contract is void. *X*'s error was not one of judgment, as in (β), but regarded the intention of *A*, and *A*, knowing that his intention was mistaken, allowed the mistake to continue.

The last instance given corresponds to the rule laid down in *Smith v. Hughes*. In that case the defendant was sued for refusing to accept some oats which he had agreed to buy of the plaintiff, on the ground that he had intended and agreed to buy old oats, and that those supplied were new. The jury were told that if the plaintiff knew that the defendant *thought he was buying old oats*, then he could not recover. But the Court of Queen's Bench held that this was not enough to avoid the sale; that in order to do so the plaintiff must have known that the defendant *thought he was being promised old oats*. It was not knowledge of the misapprehension of the *quality* of the oats, but knowledge of the misapprehension of the *quality promised*, which would disentitle the plaintiff to recover.

L. R. 6 Q. B. 597.

Mistake of buyer as to quality not known to seller.

In giving judgment in this case, Blackburn, J., says:— 'In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality.' (This is instance *a*.)

Mistake of buyer as to quality

'And I agree that even if the vendor was aware that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.' (This is instance

And Hannen, J., said, 'It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. . . . . But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in a case of sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor.' *Scott v. Littledale*[1]. (This corresponds to instance γ.)

Mistake of buyer as to quality promised not known to seller.

8 E. & B. 815

And further he says, 'If, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain.' (This corresponds to instance δ.)

Mistake of buyer as to quality promised known to seller.

In the case of *Garrard v. Frankel* the point insisted on in *Smith v. Hughes* arose in equity. The plaintiff and defendant signed a memorandum of agreement by which the plaintiff promised to let certain premises to the defendant *at the rent of* £230, *in all respects on the terms of the within lease*; and this memorandum accompanied a draft of the lease referred to. The plaintiff, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed with this error. The Court was satisfied, upon the evidence, that the defendant was aware of the discrepancy between the rent which she was promising to pay and the rent which the plaintiff believed her to be promising

30 Beav. 445

Application of rule in equity.

[1] This case puts, from the seller's point of view, the principle which we have been illustrating from the point of view of the buyer. The seller means to promise one thing; he in fact promises another; the fact that he thinks he is promising something less than he does promise has no effect on the validity of the sale.

to pay; and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or giving it up, paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed.

The rule which these two cases establish comes in substance to this: that where there is mistake, not as to the subject-matter of the contract, but as to the terms of the contract, and one party '*being at the time cognizant of the fact of the error*, seeks to take advantage of it,' the contract will be treated as void both in law and equity. There is in fact nothing but the absence of any positive representation to distinguish such cases from Fraud.

Per Romilly, M. R., in Garrard v. Frankel, 30 Beav. 451.

Effects of mistake.

The effect of Mistake, where it has any operation at all, is to avoid the contract. The Common Law therefore offers two remedies to a person who has entered into an agreement void on the ground of Mistake. If it be still executory he may repudiate it and successfully defend an action brought upon it; or if he have paid money under the contract, he may recover it back upon the general principle that 'where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back.'

Kelly v. Solari, 9 M. & W. 58

In equity the victim of mistake may resist specific performance of the contract, and may sometimes do so successfully when he might not have been able to defend at law an action for damages arising from its breach. He may also as plaintiff apply to the Chancery Division of the High Court to get the contract declared void and to be freed from his liabilities in respect of it.

Webster v. Cecil, 30 Beav. 62.

2. Misrepresentation.

Misrepresentation not easy to distinguish from fraud:

The subject of misrepresentation is beset with various difficulties. One difficulty arises from the wide use of the term Fraud to cover misrepresentations of fact which vary very widely in their nature and consequences.

or from condition.

Another difficulty arises from the desire of the Courts to exclude mere representations which do not form part of the terms of a contract from all effect upon its validity. If a representation is to affect the formation or discharge of a contract it must either be made with a fraudulent motive, or it must occur in the case of certain special contracts, or it must be a term or integral part of the contract.

And this brings us to the third difficulty. If a representation forms an integral part of the contract it is virtually placed on a level with a promise. If it turns out to be false its untruth does not affect the formation of the contract, but operates either to discharge the injured party from his liabilities or to give him a right of action as upon the failure of a promise.

We have therefore to distinguish representation, whether innocent or fraudulent, which affects the validity of a contract, from representation which affects the performance of a contract. And the terminology of this part of the subject is extraordinarily confused. Representation, condition, warranty, independent agreement, implied warranty, warranty in the nature of a condition, are phrases which it is not easy to follow through the various shades of meaning in which they are used.

It will perhaps clear the ground if we begin with three general statements which attempt to meet the three difficulties suggested.

General rules.

(*a*) The practical test of fraud as opposed to misrepresentation is that the first does, and the second does not, give rise to an action *ex delicto*. The first is a wrong, and may be treated as such, besides being a vitiating element in contract.

The second may invalidate a contract but will not give rise to the action *ex delicto*, the action of deceit.

(*b*) Misrepresentation made prior to the formation of a contract, not constituting a term in the contract, will only affect its validity in certain special cases. These are contracts of marine or fire insurance, contracts for the sale of land, and contracts for the purchase of shares in companies.

(*c*) Where representations made prior to the conclusion of a contract have any effect, they affect the formation of the contract and make it voidable. Where statements which form part of the contract turn out to be false they affect the performance of the contract, and entitle the party misled either to hold himself discharged from it, or to bring an action for a breach of one of its terms. In the one case the contract has never been effectually formed, in the other it has been formed and broken.

Let us now consider these statements more in detail.

How to distinguish misrepresentation from fraud.

(1) In the distinction which has been suggested between fraud and misrepresentation we describe them not by their nature but by their results. The procedure open to the injured party is made the test of the character of the act by which he is injured. But the character of a right is often indicated in the remedy which exists for the breach of it; and the exactitude of the pleadings now disused is sometimes a valuable aid to the ascertainment of the legal relations of the parties.

Fraud is a wrong apart from contract, and damages arising from it may be recovered in the action of deceit. But fraud which gives the action of deceit need not involve dishonest motive where there is a knowledge that the statement made is false; nor if dishonest, or at any rate self-seeking motives are present is it necessary that there be clear knowledge that the statement made is false.

Per Tindal, C. J., Foster v. Charles, 7 Bing. 105.

'It is fraud in law if a party makes representations which he knows to be false and injury ensues, although the motives

from which the representation proceeded may not have been bad.' Thus in *Polhill v. Walter* the defendant accepted a bill of exchange drawn on another person, he represented himself to have authority from that other to accept the bill, and honestly believed that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonoured at maturity, and an indorsee, who had given value for the bill on the strength of the defendant's representation, brought against him an action of deceit. It was held that he was liable, and Lord Tenterden in giving judgment said:—'If the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.'

3 B. & Ad. 114. Fraud without dishonest motive.

It will be observed that in this case there was a representation of facts known to be false; that the knowledge of the untruth of the statement was the ground of the decision: it is therefore clearly distinguishable from a class of cases in which it has been held, after some conflict of judicial opinion, that a false representation believed to be true by the party making it will not give rise to the action of deceit.

See Benjamin on Sales, &c.

It is not necessary, however, to constitute fraud that there should be a clear knowledge that the statement made is false. Statements which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, bring their maker within the remedies appropriate to fraud.

Reckless misstatement.

Thus Lord Cairns lays it down as the settled rule of law that 'if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue.'

Reese River Mining Co. v. Smith, L. R. 4 H. L. 64.

And so neither the intent to defraud nor deliberate assertion

of untruth are necessary elements in fraud. The nearest approach which we can make to a distinction between misrepresentation and fraud is that the former is an innocent misstatement or non-disclosure of facts, while the latter consists in representations known to be false, or made in such reckless ignorance of their truth or falsehood as to entitle the injured party to the action of deceit.

Innocent misstatement does not invalidate contract unless (1) the contract be of a special class;

(2) In dealing with innocent misrepresentation and non-disclosure of fact, we may say generally that, unless they occur in the particular kinds of contract already mentioned, they do not affect the validity of consent. The strong tendency of the courts has been to bring, if possible, every statement which, from its importance, could affect consent, into the terms of the contract. If a representation cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at any rate an integral part of its terms, such a representation is set aside altogether.

Contracts are often of a somewhat complex character, and consist of statements that certain things are, and promises that certain things shall be.

If a representation is not part of a contract, its truth, except in the excepted cases and apart from fraud, is immaterial. If it be part of a contract it receives the name of a Condition or a Warranty, its untruth does not affect the formation of the contract but operates to discharge the injured party from his obligation, or gives him a right of action, *ex contractu*, for loss sustained by the untruth of a statement which is regarded in the light of a promise. We shall get a clearer notion of these various phases of representation from the case of *Behn v. Burness*.

or (2) it amount to a condition.

3 B & S. 751.

The action was brought upon a charter party dated the 19th day of Oct. 1860, in which it was agreed that the plaintiff's ship *then in the port of Amsterdam* should proceed to Newport and there load a cargo of coals which she

should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport the defendant refused to load a cargo and repudiated the contract, upon which action was brought. The question for the Court was whether the words *now in the port of Amsterdam* amounted to a condition the breach of which entitled the defendant to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. Williams, J., in giving judgment in the Exchequer Chamber, thus distinguishes the various parts or terms of a contract :—

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Rep
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'Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract ; and, consequently, the contract is not broken though the representation proves to be untrue ; *nor* (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing) *is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue*. . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether

this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

'In the construction of charter parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation

Hays, 2 M. & G. 257.

she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.

8 C. B., N.S. 45.

'But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.'

Tarrabochia v. Hickie, N.

The Court ultimately held that the statement that the ship was in the port of Amsterdam at the time of making the contract was intended by the parties to be a Condition, and that the breach of it discharged the charterer from the obligation to perform what he had promised.

The judgment in this case has been cited at some length, not only because it is the fullest judicial analysis of the terms

of a contract, but also because it affords a good illustration of the provoking confusion of the terminology of this part of the subject.

It will be observed that Condition is used in two senses, as meaning a statement that a thing is, and a promise that a thing shall be; in either case the statement or promise is of so important a nature that the untruth of the one, or the breach of the other, discharges the contract. senses of condition

Warranty also is used in several senses. It is first made a convertible term with a Condition; it is then used 'in the narrower sense of the word,' in which sense it means (1) a subsidiary promise in the contract, the breach of which could under no circumstances do more than give rise to an action for damages, and (2) a Condition, the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.

Yet in spite of this verbal confusion the judgment gives us a clear idea of the various terms in a contract.

(*a*) *Representations*, made at the time of entering into the contract but not forming a part of it, may affect its validity in certain special cases but are otherwise inoperative. When they do operate, their falsehood vitiates the formation of the contract and makes it voidable. tation

(*β*) *Conditions* are either statements, or promises which form the basis of the contract. Whether or not a term in the contract amounts to a Condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a Condition, then, whether it be a statement or a promise, the untruth, or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract. Condition.

(*γ*) *Warranties*, used in 'the narrower sense,' are independent subsidiary promises, the breach of which does not Warranty *ab initio*.

discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfil his promise.

Warranty *ex post facto.*

(δ) A condition may be broken and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or at any rate to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.

We have dwelt thus at length upon a subject which would seem to be more appropriately discussed under the head of Discharge of Contract, because it appeared necessary to point out the distinction between the Representation which in special cases affects the validity of a contract, and Statements which are introduced into the terms of the contract as Conditions, the untruth of which operates as a discharge. And it will be well before leaving this part of the discussion to illustrate by another case the desire of the Courts to include within the terms of the contract every statement of fact, which, apart from fraud, is in any way to affect it.

10 C.B., N.S. 844.

Representation made anterior to contract: held a condition.

The case of *Bannerman v. White* arose out of a sale of hops by the plaintiff to the defendant. Before commencing to deal for the hops the defendant asked the plaintiff if any sulphur had been used in the treatment of that year's growth of hops. The plaintiff said 'no.' The defendant said that he would not even ask the price if any sulphur had been used. After this the parties discussed the price and the defendant agreed to purchase the growth of that year. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops. The plaintiff sued for their price. It was proved that sulphur had been used by the plaintiff over five acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter

or thought it unimportant. The jury found that the representation made by the plaintiff as to the use of sulphur was not wilfully false, and they further found that 'the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff.' The Court had to consider the effect of this finding, and came to the conclusion that the representation of the plaintiff was a part of the contract and a preliminary condition, the breach of which entitled the defendant to be discharged from liability.

Erle, C. J., said, 'We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable, then, the effect is that the defendants required, and that the plaintiff gave his *undertaking* that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

Bannerman v. White, 10 C. B. N. S. 844.

'The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty super-added; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged.'

It is worth noticing with regard to these words—Firstly, that the Chief Justice notes, though he does not altogether avoid, the confusion of terminology which has been already dwelt upon. Secondly, that the introduction of the representation into the contract as one of its conditions shows more markedly than the judgment in *Behn v. Burness* that statements which go to the validity of a contract are

placed on a level with promises. For in the one case the statement was definitely introduced into the charter party, in the other it was made even before the parties commenced bargaining.

Reason for limiting the effect of representations:

The determination of the Courts to exclude representations from affecting a contract unless they form a part of its terms, is an instance of the practical wisdom which marks the English Law of Contract. The process of coming to an agreement is generally surrounded by a fringe of statement and discussion, and the Courts might find their time occupied in endless questions of fact if it were permitted to a man to repudiate his contract, or bring an action for the breach of it, upon the strength of words used in conversation preceding the agreement. When, therefore, the validity of a contract is called in question, or the liabilities of the parties said to be affected by reason of representations made at the time of entering into the contract, the effect of such representations may be said to depend on the answer that can be given to three questions—1. Were the statements in question a part of the terms of the contract? 2. If not, were they made fraudulently? 3. If neither of these, was the contract, in respect of which they were made, one of those which we will call for convenience contracts *uberrimae fidei*? If all these questions are answered in the negative, the representation goes for nothing.

not adhered to in the Equity Courts.

In the application of equitable remedies the Courts have sometimes been less careful in limiting the effect of representations, and their decisions in this respect are not easy to reduce to any certain principle.

Thus the untruth of a statement made by one of the parties to another has been held to constitute a good defence to a suit for specific performance of a contract, though no fraud was alleged, and though the statement was no term in the contract. A lessee of wine-vaults received in the course of negotiations for a lease an assurance from the lessor that the vaults were dry or should be made dry. The House of Lords

for

held that specific performance might be refused on failure of this representation, though Lord Cairns expressly said that it was 'not a guarantee,' and that its failure would probably not be a cause of action in a Common Law Court.

ance; Lamare v Dixon, L. R. 6 H.

So too it has been held to be ground for setting a contract aside that a representation believed to be true when (2) a contract has turned out to be false; and this not on the ground that the contract was broken by failure of a vital condition, but that an attempt to enforce, or to resist the avoidance of a contract induced by statements which have turned out untrue, was a sort of *ex post facto* Fraud.

In *Traill v. Baring*, a case of this nature, the decision might 4 D. J. & S. 318; 34 L. J. Ch. 521. be explained as resting on the obsolete doctrine of 'legal' or 'technical' as opposed to 'moral' Fraud. But in a very late case, Jessel, M. R., was careful to state the attitude of equity towards representations of this sort, as being such as is above described. Redgrave v Hurd, 20 C. D. 13.

Again, in *Coverdale v. Eastwood* a promise to make a pro- 13 Eq. 121 vision by will in consideration of marriage was the subject of the suit, and Bacon, V.C., while admitting that the transaction amounted to a contract, based his decision on 'this larger principle, that where a man makes a representation to another in consequence of which that other alters his position, or is induced to do any other act which is either permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively.'

Thus, in the cases above cited, a *bonâ fide* representation, not a part of the contract, has been held (1) to be a ground of defence to a suit on the contract: (2) to be a ground for avoiding the contract: (3) to constitute some undefinable relation analogous to contract and of like effect, but based on 'a larger principle.'

It is unfortunate that these decisions which might have been brought into perfect accord with the more exact reasoning of the Common Law Courts should have been expressed

in language calculated to create additional confusion in a subject already difficult.

Pollock, p. 687. For a fuller discussion of these cases the reader should refer to the interesting note of Mr. Pollock on this subject.

Effect of making misrepresentation a mode of discharge. (3) One result of this introduction into the body of a contract of such statements as are allowed to be operative is that their untruth, instead of being a vitiating element in the Formation of contract, becomes a form of Discharge. We have therefore to distinguish between Misrepresentation which makes a contract *voidable* because entered into under such circumstances as preclude true consent, and a failure of a descriptive statement which amounts to a breach of contract, either *discharging* the injured party or giving him a *right of action* for damages sustained.

The difference is not of any great practical importance, though it somewhat interferes with a systematic arrangement of the subject. In the one case the parties have never been completely bound to one another for want of genuineness of consent: in the other case there has been a *vinculum juris* in all respects complete; it has been broken, and one of the parties, if he so please, is discharged, and a new obligation, a right of action, takes the place of the old one.

3 B. & S. 751. In the case of such a Condition as that in *Behn v. Burness*, it would have seemed to accord more truly with the attitude of the parties if the defendant were allowed to say 'you told me that your vessel was at Amsterdam; if I had not thought it was there I would not have contracted with you: my consent was obtained by misrepresentation of material facts and so was unreal. I never really contracted at all.' But instead of this he is made to say, 'in stating that your ship was at Amsterdam you must be supposed to have promised me that if it was not there I should be discharged: it was not there and I am discharged.' As regards the rights of the parties the difference is not very material, but it would have been simpler to attach the natural meaning to the words of men, and better

to have avoided the introduction of implied conditions and warranties which are apt to give an air of unreality and artifice to the subject of the fulfilment and breach of contract.

Contracts affected by Misrepresentation.

Contracts *uberrimae fidei.*

It remains to consider the special contracts which are affected in their formation by misrepresentation or non-disclosure. These are contracts sometimes said to be *uberrimae fidei*, and their characteristic in this respect is that one of the parties must, from the nature of the contract, rely upon statements made by the other, and is placed at a disadvantage as regards his means of acquiring knowledge upon the subject.

(*a*) Contracts of marine and fire insurance.

In the contract of marine insurance the insured is bound to give to the underwriter all such information as would be likely to determine his judgment in accepting the risk; and misrepresentation or concealment of any such matter, though unaccompanied by fraudulent intention, avoids the policy. 'It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.' So in the case here quoted, where goods were insured upon a voyage for an amount considerably in excess of their value, it was held that although the fact of over-valuation would not affect the risks of the voyage, yet, being a fact which underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

Per Blackburn, J., in Lindenau v. Desborough, 8 B. & C. 592.

Fire insurance.

In the contract of fire insurance the description of the premises appears to form a representation on the truth of which the validity of the contract depends. American authorities go further than this, and hold that the innocent non-disclosure of any material facts vitiates the policy. In a case quoted by Blackburn, J., in the judgment above cited, 'the plaintiffs had insured certain property against fire, and

New York Bowery Fire

York Fire Insurance Co., 17 Wend. 359.

the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury, that if this information given to the president of the plaintiff company was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the Court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and whether intentional or not, it vitiated the insurance.'

Distinction in the case of life insurance.

The contract of life insurance differs from those of marine and fire insurance in this respect [1]. Untruth in the representations made to the insurer as to the life insured will not affect the validity of the contract unless they be made fraudulently, or unless their truth be made an express condition

8 E. & B. 232. of the contract. Thus in *Wheelton v. Hardisty*, an insurance office was held liable on a policy entered into on representations falsely and fraudulently made by a third party as to the health and habits of the person whose life was insured, which representations were made to the person insuring the life and innocently supplied by him to the insurance office. The Court of Exchequer Chamber expressly distinguished the case from that of marine policies. 'There is nothing in law,' said Willes, J., 'to make the truth of the statement a

8 E. & B. 299. condition precedent to the liability of the defendants upon the policy, unless it were untrue to the knowledge of the plaintiffs, and therefore fraudulent: the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect.'

11 Ch. D. 363. [1] The language of Jessel, M. R., in *London Assurance Co. v. Mansel* seems at first sight to throw doubt on this distinction, but the facts disclose a statement fraudulent in itself, and made to the office by the party insured, as against whom the policy was set aside.

(β) Contracts for the sale of land.

Sale of land.

In agreements of this nature a misdescription of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract. A single instance will illustrate the operation, and the rationale of the rule. In *Flight v. Booth*, leasehold property was agreed to be purchased by the defendant. The lease contained restrictions against the carrying on of several trades, of which the particulars of sale mentioned only a few; and Tindal, C. J., in holding that the plaintiff could recover back money paid by way of deposit on the purchase of the property, said, 'We think it is a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all: in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.'

1 Bing. N. C. 37.

3 Camp. 274.

Equity, however, will endeavour to adjust the rights of the parties with reference to the materiality of the misdescription, and according to the circumstances of the case will refuse to compel the purchaser to conclude the sale, or will enforce the sale subject to compensation to be made by the vendor; but it will only adopt this last course where the misdescription is no more than a detail of the transaction, and does not affect the substance of the contract.

Pollock on Contracts, pp. 119, 120.

Purchase of projector's statements.

(γ) Contracts for the purchase of shares in Companies.

rules with respect to the candour and fulness of statement required of projectors of an undertaking in which they invite the public to join cannot be better stated than in the judgment of Kindersley, V. C., in the case of the *New Brunswick and Canada Railway Company v. Muggeridge.*

1 Dr. & Sm. at p. 381.

'Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.' These dicta are quoted with approval by Lord Chelmsford in *The Venezuela Railway Company v. Kisch.*

L. R. 2 H. L. at p. 113.

In a later case Lord Cairns points out the distinction between Fraud and such non-fraudulent Misrepresentation as makes a contract of this nature voidable. He intimates that mere non-disclosure can never amount to fraud unless accompanied with such substantial representations as give a false air to facts, but that 'it might be a ground in a proper proceeding and at a proper time for *setting aside an allotment or purchase of shares.*'

L. R. 6 H. L. 403. In Peek v. Gurney.

We should distinguish this right of avoidance for non-disclosure, not only from the remedy in deceit for actual fraud, but from the remedy in tort given by the Companies Act against directors for non-disclosure of contracts made by a company or its promoters, and open to persons who take shares on the faith of a prospectus in which such contracts are not set out or referred to.

30 & 31 Vict. c. 131. § 38.

...an v. Metcalfe, 5 C. P. D. (C. A.) 455.

Contract of suretyship

The contract of suretyship is sometimes treated as being one of this particular class of contracts; but as regards the

formation of the contract it is safe to say that this is not so.

is not *rimae fidei*

It has been explicitly laid down in more than one case that the rules applicable to marine insurance do not apply to the contract entered into between the creditor and the surety of the debtor. Non-disclosure or mis-representation by the former must amount to fraud in order to invalidate the contract, though it would appear from the decision in *Lee v. Jones* that in contracts of this nature very slight evidence is regarded as material upon which a jury may found an inference of fraud.

in its inception, N. British Insura v. L 10 Ex. 523. Hamilton v. Watson, 12 Cl. & F. 109.

17 C. B., N. S. at p. 503.

But once the contract of suretyship has been entered into, the surety is entitled to be informed of any agreement which alters the relations of creditor and debtor, or any circumstance which might give him a right to avoid the contract. So in *Phillips v. Foxall*, the defendant had guaranteed the honesty of a servant in the employ of the plaintiff; the servant was guilty of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty, and the plaintiff came upon the defendant to make good the loss. It was held that as the defendant would have an equitable right to revoke a guarantee of this nature upon the first intelligence of the servant's dishonesty, the concealment from him of what had occurred released him from all liability for the subsequent loss.

but becomes so when once made.

L. R. 7 Q. B. 666.

Burgess v. Eve, 13 Eq. 457.

Even in contracts of the nature just described there is a limit to the effect of statements made with reference to the subject-matter of the contract. A mere expression of opinion will not amount to a representation the falsehood of which invalidates the contract. Thus in a contract of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was

Expressions of opinion do not amount to representation.

safe and good. The vessel was lost there: but the Court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the expressions contained in the letter were not a representation of fact, but an opinion which the insurers could act upon or not as they pleased.

Anderson v. Pacific Insurance Co., L. R. 7 C. P. 65.

Nor do commendatory ex-

In like manner commendatory expressions, such as men habitually use in order to induce others to enter into a bar-

, are not dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser. Thus at a sale by auction a statement that land was 'very fertile and improvable,' whereas in fact it was in part abandoned as useless, was held not to amount to a representation or misdescription such as would invalidate a sale of land, it was said to be 'a mere flourishing description by an auctioneer.'

L. R. 2 Ch. at p. 27.

§ 3. Fraud.

Fraud.

In dealing with the subject of Fraud, we must endeavour to confine ourselves to a few very simple and general rules, lest we should be led into a discussion beyond the scope of this treatise, and perhaps of ethical rather than legal significance. It is idle to attempt to frame a definition of Fraud which should cover every aspect of so multiform a conception; nevertheless we may put together in a set of words what may be considered to be the essential characteristics of Fraud such as will give rise to the action of deceit.

Its essential features.

Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

Let us consider these characteristics in detail.

There must be a representation, false in itself,

Fraud is a false *representation*.

It differs in this respect from *non-disclosure* such as may vitiate a contract *uberrimae fidei;* there must be some active

attempt to deceive either by a statement which is false, or by a representation, true so far as it goes, but accompanied with such a suppression of facts as makes it convey a misleading impression. Concealment of this kind is sometimes called 'active,' 'aggressive,' or 'industrious;' but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. And the distinction between the misrepresentation by non-disclosure, which has no legal consequences except in the case of contracts *uberrimae fidei*, and the misrepresentation which would give rise to an action of deceit, is most clearly pointed out by Lord Cairns in the case of *Peek v. Gurney*. 'Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time *for setting aside an allotment or a purchase of shares*, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as *that the withholding of that which is not stated makes that which is stated absolutely false*.'

or combined with suppression of truth.

L. R. 6 H. L. at p. 403.

Disclosure then is not in the case of ordinary contracts incumbent on the parties. A vendor is under no liability to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist. In the case of *Ward v. Hobbs*, the defendant sent to a public market pigs which were to his knowledge suffering from a contagious disease, and his sending them to the market was a breach of 32 & 33 Vict. c. 78. § 57. The plaintiff bought the pigs, no representation being made as to their condition. The greater number died: other pigs belonging to the plaintiff were also infected, and so were the stubble-fields in which they were turned out to run. It was urged that the exposure of the pigs in the market amounted to a representation, under the circumstances, that they were

Non-disclosure is not fraud;

3 Q. B. D. (C. A.) 150. 4 App. Ca. 14.

Contagious Diseases (Animals) Act.

free of any contagious disease. Cotton, L. J., in his judgment said, 'What is relied upon here as a representation is this: that the defendant, knowing the pigs had an infectious disease, sent them to market. Is that evidence on which a jury could find, properly, that the defendant represented that the pigs had not, to his knowledge, any infectious disease?' And the Court held, overruling the judgment of the Court of Queen's Bench, that it was not.

10 C. B. 591. So too in the case of *Keates v. Lord Cadogan*, where the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house[1] which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition, it was held that no such action would lie.

'It is not pretended,' said Jervis, C. J., 'that there was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, *viz.* make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit.'

The representation must be a representation *of fact*.

nor is ex- of ; It is hardly necessary to repeat what was said on the subject of misrepresentation, that a mere expression of opinion,

[1] The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not on the ground of fraud, but because 'he is offered something substantially different from that which was contracted for.'

Wilson v. Finch-Hatton, 2 D. 336.

which turns out to be unfounded, will not invalidate a contract; but a good illustration of the contrast between opinion and representation may be found in the difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will: the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

Harvey v. Young, 1 Yelv. 20. Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. at p. 243.

Again, an expression of intention does not amount to a statement of fact, nor does a promise; and we must distinguish a representation that a thing is, from a promise that a thing shall be.

nor expression of intention. Burrell's case, 1 Ch. D. 552.

Yet, though the intention expressed in a promise cannot usually be regarded as a statement of facts, we must note that there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future: in the second case he misrepresents his existing intention; he not merely makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. And so it has been laid down that if a man buy goods, not intending to pay for them, he makes a fraudulent misrepresentation.

In ex parte Whittaker, 10 Ch. 446.

Again, it is said that misrepresentation of law does not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement. There is little direct authority upon the subject, but it may be submitted that the distinction drawn in *Cooper v. Phibbs* as to the difference between ignorance of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement, for deceit. It seems clear, from a late strong expression of opinion in the Queen's Bench Division, that a fraudulent representation

L. R. 2 H. L. 170.

v. London, Brighton,

and South Coast Railway Co., 2 Q. B. D. 1.

of the effect of a deed can be relied on as a defence in an action upon the deed.

The representation must be made *with knowledge of its falsehood or in reckless disregard of its truth.*

There must be knowledge of falsehood; Dickson v. Reuter's Telegraph Co., 3 C. P. D. 1.

Unless this is so, a representation which is false gives no right of action to the party injured by it. Thus where a Telegraph Company, by a mistake in the transmission of a message, caused the plaintiff to ship to England large quantities of barley which were not required, and which, owing to a fall in the market, resulted in a heavy loss, it was held that the representation, not being false to the knowledge of the Company, gave no right of action to the plaintiff. 'The general rule of law,' said Bramwell, L. J., 'is clear that no action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it.' And this rule is to be qualified, or rather supplemented, by the words of Lord Cairns in the *Reese River Mining Company v. Smith*, 'that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or not, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.'

or disregard of truth.

L. R. 4 H. L. at p. 79.

Therefore if a man makes a false representation in ignorance of its falsehood he is not liable as for fraud, unless in the case of such recklessness of statement as would suggest *mala fides*.

The enunciation of the law on the subject by Bramwell, L. J., is so clear and decisive that it is not necessary to go into a series of conflicting decisions between the years 1832 and 1844, in some of which it was laid down that a false statement made in good faith amounted to 'fraud in law.' The term seems now to be finally condemned. It had a meaning so long as some judges were disposed to hold, as

Lord Denman held in *Evans v. Collins*, that the author of a misstatement which caused loss to the plaintiff, 'though charged neither with fraud nor with negligence, *must have been guilty of some fault* when he made a false representation.' But since that decision was reversed by the Court of Exchequer Chamber, on the express ground that a statement made honestly and in a full belief of its truth could afford no cause for action, the term *legal fraud* has ceased to mean anything. The last word on the subject is said by Bramwell, L. J., in *Weir v. Bell*; he holds that to make a man liable for fraud, moral fraud must be proved against him, and adds, 'I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud or of anything else except where some duty is shown and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical, and unmeaning, with the consequent uncertainty.'

5 Q. B. 804.

5 Q. B. 820, and see Ormrod v. Huth, 14 M. & W. 650.

3 Ex. D. 243.

It is now settled that a statement made with a *bonâ fide* belief in its truth cannot be treated as fraudulent[1]; but the reckless assertions spoken of by Lord Cairns are on the border line, which it is hard to draw accurately between truth and falsehood. There may well be occasions in the course of business when a man is tempted to assert for his own ends

[1] A statement not known to be false when made, but discovered to be false before the contract induced by it is sought to be enforced, cannot give rise to an action *ex delicto*. Yet in the Chancery Division an attempt to enforce such a contract has been treated as fraudulent, and may be resisted on this ground. 'Assuming,' said Jessel, M. R., in a recent case, 'that fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency, no man ought to seek to take advantage of his own false statements.'

Peculiar use in Equity of the term Fraud.

Redgrave v. Hurd, 20 Ch. D. 13.

But fraud of this sort is practically the breach of a condition; the promisor insisting that though he cannot fulfil his promise the other party is still bound. This fraud *ex post facto* is a somewhat unsatisfactory creation of the Chancery Division of the High Court.

that which he wishes to be true, which he does not know to be false, but which he strongly suspects to have no foundation in fact. Such statements cannot be regarded as *bonâ fide*, and the maker of them must be held responsible if they turn out to be false.

Dishonest motive need not be present.

But there is another aspect of fraud in which the fraudulent intent is absent but the statement made is known to be untrue. Such is the case of *Polhill v. Walter* cited above. And the decision in that case is practically confirmed by the judgment of Lord Cairns in the case of *Peek v. Gurney*. The plaintiff in that case had purchased shares from an original allottee on the faith of a prospectus issued by the directors of a Company, and he brought an action of deceit against the directors. Lord Cairns in his judgment compared the statements in the prospectus with the facts of the condition of the Company at the time they were made, and came to the conclusion that the statements were not justified by the facts of the case. He then proceeded to point out that though these statements were false, yet the directors might well have thought, and probably did think, that the undertaking would be a profitable one. 'But,' he says, 'in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which would properly result from what was done.'

See ante, p. 137.

L. R. 6 H. L. 409.

The reason for such a rule of law is obvious: if a man chooses to assert what he knows or even suspects to be false, hoping or even believing that all will turn out well, he cannot be permitted to urge upon the injured party the excellence of the motives with which he did him a wrong, but must submit to the natural inferences and results which follow upon his conduct.

The representation must be made *with the intention that it should be acted upon by the injured party*.

We may divide this proposition into two parts. Firstly, the representation need not be made to the injured party; but, secondly, it must be made with the intention that he should act upon it.

In *Langridge v. Levy*, the defendant sold a gun to the father of the plaintiff for the use of himself and his sons, representing that the gun had been made by Nock and was 'a good, safe, and secure gun:' the plaintiff used the gun; it exploded, and so injured his hand that amputation became necessary. He sued the defendant for the false representation, and the jury found that the gun was unsafe, was not make by Nock, and found generally for the plaintiff. It was urged, in arrest of judgment, that the defendant could not be liable to the plaintiff for a representation not made to him; but the Court of Exchequer held that, inasmuch as the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale, and as 'there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.'

2 M. & W. 519. The statement need not be made to the injured party,

But the limitation of this liability is marked by Wood, V. C., in *Barry v. Croskey*. 'Every man must be held liable for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, *provided it appear that such false representation was made with the intent that it should acted* upon by such third person in the manner that occasions the injury or loss. But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made.' Therefore in *Peek v. Gurney*, a body of directors who would have been liable to original allottees of shares for false statements contained in the prospectus of the Company, were held not to be liable to persons who subsequently purchased shares

2 J. & H. 1.

but must be made

should act upon it.

L. R 6 H. L. 377.

which came into the market, on the ground that their intention to deceive could not be supposed to extend beyond the first applicants for shares. So soon as these had been allotted 'the prospectus had done its work: it was exhausted.'

R. 6 H. L. p. 410.

The representation *must actually deceive.*

Cotton, L. J., Arkwright v. Newbold, 17 Ch. D. 324.

'In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement: he must also show that he was deceived by the statement and acted upon it to his prejudice.'

1 H. & C. 90.

Deceit which does not deceive is not fraud.

In *Horsfall v. Thomas*, the defendant had bought a cannon of the plaintiff. The cannon had a defect which made it worthless, and the plaintiff had endeavoured to conceal this defect by the insertion of a metal plug into the weak spot in the gun. The defendant never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud having had no operation upon the mind of the defendant did not exonerate him from paying for the gun. 'If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.' This judgment has been severely criticised by high authority, but it is submitted that it is founded in reason. Deceit which does not affect conduct can hardly create liabilities; and it would seem as reasonable to defend an action brought for the price of goods on the ground that the seller was a man of immoral character, as to maintain that a contract was voidable by reason of a deceit practised by one party which in no way affected the judgment of the other.

Per Bramwell, B., 1 H. & C. 99.

See dicta of Cockburn, C. J., in Smith v. Hughes, L. R. 6 Q. B. at p. 605.

Effects of fraud.

We are now in a position to consider what is *the effect of Fraud*, such as we have described it to be, upon rights *ex contractu*.

We must remember that, apart from Contract, the person injured by Fraud, such as we have described, has the action at Common Law for deceit, and may recover by that means such damage as he has sustained; and Courts of Equity will in like manner grant relief from misrepresentation or fraud by compelling the defendant to make good the loss sustained by the plaintiff. These remedies are not confined to cases of Fraud by one of two contracting parties upon the other, but to any fraudulent statement which leads the person to whom it is made to alter his position for the worse.

Gurney, L. R 6 H. L. at p 390.

But we are concerned with rights arising *ex contractu*, and have to consider the particular remedies in respect of affirmation or avoidance of the contract which are open to the injured person when he discovers the fraud; and the rules with regard to these matters may be shortly stated thus:—

(1) He may affirm the contract and sue for such damages as the fraud has occasioned. 'There is no doubt,' said Lord Cairns in *Houldsworth v. City of Glasgow Bank*, 'that according to the law of England a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent representation, may, on finding out the fraud, retain the chattel or the goods, and have his action to recover any damages he has sustained by reason of the fraud.' But the existence of this twofold right must depend on the nature of the contract. A holder of shares which he has been induced to purchase by the fraud of the directors cannot retain his shares and sue the company in which he is a partner.

Right to affirm.

5 App. Ca. at p. 323.

(2) He may avoid the contract, and so may

(*a*) resist an action brought upon it at Common Law; resist specific performance when sought in Equity;

(*γ*) obtain a judicial avoidance of the contract in Equity.

Right to rescind.

(3) His right to avoid the contract is limited in certain ways. It is true that a man may keep the contract open till

Limits of right to

Clough v. London & N.W.R. Co., L. R. 7 Ex. 35.

he is sued upon it, and that a plea of fraud then set up is a sufficient rescission of the contract; but so long as he keeps it open he does so at his own risk. His right to avoid it may be determined either by his accepting some benefit under the contract, or otherwise acting upon it after he has become aware of the fraud; or by the subject-matter of the contract being so dealt with that the parties cannot be reinstated in their former position; or by innocent third parties acquiring an interest for value under the contract.

And lapse of time, although it does not otherwise affect his right to rescind, is evidence to show that he intended to affirm, increasing in strength as the rescission is delayed.

It must be borne in mind that the contract, until the defrauded party has made his election, is voidable, and not void. And where fraud is used to induce the owner of goods to part with the property in them an innocent third party may acquire rights of which no subsequent avoidance of the contract by the defrauded party can divest him. For instance, a sale of goods procured by fraud cannot be rescinded so as to revest the property in the vendor, if in the mean time the goods have been sold to a *bonâ fide* purchaser. The right of avoidance being lost, the person upon whom the fraud has been practised must resort to his action *ex delicto*.

Babcock v. Lawson, 4 Q. B. D. 394.

An exception to this rule occurs when the fraud goes not to the quality of goods, or circumstances of the sale, but to the identity of the person contracted with. The case of *Cundy v. Lindsay*, cited above, shows that where *A* is induced to send goods to *B* under the impression that he is contracting with *X* the transaction is absolutely void, and a *bonâ fide* purchaser from *B* acquires no property in the goods.

See ante, p. 124.

§ 4. Duress.

A contract is voidable at the option of one of the parties if he have entered into it under Duress.

In what it consists.

Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party

himself, or his wife, parent, or child; and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage. 1 Rolle, Abr. 688.

A contract entered into in order to relieve a third person from duress is not voidable on that ground; though a simple contract, the consideration for which was the discharge of a third party by the promisee from an illegal imprisonment, would be void for unreality of consideration. Must affect promisor, Huscombe v. See ante, p. 82.

Nor is a promise voidable for duress which is made in consideration of the release of goods from detention. If the detention is obviously wrongful the promise would be void for want of consideration; if the legality of the detention was doubtful the promise might be supported by a compromise. But money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another. Atlee v. Backhouse, 3 M. & W. 633. and must See post, Quasi-Contract.

§ 5. Undue Influence.

We have described the kind of Fraud which gives rise to the action of deceit, and the effect of Fraud of that description upon the validity of a contract. But it may well be that persons may be induced to enter into contracts not by any specific statement of a fraudulent character, but by reason of circumstances placing it in the power of others to engage them in disadvantageous bargains or promises. Undue influence

Equity has always given a wider interpretation to the term Fraud than that which the Common Law adopted. Looking beyond definite false and fraudulent statements, they have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not in equity to bind him. The taking of such an unfair advantage is sometimes called Fraud; but it is more convenient, for the purpose arises from a course of conduct, or the circumstances or the relations of the parties; not from definite statement.

of distinguishing it from the kind of Fraud with which we have already dealt, to call it the exercise of 'Undue Influence.'

The subject is one which can only be dealt with in the most general way; it depends upon the view taken by the Court of the general tendency of transactions, often extending over some time, and consisting of many details, whether or no relief is granted. It is significant of the nicety of the questions of fact involved in cases of this description, that in a recent judgment of the House of Lords on appeal from the Irish Court of Chancery, Lord Hatherley differed from Lords Blackburn and Gordon as to the propriety of granting relief, and the whole court differed from Lord Justice Christian as to the moral character of the acts complained of.

O'Rorke v. Bolingbroke, 2 App. Ca. 814.

Definition of undue influence.

It is well to try to obtain some sort of definition of Undue Influence before endeavouring to classify the sets of circumstances which have been held to suggest its existence. The best is to be found in the judgment of Lord Selborne in *The Earl of Aylesford v. Morris*. In speaking of the sort of cases 'which, according to the language of Lord Hardwicke, raise *from the circumstances and conditions of the parties contracting a presumption of Fraud*,' he says, 'Fraud does not here mean deceit or circumvention; it means *an unconscientious use of the power arising out of these circumstances and conditions;* and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.'

8 Ch. 490.

Presumption from circumstances:

In attempting to ascertain the principles upon which this presumption is raised, we may note at starting—

Kekewich v. Manning, 1 D. M. G. 188.

(*a*) that equity will not enforce a gratuitous promise even though it be under seal;

that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving 'that the transaction is righteous;' Hoghton v. Hoghton, 15 Beav. 299.

that inadequacy of consideration is regarded as an element in raising the presumption of Undue Influence or Fraud; Wood v. Abrey, 3 423.

but that mere inadequacy of consideration will not (according to the strong tendency of judicial opinion) amount to proof of either. Coles v Trecothick, 9 Ves. 246.

We may therefore frame the question which we have to discuss somewhat in this way:—When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape the effects of a grant which he has made gratuitously or a promise which he has given upon a very inadequate consideration, what must he show in addition to this in order to raise the presumption that Undue Influence has been at work?

or from relations of parties:

One class of circumstances calculated to raise this presumption appears to be that the party benefited stood in some such relation to him as to render him peculiarly subject to influence. Parental or quasi-parental relations subsisting between promisor and promisee will raise this presumption. In *Archer v. Hudson*, a young lady who had just attained her majority became security for her uncle to enable him to overdraw his account at his banker's. She was an orphan, and had resided with her uncle for seven years previous to the transaction. The Master of the Rolls, adverting to the fact that the security was obtained through the influence of a person standing *in loco parentis*, from the object of his protection and care, said, 'This is a transaction which under ordinary circumstances this Court will not allow. . . . . This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and 7 parental;

unfettered judgment, independent altogether of any sort of control.'

And one may extend the term 'parental relations' to all cases in which one member of a family exercises a substantial preponderance in the family councils either from age or from character or from circumstances.

Harvey v. Mount, 8 Beav. 439.

spiritual;

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of *mala fides;* and to this may be added a number of relations which it is somewhat hard to define, but which may generally be termed 'confidential.' Solicitor or advocate and client, guardian and ward, doctor and patient, trustee and *cestui que* trust, are some of these.

r. 273.

Or influence, however actual dealing.

But the Courts have shown themselves unwilling to limit or define the relations which they will regard as raising the presumption of influence, being more inclined to reserve to themselves the power of enquiring whether influence was in fact exercised, than to reject the possibility of such exercise because the parties did not stand in certain special relations. The principle applies to every case where 'influence is acquired and abused, where confidence is reposed and betrayed.'

7 H. L. C 750.

In *Smith v. Kay*, the defendant, who had barely attained his majority, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it certainly could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the Court.

'It is not,' said Lord Kingsdown, 'the relation of solicitor and client, or trustee and *cestui que* trust, which constitutes the sole title to relief in these cases, and which imposes upon those who obtain such securities as these the duty, before they obtain their confirmation, of making a free disclosure of every circumstance which it is important that the indi-

vidual who is called upon for the confirmation, should be apprised of. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Chancery most ordinarily deals are those of trustee and *cestui que* trust, and such like. It applies specially to those cases, for this reason and for this reason only, *that from those relations the Court presumes confidence put and influence exerted.* Whereas in all other cases where those relations do not subsist, the confidence and *the influence must be proved extrinsically;* but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a Court of Equity are just as applicable in the one case as the other.' 7 H. L. C. 779.

Or personal influence may be absent,

The doctrine has been extended to a class of cases from which the element of personal influence is altogether absent. It remains to consider the characteristics of these cases.

as in catching bargains.

They all appear to possess these common features: the promisor encumbers himself with heavy liabilities for the sake of a small, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation, of the promisor.

Attempts to prevent such bargains:

by statute:

by judicial decisions.

In former times the law attempted to guard in two ways against advantage being taken of persons in such a situation. Usury Laws provided that a promise to pay interest beyond a certain rate per cent. should be void, and thus prevented extortionate loans of money. And the Court of Chancery adopted a rule that the purchaser of any reversionary interest might always be called upon to show that he had given full value for his bargain, so that he might not take advantage of a man's present necessities to deprive him of his future estates without reasonable return.

The Usury Laws are repealed, and the 31 and 32 Vict. c. 4 abrogates the rule of law as to reversionary interests in all cases of purchases made *bonâ fide* and without fraud or unfair

Modern rule protects expectant heir,

Lord Aylesford v. Morris, 8 Ch. 484.

dealing. But if a man takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for so much money as he has actually advanced, with the current rate of interest upon it.

person in present distress,

or ignorant and ill-advised.

Per Lord Hatherley in

v. Cook, 10 Ch. 389.

And, on similar grounds, a man who bargains on terms of inequality as to age or knowledge with the promisee is considered to be entitled to the protection of the Court of Chancery. 'In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of "the expectant heir," or of persons under pressure, without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.'

Court will look not merely to the acts of the parties, but to the reasonableness of the transaction under all the circumstances of the case; and if it appear that one has taken advantage of the unprotected condition of the other to drive a hard bargain, the transaction will not be allowed to stand.

Limits of right to

v. Payne, 8 Ch. 881.

The rules respecting the right to rescind contracts entered into under Undue Influence follow, so far as equity is concerned, the rules which apply to Fraud, but with one noticeable qualification. In the case of Fraud, so soon as the Fraud is discovered the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded. But in the case of Undue Influence it is not a particular statement, but a combination of circumstances which constitutes the vitiating element in the contract; and unless it is clear that the will of the injured party is relieved from the dominant influence under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him.

CHAPTER V.

Legality of Object.

THERE is one more element in the formation of contract which remains to be considered—the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects regarded by law as illegal. The second is the effect of the presence of such objects upon the contracts in which they appear.

Two subjects of inquiry: (1) the nature, (2) the effects of illegality.

§ 1. NATURE OF ILLEGALITY IN CONTRACT.

The modes in which the law expresses its disapproval of certain objects of contract may be described as follows:—

What is illegality?

(i) Prohibition by Statute.
(ii) Prohibition by express rules of Common Law.
(iii) Prohibition through the interpretation by the Courts of what is called 'the policy of the law.'

So that illegal agreements may be (1) agreements in breach of Statute, (2) agreements in breach of express rules of Common Law, (3) agreements contrary to public policy.

These two last are not always very easy to distinguish, for frequent decisions upon certain matters of public policy have caused tolerably definite and express rules regarding them to grow up; and these are in effect rules of Common Law as express, or nearly so, as those with which we shall deal under class 2.

(i) *Contracts which are made in breach of Statute.*

Illegality from statutory prohibition.

A statute may render an agreement illegal in one of two ways—by express prohibition, or by penalty. It may say, in so many words, that contracts of a certain sort are illegal, or void, or both; and where it thus expressly avoids a contract or makes it illegal, no doubt can arise as to the intentions of the Legislature.

Illegality from imposition of a penalty, how ascertained.

But where the statute does no more than impose a penalty upon the carrying out of the objects of a contract, a question may arise whether or no the penalty amounts to a prohibition. Two marks may assist us to determine the intention of the Legislature. The first of these is the object of the penalty. If it be 'a protection to the public as well as the revenue,' if it be designed to further objects of public policy in relation to some trade or business, then a penalty amounts, without doubt, to a prohibition. If it be solely to facilitate and secure the collection of the revenue, then it is possible that the contract, though penalised, is not prohibited. The soundness of this distinction has however been called in question, and a more important mark is to be found in the continuity of the penalty.

Brown v. Duncan, 10 B. & C. 93.

Is penalty imposed for revenue ?

v. owlands, 2 . & W. 149.

Where a statute forbids the carrying on of a trade except under certain conditions, on pain of incurring a specified penalty once for all, it has been held that contracts made in breach of such provisions are not vitiated. But where the penalty is recurrent upon every breach of the provisions of the statute, then there can be no doubt that the objects of the contract are intended to be regarded as illegal, and the contract itself void.

Is it continuous ?

Smith v. Mawhood, 14 M. & W. 463.

The law then upon this point may be summarised thus. Where a penalty is inflicted by statute upon the carrying on of a trade or business in a particular manner, we may assume *primâ facie* that contracts made in breach of such statutory provisions are illegal and void. But if it appear that the penalty is imposed, not for the benefit of the public in general, but for the security of the revenue, it is *possible* that the contract was only intended to be penalised and not prohibited. And if, in addition to this, it appear that the penalty is imposed once for all upon the offending trader, and not upon each successive contract continuously, it is highly *probable*, if not certain, that contracts so made are not intended to be vitiated. Result of cases.

It is not necessary or desirable to discuss here in any detail the various statutes by which certain contracts are prohibited or penalised. They relate (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business. An excellent summary of statutes of this nature is to be found in the work of Mr. Pollock, and it is not proposed to deal further with them here. Objects of statutory prohibition. *Pollock*, p. 677.

There is however one class of contracts which, from its peculiar character and from the various forms in which it has been dealt with by the Legislature, it is worth while to examine more particularly. These contracts are Wagering Contracts. The subject has been somewhat confused by the use of the word wager as a term of reproach, so that some contracts not permitted by law have been called wagers, as opposed to others which, while precisely similar in their nature, will be enforced by Courts of Law if they comply with certain conditions. Wagering contracts.

A wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either a present What is a wager?

payment or transfer by the other party, or a promise to pay or transfer upon the event determining in a particular way.

The event may be uncertain because it has not happened, or it may be uncertain because it is not ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which has already happened, though the parties do not know in whose favour it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be rather the accuracy of each man's judgment than the determination of a particular event[1].

Marine insurance is a wager,

It is obvious that a wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects. A man who bets against his horse winning the Derby is precisely in the same position as a man who bets against the safety of his own cargo. Yet we should not hesitate to call the one a wager, while the other is called a contract of marine insurance. *A* has a horse likely to win

[1] It would seem that to constitute a wager the transaction between the parties must wholly depend on the risk in contemplation, and that neither must look to anything but the payment of money on the determination of an uncertainty.

Otherwise a guarantee would be a wager, since it is a promise by *A* to answer to *X* for the possible and uncertain default of *M*. But here the promise of *A* is supported by the consideration that *X* supplies *M* with goods, services or money. If the sum guaranteed by *A* to *X* were largely in excess of the consideration furnished, the transaction would be *pro tanto* a wager upon the solvency of *M*. The definition of a wagering contract cited by Professor Holland, in the French code, seems faulty in this respect. It is said to be 'one the effects of which, as to both profit and loss whether for all the parties or for one or several of them, depend on an uncertain event.' This would include any agreement in which the profit and loss of one party depended on a contingency. If, for instance, *A* undertook to paint a portrait of *X*, to be paid a certain price if *M* approved the likeness, otherwise nothing, such a transaction would be a wager by the French Code. But what the parties contemplate is that *A* should give skill, labour, and material, and should be paid only if *M* certify to the value of his work.

Jurisprudence, 225. Art. 1964.

Such a transaction is wholly different to an agreement to pay money dependent on the safety of *A*'s ship, the length of *M*'s life, the immunity of *X*'s house from fire.

the Derby, and therefore a prospect of a large return for money laid out in rearing and training the horse, in stakes and in bets; he wishes to secure that he shall in no event be a loser, and he agrees with *X* that, in consideration of *X* promising him £4000 if his horse loses, he promises *X* £7000 if his horse wins.

though there be 'insurable interest.'

The same is his position as owner of a cargo: here too he has a prospect of large profits on money expended upon a cargo of silk, here too he wishes in no event to be a loser, and he agrees with *X*, an underwriter, that in consideration of his paying *X* £—, *X* promises to pay him £— if his cargo is lost by certain specified perils.

The law forbids *A* to make such a contract unless he has what is called 'an insurable interest' in the cargo, and contracts in breach of this rule have been called mere wagers, while those which conform to it have been called contracts of indemnity. But such a distinction is misleading. It is not that one is and the other is not a wager: a bet is not the less a bet because it is a hedging bet; it is the fact that one wagering contract *is* and the other *is not permitted by law* which makes the distinction between the two. Apart from this there is no real difference in the nature of the contracts.

Life insur-

A life insurance is in like manner a wager. Let us compare it with an undoubted wager of a similar kind. *A* is about to commence his innings in a cricket match, and he agrees with *X* that if *X* will promise to give him £1 at the end of his innings, he will pay *X* a shilling for every run he gets. *A* may be said to insure his innings as a man insures his life; for the ordinary contract of life insurance consists in this, that *A* agrees with *X* that if *X* will promise to pay a fixed sum on the happening of an event which must happen sooner or later, *A* will pay to *X* so much for every year that elapses until the event happens. In each of these cases *A* sooner or later becomes entitled to a sum larger than any of the individual sums which he agrees to pay. On the

other hand, he may have paid so many of these sums before the event takes place that he is ultimately a loser by the transaction.

History of the common law as to wagers;

Let us now turn to the history of the law respecting wagering contracts.

At Common Law wagers were enforceable, and, until the latter part of the last century, were only discouraged by the Courts by the imposition of some trifling difficulties of pleading. Gradually however the Courts, finding that frivolous and sometimes indecent matters were brought before them for decision, established the rule that a wager was not enforceable if it led to indecent evidence, or was calculated to injure or pain a third person; and in some cases general notions of public policy were introduced to the effect that any wager which tempted a man to offend against the law was illegal.

), Car-
, p. 338.

Strange, and sometimes ludicrous, results followed from these efforts of the Courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be unenforceable, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it is evident that the substantial motive which pressed upon the judges was 'the inconvenience of countenancing idle wagers in courts of justice,' the feeling that 'it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to.'

Gilbert v. Sykes (1812), 16 East, 150.

Bayley, J., in Gilbert v. Sykes.

of statute as to wagers.

Meantime the Legislature dealt with various forms of wagering contracts. As regards purely sporting wagers the history of legislation extends over a century and a half. It was enacted by 16 Car. II. c. 7, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security given for money so lost should be void. The 9 Anne, c. 14 carried the law upon this point a stage further, enacting that

16 Car. II. c. 7.

9 Anne, c. 14.

void, but securities given in respect of them still fall into two classes.

Considera-tion illegal.

A promissory note given in payment of a bet made upon a cricket match is tainted with illegality at the outset; not only is it void as between the original parties to it, but every subsequent purchaser may be called on to show that he gave value for the note; and if it can be shown that he knew of the illegal consideration for which it was first given, he may be disentitled to recover upon it.

Promise void.

A promissory note given in payment of a wager upon the result of a contested election would, as between the parties to it, be given on no consideration at all, inasmuch as it is given in discharge of an obligation which does not exist. But the wager is not illegal, it is simply void; and if the note be endorsed over to a third party, it matters nothing that he was aware of the circumstances under which the note was originally given; nor does it lie upon him to show that he gave value for the note, though he could not recover if it were proved that he gave none.

Fitch v. Jones, 5 E & B. 245.

As regards wagering contracts entered into for commercial purposes, there are three important subjects with which the Legislature has dealt. These are Stock Exchange transactions, marine insurance, and insurance upon lives or other events.

7 Geo. II. c. 8 (Sir John Barnard's Act).

The first of these subjects was dealt with by Sir John Barnard's Act, 7 Geo. II. c. 8, which was more particularly directed to wagers on the price of stock, or, as they are sometimes called, 'agreements to pay differences.' These originate in some such transaction as this: *A* contracts with *X* for the purchase of fifty Russian bonds at £78 for every £100 bond. The contract is to be executed on the next settling day. If by that date the bonds have risen in price, say to £80, *X*, unless he has the bonds on hand, must buy at £80 to sell at £78; and if he has them on hand, he is obliged to part with them below their market value. If, on the other hand, the bonds have gone down in the market, *A* will

be obliged to pay the contract price which is in excess of the market value.

It is easy to see that such a transaction may be made the medium of purely wagering speculations; that *A* may never intend to buy nor *X* to sell the bonds in question; that they may intend no more than that the winner should receive from the loser the difference between the contract price and the market value on the settling day. And yet such a payment of differences may be perfectly *bonâ fide; A* may have found so much better an investment for his money between the date of the contract and the settling day that it is well worth his while to pay a difference in *X*'s favour to be excused performance of the contract.

Sir John Barnard's Act was repealed by 23 Vict. c. 28, and contracts of this nature, if proved to be simple wagers, fall under the 8 and 9 Vict. c. 109. § 18[1]. But it is hard to prove that they are so. The shares may be bought on the terms that they are not to change hands; then the transaction is a wager on their price at a future day. But if the purchase is the result of one agreement and the payment of the difference is the result of another, it is impossible to say that either is a wager, and not easy to construct a wager by combining the two transactions.

v. Blane, 11 C. B. 538.

Thacker v. Hardy, 4 Q. B. D.

Marine insurance is dealt with by 19 Geo. II. c. 37, the effect of which is to avoid all insurances on British ships or merchandise laden on board such ships unless the person effecting the insurance is *interested* in the thing insured. What is an insurable interest, that is to say such an interest as entitles a man to effect an insurance, is a question of mercantile law with which we are not here concerned.

Marine insurance.

19 Geo. II. c. 37.

The subject of insurance generally was dealt with by 14 Geo. III. c. 48, from which Act, however, marine insurance is excepted. The Act forbids insurances on the lives of any

Insurance generally.

14 Geo. III. c. 48.

[1] The effect of 8 and 9 Vict. c. 109, § 18 upon Stock Exchange transactions is well summarised in the Appendix to the Report of the Stock Exchange Commission, 1878 [2157], p. 356.

persons, or on any events whatsoever in which the person effecting the insurance has no interest; it further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured should be recovered by him. A creditor may thus insure the life of his debtor, and a lessee for lives may insure the lives upon which the continuance of his lease depends.

But a policy of life insurance differs in an important respect from a policy of marine or fire insurance. The latter are contracts of indemnity, and if the insured recovers the amount of his loss from any other source the insurer may recover from him *pro tanto*. 'Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such a loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. *The policy never refers to the reason for effecting it.* It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment.'

Tibbitts, 5 Q. B. D. 560.

Life insurance differs from other contracts of insurance.

Law v. London Indisputable Life Policy Co., 1 K. & J. 229.

Thus, though in a life policy the insured is required by 14 Geo. III. c. 48 to have an interest at starting, that interest is nothing as between him and the company who are the insurers. 'The policy never refers to the reason for effecting it.' The insurer promises to pay a large sum on the happening of a given event, in consideration of the insured paying lesser sums at stated intervals until the happening of the event. Each takes his risk of ultimate loss, and the statutory requirement of interest in the insured has nothing to do with the contract. And so if a creditor effects an insurance on his debtor's life, and afterwards gets his debts paid, yet still continues to pay the insurance premiums, the fact that the debt has been paid is no answer to the claim which

he may have against the company. This rule has been established in *Dalby v. The London Life Assurance Company*, overruling *Godsall v. Boldero*, in which Lord Ellenborough had held that a contract of life insurance, like one of marine or fire insurance, was a contract of indemnity, and that it could not be enforced if the loss insured against had not in fact occurred.

15 C. B. 365.

9 East, 72.

(ii) *Contracts which are made in breach of definite rules of Common Law.*

It is hardly necessary to state that an agreement to commit a crime or indictable offence would be made on an illegal consideration: but it is difficult to find an instance which is not at the same time a breach of some statutory prohibition.

Agreement to commit a crime;

Again, a contract with an alien enemy is illegal and void, and is stated, in the leading case upon the subject, to be void, not on any ground of public policy, but because 'it was a principle of the Common Law that trading with an enemy without the king's license was illegal in British subjects.'

to trade with alien enemies;

Potts v. 8 T. R. 548.

The commonest form of contracts in breach of rules of Common Law is an agreement to commit a civil wrong. Thus in *Allen v. Rescous* an agreement in which one of the parties undertook to beat a man was held void. An agreement which involves the publication of a libel is in like manner void. Agreements to commit a fraud upon a third party have not unfrequently come before the Courts. Thus in the case of *Mallalieu v. Hodgson*, a debtor making a composition with his creditors of 6*s.* 8*d.* in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forego a portion of his debt in consideration of the others foregoing theirs in a like proportion. 'Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void.'

to commit a civil wrong.

2 Lev. 174.

Clay v. 1 H. & N. 73.

16 Q. B. 689.

Thus too where the plaintiff purchased from the defendants an exclusive right to use a particular scientific process, and it turned out that they had no such exclusive right as they professed to sell, it was held that the plaintiff could not recover, because, upon his own showing, it appeared that he had purchased this right in order to float a company from which he expected to make a profit by defrauding the shareholders.

e v. Phosphate Sewage Co., L. R. 10 Q. B. 499.

Fraud and illegality.

It is worth noticing here a difficulty sometimes introduced into this part of the law of contract arising from a confusion of illegality with fraud. Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act. But fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract. Fraud may vitiate a contract for a reason other than the fact that it constitutes a civil wrong: as between the parties to a contract the fraud of one prevents the consent of the other from being genuine. If the fraud is discovered and the discovery acted upon in time, the contract can be avoided, not because the fraud is an illegality, but because the consent of the defrauded party was unreal: if the contract has been executed, the defrauded party must rely upon his remedy in *tort* and can sue for damages for the wrong he has sustained. But as between the parties to a contract, while still executory, the fraud of one affects it because the consent of the other is not genuine.

We may say then that if *A* is induced to enter into a contract with *X* by the fraud of *X* the contract is *voidable*, because *A*'s consent is not genuine. If *A* and *X* make a contract the object of which is to defraud *M* the contract is *void*, because *A* and *X* have agreed to do what is illegal. The subject would be much obscured if we allowed ourselves to confuse *reality of consent* with *legality of object*.

As in Smith on Contracts, Lect. vi.

(iii) *Contracts which are made in breach of the policy of the law.*

Public policy.

The policy of the law, or public policy, is a phrase of frequent occurrence and somewhat attractive sound, but it is very easily capable of introducing an unsatisfactory vagueness into the law. It would be difficult to find its earliest application; most likely agreements which tended to promote litigation or to restrain trade or marriage were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were doubtless a frequent provocative of judicial ingenuity on this point, as is sufficiently shown by the case of *Gilbert v. Sykes* quoted above: but it cannot be said with confidence that the doctrine of public policy originated in the endeavour to elude their binding force. Whatever may have been the origin of the doctrine, it was applied very frequently, and not always with the happiest results, during the latter part of the last and the commencement of the present century. Modern decisions, however, while maintaining the duty of the Courts to consider the public advantage, have tended to limit the sphere within which this duty has been exercised, and the modern view of the subject is perhaps best expressed by Jessel, M. R.: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.'

General application.

16 East, 150.

Egerton v Earl Brownlow, 4 H. L. C. 1.

Printing Co. v. Sampson, 19 Eq. 462.

There are some subjects, however, which have fallen under tolerably definite rules making agreements of certain kinds illegal, not as breaking express rules, but as infringing established principles or tendencies of the law. We will endeavour to arrange them under a few convenient heads.

Agreements tending to injure the public service.

Sale of offices.

The public has an interest in the proper performance of their duty by public servants, and Courts of Law hold contracts to be illegal which have for their object the sale of

public offices or the assignment of the salaries of such offices.

B. & C. 661. This principle was carried so far that in *Card v. Hope* a deed was held to be void by which the owners of the majority of shares in a ship sold a portion of them, a part of the consideration for the sale being a covenant that the purchaser should have the command of the ship at sea, and that in the event of his death the sellers would appoint on the nomination of his executors. The judgment proceeded not merely on the ground that the ship was in the service of the East

v. India Company, which had been held equivalent to being in

Preston, 8 T. R. 89. the public service, but on the ground that the public had a right to the exercise by the owners of *any* ship of their best judgment in selecting officers for it.

This is perhaps an extreme case. But there can be no doubt that the sale of public offices is contrary to the rules of Common Law, as it is also subject to statutory prohibition,

5 & 6 Ed. VI. c. 16. 49 Geo. III. c. 126. on the ground that the public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices.

Assignment of

On a somewhat different principle the same rule applies the assignment of salaries or pensions. 'It is fit,' said

8 M. & W. 149. Lord Abinger in *Foster v. Wells*, 'that the public servants should retain the means of a decent subsistence and not be exposed to the temptations of poverty.' And in the same

or pensions. case, Parke, B., lays down the limits within which a pension is assignable. 'When a pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assignable.'

Agreements which tend to prevent the course of justice.

Stifling prosecutions,

These most commonly appear in the form of agreements to stifle prosecutions, and we can hardly do better than adopt Lord Westbury's statement of the law in one of the latest

cases on the subject. 'You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.' But the rule thus laid down must be taken subject to this qualification, that where civil and criminal remedies co-exist, a compromise of a prosecution is permissible. 'We shall probably be safe in laying it down that the law will permit a compromise of all offences though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.'

Williams v. Bayley, L. R. 1 H. L. 200.

except where civil and criminal remedies co-exist.

Keir v. Leeman, 6 Q. B. 321, and see 9 Q. B. 395.

Again, agreements to refer matters in dispute to arbitration are regarded as attempts to 'oust the jurisdiction of the Courts,' and are not necessarily enforced. Under the Common Law Procedure Act, 1854, the Courts have a discretionary power to stay proceedings pending an arbitration, where there has been an agreement to refer an existing dispute. But when a contract contains a condition which provides that disputes arising out of it shall be referred to arbitration, the validity of such a condition depends upon rather a fine distinction. Where the amount of damage sustained by a breach of the contract is to be ascertained by specified arbitration before any right of action arises, the condition is good; but where all matters in dispute, of whatever sort, are to be referred to arbitrators and to them alone, such a condition is illegal. The one imposes a condition precedent to a right of action accruing, the other endeavours to prevent any right of action accruing at all.

Reference to arbitration.

17 c. 125. § 11.

Scott v. Avery, 5 H. L. C. 811.

Edwards v. Aberayron Insurance Society, 1 Q. B. D. 596

Agreements which tend to encourage litigation.

The rules respecting maintenance and champerty are really based upon this consideration of public policy. It is not thought well that one should buy an interest in another's

quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be 'when a man maintains a suit or quarrel to the disturbance or hindrance of right.'

Com. Dig. vol. v. p. 22.

Champerty is where 'he who maintains another is to have by agreement part of the land, or debt, in suit.'

Maintenance.

It seemed true till lately to say that the mere maintaining or assisting another person in a suit would not now avoid a contract entered into for such a purpose, unless there were something vexatious in the maintenance. 'The law of maintenance,' says Lord Abinger in *Findon v. Parker*, 'as I understand it upon the modern constructions, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defences which they have no right to make.'

11 M. & W. 682.

But in the recent case of *Bradlaugh v. Newdegate*, Lord Coleridge held it sufficient to constitute maintenance that the conduct of the defendant 'tended to promote unnecessary litigation.' The defendant had given a bond for the costs of a suit brought by one Clarke against the plaintiff to recover penalties due for voting in the House of Commons without having taken the necessary oath. The House of Lords decided that though the plaintiff had incurred the penalty it was not payable to Clarke, and upon this ground the Lord Chief Justice held that the defendant had promoted unnecessary litigation and that his conduct amounted to maintenance.

11 Q. B. D. 10.

v. Clarke, 8 A Ca. 354

The case stands alone in modern times as a revival of the ancient severity of the law in respect of maintenance.

Champerty.

But champerty, or the maintenance of a quarrel for a share of the proceeds, has been repeatedly declared to avoid an agreement made in contemplation of it. Its most obvious form, a promise to supply evidence or conduct a suit in consideration of receiving a portion of the money or property to be recovered, was held illegal in *Stanley v. Jones* and *Sprye v. Porter*. Its less obvious form, a purchase, out and out,

7 Bing. 369. 7 E. & B. 81.

of a right to sue has been placed on the footing of an assignment of a chose in action, a matter with which we shall presently come to deal. The enforceability of such an agreement would depend upon the purchase including any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the contract, but an agreement to purchase a bare right would not be sustained.

Prosser v. Edmonds, 1 Y. & C. 499.

Agreements which are contrary to good morals.

The only aspect of immorality with which Courts of Law have dealt is sexual immorality; and the law upon this point may be shortly stated.

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is void whether made by parol or under seal.

Ayerst v. Jenkins, 16 Eq. 275.

A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, void if made by parol.

Gray v. Mathias, 5 Ves. 286. Beaumont v. Reeve, 8 Q. B. 483.

And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended.

Pearce v. Brooks, L. R. 1 Exch. 213.

Agreements which affect the freedom or security of Marriage.

Such agreements, in so far as they restrain the freedom of marriage, are discouraged on political grounds as injurious to the increase of the population and the moral welfare of the citizen. So a promise under seal to marry no one but the promisee on penalty of paying her £1000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive. So too a wager in which one man bet another that he would not marry within a certain time was held to be void, as giving to one of the parties a pecuniary interest in his celibacy.

Restraint of marriage,

Lowe v. Peers,

Hartley v. Rice, 10 East, 22.

or of freedom of choice.

What are called marriage brocage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal on various social grounds.

Arundel v. Trevillian, Rep. in Ch. 47.

ments for separation.

Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation. But if such agreements provide for a possible separation in the future they are illegal, whether made before or after marriage, because they give inducements to the parties not to perform 'duties in the fulfilment of which society has an interest.'

Cartwright v. Cartwright, 3 D. M. & G. 982.

Agreements in restraint of trade.

Restraint of Trade.

It is against the policy of the law that a man should deprive himself of the means of exercising his skill and earning his living. The trade of the country and the individual himself may alike be sufferers. The law upon this subject would fill a considerable space, but it is enough for our present purposes to give the simplest and most general rules to which it can be reduced.

Rules regarding it.

(1) Consideration is required to support a promise in restraint of trade, even though the promise be made under seal. *Mallan v. May.* Indeed it was at one time thought that the Courts would inquire into the adequacy, as well as the existence of the consideration, but this has been settled not to be so since the case of *Hitchcock v. Coker* (1837).

11 M. & W. 665.

6 Ad. & E. 438.

(2) Until quite recently it was regarded as a settled rule that the restraint may be unlimited as to time, but must not be unlimited as to space. A man might promise that he would never carry on a certain trade within ten miles of London and the promise would be good; but if he promised that he would not carry on the trade anywhere for five years it would not be upheld. In direct conflict with this rule and with the decisions based on it is the decision of Fry, J., in *Rousillon v. Rousillon.* If this decision is upheld, the limitation in each case must be judged on its merits by the Court.

Allsopp v. Wheatcroft, 15 Eq. 59.

14 Ch. D. 358.

(3) The restriction as to space must be reasonable in the judgment of the Court. Beyond this no definite rule as to the extent of restriction permissible can be laid down. The cases since 1854 turning upon this point have been excellently summarised by Mr. Pollock. Pollock, 333.

§ 2. Effect of Illegality upon Contracts in which it exists.

We now come to the second branch of the subject of Illegality in Contract, its effect upon the validity of a contract. The effect of illegality upon the validity of contracts in which it appears must of necessity vary according to circumstances. It may affect the whole, or only a part of a contract, and the legal and illegal parts may or may not be capable of separation. The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent though the contract is designed to further an illegal purpose. The parties may both be ignorant, or both be aware of the illegality which remotely or directly affects the transaction; or one may be innocent of the objects intended by the other. Securities may be given for money due upon or money advanced for an illegal purpose, and the validity of such securities depends upon various considerations. The most that can be done here to elucidate a very complex and lengthy branch of the law is to lay down some rules which will answer roughly, but it is hoped not inaccurately, the questions thus suggested. What is the effect of illegality.

When the contract is divisible.

(i) Where the contract consists of several parts, so that there are several promises based on several considerations, the fact that one or more of these considerations is illegal will not avoid all the promises if those which were made upon legal considerations are severable from the others. This is an old rule of law explicitly laid down in Coke's Reports, Legal parts of contract to be ed if sible illegal Pigot's Co. Rep.

'That if some of the Covenants of an Indenture or of the conditions endorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good.'

The rule applies whether the illegality exist by Statute or at Common Law, though at one time the judges held differently, and fearing lest statutes might be eluded, laid it down that 'the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is and preserves the rest.' This distinction has however been held in several modern cases to be without foundation.

The most frequent illustrations of the general proposition are to be found in cases where a corporation has entered into a contract some parts of which are *ultra vires*, and so, in a sense, unlawful. In such cases it has always been held that 'where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good[1].'

Brighton and Dover Railway, L. R. 3 C. P. 250.

When the contract is indivisible.

(ii) Where there is one promise made upon several considerations, some of which are bad and some good, the promise is wholly void, for it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise. An old case which may be quoted in its entirety will illustrate this proposition.

[1] These cases may serve as an illustration of the proposition before us, but it must be borne in mind that Lord Cairns, in *The Ashbury Carriage Co. v. Riche*, has pointed out that contracts of this nature are invalidated not so much by the *illegality* of their object as by the *incapacity* of the corporation to bind itself by agreement for purposes beyond its statutory powers.

L. R. 7 H. L. 653.

The grounds of action were stated to be, 'That whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff; the defendant in consideration he would permit him to go at large, and of two shillings to the defendant paid, promised to pay the plaintiff all the money in which H. was condemned: and upon *assumpsit* it was found for the plaintiff: and it was moved in arrest of judgment, that the consideration is not good, being contrary to the statute of 23 H. 6, and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet being void and against the statute in part it is void in all.'

v. Ellison, Eliz. 199.

Where the direct object is unlawful but the intention innocent.

(iii) Where the direct object of the parties is to do an illegal act the contract is void. It does not matter whether or no they knew that their object was illegal, 'ignorance of the law excuseth none.'

Direct object being illegal, the contract is void,

But the knowledge of the parties may become important if the contract admits of being performed, and is in fact performed in a legal manner, though a detail in the performance as originally contemplated by the parties would, unknown to them, have directly resulted in a breach of the law. In *Waugh v. Morris* the defendant chartered the plaintiff's ship to take a cargo of hay from Trouville to London. The cargo was to be taken from the ship alongside, and was intended to be landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council had forbidden the landing of French hay. The defendant, on learning this, took the cargo from alongside the ship without landing it, and exported it. The vessel was delayed beyond the lay-days and the plaintiff sued for the delay. The defendant set up the illegal intention as avoiding the contract, but without success. 'We agree,' said Blackburn, J., in delivering the judgment of the Court, 'that where a contract is to do a

unless illegal intent be absent and the contract can be legally performed.

L. R. 8 Q. B. 202

Under 32 & 33 Vict. c. 70, § 78. Contagious Diseases (Animals) Act, 1869.

thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance.'

Where the direct object is innocent but the intention unlawful.

Illegality of object avoids an otherwise innocent contract.

(iv) Where the object of a contract is innocent in itself but is designed to further an illegal purpose, the contract is void if both parties knew of the illegal purpose at the time the contract was entered into.

There is nothing illegal in a loan of money or a supply of goods; but if these are known to be intended to further an illegal purpose, neither the money lent nor the goods supplied can form the subject of an action. The whole transaction is void. The law upon this subject rests mainly upon three cases which will furnish convenient illustrations of the rule.

3 B. & Ald. 179. The first of these is *Cannan v. Bryce* (1819), in which the assignees of a bankrupt sued for the proceeds of goods which they asserted to be a part of the bankrupt's property. The goods had been assigned by the bankrupt to the defendant in part satisfaction of a bond which was to secure to the defendant the payment of money lent by him to the bankrupt to meet losses arising from stock-jobbing transactions which were illegal under 7 Geo. II. c. 8. It was held that the lending of the money, the bond, and the assignments under the bond (which were made after bankruptcy) were all alike void, and that the plaintiffs could recover the proceeds of the goods. There was no doubt that the defendant knew the illegal object to which his money was to be applied; and Abbott, C. J., in giving judgment, said, 'Then as the statute has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the

making such payment is not an unlawful act: if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that *I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object.*'

The second case is *M'Kinnell v. Robinson* (1838). Here an action was brought to recover a sum of money lent, as the plaintiff knew, for the purpose of playing at 'Hazard,' a game which, apart from 9 Anne, c. 14, is prohibited by 12 Geo. II. c. 28. It was held that the plaintiff could not recover, on the principle 'that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced.' 3 M. & W. 435.

The third case is *Pearce v. Brooks* (1866). The action was brought by coach-builders to recover payment for the hire of a brougham engaged by a prostitute. Evidence was given that the plaintiffs knew the character of the defendant, and from this, and from the nature of the article supplied, the jury found that the plaintiffs knew that it was supplied for the furtherance of an immoral purpose. Upon this it was held that the plaintiffs could not recover. 'My difficulty was,' said Bramwell, B., 'whether though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for duelling pistols, and to say "I think I shall fight a duel tomorrow," might not the seller answer, "I do not want to know your purpose; I have nothing to do with it; that is your business; mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of *Cannan v. Bryce* and *M'Kinnell v. Robinson* concludes the matter.' These words exactly indicate the distinction between this class of L. R. 1 Exch. 213. p. 220.

contracts and those described in (iii). It is not necessary that the parties to a contract *primâ facie* innocent should bind themselves to adapt it to an illegal purpose in order to avoid it. It is enough that the one party knows the unlawful intent of the other, and knows that the contract is intended to be applied to carry it out.

Distinction where illegal act

But a loan of money designed to satisfy debts arising from a past illegal transaction is distinguishable from the cases just cited. In *Cannan v. Bryce* the statute had forbidden, not only stock-jobbing transactions of a certain sort, but advances of money to pay debts arising from them: in the other two cases the illegality was still in contemplation when the contract was made.

3 B. & Ald. 179. 7 Geo. II. c. 8.

8 Ch. D. 756.

And so in *Pyke's case* a loan of money intended to pay lost bets was held to be recoverable from the estate of the bankrupt borrower. 'The mischief had been completed,' said Jessel, M. R., 'the illegal act had been carried out, before the money was lent. The money was advanced to enable the borrower to pay the debts which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet.'

Where the unlawful intention is on one side only.

Innocent party may avoid contract.

(v) Where one of two parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into the contract in ignorance of his intention, the innocent party may, while the contract is still executory, avoid it at his option. In *Cowan v. Milbourn*, the plaintiff sued the defendant for breach of an agreement to let him a set of rooms. It appeared that the plaintiff intended to use the rooms for the purpose of delivering lectures which were unlawful, as being blasphemous within the meaning of 9 and 10 Will. III. c. 32. The defendant was not aware of the use to which the plaintiff meant to put the rooms at the time the agreement was made; and he subsequently refused to allow the plaintiff to use them, though he

L. R. 2 Exch. 230.

did not at first allege the character of the lectures as the ground of his refusal. It was held that he was entitled to avoid the contract, and was not bound to give his reasons.

and see Clay v. Yates, 1 H. & N. 78.

Securities for money due on illegal transactions.

Securities

(vi) Where a promise has been given to secure the payment of money due or about to become due upon an illegal transaction, the validity of such a promise is based upon two considerations:—

a. Whether the transaction is illegal or void.

β. Whether or no the promise is made under seal.

Where the promise is given in the form of a negotiable instrument, a further question arises as to its value in the hands of third parties, and this is affected by the answer to the first of the considerations above stated.

There is a difference, not very easy to analyse but of considerable practical importance, between cases in which Common Law or Statute make an object illegal, and cases in which they make a transaction void. The distinction has been thus stated: 'A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it;' but this *dictum* does not exactly describe the difference between the cases, inasmuch as it does not cover all the cases in which the difference exists. A bet upon a cricket-match, for example, is not punishable, but it is more than merely void, as has already been explained.

Per Pollock, B., in Cowan v. Milbourn, L. R. 2 Exch. 230.

Distinction between 'illegal' and 'void.'

The effect of the difference is this, that in the one case the promise is regarded as given upon an illegal consideration, in the other upon no consideration at all; in the one case everything connected with the transaction is 'tainted with illegality,' in the other, collateral contracts arising out of the avoided transaction are under certain circumstances supported.

The 'taint of illegality.'

Per Curiam in Fisher v. Bridges, 3 E. & B. 642.

In cases where the transaction is illegal, a promise under seal given to secure the payment of money due upon it is void. This was decided in the case of *Fisher v. Bridges* by

Effect of contract illegal

3 E. & B. 642.

the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. The plaintiff sued the defendant upon a covenant to pay a sum of money. The defence was that the covenant was security for the payment of a sum of money due upon a purchase of land agreed to be sold for a purpose declared to be illegal by Statute. The Court of Queen's Bench held that the defendant was bound, inasmuch as there was nothing unlawful in a simple promise to pay money. The Court of Exchequer Chamber held that the illegality when proved tainted the subsequent promise, and that this was not a simple promise to pay money, but that it 'sprang from and was the creature of an illegal transaction.'

12 Geo. II. c. 28.

If a promise under seal would be void under these circumstances, it is obvious that a parol contract, even if based in part upon some new consideration, would be void also.

Negotiable instruments, how

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties to the contract, but its effect upon subsequent holders of the instrument. In these cases, as we have already noticed, the ordinary presumption in favour of the holder of such an instrument does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder is liable to have to show that he is a holder for value; that is to say, that he gave consideration for the bill: and even then, if he can be proved to have been aware of the illegality, he will be disentitled to recover.

Effect of contract being void,

Where the consideration is not illegal but the transaction is void, a promise given to pay money due upon such a transaction is based upon no consideration at all. If made under seal it is binding, if by parol it is void.

Thus if a contract be entered into which is invalid for want of some necessary form, a covenant to pay money due upon a contract of this nature is binding. Where a corporation borrowed money upon mortgage without having first obtained the approbation of the Lords of the Treasury, they

a. on promise under

did what the Municipal Corporations Act declared to be 'unlawful;' but having received the mortgage money and covenanted under seal to repay it, they were held bound by their covenant. 'Although the mortgage may be invalid, that is no reason why the corporation should not be liable upon their covenant to repay the mortgage money.'

5 & 6 Will. IV. c. 76.

Payne v. Mayor of Brecon, 3 H. & N. 579.

So too in the case of promises of payment made in consideration of past illicit cohabitation, such promises are invalid if made by parol, not on the ground that the consideration is illegal, but because there is in fact no consideration at all. But a bond given upon such past consideration would be binding.

b. on parol contracts; Beaumont v. Reeve, 8 Q. B. 483.

Ayerst v. Jenkins, 16 Eq. 275.

Negotiable instruments given upon such consideration are, as between the original parties to them, void, for the reason just stated, that they are simple contracts in which the promise is made in consideration of a transaction which raises no legal obligation, and therefore cannot support it. But where the negotiable instrument has passed into the hands of a subsequent holder, such a holder is not affected by the fact that as between the original parties the promise is voluntary. In *Fitch v. Jones*, a promissory note was given by the defendant to *X* in payment of a bet made on the amount of hop duty in the year 1854. *X* indorsed the note to the plaintiff. The main question for the Court was, 'whether the plaintiff was bound on proof of the origin of the note to show that he had given consideration for the note, or whether it was for the defendant to show that he had given none.'

c. on negotiable in-

'I am of opinion,' said Lord Campbell, 'that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract, which, even before stat. 8 & 9 Vict. c. 109, the law would not enforce[1]: but it was not illegal: there is no

[1] It had been held in a previous case, *Atherfold v. Beard*, that a wager on the amount of hop duty was against public policy, because the evidence at the trial would expose to the world the amount of public revenue. 2 T. R. 610.

penalty attached to such a wager; it is not in violation of any statute, nor of the Common Law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all.'

Can a man be relieved from a contract which he knew to be unlawful?

Illegality known at the time, no ground for avoidance.

Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 490.

(vii) It remains to consider whether a party to an illegal contract can under any circumstances make it a cause of action. We may lay down without hesitation the rule that a party to such a contract cannot come into a Court of Law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The general rule is well expressed in the maxim, '*in pari delicto potior est conditio defendentis.*'

But there are some exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. These would appear to group themselves in two classes: (1) cases in which the plaintiff has been induced to enter into the contract under the influence of fraud or strong pressure; (2) cases in which, the contract being unperformed, money paid or goods delivered in furtherance of it have been held recoverable.

unless plaintiff be not *in pari*

or a *locus pœnitentiæ* remains.

The first class of cases are best illustrated by the decisions in *Reynell v. Sprye* and *Atkinson v. Denby*. In the first case the plaintiff had been induced, by the fraud of the defendant, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the Court being satisfied that he had been induced to enter into the agreement by the fraud of the defendant, considered that he was entitled to relief. 'Where

1 D. M. & G. 660.
6 H. & N. 778.

the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given him.'

1 D. M & G. p.

The case of *Atkinson v. Denby* is a peculiar one, and appears almost to indicate an approach on the part of the Common Law Courts to the equitable doctrine of Undue Influence. The plaintiff, a debtor, offered his creditors a composition of 5*s*. in the pound. The defendant was one of the creditors, and his acceptance or rejection of the offer was known to be certain to determine the decision of several other creditors. He refused to assent to the composition unless the plaintiff would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and the plaintiff sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, in affirming the judgment of the Court of Exchequer, said, 'It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because *the one has power to dictate, the other no alternative but to submit*.'

6 H. & N. 778. 7 H. & N. 934.

The second exception to the general rule may best be stated in the words of Mellish, L. J., in *Taylor v. Bowers*. 'If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done.' The case was one of a fictitious assignment of goods to a third party with a view to defraud the creditors. The goods were then assigned to the defendant, and the plaintiff,

1 Q. B. D. (C. A.) 300. While the illegal purpose is executory there is a *locus tenitae*.

the debtor, demanded them back. Nothing had been done towards carrying out the fraudulent intention of the parties, and the plaintiff was held entitled to recover. The rule seems to come to this, that until an illegal purpose is carried out there is a *locus poenitentiae* for one who has contributed goods or money for such a purpose.

1 Q. B. D. 189.

The case of *Hampden v. Walsh* illustrates the same rule[1]. The plaintiff and another person each deposited £500 with the defendant to abide the decision of two scientific men as to the shape of the earth; the decision went against the plaintiff, but before the money was paid over he claimed it back, and he was held entitled to recover it. He had repudiated the wager before the money had left the hands of the stakeholder, and the Court held, on the authority of several cases, that the 8 & 9 Vict. c. 109. § 18 did not deprive a party to a contract, thereby rendered void, from repudiating the contract and recovering the money advanced before it had been paid.

Varney v. Hickman, 5 C. B. 271. Martin v. Hewson, 10 Ex. 737.

On the meaning of the terms 'void,' 'voidable,' and 'unenforceable.'

We may now, after considering the elements necessary to a valid contract, ask ourselves what we mean by the terms which denote the effect of the absence of one of these elements.

By 'void' we mean, destitute of legal effect.

By 'voidable' we mean, capable of being affirmed or rejected at the option of one of the parties.

10 Q. B. D. 100.

[1] The case of *Read v. Anderson* offers an apparent exception to this rule. It was there laid down that an authority given to a betting agent to make bets in his own name, and pay them if lost, could not be revoked between the determination of the bet and the date of payment. It was stated as the ground of decision, that since the betting agent was employed to make the bets in his own name, he would, if they were not paid, have been noted as a defaulter at Tattersall's, and would so have been placed under some disabilities in the exercise of his occupation; that the authority given to him was thus coupled with an interest, and was therefore irrevocable. The case is distinguishable from *Hampden v. Walsh*, and turns on the meaning of 'an authority coupled with an interest,' as to which it cannot be considered conclusive.

By 'unenforceable' we mean, valid, but incapable of proof pending the fulfilment of certain conditions.

But it seems at first sight as if the word void was capable of bearing two meanings, one of which might apply to a contract not wholly destitute of legal effect.

Nullity may be patent or

We say that a contract is void on the ground of mistake, or by the operation of the Infant's Relief Act; yet if mistake or infancy be not pleaded to an action on the contract the parties would be held to be bound. Is then such a contract void?

In fact it is just as void as one in which the acceptance differs in terms from the offer, or one which has for its object something manifestly illegal. For some causes of nullity in contract are obvious, some are latent. A plaintiff who claims under an alleged promise which he did not accept in the terms in which it was offered, or which is gratuitous yet not under seal, or which bears an illegal object on the face of it, cannot even put the defendant on his defence: but if he claim under a promise made by an infant to buy goods, or made under such mistake as invalidates contract, there is nothing on the surface of the transaction to show its nullity. Yet it is void if the defendant choose to prove it so, and, if he do not, his neglect to use the forms of procedure does not alter the character of the transaction.

But if the defendant in these cases may at his option avoid the contract or let it stand, there would seem to be a certain unreality in the distinction between void and voidable contracts.

This is not so. When the nullity of the contract becomes apparent the whole transaction falls to the ground. It is incapable of affirmation, nor can third parties *bonâ fide* acquire rights for value under it: whereas in voidable contracts the party who has the option is not confined in the exercise of his option to the use or neglect of forms of pleading. There is a contract though it is marked by a flaw, and he may say that he will affirm it in spite of the flaw.

On the other hand he may lose his right to avoid it, either by his own conduct in taking benefit under it, or by the fact that innocent third parties have acquired rights under it. This could not occur if the contract was void.

An illustration will show the essential difference between what is void and what is voidable :—

Contracts void, Cundy v. Lindsay, 3 App. Ca. 465.

(α) *A* sells goods to *X*, being led to think that *X* is *Y*; *X* sells the goods to *M*. The contract is void on the ground of mistake, and *M* acquires no right to the goods.

voidable, Lawson, 4 Q. B. D. 394.

(β) *A* sells goods to *X*, being led by the fraud of *X* to think that the market is falling. *X* resells the goods to an innocent purchaser for value. *M* acquires a good title to the goods, and *A* is left to his remedy against *X* by the action of deceit.

In the first of these cases the complete nullity of the contract prevents any rights arising under it if the mistaken party choose to avoid it. In the second there is a contract, and one capable of creating rights, and the person defrauded has but a limited right to set it aside.

unenforceable.

A contract which is unenforceable cannot be set aside at the option of one of the parties to it: the obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being brought or proof given.

Such is a contract which fails to comply with the provisions of the Statute of Frauds, and so cannot be proved; or a contract in writing which in default of the necessary stamp can only be given in evidence on payment of a penalty; or a contract which has fallen under the Statute of Limitations, and can only be revived by an acknowledgement in writing. The defect in such contracts is not irremediable, though except in the case of want of a stamp, it can only be remedied with the concurrence of the party to be made liable.

PART III.

THE OPERATION OF CONTRACT.

We come now to deal with the effects of a valid contract when formed. And we have to ask, To whom does the obligation extend? Who have rights and liabilities under a contract?

And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

In the first instance we may lay down two general rules.

(1) No one but the parties to a contract can be bound by it or entitled under it.

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either (α) by act of the parties, or (β) by rules of law operating in certain events.

These two rules seem at first to look like one rule subject to certain exceptions, but they are in fact distinct. The obligation binds only the parties to the agreement; but these parties, having created the obligation which binds them to one another, may in certain ways and under certain circumstances be replaced by others who assume their rights or liabilities under the contract. The rules may perhaps be made clearer by an illustration.

(1) If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles.

(2) But there are circumstances under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution.

CHAPTER I.

The Limits of the Contractual Obligation.

Contract cannot confer rights or liabilities on a third party.

We may safely lay down the general rule that a person, who is not a party to a contract, cannot be included in the rights and liabilities which the contract creates so as to enable him to sue or be sued upon it. This is not only established by decided cases, but seems to flow from the very conception which we form of contract. A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by *A* to *X* to confer a benefit upon *M*, the legal relations of *M* are nevertheless unaffected by that obligation. *He* was not a party to the agreement. *He* was not bound by the *vinculum juris* which it created, and the breach of that legal bond cannot affect the rights of a party who was never included in it.

Nor, again, can liability be imposed on such a third party. One characteristic of the contractual as opposed to other forms of obligation consists in this, that the restraint which it imposes on individual freedom is voluntarily created by those who are subject to it, is, in fact, the creature of agreement.

The relation of principal and agent which forms an exception to the rule just laid down must form the topic of a separate chapter.

Trustee and *cestui* trust.

A trust, again, has this in common with contract, that it originates in agreement, and that among its other objects it aims at creating obligations. If we could place a trust upon the precise footing of contract we might say that it formed

a very real and substantial exception to the general rule which we have laid down. There can be no doubt that the creator of a trust and the trustee do, by agreement, bring rights into existence which a third party, the *cestui que* trust, may enforce. But it is better at once to set aside trusts from the discussion, and for this reason. Contract differs from other forms of agreement in having for its sole and direct object the creation of an obligation. The contractual obligation differs from other forms of obligation mainly in taking its origin in the voluntary act of the parties obliged. A trust and the obligations resulting from a trust correspond to neither of these characteristics. The *agreement* which creates a trust has many other objects besides the creation of obligations, these objects may include conveyance, and the subsequent devolution of property. The *obligation* which exists between trustee and *cestui que* trust does not come into existence by the act of the parties to it. It is better therefore, having noted the similarities between the contractual and the fiduciary obligation, to dismiss the latter altogether from our inquiries.

We may now proceed to illustrate the general proposition laid down at the commencement of this chapter: and it will appear from what has gone before that the proposition is susceptible of a twofold division. A man cannot incur liabilities, and again, a man cannot acquire rights, from a contract to which he was not a party.

§ 1. *A man cannot incur liabilities from a contract to which he was not a party.*

Contract cannot impose liability upon a third party

This proposition is a part of a wider rule to the effect that liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his act or consent. *A* cannot by paying *X*'s debts unasked, make *X* his debtor; 'a man cannot, of his own will, pay another man's debt without his consent and thereby convert himself into a creditor.'

Durnford v. Messiter, 5 M. & S.

And in like manner *A* and *M* cannot, by any contract into

which they may enter, thereby impose liabilities upon *X*. An illustration of this rule is afforded in the case of *Schmaling v. Thomlinson.* The defendants in that case employed *X*, a firm of brokers, to transport a quantity of cocoa from London to Amsterdam. *X* agreed with the plaintiff to put the whole conduct of the transport into his hands, he did the work and sued the defendants for his expenses and commission. It was held that the defendants were not liable, inasmuch as there was no privity between them and the plaintiff; that is to say, that there was nothing either by writing, words, or conduct to connect them with the plaintiff in the transaction. *X* was employed by the defendants to do the whole work for them, and there was held to be 'no pretence that the defendants ever authorised them to employ any other to do the whole under them: the defendants looked to *X* only for the performance of the work, and *X* had a right to look to the defendants for payment, and no one else had that right.'

6 Taunt. 147.

But does a contract impose a *duty* on third parties?

A contract then cannot impose the burdens of an *obligation* upon one who was not a party to it; nevertheless a contract does impose a *duty,* upon persons extraneous to the obligation, not to interfere with its due performance. We use the term duty as signifying that necessity which rests upon all alike to respect the rights which the law sanctions, reserving the term obligation for the special tie which binds together definite and assignable members of the community.

2 E. & B. 216.

In *Lumley v. Gye* the plaintiff, being the manager of an opera house, engaged a singer to perform in his theatre. The defendant induced her to break her contract. The plaintiff sued the defendant for procuring this breach, and the questions raised took the following form. It was argued that an action would lie against one who procured the breach of any kind of contract; but that if that were not so an action would lie, at any rate, for inducing a servant to quit the service of his master.

Peculiar relations of master

It may be taken that the relations of master and servant have always been held to involve a right on the part of the

master and servant. and servant. to bring an action against any one who enticed away his servant, and so the Court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? if not, then does the exceptional rule applicable to the contract of master and servant apply to the manager of a theatre and the actors whom he engages to perform? How far applicable to *Gye*.

The majority of the Court answered both these questions in the affirmative. Coleridge, J., in an elaborate dissenting judgment answered both in the negative, holding that the action 'could not be maintained, because, first, merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another is . . not actionable; second, that the law with regard to seduction of servants from their masters' employ, in breach of their contract, is an exception, the origin of which is known [1], and that that exception does not reach the case of a theatrical performer.'

The case stood alone from 1853 to 1881. In the latter year the case of *Bowen v. Hall* came before the Court of Appeal, offering precisely the same points for decision as *Lumley v. Gye*. The majority of the Court, setting aside the question whether the relation of master and servant affected the rights of the parties, laid down a broad principle that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, does that other an actionable wrong. 6 Q. B. D. 339. 2 E. & B. 216

From this decision Lord Coleridge, C. J., dissented, pointing out that a malicious attempt to make *A* break his contract with *X*, if ineffectual, is not actionable, nor is an effectual attempt if not malicious; and that to make the right of action depend upon the motive of the attempt might lead to 'dangerous and inexpedient inquiries for a court of justice.'

This decision of the Court of Appeal settles a question which, despite the case of *Lumley v. Gye*, must be considered

[1] The exception which the law of Master and Servant seems to have engrafted upon the Common Law in this matter is traced by the learned Judge, in a detailed historical argument, to the Statutes of Labourers.

to have remained open till 1881. A contract confers upon the parties to it rights *in rem* as well as rights *in personam*; it not only binds together the parties by an obligation, but it imposes upon all the world a duty to respect the contractual tie.

2. *A man cannot acquire rights under a contract to which he is not a party.*

Contract cannot confer rights on a third party,

This is a rule which admits of fuller illustration than the one which we have just been discussing. It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual contracting party; or if *A*, and a group of persons which we will call *X*, enter into a contract, it might be convenient that *M* should be able to sue on behalf of the multitude of which *X* consists.

unless it

If *A* makes a promise to *X*, the consideration for which is a benefit to be conferred on *M* by *X*, such a contract cannot

tion of trust:

confer a right of action on *M*. This is the inflexible rule of English Law, modified only by decisions which go to show that where *X*'s promise amounts to a declaration of trust on behalf of *M*, then, and not otherwise, *M* can sue: not under the contract but in virtue of the fiduciary relation which it creates.

4 B. & Ad. 433.

In *Price v. Easton* the plaintiff sued upon a promise made by the defendant to *X* that in consideration that *X* would work for him he would pay the plaintiff a sum of money. It was held by the Court of Queen's Bench that the plaintiff could not recover because he was not a party to the contract, the members of the Court stating in different forms the same reason for their decision. Lord Denman, C. J., said that the declaration did not 'show any consideration for the promise moving from the plaintiff to defendant.' Littledale, J., said, 'No privity is shown between the plaintiff and the

defendant.' Taunton, J., that it was 'consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between *X* and the defendant:' and Patteson, J., that there was '*no promise to the plaintiff alleged.*'

not even if near of kin to the promisee.

It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. But this doctrine was finally overruled in the case of *Tweddle v. Atkinson* by the Court of Queen's Bench. 1 B. & S. 393.

The facts of that case were these. *M* and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, to the effect that each should pay a sum of money to *M*, *and that M should have power to sue for such sums.* After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him. It was held that the action would not lie, and Wightman, J., said, '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.*' 1 Ventr. 6. 1 B. & S. 397.

The doc-

Equity was not always so unhesitating as the Courts of Common Law in the language used as to the rights of one who is to be benefited by a contract to which he is not a party.

The question has most frequently arisen in cases where contracts have been made or work done on behalf of a Company

v. Baxter, L. R. 2 C. P. 174.

which has not yet come into existence. The Company when formed cannot ratify such transactions, and attempts have been made to bind it by introducing into the articles of association a clause empowering the directors to fulfil the terms of the contract, or to repay those who have given work or advanced money to promote the existence of the Company.

Porto Alegre Railway Co., L. R. 9 C. P. 503.

The Common Law Courts have uniformly held that no right of action accrues to the beneficiary under such a provision. In equity language has been used, sometimes very explicit, to the effect that 'where a sum is payable by *A B* for the benefit of *C D*, *C D* can claim under the contract as if it had been made with himself.' But recent decisions on this subject put the matter on a plain footing and distinguish the cases in which a third party may or may not sue.

Touche v. Metropolitan Warehousing Co., 6 Ch. 671.

D. 368.

1 Ex. D. 88 (C. A.).

In *Eley v. Positive Government Security Life Assurance Company*, one of the articles of association of the defendant Company provided that the plaintiff should be employed as its permanent solicitor. The action was brought for a breach of contract in not employing the plaintiff.

Lord Cairns, in delivering the judgment of the Court of Appeal, says, 'Articles of association, as it is well known, follow the memorandum, which states the objects of the Company, while the articles state the arrangement between the members. They are an agreement *inter socios*, and in that view if the introductory words are applied to Article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now so far as that is concerned it is *res inter alios acta*, the plaintiff is no party in it. No doubt he thought that by inserting it he was making his employment safe as against the Company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff.'

See Ashbury Carriage Co. v. Riche, L. R. 7 H. L. at p. 667.

An attempt was made in the case of the *Empress Engineering Company* to enforce an agreement made between *A* and *X*, wherein *A* professed to act on behalf of the Company, though it was not as yet formed. The agreement was subsequently introduced into its articles of association, but the Court of Appeal held that the transaction gave no claim to *X* against the Company. 16 Ch D. 1

It may well be that an agreement between two parties may be so framed as to make one of them trustee for a third, and as was pointed out in the course of the argument by Jessel, M. R., some cases of this nature have created the impression that a third party who is to be benefited by a contract acquires rights *ex contractu* in equity. But a mere contract between two parties that one of them shall pay money to a third does not as a rule make that third person a *cestui que trust*[1]. Declaration of trust needed that party sue.

Attempts have been made, but without success, to break the general rule in the case of unincorporated companies and societies who wish to avoid bringing action in the names of all their members. To this end they introduce into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Such a case is that of *Gray v. Pearson*, where the managers of a Mutual Assurance Company, not being members of it, were authorised, by powers of attorney executed by the members of the Company, to sue upon contracts entered into by them as agents on behalf of the Company. They sued upon a contract so entered into, and the Court of Common Pleas held that they could not maintain the action, 'for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been Attempts to enable a third party to sue for many joint contractors have uniformly failed. L. R. 5 C P. 568. Per Willes, J., at p. 574.

[1] In the Law Reports, Feb. 1884, are two instructive cases. The one a contract between *A* and *X* which made *X* trustee for *M*: the other an undertaking by a company to pay the expenses of its formation, which was held not to make it liable upon contracts between its promoters and a solicitor who gave time and trouble to the business of its formation. *In re* Flavell, 25 Ch. D. 89. *In re* Rotherham Alum & Chemical Co., 25 Q. D. 103.

violated.' And Montagu Smith, J., said, 'This is an attempt to do what has been frequently but fruitlessly attempted before, viz. to get rid of the difficulty of a large number of people suing in their own names,—to appoint a public officer without obtaining an Act of Parliament or a Charter of Incorporation.'

Statutory relaxations of the rule.

The practical inconvenience under which bodies of this description labour has been met in many cases by the Legislature. Certain companies and societies are enabled to sue and be sued in the name of an individual appointed in that behalf[1], and the Judicature Act has laid down a general rule that—'Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action on behalf of all the parties so interested.'

Order XIV. § 9.

Agency postponed.

But although *A* cannot by contract with *X* confer rights or impose liabilities upon *M*, yet *A* may represent *M*, in virtue of a contract of employment subsisting between them, so as to become his mouthpiece or medium of communication with *X*.

This employment for the purpose of representation is the contract of agency. A treatment of the subject here would constitute a parenthesis of somewhat uncouth dimensions. It will be better dealt with in an Appendix.

[1] Statutes of this nature are—

7 Geo. IV. c. 46, relating to Joint Stock Banking Companies;

7 Will. IV. and 1 Vict. c. 73, relating to companies formed under letters patent;

34 and 35 Vict. c. 31, relating to Trades Unions;

38 and 39 Vict. c. 60, relating to Friendly Societies;

and in many cases companies formed by private Acts of Parliament possess similar statutory powers.

CHAPTER II.

The Assignment of Contract.

Assignment of contract.

We now come to discuss the cases in which the contractual obligation may pass to one who was not a party to the original agreement. We have seen that a contract cannot affect any but the parties to it; but the parties to it may under certain circumstances drop out and others take their places, and we have to ask, first, how this can take place by the voluntary act of the parties themselves, or one of them.

§ 1. *Assignment by act of the parties.*

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.

Assignment of liabilities.

Liabilities cannot be assigned.

A man cannot assign his liabilities under a contract.

Or we may present the matter from the point of view of the other party to the contract, and say that a man cannot be compelled to accept performance of the contract from one who was not originally a party to it.

The rule seems to be based on sense and convenience. It is not merely that a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract; but, to use the language of Lord Denman in *Humble v. Hunter*, 'you have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract.'

12 Q. B. 317.

An illustration is supplied by the case of *Robson & Sharpe v. Drummond*. Sharpe let a carriage to the defendant at a

2 B. & Ad. 303.

yearly rent for five years, undertaking to paint it every year and keep it in repair. Robson was in fact the partner of Sharpe, but the defendant contracted with Sharpe alone. After three years Sharpe retired from business, and the defendant was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. The defendant refused to accept the substitution of Robson for Sharpe, and it was held that he could not be sued upon the contract. 'The defendant,' said Lord Tenterden, 'may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe... The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person.'

for rule.

Exceptions to the rule.

There are certain limitations to this rule. A liability may be assigned with the consent of the party entitled; but this is in effect the rescission, by agreement, of one contract and the substitution of a new one in which the same acts are to be performed by different parties.

Dicey, Parties to Actions, 235.

Or again, if *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. But *A* does not cease to be liable if the work is ill done.

British Waggon Co. v. Lea, 5 Q. B. D. 149.

Again, where an interest in land is transferred, liabilities attaching to the enjoyment of the interest pass with it. But this arises from the peculiar nature of obligations attached to land and will be matter for separate discussion.

Assignment of rights.

(i) At Common Law.

lity of the

At Common Law, apart from the customs of the Law Merchant, the benefit of a contract, or a *chose in action*, cannot

be assigned so as to enable the assignee to sue upon it in his own name. He must sue in the name of the assignor or his representatives; or rather, the Common Law so far takes cognisance of such equitable rights as are created by the assignment that the name of the assignor may be used as trustee of the benefits of the contract for the assignee.

benefit of a contract:

Powles v. Innes, 11 M. & W. 10.

The only mode by which the rights under a contract can be really transferred is not, strictly speaking, by assignment at all, but by means of a substituted agreement.

at common law only by substituted agreement;

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed between all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relations with either party. In such a case the consideration of *A*'s promise is the discharge by *M*; for *M*'s discharge of *A*, the extinguishment of his debt to *X*; for *X*'s promise, the substitution of *A*'s liability for that of *M*.

Per Lord Tenterden, C. J.; Fairlie v. Denton, 8 B & C. 400.

But there must be ascertained sums due from *A* to *M* and from *M* to *X*; and it is further essential that there should be a definite agreement between the parties, for it is the promise of each which is the consideration for those given by the others. Thus it is not enough that *A* should say to *X* 'I will pay you instead of *M*,' and should afterwards suggest the arrangement to *M* and receive his assent.

in cases of debt;

Cuxon v. Chadley, 3 B. & C. 591.

Nor is it enough that *M* should in writing authorise *A* to pay to *X* the debt due from *A* to himself, and that *A* should write 'acknowledged' at the foot of the document: *X* cannot sue *A* for the money. These were the facts in *Liversidge v. Broadbent*. *M* owed money to the plaintiff, who required security for his debt. *M* thereupon, being owed money by the defendant, gave to the plaintiff a paper authorising the defendant to pay the money to him (the plaintiff); this paper the defendant 'acknowledged' in writing; but on his being sued for the money, the Court of Exchequer held that such an acknowledgment gave no right of action.

4 H. & N. 603

It will be observed that in neither of these cases was there such an agreement as amounted to a discharge by *M* of the

debt due to him from *A*; there was therefore no consideration for *A*'s promise to pay *X*, and on that ground *X* would be unable to maintain an action against *A*.

In the case last mentioned, Martin, B., thus gave reasons for holding that *X* could not recover:—

'There are two legal principles which, so far as I know, have never been departed from: one is that, at Common Law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that *M* could not assign to the plaintiff the debt due from the defendant to him. . . The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action. . . . No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor; and if there is any consideration for the promise, he is bound to perform it. But here there was none whatever. There was no agreement to give time, or *that the debt of M should be extinguished*,—no indulgence to him or detriment to the plaintiff. There was nothing in nature of a consideration moving from the plaintiff to defendant, but a mere promise by the defendant to pay another man's debt.'

Broadbent, 4 H. & N. 610.

It is thus apparent that a contract cannot be assigned at Common Law except (1) by an agreement between the original parties to it and the intended assignee, which is subject to all the rules for the formation of a valid contract, and which is limited in its operation to the transfer of a debt; or (2) by the rules of the Law Merchant under circumstances to be noted presently.

or by custom of merchants.

(ii) In Equity.

Assignability of contracts in equity

Equity will permit the assignment of a *chose in action*, or the rights which a man possesses under a contract, whenever the contract is not for exclusively personal services; and a

suit in equity may be maintained by the assignee in his own name.

But certain conditions affect the rights of the assignee. Is to certain conditions.

(α) The assignment will not be supported unless consideration has been given by the assignee.

(β) It will not bind the person liable until he has received *notice*, although it is effectual as between assignor and assignee from the moment of the assignment.

(γ) The assignee takes subject to all such defences as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

Notice.

It is fair upon the person liable that he should know to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor. A convenient illustration is furnished in the case of covenants to pay interest on a mortgage debt. If the mortgage be assigned by the mortgagee without notice to the mortgagor, and interest be afterwards paid by the mortgagor to the duly-authorised agent of the mortgagee, the money so paid, though due to the assignee, cannot be recovered by him from the debtor. Williams v. Sorrell, 4 Vesey, 389. We may put the case thus:—Money is due at regular intervals from *A* to *X*, and is ordinarily paid by *A* to the agent of *X*: *X* assigns his interest in the debt to *M*. *A* receives no notice but continues to pay the money to *X*'s agent: the money so paid cannot be recovered by *M* from *A*.

The *rationale* of the rule is thus expounded by Turner, L. J., in *Stocks v. Dobson*:—'The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no 4 D. M. & G. 15.

legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee*.'

4 D. M. & G. at p. 17.

And the same case is authority for this further proposition, that 'equitable titles have priority according to the priority of notice.' The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which they gave notice to the party to be charged.

Title.

Assignee takes subject to equities.

Crouch v. Credit Foncier, L. R. 8 Q. B. 380. Mangles v. Dixon, 3 H. L. C. 735.

'The general rule, both at law and in equity, is that no person can acquire a title, either to a *chose in action* or any other property, from one who has himself no title to it.' And further, 'if a man takes an assignment of a *chose in action*, he must take his chance as to the exact position in which the party giving it stands.'

The facts of the case last cited will afford an apt illustration of this proposition.

M chartered half his vessel to *X*, using the other half himself, and taking half the risks of the adventure. The form in which the agreement between the parties was expressed was this:—*M* and *X* executed a charter party whereby *X* appeared as sole charterer: by a second document a clerk of *M* undertook the payment of half the freight and half the risks of the adventure; and by a third document *M* guaranteed to *X* the performance by his clerk of the undertaking contained in the second document. The whole arrangement was *bonâ fide*, and its peculiarities arose from the difficulty created by *M* being the charterer of a portion of his own vessel.

Subsequently *M* assigned the charter to *A* for a large sum, without communicating to him the accompanying documents which divided both the profits and the risks between the owner *M* and the charterer *X*. *A* sued at Common Law in the name of *M* and recovered the whole freight, the Court of Exchequer holding that *X* was bound on the true construction of the agreements to pay over the freight to *M* in the first instance, and afterwards settle the balance of profit and loss. *X* applied to the Court of Chancery to have an account taken in respect of the joint adventure, and to restrain *A* from proceeding on the Common Law judgment. It was held by the House of Lords that *A* must stand in the same position with *M* as to the whole agreement, that he was not entitled to more than a moiety of the freight, and was liable for half the losses of the adventure.

Mangles, 3 Ex. 395

s. c. 3 H. L. C.

In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to *X*, who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of the interest acquired in it by *X*.

Graham v. Johnson, 8 Eq. 38.

It is possible, however, that two parties to a contract may stipulate that if either assign his rights under it, such an assignment shall be 'free from equities;' that is to say, that the assignee shall not be liable to be met by such defences as would have been valid against his assignor. It is questionable, however, whether such a stipulation would protect the assignee against the effects of Fraud, or any vital defect in the formation of the original contract.

This rule may be excluded by express terms.

Ex parte Asiatic Banking Corporation, 2 Ch. 397.

(iii) By Statute.

It remains to consider, so far as mere assignment goes, the statutory exceptions to the Common Law rule that a *chose in action* is not assignable.

Assignment of contract by statute.

(*a*) The Judicature Act of 1873 gives to the assignee of any debt or legal *chose in action* all legal rights and remedies.

36 & 37 Vict. c. 66. § 25. sub-§ 6.

But (1) the assignee takes subject to equities; (2) the assignment must be absolute; (3) must be in writing signed by the assignor; (4) express notice in writing must be given to the party to be charged, and the title of the assignee dates from notice.

It is to be noted that the requirements of this section as to form are far more stringent than those of the Equity Courts, which apparently did not require writing either for the assignment or the notice.

It should further be noted that the assignment operates without the consent of the party liable. In *Brice v. Bannister* the defendant received express notice of the assignment of a debt accruing from him to the assignor. He refused to be bound by the assignment and paid his debt to the assignor. He was held liable notwithstanding to the assignees for the amount assigned.

3 Q. B. D. 569.

Policies of life insur-

(β) By 30 & 31 Vict. c. 144, policies of life insurance are assignable in a form specified by the Act, so that the assignee may sue in his own name. Notice must be given by the assignee to the Assurance Company, and he takes subject to such defences as would have been valid against his assignor.

Policies of marine insurance.

(γ) By 31 and 32 Vict. c. 86, policies of marine insurance are similarly assignable; but this statute contains no requirement as to notice.

Shares.

8 & 9 Vict. c. 16. § 14. 25 & 26 Vict. c. 89. § 22.

(δ) Shares in Companies are assignable under the provisions of the Companies Clauses Act, 1845, and the Companies Act, 1862.

Mortgage debentures.

28 & 29 Vict. c. 78.

(ϵ) Mortgage debentures issued by Companies under the Mortgage Debenture Act are assignable in a form specified by the Act.

Negotiability.

Assign-

So far we have dealt with the assignment of contracts by the rules of Common Law, equity and statute, and it would appear that under the most favourable circumstances the assignment of a contract binds the party chargeable to the

assignee, only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses in himself.

from negotiability.

We now come to deal with a class of promises the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise. In other words, we come to consider *negotiable instruments* as distinguished from *assignable contracts*.

Features

The essential features of *negotiability* appear to be these.

Firstly, the written promise gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Secondly, the holder is not prejudiced by defects in the title of his assignor; he does not hold subject to such defences as would be good against his assignor.

Notice therefore need not be given to the party liable, and the assignor's *title* is immaterial.

Certain contracts are negotiable by the custom of merchants recognised by the Courts; such are bills of exchange, foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company.

litan Bank, 2 Q. B. D. 194.

by statute.

Certain other contracts have been made negotiable by statute, as promissory notes by 3 & 4 Anne, c. 9, and East India bonds by 51 Geo. III. c. 4.

18 c. 111.

Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which will call for a separate consideration.

Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative of the

nature of negotiability, that we will shortly consider their principal features.

A bill of exchange. 45 & 46 Vict. c. 61. § 1.

A bill of exchange is an unconditional written order addressed by *M* to *X* directing *X* to pay a sum of money to a specified person or to bearer. Usually this specified person is a third person *A*, but *M* may draw a bill upon *X* in favour of himself, or he may draw upon *X* in favour of *X*. We must assume that the order is addressed to *X* either because he has in his control funds belonging to *M* or is prepared to give him credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient form for illustration.

How drawn.

M directs *X* to pay a sum of money to *A* or order, or to *A* or bearer. *M* is then called the drawer of the bill, and by drawing it he promises to pay the sum specified to *A* or any subsequent holder if *X* do not accept the bill or, having accepted it, fail to pay.

How accepted.

Until acceptance, *X*, upon whom the bill has been drawn, is called the drawee. When *X* has assented to pay the sum specified, he is said to become the acceptor. Such assent must be expressed by writing on the bill signed by the acceptor, or by his simple signature. An acceptance is an unconditional promise to pay the sum named when due.

If the bill be payable to *A* or bearer, it may be transferred from one holder to another by mere delivery: if it is payable to *A* or order, it may be transferred by indorsement.

How indorsed:

Indorsement is an order, written upon the bill, and signed by *A*, in favour of *D*. Its effect is to assign to *D* the right to demand acceptance or payment of the bill from *X* when due, and in the event of default by *X* to demand it of *M*, the original drawer, or of *A*, against whom he has a concurrent remedy as being to all intents a new drawer of the bill.

specially,

If the indorsement be simply to *D*, or to *D* or order, the bill may be assigned by *D* to whomsoever he will in the same manner as it was assigned to him.

in blank.

If the indorsement be the mere signature of *A*, it is

indorsed in blank, and the bill then becomes payable to bearer, that is, assignable by delivery. *A* has given his *order* and that addressed to no one in particular; the bill is in fact indorsed over to any one who becomes possessed of it.

A promissory note is a promise in writing made by *X* to *A* that he will pay a certain sum at a specified time or on demand to *A* or order, or to *A* or bearer. *X*, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are similar to those relating to a bill of exchange.

A sory note.

We may now endeavour to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Assignability distinguished

Let us suppose that *X* makes a promissory note payable to *A* or order, and that *A* indorses it over to *D*. *D* calls upon *X* to pay the value of the note, and sues him upon default.

In the case of an ordinary contract, *D* would, at the least, be called upon to show that he had given consideration to *A* for the assignment; that notice of the assignment had been given by him to *X*; and he would then have no better title than *A*.

In the case of negotiable instruments Consideration is presumed to have been given until the contrary is shown, and notice of assignment is not required.

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Notice not needed.

But suppose it turn out that the note was given by *X* to *A* for a gambling debt, or was obtained from him by fraud. The position of *D* is then modified to this extent.

The ater title than the

As between *A* and *X* the note would be void or voidable according to the nature of the transaction, but this does not affect the rights of a *bonâ fide* holder for value, that is, a person who gave consideration for the note and had no notice of the vitiating elements in its origin. The presumptions of law under these circumstances are, (1) that *D* did not give

value for the bill, but (2) that he was ignorant of the fraud or illegality; for fraud, or participation in an illegal act, is never presumed. It will be for *D* to show that he gave value for the bill, but for *X* to show that *D* knew that the bill was tainted in its origin. If *D* proves his point and *X* fails to prove his, then *D* can recover in spite of the defective title of *A* his assignor.

s on Bills, ed. 12, p. 122.

L. R. 8 Q. B. 374.

The case of *Crouch v. Credit Foncier of England* furnishes an illustration both of the nature of negotiability and the limits within which the creation of negotiable instruments is permissible.

An instrument under seal is not negotiable.

A debenture assignable under the Companies Act and expressed to be payable to the bearer was stolen; the thief sold it to the plaintiff, and he sued the Company for non-payment; the jury found that he was a *bonâ fide* holder for value of the debenture, but the Court held that he could not recover, because, in spite of the wording of the debenture, it was an instrument under seal and therefore could not be, what it purported to be, a negotiable instrument assignable by delivery. The plaintiff therefore suffered for the defective title of his assignor.

Had the debenture been a negotiable instrument, the plaintiff could have recovered; for, as Blackburn, J., said, in speaking of such contracts, 'the person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.'

L. R. 8 Q. B. p. 382.

But the case further goes to show that a man cannot, by merely making an instrument payable to bearer, make it thereby negotiable, if the custom of the law merchant does not recognise it as such; or if, being so recognised by the custom of merchants, the character of the instrument preclude its negotiability. For it had been the custom of merchants to treat these debentures as assignable by delivery; yet when

one of them came before the Courts it was at once denied the incidents of negotiability as incompatible with its character of an instrument under seal.

Bill of lading.

It would not be desirable to go further into the subject of negotiable instruments than is necessary to exhibit the essential features of negotiability. We may however notice the character of 'bills of lading,' as possessing some peculiar marks. A bill of lading is called 'a document of title,' 'a symbol of property;' and the meaning of these phrases is this. The bill of lading is a receipt by the master of a ship for goods bailed to him for delivery to A or his assigns. Of this receipt three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to A, the consignee, who on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu* [1].

What it is.

What rights its assignment confers.

The assignment of the bill of lading by indorsement by the consignee to a holder for value gives to that holder a better right than the consignee himself possessed. He has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and gives him a claim to them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor.

Lickbarrow v. Mason, 1 Sm. L. C. 825.

By law merchant, rights.

His right however, which in this respect is based upon the law merchant, is a right of property only. The assignment of the bill of lading gives a right to the goods. It did not at Common Law give any right to sue on the contract expressed in the bill of lading.

By 18 & 19 Vict. c. 111, contractual rights;

This right is conferred by 18 and 19 Vict. c. 111. By that act the assignment of a bill of lading is made to

[1] Stoppage *in transitu* is the right of the unpaid vendor, upon learning the insolvency of the buyer, to retake the goods before they reach the buyer's possession. For the history of this right the reader is referred to the judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*; for its application, to Benjamin on Sales, bk. v. part 1.

8 M. & W. 339.

transfer not only the property in the goods, but 'all rights of suit' and all liabilities in respect of the goods 'as if the contract contained in the bill of lading had been made with himself.'

As regards the negotiability of a bill of lading, it differs in some important respects from the instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these to a certain extent wider than those possessed by the assignor; therein it differs from negotiable instruments which only confer rights *in personam*.

but not independent of assignor's title. Gurney v. 3 E. & B. 622.

But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a *bonâ fide* indorsee. And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading then may be called a contract assignable without notice, partaking in some respects of the character of conveyance, inasmuch as it gives a title to property, but incapable of giving a better title, whether proprietary or contractual, than is possessed by the assignor; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

§ 2. *Assignment of contractual rights and liabilities by operation of law.*

We have hitherto dealt with the mode in which the parties to a contract may by their own acts assign to others the benefits or the liabilities of the contract. But rules of law may also operate to transfer to one person the rights or the liabilities of another.

Assignment of interests in land.

If *A* by purchase or lease acquire an interest in land of *M*, upon terms which bind them by contractual obligations in

respect of their several interests, the assignment by either party of his interest to *X* will within certain limits operate as a transfer to *X* of those obligations.

Marriage, which once transferred to the husband conditionally the rights and liabilities of the wife, has little effect since the Act of 1882. Marriage.

Representation, whether in the case of death or bankruptcy, operates to confer in the one case upon the executors or administrators of the deceased, in the other upon the assignees of the bankrupt, his rights and liabilities; but the assignment is merely a mechanical contrivance for continuing, up to a certain point and for certain purposes, the legal existence of the deceased or the bankrupt. They to whom the contract is assigned take no benefit by it, nor are they personally losers by the enforcement of it against them. They merely represent the original contracting party to the extent of his estate and no more. Representation.

of obligations upon the transfer of interests in land.

a. Covenants affecting leasehold interests.

At Common Law these are said to 'run with the land and not with the reversion,' that is to say they pass upon an assignment of the lease, but not upon an assignment of the reversion. If the lessee assigned his lease, the man to whom he assigned it would be bound to the landlord by the same liabilities and entitled to the same rights as his assignor, to this extent :— Covenants affecting leasel run wi the lar

(1) Covenants in a lease which 'touch and concern the thing demised' pass to the assignee of the lessee whether or no they are expressed to have been made with the lessee 'and his assigns.' Such are covenants to repair, or to leave in good repair, or to deal with the land in any specified manner. if they concern the thing demised, See cases collected in note to Spencer's case, 1 Sm. L. C. 73, 74.

(2) Covenants in a lease, which touch and concern the

thing demised, but relate to something not in existence at the time of the lease, are said to pass to the assigns only if named, that is to say, if the covenant be expressed as made with heirs and assigns. But although this rule is laid down in the leading case upon the subject, it has been so unfavourably commented upon in a modern decision that its validity is extremely questionable.

2 H. & N. 808.

not if purely personal.

(3) In no case does the assignee of the lessee acquire benefit or liability from merely personal or collateral covenants made between his assignor and his landlord. *X* the lessee covenanted to use his premises as a public-house. *A* the lessor covenanted not to build or keep any house for sale of beer or spirits within half a mile of the demised premises. *X* assigned his lease to *M*. It was held that the benefit of *A*'s covenant did not pass to *M*.

Covenants do not run with the reversion except by statute.

The reversioner or landlord does not, at Common Law, by the assignment of his interest in the land convey his rights and liabilities to the assignee.

It was not till 32 Hen. VIII. c. 34 that the law in this respect was changed, a change probably due to the dissolution of the monasteries. By that act the assignee of the reversion is enabled to take the benefits, and also incurs the liabilities, of covenants entered into with his assignor: and it has been settled that the rules as to the connection of the covenants with the thing demised apply to such as run with the reversion equally with those that run with the land. The act only applies to leases under seal, but in the case of leases from year to year, payment of rent, and the acceptance of it, is held to be evidence from which a jury may infer 'a consent to go on, on the same terms as before.'

Sm. L. C. 1. 69.

Per Willes, J., Cornish v. Stubbs, L. R. 5 C. P. 339.

Covenants affecting freehold interests.

Covenants

At Common Law, covenants entered into *with* the owner of land, that is to say, promises under seal made *to* the owner of land, and for his benefit, pass to his assignees, provided

they touch, and concern the land conveyed and are not merely personal.

X a vendor of land covenants with *A* the purchaser that he has a good right to convey the land; the benefit of such a covenant would pass from *A* to his assignees. It would be otherwise if a covenant were introduced into the conveyance relating to some matter purely personal between *A* and *X*. Dicey, Parties to

On the other hand, covenants entered into *by* the owner of land which restrict his enjoyment of the land, do not at Common Law bind his assignees, except he thereby create certain well-known interests, such as easements and profits, recognised by Law. Cove *by* owner.

If a man endeavour to create restrictions on his land which are not included in the circle of rights *in re alienâ* known to the Common Law, he cannot affix those rights to the land so as to bind subsequent owners. The cases which deal with attempts to create 'an easement in gross' illustrate this proposition, the principle of which is thus enunciated by Lord Brougham in *Keppell v. Baily*:—'It must not be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of the owner. . . . Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote.' Stockport Waterworks Co. v. Potter, 3 H. & C. 300. 2 Mylne & Keen, 517 Common Law view.

But Courts of Equity have established a class of exceptions to this general rule, and although these have been mainly confined to covenants in the case of land sold for building purposes, it is difficult to see what limitations can be introduced to the principle on which they are enforced. The view taken by Courts of Equity may be thus illustrated. *A* sells land to *X* and covenants that he *A*, being possessed of adjoining land, will never use it otherwise than in a particular way. *A* sells his land to *M* with notice of the covenant, and Equitable enforcement of re co

enjoyment of the land is then limited by the terms of

the covenant. The principle is thus stated by Lord Cottenham :—'That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. . . . It is said that the covenant, being one which does not run with the land, this Court cannot enforce it; but the question is, *not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.*'

v. Moxhay, 774.

Assignment of contractual obligation upon marriage.

45 & 46 Vict. c. 75. §§ 13, 14.

The only effect which marriage now produces by way of assignment of rights or liabilities is that if the separate estate of the wife be insufficient to satisfy her antenuptial contracts the husband is liable to the extent of all property which he shall have acquired or became entitled to through his wife.

Assignment of contractual obligation by death.

Representatives acquire all

which affect personal estate,

Death passes to the executors or administrators of the deceased all his personal estate, all rights of action which would affect the personal estate, and all liabilities which are chargeable upon it. Thus covenants which are attached to leasehold estate pass, as to benefit and liability, with the personalty to the executor or administrator, while covenants affecting freehold, as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.

if not dependent on skill or service.

And further performance of such contracts as depend upon the personal services or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance. Contracts of personal service expire with either of the parties to them: an apprenticeship contract is thus terminated by the death of the master, and no claim to the services of the apprentice survives to the executor.

v. Bu:field, 2 Str. 1166.

In like manner a breach of contract which involves a purely personal loss does not confer a right of action upon executors. In *Chamberlain v. Williamson*, an executor sued for a breach of promise to marry the deceased, the promise having been broken and a right of action having accrued in the lifetime of the testatrix. But the Court held that such an action could not be brought by representatives of a deceased person, inasmuch as it did not clearly appear that the breach of contract had resulted in damage to the personal estate. 'Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate.'

2 M. & S.

of contractual obligation by

The trustee of a bankrupt is appointed for the purpose of getting in and dividing the property for the benefit of the

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The Bankruptcy Act, 1883, provides that where any part of the property of a bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee

46 & 47 Vict. c. 52 § 50 (5).

And inasmuch as the duty of the trustee is not merely to represent the bankrupt, but to represent him with special reference to the interests of his creditors, he is able to disclaim, and so discharge such executory contracts as he thinks will not be beneficial to the estate.

46 & 47 Vict. c. 52 § 55.

But, it may be doubted whether, like the representative of a deceased person, he is not excluded from suing for 'personal injuries arising out of breaches of contract, such as contracts to cure or to marry.'

Drake v. Beckham, 11 M & W. 319.

PART IV.

THE INTERPRETATION OF CONTRACT.

Interpretation of contract.

AFTER considering the elements necessary to the formation of a contract, and the operation of a contract as regards those who are primarily interested under it, and those to whom interests in it may be assigned, it seems that the next point to be treated is the mode in which a contract is dealt with when it comes before the Courts in litigation. In considering the interpretation of contract we require to know how its terms are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; what rules are adopted for construing the meaning of the terms when fully before the Court.

In what the subject consists.

Rules relating (1) to evidence, and (2) to construction.

The subject then divides itself into rules relating to evidence and rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

CHAPTER I.

Rules relating to Evidence.

Provinces of Court and Jury.

If a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the Court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said. See p. 126.

The same rule applies to contracts made in writing. Where men have put into writing any portion of their terms of agreement they cannot alter by parol evidence that which they have written. When the writing purports to be the whole of the agreement between the parties, it can neither be added to nor varied by parol evidence.

Why oral contracts need not be

We may, as regards rules of evidence, dismiss purely oral contracts from our consideration. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract is a question to be answered by reference to the formation of contract; the interpretation of such a contract when proved to have been made may be dealt with presently under the head of rules of construction.

Three matters of inquiry.

Our consideration of the rules relating to evidence may be confined to their effect upon written contracts and contracts under seal; and we may say that admissible evidence extrinsic to such contracts falls under three heads.

1. Proof of existence of document;

(1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

2. Of fact of agreement;

(2) Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

3. Of terms of contract.

(3) Evidence as to the terms of the contract. These may require illustration which necessitates some extrinsic evidence; or they may be ambiguous and then may be in like manner explained; or they may comprise, unexpressed, a usage the nature and effect of which has to be proved.

We thus are obliged to consider (1) evidence as to the existence of a document, (2) evidence that the document is a contract, (3) evidence as to its terms.

Difference between formal and simple contract.

p. 45.

We must note that a difference, suggested some time back, between contracts under seal and formal contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression: therefore if the instrument is proved the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow.

In the first the instrument is the contract.

Wake v. Harrop, 6 H. & N. 775.

But 'a written contract not under seal is not the contract itself, but only evidence, the record of the contract.' Even where statutory requirements for writing exist, as under 29 Car. II. c. 3. § 4, the writing is no more than evidentiary of a previous or contemporaneous agreement. A written offer containing all the terms of the contract signed by *A* and accepted by performance on the part of *B*, is enough to enable *B* to sue *A* under that section. And where there is no such necessity for writing, it is optional to the parties

In the second the writing is only evidence of the contract.

to express their agreement by word of mouth, by action or by writing, or partly by one, and partly by another of these processes.

It is always possible therefore that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. 'They put on paper what is to bind them, and so make the written document conclusive evidence against them.' Wake v. Harrop, 6 H & N. 775.

§ 1. *Proof of*

A contract under seal is proved by evidence of the sealing and delivery. Formerly it was necessary to call one of the attesting witnesses where a contract under seal was attested, but the Common Law Procedure Act, 1854, enacted that this should no longer be required save in those exceptional cases in which attestation is necessary to the *validity* of the deed. A warrant of attorney and a *cognovit* afford instances of instruments to which attestation is thus necessary. Proof of contract under seal. c. 20. Ante, p 43.

In proving a simple contract parol evidence is always necessary to show that the party sued is the party making the contract and is bound by it [1]. And oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance: *AB* in Oxford writes to *X* in London, 'I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) *AB.*' To prove the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if *A* puts the terms of an agreement into a written offer which *X* Of simple contract. Supplementary oral evidence where contract written or part.

[1] As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice being given by one party to the other to admit such a document. Such admissions are regulated by the Judicature Act, 1873, Order xxxii. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for production may give secondary evidence of the contents of the document.

accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with *X*, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of *X*.

Harris v. Rickett, 4 H. & N. 1.

or where connection of parts do not appear from documents.

So too where a contract consists of several documents which need oral evidence to show their connection, such evidence may be given to connect them. From this rule we must except contracts of which the Statute of Frauds requires a written memorandum. There the connection of the documents must need no oral evidence to establish its existence.

Boydell v. Drummond, 1 East, 142.

But this is an illustration of the rule that where the Statute of Frauds requires written evidence of a contract it requires such evidence as to the *whole* of the contract. And this requirement has been held inapplicable to contracts outside the Statute. 'I see no reason,' says Brett, J., 'why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance.'

Edwards v. Aberayron Mutual Society, 1 Q.B.D. 587.

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but these are a part of the general law of evidence. The reader is referred for a summary of the rules existing upon this subject to Mr. Justice Stephen's Digest of the Law of Evidence, pp. 68–73.

§ 2. *Evidence as to fact of Agreement.*

Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the Court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement.

It may be shown that incapacity of one of the parties, want of genuine consent, or illegality of object made the agreement of the parties unreal, or such as the law forbids to be carried

into effect. In the case of a simple contract it may be shown, where the promise only appears in writing, that no consideration was given for the promise. Such evidence is constantly admissible to contradict the presumption of value given for a bill of exchange or promissory note. But this must be distinguished from evidence which may be given as to the total failure of consideration promised, for this is a mode of discharge.

Foster v. Jolly, 1 C. M. & R. 708.

See Part V. ch. iii § 2.

Similarly in the case of a deed, where fraud or undue influence is alleged, the absence or inadequacy of consideration may be adduced in derogation of the deed. Extrinsic evidence is thus admissible, not to alter the purport of the agreement, but to show that it was made under such conditions as to preclude the reality of consent.

Evidence of condition operation of contract.

Apart from such circumstances as these it is permissible to prove a parol condition suspending the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an *escrow*, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

In the case of a deed:

See p. 46.

And so it is with a written contract. Evidence may be given to the effect that a document purporting to be a contract is not so in fact. It may be dependent upon a condition unexpressed in the document, so that until the condition happens, the parties agree that the written contract is to remain inoperative.

of contract.

Thus in *Pym v. Campbell* the defendants agreed to purchase from the plaintiffs a portion of the benefits to be derived from a mechanical invention made by the plaintiffs. The purchase was to be made if one *X* approved of the invention, but before this approval had been given they signed a memorandum of agreement on the express understanding that they did so for convenience only and that the agreement was not to bind them until the approval of one Abernethie had been

6 E & B. 3

intimated. Abernethie did not approve of the invention. The plaintiffs contended that the agreement was binding and that the verbal condition was an attempt to vary by parol the terms of a written contract. But the Court held that the evidence was admissible, not to *vary a written contract* but to show that *there had never been a contract at all.*

The law was thus stated by Erle, J.:—'The point made is, that this is a written agreement, absolute on the face of it, and that evidence was adduced to show it was conditional: and *if that had been so it would have been wrong.* But I am of opinion that *the evidence showed that in fact there was never an agreement at all.* The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence: but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.*

Pym v. Campbell, 6 E. & B 374.

§ 3. *Evidence as to the terms of the Contract.*

Evidence as to terms.

We now come to extrinsic evidence as affecting the terms of a contract, and here the admissibility of such extrinsic evidence is narrowed to a small compass: for 'according to

the general law of England the written record of a contract must not be varied, or added to by verbal evidence of what was the intention of the parties.' Per Blackburn, J., in Burges v. Wickham, 3 B & S

We find exceptions to this rule— Exceptions.

(*a*) in cases where terms are proved supplementary, or collateral to so much of the agreement as is in writing;

(*b*) in cases where explanation of the terms of the contract is required;

(*c*) in the introduction of usages into the contract;

(*d*) in the application by equity of its peculiar remedies in the case of mistake.

(*a*) It may happen that the parties to a contract have not put all its terms into writing. Evidence of the supplementary terms is then admissible, not to vary but to complete the written contract. Supplementary terms.

In *Jervis v. Berridge* the plaintiff agreed to assign to the defendant a contract for the purchase of lands from *M.* The assignment was to be made upon certain terms, and a memorandum of the bargain was made in writing, from which at the request of the defendant some of the terms were omitted. In fact the memorandum was only made in order to obtain a conveyance of the lands from *M.* When this was done and the defendant had been put in possession he refused to fulfil the omitted terms which were in favour of the plaintiff. On action being brought he resisted proof of them, contending that the memorandum could not be added to by parol evidence. Lord Selborne however held that the memorandum was 'a mere piece of machinery obtained by the defendant *as subsidiary to and for the purposes of the verbal and only real agreement* under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent.' 8 Ch. 351.

Again, evidence may be given of a verbal agreement collateral to the contract proved, subjecting it to a term unexpressed in its contents. Such a term however can Collateral terms.

only be enforced if it be not contrary to the tenor of the written agreement. Thus, where a farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down, it was held that he was entitled to compensation for damage done to his crops by a breach of such a verbal promise, though no reference to it appeared in the terms of the lease.

Mellish, L. J., in giving judgment said, 'No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved.'

Erskine v. Adeane, 8 Ch. at p. 776.

Explanation of terms; to identify parties,

(*b*) Explanation of terms may merely amount to evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name but on behalf of a principal whose name or whose existence he does not disclose.

Wake v. Harrop, 6 H. & N. 768.

or subject-matter,

Or it may be a description of the subject-matter of the contract, as in a case in which *A* agreed to buy of *X* certain wool which was described as 'your wool,' and the right of *X* to bring evidence as to the quality and quantity of the wool was disputed. The Court held that it was admissible, and Erle, J., thus stated the grounds of decision:—

'I am of opinion that the plaintiffs are entitled to succeed. I assume that they must prove a written contract, and that that contract must contain all the material terms. The contract here is most explicit: it is to purchase of the plaintiffs

"your wool," at 16*s.* a stone, to be delivered at Liverpool. The oral evidence is no doubt admissible to identify the subject-matter of the contract, and to show what "your wool" really was. The judge, who has to construe the written document, cannot have judicial knowledge of the subject-matter; and evidence has been invariably allowed to identify it.'

v. Longbottom, 1 E. & E. 977.

Explanation of terms may be an explanation of some word not describing the subject-matter of the contract, but the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where a vessel is warranted 'seaworthy,' a house promised to be kept in 'tenantable' repair, a thing undertaken to be done in a 'reasonable' manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, and so as to ascertain the intention of the parties.

to show application of phrases.

In *Burges v. Wickham*, a vessel called the Ganges, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, having first been temporarily strengthened so as to be fit to meet the perils of such a voyage. Her owner insured her, and in every policy of marine insurance there is an implied warranty by the insured that the vessel is 'seaworthy.' The Ganges was not seaworthy in the sense in which that term would be ordinarily applied to an ocean-going vessel, but her condition was made known to the underwriters, and though the adventure was more dangerous than an ordinary voyage to India, there appeared to be a reasonable probability of its being brought to a safe ending. At any rate, the underwriters took the risk in full knowledge of the facts. The Ganges was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy in the ordinary sense of the word as applied to an ocean voyage, and maintained that evidence could not be admitted to show that, with reference to this particular vessel and voyage, the term was understood

3 B. & S. 669.

in a modified sense. It was held that such evidence was admissible. The grounds on which it was admissible are stated by Blackburn, J., in a judgment which explains the rule with the utmost clearness:—

'It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of
16 M. & W. 541. the other (see *Payne v. Haine*). So, suppose a sale of a horse warranted to go well in harness; the qualities necessary to constitute a good goer in harness would be different in a pony fit to draw a lady's carriage or a dray-horse; or in a lease of Whiteacre for a year with an express contract to cultivate it in a proper manner, the quantity of labour and manure which the tenant would have to bestow must be different according as Whiteacre consists of hop gardens or meadows. In each of these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. The two last instances I have supposed are not, as far as I know, decided cases; but I give them to explain my meaning as examples of a general rule. Now, according to the view already expressed, seaworthiness is a
Burges v. Wickham, 8 B. & S. 699. term relative to the nature of the adventure, it is to be understood, not *simpliciter*, but *secundum quid*.'

Cases of the sort we have just described are called cases of

latent ambiguity, and are sometimes distinguished from *patent* ambiguities, where words are omitted, or contradict one another; in such cases explanatory evidence is not admissible. Thus, where a bill of exchange was drawn for 'two hundred pounds' but the figures at the top were '245,' evidence was not admitted to show that the bill was intended to be drawn for the larger amount.

Sa Piper, N. C.

(*c*) Evidence is admissible of the usage of a trade or a locality which may add a term to a contract, or may attach a special and sometimes non-natural meaning to one of its terms. As an instance of a usage which annexes a term to a contract we may cite the warranty of seaworthiness just mentioned, which by custom is always taken to be included in the contract of marine insurance, though not specially mentioned.

Evidence of usage.

Usage to annex incidents.

Similarly in the case of agricultural customs, a usage that the tenant, quitting his farm at Candlemas or Christmas, was entitled to reap the corn sown the preceding autumn, was held to be annexed to his lease, although the lease was under seal, and was silent on the subject.

Wigglesworth v Dallison, 1 Sm. L. C.

The principle on which such usages are annexed is stated by Parke, B., in *Hutton v. Warren*, to rest on the 'presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.'

1 M. & W. 475. At p. 475 And see judgment of Blackburn, J., in Mollett v. Robinson, L. R. 7 C. P. at p. 111.

The admissibility of evidence of usage to explain phrases in contracts, whether commercial, agricultural, or otherwise subject to known customs, might be exemplified by reference to very numerous cases. The principle on which such explanation is admitted has been stated to be, 'that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evidence neither adds to, nor qualifies, nor contradicts the existing contract; it only ascertains it by expounding the language.'

To explain phrases.

Brown v. Byrne, 3 E. & B.

Thus in commercial contracts in the case of charter-parties in which the days allowed for unloading the ship 'are to commence running "on arrival" at the ship's port of discharge, evidence may be given to show what is commonly understood to be the port. Some ports are of large area, and by custom "arrival" is understood to mean arriving at a particular spot in the port.'

Per Coleridge, C. J., v. .658.

In like manner a covenant by the lessee of a rabbit warren that he would leave 10,000 rabbits on the warren was explained by evidence of a usage of the locality that 1000 meant 1200.

3 B. & Ad. 728.

Closely connected with the principle that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents.

Hills v Evans, 31 L. J. Ch. 457.

In order to affect a contract a usage must be consistent with rules of law. 'A universal usage cannot be set up against the general law.' And it must also be consistent with the terms of the contract, for it is optional to the parties to exclude the usage, if they think fit, and to frame their contract so as to be repugnant to its operation.

Per Erle, C. J., in Meyer v. Drener, 16 C. B., N. S. 646.

Conditions under which usage operates.

In the application of equitable remedies, the granting or refusal of specific performance, the rectification of documents or their cancellation, extrinsic evidence is more freely admitted. *A* offered to *X* several plots of land for a round sum; immediately after he had despatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed *X* of the mistake without delay, but not before *X* had concluded the contract by acceptance.

Proved mistake a ground for performance.

On proof of this, specific performance of the contract was refused, and *X* was left to such remedy by way of damages as the Common Law Courts might give him. Thus, though, as we have seen, a man is ordinarily bound by the terms of

Webster v. Cecil, 30 Beav. 62.

an offer unequivocally expressed, and accepted in good faith, evidence has been admitted to show that the offer was made by inadvertence.

Again, where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties. And this is done for two purposes and under two sets of circumstances.

Where a contract has been reduced into writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, the Chancery Division will rectify the written instrument in accordance with their true intent. This may be done even though the parties can no longer be restored to the position which they occupied at the time when the contract was made. Should the original agreement be ambiguous in its terms, extrinsic and, if necessary, parol evidence will be admitted to ascertain the true intent of the parties.

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Earl Beauchamp v. Winn, L. R. 6 H. L. at p. 233. Murray v. Parker, 19 Beav. 305

But there must have been a genuine agreement (*Mackenzie v. Coulson*): its terms must have been expressed under *mutual* mistake (*Fowler v. Fowler*): and the oral evidence, if the only evidence, must be uncontradicted.

8 Eq. 375.

4 D. & J. 250. See case cited in Pollock, 52.

Where mistake is not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of Fraud, and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract or having the contract annulled. Instances of such cases are *Garrard v. Frankel*, cited above, or *Harris v. Pepperell*, in which the mistake of the one party was caused by the other, though not with any fraudulent intent, and known to him before his position had been affected by the contract.

Correction

30 See

Harris v. Pepperell, 5

It would seem that, in such cases, these corrective powers

are not used unless the parties can be placed in the same position as if the contract had not been made.

36 & 37 Vict. c 66. § 34.

The Judicature Act reserves to the Chancery Division of the High Court a jurisdiction in 'all causes for the rectification or setting aside or cancellation of deeds or written instruments.'

CHAPTER II.

Rules relating to Construction.

§ 1. *General Rules.*

So far we have dealt with the admissibility of evidence in relation to contracts in writing. We now come to deal with the rules of construction which govern the interpretation of the contract as it is found to have been made between the parties.

(1) The first rule to lay down is that words are to be understood in their plain and literal meaning. And this rule is followed even though its consequences may not have been in the contemplation of the parties, subject always to admissible evidence being adduced of a usage varying the usual meaning of the words, and subject to the next rule which we proceed to state.

(1) Words to be understood in their plain meaning.

(2) 'An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement*;' 'Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.'

Mallan v May, 11 M. & W. 17. Ford v. Beech 11 (

These two rules would seem sometimes to be in conflict, but they come substantially to this; men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The Courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport,

(2) Si to inference of inten- document.

General purport of rules of construction.

then by the literal meaning of its words. Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties so far as it can be discerned.

Thus Courts, both of Law and Equity, will correct obvious mistakes in writing and grammar.

They will restrain the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply.

10 A. & E. 326.

They assign to words susceptible of two meanings that which will make the instrument valid. Thus in *Haigh v. Brooks*, a document was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J. S. It was argued that this showed a past consideration, but the Court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance,' or '*on condition* of your being in advance.'

Assurance Association, 3 B. & S. at p. 929

They will construe words most strongly against the party who used them. The principle on which this rule is based seems to be that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

§ 2. *Rules of Law and Equity as to Time and Penalties.*

There are two points of construction on which law and equity once differed though they differ no longer. These have reference to terms respecting *time* and *penalties*.

Time. Of the essence of the contract at Common Law.

At law, '*time* was always of the essence of the contract.' If *A* made a promise to *X* whereby he undertook to do a certain thing by a certain day in consideration that *X* would thereupon do something for him, *X* was discharged from his promise if, by the date named in the contract, *A*'s promise was unfulfilled.

Not so in Equity.

Equity however looked further into the

intention of the parties, so as to ascertain whether in fact the performance of the contract was meant to depend upon *A*'s promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to *A* the enforcement of *X*'s promise if his own was *performed within a reasonable time*. It is nevertheless open to the parties to make time of the essence of the contract by express agreement.

Lennon v Napper, 2 Sch & L. 684

The distinction between the rules of law and equity in this respect is now swept away by the Judicature Act, which enacts that

36 & 37 Vic. c. 66, § 25, sub-§ 7

'Stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be, or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.'

We have had occasion to note in the case of Bonds and Mortgages the attitude of the Equity Courts towards an agreement which imposes on one of the parties, for a breach of all or any of its terms, a loss in money or property disproportionate to the objects which the agreement was intended to effect. And for a long time past Courts of Law have taken a similar view of the subject.

Penalties

General rules

The question of construction is of this kind. Where the parties affix a penalty to the non-performance of his promise by one, or each of them, they may have intended to effect either of two purposes; to assess the damages at which they rate the non-performance of the promise, or to secure its performance by the imposition of a penalty in excess of the actual loss likely to be sustained.

If the former was their intention, the sum named is recoverable as 'liquidated damages[1].' If the latter, the amount

[1] Liquidated damages are 'the sum agreed upon in the contract by the parties themselves as the damages for a breach of it.' Unliquidated damages are such as are left to be assessed by a jury according to the loss sustained. Bullen

Penalty and liquidated damages.

recoverable is limited to the loss actually sustained, in spite of the sum undertaken to be paid by the defaulter. In construing contracts in which such a term is introduced, the Courts will not be guided by the name given to the sum to be paid. If it be in the nature of a penalty they will not allow it to be enforced although the parties have expressly stated that it is to be paid as liquidated damages and not as a penalty.

For determining this question of construction the following rules may be laid down.

If the contract is for a matter of certain value and a sum is fixed to be paid on breach of it which is in excess of that value, then the sum fixed is a penalty and not liquidated damages.

If the contract is for a matter of uncertain value and a sum is fixed to be paid on breach of it, the sum is recoverable as liquidated damages. There is 'nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree.'

Per Tindal, C. J., in Kemble v. Farren.

Protector Loan Co. v. Grice, 5 Q. B. D. (C. A.) 502.

And if a debt is to be paid by instalments it is no penalty to provide that on default of any one payment the entire balance of unpaid instalments is to fall due.

If the contract contains a number of terms some of which are of a certain value and some not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages, however strongly the parties may have expressed their intention that it shall be so.

147. Thus in *Kemble v. Farren* the defendant agreed to act at Covent Garden Theatre for four consecutive seasons and to conform to all the regulations of the theatre, and the plaintiff promised to pay the defendant £3 6*s*. 8*d*. every night, during that time, that the theatre should be open for performance, and to give him one benefit night in each season.

It was further agreed that for a breach of any term of this agreement by either party, the one in default should pay the

other £1000, 'to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be *liquidated and ascertained damages and not a penalty* or penal sum or in the nature thereof.' The defendant refused to act during the second season, the jury put the damages for his breach of contract at £750, and the plaintiff moved for a rule to raise them to £1000.

But the Court held, that in spite of the explicit statement of the parties that the sum was not to be regarded as a penalty, it must be so regarded. If the penal clause had been limited to breaches uncertain in their nature and amount, it was thought that it might have had the effect of ascertaining the damages, for the reason above cited. 'But,' said Tindal, C. J., 'in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the other hand, the plaintiff had neglected to make a single payment of £3 6*s*. 8*d*. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement.' Kemble Farren, 6 Bing.

PART V.

DISCHARGE OF CONTRACT.

of contract; We have now dealt with the elements which go to the formation of Contract, with the operation of Contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.

how effected. The modes in which a contract may be discharged would seem to be these.

Agreement. (α) It may be discharged by the same process which created it, mutual agreement.

Performance. (β) It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.

Breach. (γ) It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other.

Impossibility. (δ) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.

Operation of Law. (ϵ) It may be discharged by the operation of rules of law upon certain sets of circumstances, to be hereafter mentioned.

CHAPTER I.

Discharge of Contract by Agreement.

We have often noted, as the essential feature of the contractual obligation, that it is the result of the voluntary act of the parties, expressed by their agreement. As it is their agreement which binds them, so by their agreement they may be loosed. Forms of discharge by agreement.

And this mode of discharge may occur in one of three forms: waiver; substituted agreement; condition subsequent.

§ 1. *Waiver.*

A contract may be discharged by express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract. Waiver.

An agreement of this nature is subject to the rule which governs all simple contracts, with regard to consideration. And the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, often stated, that 'a simple contract may, *before* Byles on Bills, 107.
', be waived or discharged, without a deed and without consideration,' must be taken to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind, than the discharge of each party by the other from his liabilities under the contract.

There seems to be no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where *A* has done all that he was bound to do and the time for *X* to perform his promise has not yet arrived, a bare waiver of his claim by *A* would be an effectual discharge to *X*. Mere waiver of contractual rights invalid

In fact, English law knows nothing of the abandonment of such a claim, except by release under seal, or for consideration. The plea of 'waiver' under the old system of pleading was couched in the form of an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Where a discharge by waiver is alleged as a defence in an action for breach of contract, the cases tend to show that the defendant must set up, in form or substance, a mutual abandonment of claims, or else a new consideration for the waiver.

and Pract.

Tit. Waiver, Rescission.

7 M. & W. 55. In *King v. Gillett*, the plaintiff sued for breach of a promise of marriage; the defendant pleaded that before breach he had been *exonerated and discharged* by the plaintiff from the performance of his promise. The Court held that the plea was allowable in form; 'yet we think,' said Alderson, B., 'that the defendant will not be able to succeed upon it, . . . unless he proves *a proposition to exonerate on the part of the plaintiff, acceded to by himself*; and this in effect will be a rescission of the contract.'

2 H. & N. 79. In *Dobson v. Espie*, the plaintiff sued the defendant for non-payment of deposit money due upon a sale of land. The defendant pleaded that, before breach of his promise to pay, the plaintiff had given him *leave and license* not to pay. The Court held that such a plea was inapplicable to a suit for the breach of a contract, and that the defendant should have pleaded an *exoneration and discharge*; but it is difficult to see why the pleader should not have adopted the latter form of plea, unless it were that (according to the reasoning of Alderson, B., in *King v. Gillett*) an *exoneration* means *a promise to exonerate*, which like any other promise needs consideration to support it. It is clear that in *Dobson v. Espie* the plaintiff was to obtain nothing for his alleged waiver; neither the relinquishment of a claim, nor any fresh consideration.

Finally, we have the express authority of Parke, B., in

Foster v. Dawber, for saying that an executed contract, i. e. a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver. But this case illustrates another feature of the matter under discussion, to which we will now proceed. 6 Exch. 839.

Peculiarity of bills of exchange and promissory notes.

To the general rule which we have laid down there is an important exception in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may be waived and discharged without any consideration for their waiver. The point arose in the case of *Foster v. Dawber*. The plaintiff was the executor of one *J. C.*, to whom the defendant had given promissory notes for £1000 as security for a loan of that amount. Afterwards *J. C.* had given the defendant a discharge for the promissory note. It was held that the discharge, though unsupported by consideration, was valid. 6 Exch. 839.

The Court said, 'It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by a release under seal, or by performance of the obligation*, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts. . . . . The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule.' 6 Exch. 851.

And it was further held that the rule as to bills of exchange, originating in the law merchant by which those instruments are almost entirely governed, would apply to promissory notes which derive their negotiable character from statute. The statute 3 & 4 Anne, c. 9, makes the same law applicable to both instruments.

§ 2. *Substituted Contract.*

tuted contract, how different from waiver;

A contract may be discharged by an alteration in its terms which, in effect, substitutes a new agreement for the old one. The difference between this and the first-mentioned mode of discharge by agreement lies in the fact that the first is a total obliteration of the contract, the second is a substitution of a new bond between the parties in place of the old one.

be an implied discharge;

And it operates as a rescission in this way, that if it does not in terms express an intention that the original contract should be waived, it indicates such an intention by the introduction of new terms or new parties. The change of rights and liabilities, and consequent extinction of those which before existed, forms the consideration on each side for the new contract.

but the implication must be clear.

But the intention to discharge the original contract must distinctly appear, from the inconsistency of the new terms with the old ones. If there be a mere postponement of performance, for the convenience of one of the parties, the contract is not thereby discharged.

How different from postponement of perform-

The question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is void for non-compliance with the 17th section of the Statute of Frauds.

Haynes, L. R. 10 C. P. 606.

But the Courts have always recognised 'the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another,' and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have

accepted at the earlier date has altered at the later date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, and when by non-performance the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.

Ogle v. Earl Vane, L. R. 2 Q. B. 275. L. R. 3 Q. B. 272.[1]

The contract is discharged by alteration of its terms when (*a*) what is to be done is so far altered as to be inconsistent with it and to amount to a new contract, or (*b*) when a new party is substituted for a previous one by agreement of all three.

A good illustration of the first of these modes of discharge is afforded by the case of *Thornhill v. Neats*. *A* undertook certain building operations for *N*, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the parties for additional work, by which it became impossible that the whole of the operations should be concluded within the stipulated time. It was held that the subsequent agreement was so far inconsistent with the first, as to amount to a waiver of the sum stipulated to be paid for delay.

(a) S

8 C. B. N. S.

A contract may be discharged by the introduction of new parties into the original agreement, whereby a new contract is created, in which the terms remain the same but the parties are different.

tuted parties.

This may be done either by express agreement such as was described in a previous chapter, or by the conduct of the parties, indicating acquiescence in a change of liability.

[1] Willes, J., in giving judgment in the Exchequer Chamber in the case of *Ogle v. Earl Vane*, holds that by the forbearance on the part of the plaintiff, at the request of the defendant, to insist upon delivery of the goods at and after the time for the performance of the contract, an agreement arose which, though for want of consideration for the forbearance it could not furnish a cause of action, was nevertheless capable of affecting the measure of damages. He calls it an Accord without a Satisfaction. As to the nature of Accord and Satisfaction, see Part V. ch. iii. § 4 (*a*).

L. R. 3 Q. B. 272.

If *A* has entered into a contract with *X* and *M*, and *X* and *M* agree among themselves that *M* shall retire from the contract and cease to be liable upon it, *A* may either insist upon the continued liability of *M*, or he may treat the contract as broken and discharged by the renunciation of his liabilities by one of the parties to it.

If however *A*, after he becomes aware of the retirement of *M* from the contract, continues to deal with *X* as though no change had taken place, he will be considered to have entered into a new contract to accept the sole liability of *X*, and will not be entitled to hold *M* to his original contract.

2 M. & W. 484. The case of *Hart v. Alexander* illustrates this rule. The plaintiff employed the defendant with other members of a firm as his bankers; the defendant retired; notice, in various forms, of his retirement was shown to have reached, or to have been accessible to, the plaintiff, who nevertheless continued to bank with the firm. Finally, the firm became bankrupt: the plaintiff sued the defendant as liable to him upon the original contract, as being one of the members of the firm whom he had retained as his bankers. The jury found that the defendant's retirement was sufficiently brought to the notice of the plaintiff, and, as he had still continued to employ the firm, the Court held that a new contract had been formed between the plaintiff and its remaining members. 'I apprehend the law to be now settled,' said Parke, B., 'that if one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditor, the old firm, and the new firm—be transferred to the new firm.' Thus a change of liabilities, accepted by the plaintiff, rescinded the original contract by the creation of a new one to which the defendant was not a party.

§ 3. *Provisions for Discharge.*

A contract may contain within itself the elements of its own discharge, in the form of express provisions for its

determination under certain circumstances. These circumstances may be the non-fulfilment of a specified term of the contract; the occurrence of a particular event; or the exercise by one of the parties of an option to determine the contract.

In the first of these three cases, that in which the non-fulfilment of a specified term of the contract gives to one o the parties the option of treating the contract as discharged, we seem to be approaching very near to the subject of the discharge of contract by *breach*. For this too may arise from the non-fulfilment of a term which the parties consider to be vital to the contract. Discharge

But there is a marked difference between a non-fulfilment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a *breach*, or non-fulfilment not contemplated or provided for by the parties. In the one case the parties have, in the other they have not looked beyond the immediate objects of the contract: in the one case the default which is to constitute a discharge is specified by the agreement of the parties; in the other it must always be a question of fact or of construction whether or no the default was in a matter vital to the contract, so as to operate as a discharge by breach.

A good illustration is afforded by the case of *Head v. Tattersall* of such a condition, or provisional discharge of a contract introduced into its terms. L. R. 7 Exch. 7.

A bought a horse of *X*. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but as it had in the meantime been injured,

though by no fault of *A*, *X* disputed the right of *A* to return it. It was held that he was entitled to do so. 'The effect of the contract,' said Cleasby, B., 'was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here *X* is the person in whom the property revested, and he must therefore bear the loss.'

Head v. Tattersall, L. R. 7 Exch. 14.

Occurrence of a specified event.

The parties may introduce into the terms of their contract a provision that the fulfilment of a condition or the occurrence of an event shall discharge them both from further liabilities under the contract.

Condition of Bond.

Such a provision is called a *condition subsequent*, and is well illustrated by the case of a Bond, which is a promise subject to, or defeasible upon a condition expressed in the Bond.

Excepted risks of charter-party.

Such a provision may be further illustrated by the 'excepted risks' of a charter-party. In a contract of that nature the ship-owner agrees with the charterer to make the voyage on the terms expressed in the contract, 'the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, during the said voyage, *always excepted*.' The occurrence of such an excepted risk releases the ship-owner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and amount to a frustration of the entire enterprise, the parties are altogether discharged.

L. R. 7 Q. B. 404.

In *Geipel v. Smith*, the plaintiff had chartered the defendant's vessel to go to a spout, load a cargo of coals, and proceed thence to Hamburg: the contract contained the usual excepted risks. Before anything was done under the contract a war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The

defendant thereupon, regarding a blockade as a 'restraint of princes,' refused even to load a cargo, and treated the contract as being at an end. The plaintiff sued him for not having fulfilled so much of the contract as would not have involved the risk; but the Court held that as a performance of the main object of the contract had become impossible by the occurrence of an excepted risk, the defendant was not bound to attempt a fulfilment of his preliminary duties.

Limitations of carrier's liability.

Another illustration may be drawn from the contract entered into by a common carrier. A common carrier is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he makes an almost unqualified promise to bring the goods safely to their destination or to indemnify the owner for their loss or injury. His promise is, however, not wholly unqualified; it is defeasible upon the occurrence of certain excepted risks,—'The Act of God and of the Queen's enemies,' and injuries arising from defects inherent in the thing carried. This qualification is an implied term in every contract made with a carrier, and the occurrence of the risks exonerates him from liability for loss incurred through their agency.

Nugent v. Smith, 1 C. P. D. 423.

The Act of God is a phrase which needs some explanation, but which has not until very recently received any judicial exposition.

The case of *Nugent v. Smith*, however, affords a good definition of its meaning, so far as its meaning is susceptible of definition. In that case the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant, but the Court of Common Pleas held him to be liable on the ground that the rough weather was not so violent and unusual as to amount to 'the Act of God,' nor was the struggling of the

1 C. P. D. 423.

Meaning of phrase 'Act of God.'

1 C. P. D. 423.

mare alone enough to show that it was from her inherent vice that she was injured. But the Court of Appeal reversed this decision, and endeavoured to frame an intelligible definition of such an 'irresistible cause of loss' as is described by the term 'Act of God.'

The difference between the two decisions comes to this:—

Per Brett, J., p. 34.

The Court of Common Pleas held that to constitute the 'Act of God,' a loss must arise from 'such a direct and violent and sudden and irresistible act of nature' as could not be foreseen, or, if foreseen, prevented; the Court of Appeal held 'that it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that *by no reasonable precaution under the circumstances could it have been prevented.*'

Per Mellish, L. J., p. 441.

This exception from the general liability of the carrier of goods is a known and understood term in every contract which he makes. The discharge hence arising must be distinguished from discharge arising from a subsequent impossibility of performance not expressly provided against in the terms of the contract. With this we shall deal hereafter.

optional with notice.

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision exists in the ordinary contract of domestic service, the servant can terminate the contract by a month's notice, the master by a month's notice or the payment of a month's wages. And similar terms may be incorporated with other contracts between employer and employed, either expressly or by the usage of a trade.

Nowlan v Ablett, 3 C. M. & R. 54.

Parker v. Ibbetson, 4 C. B., N. S. 347.

A was engaged by *X* to serve him for a year as agent in his business of a woollen merchant, but was dismissed in the course of the year at a month's notice. He sued *X* for breach of contract. It was proved to be a custom of the trade that all such engagements were determinable at a month's notice. The jury found that the custom existed, but they further found that it did not form a part of the contract.

The Court, however, decided that, having been found to exist, the custom must be taken to form a part of the contract, and that it was not for the jury to construe the contract so as to exclude it. *X* was therefore held to be entitled to determine the contract in virtue of this implied term, although the engagement was to have lasted for a year had he not exercised the option given to him by the custom.

Form of discharge by agreement.

It remains to consider the form in which it is necessary to express an agreement purporting to discharge a contract already existing.

The general rule is, that a contract must be discharged in the same form as that in which it is made. A contract under seal can only be discharged by agreement, if that agreement is also under seal: a contract entered into by parol may be discharged by parol.

Parties to a deed cannot therefore discharge their obligations by a parol contract; but it is possible for them to make a parol contract which creates obligations separate from, and yet substantially at variance with the deed.

under seal

but a parol contract will bind, though at variance with deed.

If *M* and *X* enter into a contract under seal, they cannot meet and by word of mouth or by writing waive their respective rights under the contract. But they may make such a contract as does in effect contravene the terms of the deed, and gives a right of action to which the deed furnishes no answer. *M* and *X* entered into a contract under seal, by which *M* let to *X* certain rooms for a certain time at a rent to be ascertained in a certain way. *M* died, and *A* his administrator agreed with *X* by parol, that in consideration of £70 to be paid by *X* and to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. *X* failed to make the payment agreed upon, and *A* sued him upon the parol contract. It was urged on behalf of *X* that the parol contract was an attempt to vary the deed by an instrument not under seal; and that a performance of this contract, being no discharge of the deed, would

Nash v. Armstrong. 10 C. B., N. S. 259.

leave him liable to his previous obligation. But the Court held that the parol contract created a new obligation, and was not an attempt to vary an old one; that a performance of this new contract would furnish a good equitable answer to an action brought upon the contract under seal; and that therefore *A* was entitled to bring action upon the parol contract.

See per Willes, J., p. 262.

(2) In case of parol contracts.

A parol or simple contract may be discharged by writing or by word of mouth, whether or no the original contract be in writing; and this follows from what has been said before, that the writing is not the agreement but the evidence of it, and that, as the essentials of agreement lie in the expressed intention of the parties and not in the writing which is the instrument of that expression, the contract may be discharged '*eo ligamine quo ligatum est*,' by a valid expression of the intention to put an end to it.

Under 29 Car. II. c. 3. § 4.

Salisbury, 1 Vern. 240.

But an exception must be made where a contract is required by Statute to be in writing. In such a case there appears to be authority for saying that an absolute discharge of the contract may take place by word of mouth. But if the discharge be not a simple rescission or cancellation, if it be such an implied discharge as arises from the making of a new agreement inconsistent with the old one, then there must be writing such as would satisfy the enactment which governs the original contract.

L. R. 2 E.

The most recent authority upon this point is the case of *Noble v. Ward*. There a contract was made for the sale of goods upon the 18th of August, in which it was agreed that the goods should be delivered within a certain time. This contract was in writing and satisfied the requirements of 29 Car. II. c. 3. § 17. On the 27th of September a verbal agreement was made extending the time for delivery. An action was brought by the vendors for non-acceptance of the goods, and '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.' But the agreement

of the 27th of September, being made by word of mouth, was invalid, and could not operate as a new contract for the sale of the goods. The defendants nevertheless contended that though invalid to create a new contract, it was valid to rescind the existing one. But this contention the Court would not allow; it was, in fact, laid down 'that no rescission could take place by an invalid contract.' And the same rule has been applied to contracts under the 4th, and contracts under the 17th sections of the Statute of Frauds.

Goss v. L
Nugent.
5 B. & Ad

CHAPTER II.

Discharge of Contract by Performance.

THIS branch of our subject need not detain us long, but there are some aspects of performance which call for a brief notice.

Kinds of performance:

We must distinguish performance which discharges one of two parties from further liabilities under a contract, and performance which amounts to an extinction of the obligation.

where promise is given for executed consideration:

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

where promise is given for promise.

Where one promise is given in consideration of another, performance by one party does not necessarily discharge the contract, though it discharges him who has performed his part from doing more. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, it is still possible that the contract may be discharged in any one of the ways we have mentioned.

Whether or no a contract has been performed is a matter which, so far as the person performing the contract is concerned, must be answered by reference to the *operation of contract*; so far as the performance is concerned, must be answered by reference to the *construction of contract*. If there be a failure of performance, partial or total, then the contract is broken; whether the breach amounts to a discharge is a question to be discussed hereafter.

But there are two aspects of Performance which we may shortly dwell upon: these are, Payment and Tender.

Payment.

In dealing with payment as a form of discharge we must place it under the head of performance, although payment is intimately connected with the discharge of contract and of the rights arising from breach of contract, by means of a substituted agreement.

Payment as a mode of discharge.

If in a contract between *A* and *X* the liability of *X* consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges *X* by the performance of his agreement.

If, again, *X* being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with *A* to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. Payment is then a performance of *X*'s duties under the new agreement, and, so far as he is concerned, a consequent discharge.

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation formed by this right of action may be discharged by *accord and satisfaction*, an agreement the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.

See Part V. ch. III. § 4.

Payment, then, is the performance of a contract, whether it be a performance of an original, or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which may have arisen from the breach of an agreement.

Payment

It remains to notice some points which arise when a

Negotiable instrument as payment;

negotiable instrument is given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it.

The giving of such an instrument in payment of a liquidated or unliquidated claim is in effect a substitution of a new agreement for the old one, but it may affect the relations of the parties in either one of two different ways.

If *X* makes a payment to *A* either in performance of an existing contract, or in satisfaction of a broken contract, and that payment takes the form of a negotiable instrument, *X* may be discharged from his previous obligation either absolutely or conditionally.

may be an absolute,

A may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge *X* altogether from his existing liabilities. *A* then relies upon his rights conferred by the instrument, and if it be dishonoured, must sue on it, and cannot revert to the original cause of action. But

Sard v. Rhodes, 1 M. & W. 153.

the presumption, where a negotiable instrument is taken in lieu of a money payment, is, that the parties intended it to be a conditional discharge. Their position then is this: *A* having certain rights against *X*, has agreed to take a negotiable instrument instead of immediate payment, or immediate enforcement of his right of action, and *X* has so far satisfied *A*'s claim. But if the bill be dishonoured at maturity, the consideration for *A*'s promise has wholly failed and his original rights are restored to him. The agreement is 'defeasible upon condition subsequent;' the payment by *X* which is the consideration for the promise by *A* is not absolute, but may turn out to be, in fact, no payment at all.

or conditional discharge.

Sayer v. Wagstaff, 5 Beav. 423.

Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of expressions to the contrary) that, if payment be not made

See judgment of ke, B.,

when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.

Robinson v. Read, 9 B & C. 455.

Sayer v.

We have dwelt thus upon Payment because it is often so involved with the subject of substituted agreement as to cause some obscurity.

Tender.

We now come to an attempted Performance, or Tender. The word is applied to performance of two kinds, and to attempts to perform which are not similar in their results. It is applied to a performance of a promise to do something, and to a performance of a promise to pay something. In each case the performance is frustrated by the act of the party for whom the performance is to take place. Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.

Tender

is of two kinds.

Tender by delivery.

Startup v. Macdonald, 6 M & G. 593 Benjamin on Sales p. 564

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defence to an action by the creditor, does not constitute a discharge of the debt.

Tender of payment.

Dixon v. Clarke, 5 C. B. 376.

If the creditor will not take the money due to him when he has a right to demand it, he puts himself at a certain disadvantage in trying to recover it by action; but the debtor must, in order to defend himself successfully by a plea of tender, continue always ready and willing to pay the debt. Then when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.

Dixon v Clarke, 5 C B 376

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, the defendant

gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender.

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. Besides these requirements the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change.

Legal tender, as regards coinage and notes, is regulated by various statutes[1].

[1] 3 and 4 Will. IV. c. 98. § 6, enacts that Bank of England notes are legal tender for any sum above £5.

29 and 30 Vict. c. 65, gives power to the Queen to proclaim that gold coinage of colonial mints should be legal tender throughout any part of her dominions specified in the proclamation.

33 and 34 Vict. c. 10, enacts that the coinage of the mint shall be legal tender as follows: -gold coins, to any amount; silver coins, up to forty s; bronze coins, up to one shilling.

CHAPTER III.

Discharge of Contract by Breach.

Breach of contract.

If one of two parties to a contract breaks through the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will *discharge* the injured party from such performance as may still be due from him. We must, however, bear in mind that, though every breach of the contractual obligation confers a right of action upon the injured party, every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the breach. It is often very difficult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by the breach.

Its result.

Breach always gives right of action, not always a d' cha

By *discharge* we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract,—the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a *right of action*.

Discharge indicated by old forms of pleading.

The discharge of contract is indicated with some precision by the pleadings in use before the Judicature Acts. Many of the cases which illustrate this part of the subject turn upon questions of pleading, and we shall find that the understanding of the remedy, as often happens, is a material assistance to the ascertainment of the right. At the risk of a digression we will turn for a moment to this aspect of the question before us.

§ 1. Position of parties where a Contract is discharged by Breach.

Exoneration from performance.

In a contract between *A* and *X*, a breach by *X* might be considered to be a discharge of the contract if *A*, in bringing action upon it, was not required to allege that he had performed or endeavoured to perform that which was still due from him under the contract; or if *X* could not successfully use such non-performance by *A* either as a cause of action or a ground of defence.

Right to sue in *indebitatus assumpsit.*

Further, where *X* made default after *A* had done all or a part of that which he promised, the contract was discharged by such default if *A* could sue for the value of that which he had done in *indebitatus assumpsit*, that is, on a new and distinct contract arising upon the acceptance of money, goods, or services offered by the plaintiff and accepted by the defendant.

This needs a short explanation.

Before the Judicature Acts came into operation, where an action was brought upon a contract arising on consideration executed, that is a promise, acted or uttered, to pay for money, goods, or services offered and accepted, the plaintiff might state his case in certain short forms known as the *indebitatus* counts. These, which were an adaptation of the action of *Assumpsit* to the subject-matter of the action of *Debt*, did no more than state a money claim existing for money due, goods supplied, or services rendered.

Nature of the *indebitatus* counts.

In certain cases these counts were applicable to a claim arising out of a special contract, that is a contract arising upon express promises made on either side, but they were so applicable only where the contract was *discharged by breach.* When applicable to special contract.

If *A* had performed all that he had promised in a contract made with *X*, and there remained only a money payment due from *X* resulting in a present liability in which *X* made default by non-payment, *A* might sue *X* in the form of an *indebitatus* count. This means that *A* might sue upon a new and distinct contract, arising upon the offer and acceptance of that which he had performed. The performance of the original contract was so far complete that nothing remained to be done but a payment to be made by *X* to *A*: the payment was presently due; default discharged the contract, and *A* might sue, not only on the special contract as having been made and broken, but upon a contract arising from conduct, from the offer of an act, its acceptance, and a consequent implied promise to pay its worth, such as we described in speaking of executed consideration. Ante, p. 69.

'The principle as to the proper form of declaring where the original contract has been executory, but the period of credit has expired, or condition has been performed, is, not that the law alters the mode of declaring on the original contract and states it not according to the fact, but that *it conclusively infers that simple contract to pay the price for goods sold and delivered which would arise upon the facts of a sale and delivery without any special circumstances accompanying them.* He who seeks to disturb that inference must not content himself with merely showing conditions, or other special provisions forming part of the contract at the time of its being entered into: *he must show them in existence and operation at the time of action brought:* if not, they must be struck out of consideration and the contract treated as originally simple, unconditional, and executed.' Per Cur., Beverley v. Lincoln Gas Light & Coke Co., 6 A. & E.

A similar practice prevailed where, *A* having done a A *meruit.*

part, though not all that he was bound to do under the contract, *X* committed a breach which amounted to a discharge. If that which *A* had done could be represented in a claim for money payment, *A* was entitled to sue, not only on the special contract, but in *indebitatus assumpsit*, for a *quantum meruit* or the value of so much as he had done.

'If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, *I decline taking any more*, he is at all events entitled to recover against me the value of the ten that I have received.'

Per Best, C. J., Mavor v. Pyne, 3 Bing. 288.

When it may be sued upon.

But the right to sue in this form on a *quantum meruit* is frequently and emphatically stated to depend on the fact that the contract has been discharged. On the other hand, it is laid down 'as an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, *immediately* sue on a *quantum meruit*, for anything which he had done under it previously to the rescission.'

Hulle v. Heightman, 2 East, 145.

2 Sm. L. C. 21.

It is possible that *A* may have done nothing under the contract which can be estimated at a money value, or that the default made by *X* is not such as can be stated in the form of a money claim. Then if the breach amount to a discharge, *A* is exonerated from such performance as may still be due from him, and is entitled to sue at once upon the special contract for such damages as he has sustained.

A. D 1883. Order xix. App. C.

The new rules of pleading lately issued under the Judicature Act do not alter the relations of the parties, though the forms of pleading are shortened and a simple indorsement on the writ of summons may be substituted for the old *indebitatus* counts.

Rights of party discharged.

Thus where a contract between *A* and *X* is discharged by the default of *X*, *A* may—

(α) Consider himself exonerated from any further performance which may have been due on his part; and successfully defend an action brought for non-performance: Behn v. Burness, 3 B. & S. 756.

(β) Sue at once upon the contract for such damages as he has sustained by its breach, without being obliged to show that such performance has been done or tendered by him: Cort v. Ambergate Railway Co., 17 Q. B. 127.

(γ) Lastly, if he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may deal with such a claim as due upon a different contract arising upon a promise which is understood from the acceptance of an executed consideration. Planché v.

§ 2. Forms of Discharge by Breach.

We are now in a position to ask, What are the circumstances which confer the rights just mentioned? What is the nature of the breach which amounts to a discharge?

A contract may be broken in any one of three ways: a party to a contract may (1) renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may totally or partially fail to perform what he has promised. Modes in which those right may arise.

Of these forms of breach the first two may take place while the contract is still wholly executory, i. e. before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

We will therefore deal first with renunciation and impossibility created by the act of one party *before* performance is due, then with such renunciation and impossibility so created *in the course* of performance, and then with simple failure in performance.

(1) *Discharge by renunciation before performance is due.*

The parties to a contract which is wholly executory have a right to something more than a performance of the contract (1) Breach before performance due,

when the time arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

by renunciation,

It is now settled that a renunciation of a contract by one of the parties before the time for performance has come, discharges the other, if he so choose, and entitles him at once to sue for a breach.

2 E. & B. 678.

Hochster v. Delatour is the leading case upon this subject. *A* engaged *X* upon the 12th of April to enter into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May *A* wrote to *X* to inform him that he should not require his services. *X* at once brought an action, although the time for performance had not arrived. The Court held

p. 689.

that he was entitled to do so. 'Where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation.'

It seems hardly necessary to have created an implied contract in order to give the plaintiff in this case a right of action. If *X* makes a binding promise to *A*, the obligation comes into existence at once, and consists in *X*'s promise as well as in his performance of that promise. *A* is entitled, not only to the promised act at the promised time, but to the liability of *X* up to that time. In other words, the contract is a contract from the time it is made, and not from the time that performance of it is due; and if this is so, it seems hardly in accordance with reason to introduce into every contract an implied promise that, up to a certain period of its existence, it shall not be broken.

Frost v. Knight, L. R.

The sense of the rule is very clearly stated by Cockburn, C. J., in a case which offers a somewhat further development

3.

of the rule in *Hochster v. Delatour*. In that case a time was fixed for performance, and before it arrived the defendant

renounced the contract. In *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties.

is a discharge even if performance be contingent.

A promised to marry *X* upon his father's death, and during his father's lifetime renounced the contract; *X* was held entitled to sue upon the grounds explained above. 'The promisee,' said Cockburn, C. J., 'has an inchoate right to the performance of the bargain, which becomes complete when the time for performance arrives. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests.'

L. R. 7 Exch. at p. 114.

The promisee may therefore treat the contract as broken, so soon as the promisor has announced his intention to break it. But if he will not accept the renunciation, and continues to insist on the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur to discharge it from other causes, the promisor may take advantage of such discharge.

The promisee must treat renunciation as discharge.

Thus in *Avery v. Bowden*, *A* agreed with *X* by charter-party that his ship should sail to Odessa, and there take a cargo from *X*'s agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but *X*'s agent refused to supply one. Although the days within which *A* was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. *A* would then have had a right to sue upon the contract. But the master of the ship continued to demand a cargo, and before the running days were out—before therefore a breach by non-performance had occurred—a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards *A* sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before

5 E. & B. 714

the war broke out (for the running days had not then expired), and as the renunciation of the contract had not been accepted as a breach by *A*'s agent, *X* was entitled to the discharge of the contract which took place upon the declaration of war.

Avery v. Bowden, 5 E. & B. 714.

(2) *Impossibility created by one party before performance is due.*

(2) By making performance impossible.

If a renunciation of his contract by *A* discharges *X* and gives him a right of action before the time for performance has arrived, it would appear that *a fortiori* a similar discharge and right of action accrues to *X* if *A*, before the time for performance arrives, makes it impossible that he should perform his promise.

A promised to assign to *X*, within seven years from the date of the promise, all his interest in a lease. Before the end of seven years *A* assigned his whole interest to another person. It was held that *X* could sue at once, without waiting until the end of seven years. 'The plaintiff has a right to say to the defendant, You have placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract.'

Lovelock v. Franklyn, 8 Q. B. 371.

Lovelock v. Franklyn, 8 Q. B. at

The cases just cited illustrate the rule that a contract may be broken while it is yet executory, and before any performance on either side has fallen due. They are comparatively simple, because the circumstances leave no doubt of the intention of the party in default; their interest lies in the enforcement of the principle that performance of a promise is not all that a promisee is entitled to, that the continuous liability of the promisor, until the time for performance arrives, is a substantial element in the rights

arising from the contract, and that a refusal to maintain this liability is an immediate breach and confers an immediate right of action.

(3) *Renunciation in the course of performance.*

It may also happen that in the course of performance one of the parties may by word or act deliberately and avowedly refuse performance of his part. He may do this by renouncing the contract, or by rendering it impossible of performance. The other party is then exonerated from a continued performance of his promise, and is at once entitled to bring action.

An illustration of such a discharge by renunciation of the contract is furnished by the case of *Cort v. The Ambergate Railway Company*. The plaintiffs contracted with the defendant Company to supply them with 3900 tons of railway chairs at a certain price. The chairs were to be delivered in certain quantities at specified dates. After 1787 tons had been delivered, the defendants desired the plaintiffs to deliver no more, as they would not be wanted. Action was brought upon the contract, the plaintiffs averring readiness and willingness to perform their part, and that they had been prevented from doing so by the Company. They obtained a verdict, but the Company moved for a new trial on the ground that the plaintiffs should have proved not merely readiness and willingness to deliver, but an actual delivery of the chairs.

The Court of Queen's Bench held that where a contract was renounced by one of the parties to it, the other party need not do more than show that he was willing to have performed his part. And the principle of the decision was thus stated :—

'When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the

vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.'

Cort v. Ambergate Railway Company, 17 Q. B

(4) *Impossibility created by one party in the course of performance.*

bility created during performance.

The rule of law is similar in cases where one party has by his own act made the contract impossible of performance.

8 Bing. 14

In *Planché v. Colburn* the plaintiff was engaged by the defendants for £100 to write a treatise on 'Costume and Ancient Armour' to be published in a serial called 'The Juvenile Library.' The plaintiff incurred expense in preparing his work and actually completed a portion of it, but before it was delivered to the defendants they had abandoned the 'Juvenile Library' on the ill-success of its first numbers. The plaintiff sued the defendants on the special contract and also on a *quantum meruit* for the work and labour expended by him on his treatise. He thus set up two distinct contracts, the original executory contract for the breach of which he claimed damages, and a contract arising from the execution of work upon request, under which he claimed the value of so much as was done before the contract was put an end to by the plaintiff.

It was argued that he could not recover upon this latter aspect of his claim because, his part of the original contract being unperformed, that contract was not wholly at an end: but the Court held that the abandonment of the publication

in question did put an end to the contract and effect a discharge.

'I agree,' said Tindal, C. J., 'that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*; part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labour. 8 Bing 14.

(5) *Breach by failure of performance.*

In the two cases of discharge last dealt with it is apparent that *X* has in word or act so dealt with the contract as to intimate to *A* that a further performance on his part is needless. The Courts have been asked in these cases to decide whether *A* is bound to tender a performance which he well knows that *X* will not or cannot accept, and they have decided that he is not so bound.

Breach by failure of performance, how determined.

But where the breach of contract by *X* does not make the contract wholly incapable of performance, or is not accompanied with any overt expression of intention to abandon his rights, it is not always easy to determine whether *A* is thereby discharged or whether he merely acquires a right of action from the breach. We have to look to the terms of the contract and endeavour to ascertain the intention of the parties as to the nature of their respective promises; and the difficulties resolve themselves into this question—Were the promises of the parties *independent of, or conditional upon, one another?*

By independence or conditional character of promises.

Independent Promises.

An independent promise

A promise may be independent in several ways.

(*a*) A promise may be *absolute.*

A's promise to *X* may be wholly unconditional upon the performance by *X* of his promise to *A*. In such a case a

failure of performance by *X* would not discharge *A*, but would only furnish ground for an action against *X*.

divisible in respect of performance,

(*b*) The performance of a promise may be *divisible*.

The promise may be susceptible of more or less complete performance; and the damage sustained by an incomplete performance, or partial breach may be apportioned according to the extent of failure. The promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of these does not discharge the promisee.

subsidiary.

(*c*) A promise may be *subsidiary*.

The breach committed by one of the parties may be a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. The injured party is then bound to continue his performance of the contract, but may bring action to recover such damages as he has sustained by the default of the other.

Absolute Promises.

In absolute promises, one party relies on the performance by the other.

If *A* make a promise to *X* in consideration of a promise made by *X* to *A*, and *A* has not, in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon the performance of *X*'s promise, a breach of his promise by *X* will not discharge *A*. The position of *A* is this: his promise is given in consideration of *X*'s promise, not in consideration of the performance by *X* of his promise: in other words, he has been content with *X*'s liability, and has not insisted upon *X*'s performance as a security for his promise.

Some of the old cases upon this subject turn upon very technical constructions of terms: if *A* make a promise to *X* in consideration of its being '*agreed*' that *X* do something for *A*, each promise is regarded as absolute and independent of the other; if the promise be made '*provided*' that *X* do

Rolle, Abr. i. 518.

something for *A*, the promise of *A* is conditional, and is discharged on failure of performance by *X*.

An old case (1649) furnishes a good instance of such absolute promises. 'Ware brought an action of debt for £500 against Chappell upon an indenture of covenants between them, viz. that Ware should raise 500 soldiers and bring them to such a port, and that Chappell should find shipping and victuals for them to transport them to Galicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time; and to this plea the plaintiff demurs. Rolle, C. J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of men raised, for the number is known to be 500; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping.'

Ware v. Chappell, Style, 186.

Style, 186.

The reason for holding such promises to be *absolute* is thus stated by Holt, C. J.:—'What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he makes a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that *A* shall have the horse of *B*, and *A* agree that *B* shall have his money, they may make it so; and there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed before his doing what he undertakes of his side, it must then be averred; as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse.'

Reasons assigned for rule, by Holt, C. J.;

Thorpe v. Thorpe, 12 Mod. Rep. 455.

by Willes, C. J.

Willes, 496.

And another reason is suggested by Willes, C. J., in *Thomas v. Cadwallader*, namely, 'When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other[1].'

Tendency of modern decisions.

The cases dating from the close of the last century seem to show a tendency of the Courts not to construe promises to be independent of one another, where they form the whole consideration for one another, unless there be some very definite expression of the intention of the parties to that effect.

8 T. R. 366.

'The older cases,' says Grose, J., in *Glazebrook v. Woodrow*, 'lean to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case;' and the interpretation of such promises may now be taken to rest upon 'the good sense of the case and the order in which the things are to be done.'

Per Lord Kenyon, C. J., in Morton v. Lamb, 7 T. R. 125.

The order in which the things are to be done would appear now to be the main test of the existence of such absolute promises. Thus where *X* makes a promise to *A*, the date of performance not being fixed, and *A* in consideration thereof promises to pay a sum of money to *X* at a fixed date, the payment is independent of performance.

In March, 1879, *A* agrees to purchase land of *X* and covenants to pay a sum of money on the 1st of April, 1879. *X* covenants in turn to convey the lands to *A*, but no day is fixed for the execution of the conveyance. So soon as the 1st of April is passed, *X* can sue *A* for the money, and it is no answer to his claim that he has never conveyed, or offered

[1] But this view of the matter is certainly open to the criticism passed upon it by an American judge:—'Courts are not required to speculate upon the inequality of loss to the parties, or to look beyond the agreement to its performance in order to ascertain its character, as suggested by some judges and commentators.'

PerGardiner, J., in Grant v. Johnson. Langdell, 620.

to convey the land to *X*. And so the law is laid down in *Mattock v. Kinglake*, where the facts were such as those just described :— 10 A. & E. 50.

'A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money without averring performance of the consideration.' Per Littledale, J., in Mattock v. Kinglake, 10 A. & E. 50.

But, upon the whole, it may be safe to say that, in the absence of very clear indications to the contrary, promises each of which forms the whole consideration for the other will not be held to be independent of one another. A failure to perform the one will exonerate the promisee from a performance on his part.

Promises the performance of which is divisible.

Contracts frequently occur in which the promise of one or both parties admits of a more or less complete performance; such would be a contract by way of charter-party to load and deliver a complete cargo; or a contract for the sale of goods in which delivery and acceptance are to take place by instalments extending over a considerable period of time. Where performance is divisible,

In contracts of this nature it may be laid down as a general rule, that a breach, which only deprives the promisee of a part of that to which he was entitled, does not discharge him from such performance as may be due from him. a partial breach is no

In *Ritchie v. Atkinson* the plaintiff promised to take his ship to St. Petersburgh and there load a *complete cargo* of hemp and iron, and to deliver the same on being paid freight at specified rates. He came away with an incomplete cargo, under a mistaken impression that an embargo was about to be laid on British ships, and the defendant refused to pay any freight, on the ground that the completeness of the cargo was a condition precedent to any payment being due. 10 East, 295.

Lord Ellenborough said that whether it was so, or no, depended 'not on any formal arrangement of words, but on

the reason and sense of the thing as it is to be collected from the whole contract:' and with regard to the promise before us, he held that 'where the freight is made payable upon an indivisible condition, such as the arrival of the ship with her cargo at her destined port of discharge, such arrival must be a condition precedent; because it is incapable of being apportioned: *but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent*; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery.'

Ritchie v. Atkinson, 10 East, 295.

L. R. 8 Q. B. 14.

The case of *Simpson v. Crippin* was decided upon similar grounds. In that case *A* agreed with *X* to supply him with a given quantity of coal to be delivered in equal monthly instalments for twelve months. *X* agreed to send waggons to receive the coal. *X* did not during the first month send waggons enough to receive one twelfth of the coal. *A* rescinded the contract. It was held that he was not entitled to do so, inasmuch as *X* was willing to continue the contract as to the remaining instalments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of the parties to fulfil one of a series of terms[1].

unless it show intent to break contract,

Withers v. Reynolds, 2 B. & Ad. 882.

Nevertheless if a default in one *item* of a continuous contract of this nature be accompanied with an announcement of intention not to perform the contract upon the agreed terms, the other party may treat the contract as being at an end. And in like manner, if non-payment of one instalment of goods be accompanied by circumstances which give the seller reasonable ground for thinking that the buyer will not be

4 C. P. D. (C. A.) 92.

[1] In the recent case of *Honck v. Müller*, it was held that failure to deliver first of a series of instalments of goods might operate as a discharge. There were but three instalments, each of a large amount. Bramwell, L. J., distinguished the facts from those in *Simpson v. Crippin*; Baggallay, L. J., was prepared to overrule that case; Brett, L. J., rested his dissenting judgment on its authority. In fact the law as to these contracts to deliver by instalments is not settled.

able to pay for the rest, he may take advantage of the one omission to repudiate the contract.

Bloomer v. Bernstein, L. R. 9 C. P. 588.

And the general rule applicable to contracts of this sort may be contravened by express stipulation. It is always open to the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfilment by the other party of his promise. In such a case nothing can be obtained either upon the contract or upon a *quantum meruit* for what has been performed.

or be made a d by contract.

In *Cutter v. Powell*, a sailor being at Jamaica, took a promissory note from the master of his ship to the following effect: 'Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, *provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool.* Kingston, July 31st, 1793.' The sum agreed to be paid was larger than the ordinary wages of a mate. The ship sailed on the 2nd of August, and reached Liverpool on the 9th of October; the sailor did his duty as second mate until the 20th of September, when he died. It was held that his representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a *quantum meruit* for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a *quantum meruit*. 'It may fairly be considered,' said Grose, J., 'that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage[1].'

6 T. R. 320, and see Sm. L. C. ii. 1, and notes thereon.

[1] Fine distinctions have recently been drawn in the Court of Appeal in construing a contract as divisible or indivisible. The cases are *Brandt v. Lawrence*, and *Reuter v. Sala*. But those cited in the text suffice to illustrate the rules of law on the subject, so far as they can be stated with any certainty.

1 Q. B. D. (C. A.) 344. 4 C. P. D. (C. A.)

Subsidiary promises.

Subsidiary promises:

We shall have to speak, in a later portion of this chapter, of subsidiary promises, or *warranties* as we will venture to call them, as distinct from *conditions* or terms on which the right to performance depends. But it is desirable to illustrate here the difference which exists between a subsidiary promise the breach of which cannot under any circumstances operate as a discharge, and a promise such as we have just described, which admits of being performed with more or less completeness, but which may be so completely broken as to discharge the promisee.

1 Q. B. D. 183.

A good instance of such a subsidiary promise is to be found in the case of *Bettini v. Gye*. There the plaintiff, a professional singer, entered into a contract with the defendant, director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in concerts and operas for a considerable time and upon a number of terms, one of which was as follows:—

'(7.) Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.'

The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this breach as a discharge of the contract. The Court held that in the absence of any express declaration that the term was vital to the contract, it must 'look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or *whether it merely partially affects it, and may be compensated for in damages.*' And it was decided that the term did not *go to the root of the matter*, so as to require to be considered a condition precedent.

how distinguished from Conditions.

And generally it may be said that where a promise is to

be performed in the course of the performance of the contract and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract. 'Where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damages he may have sustained in not having received the whole consideration.' Per Parke, B., in Graves v. Legg, 9 Ex. 716

Another illustration of a subsidiary promise of this nature is to be found in the warranty of quality in a sale of goods. Warranty of quality, when subsidiary.

Where a contract of sale is executory, so that the property in the chattel has not passed to the buyer, and the terms of the sale include a promise that the chattel shall possess a particular quality, the acceptance of the chattel by the buyer is *conditional* on its possessing that quality. Having promised to take, and pay for an article of a particular sort, he is not obliged to receive one which is not of the sort he bargained for. Benjamin on Sales, 748.

But if the contract of sale be executed, as being in its inception such a *bargain and sale*, of a specific chattel as was described in an earlier chapter, the promise as to quality becomes *subsidiary*. For, the property having passed, the buyer can only reject the goods if there be an express condition that he should do so (as in *Head v. Tattersall*), or possibly in the event of the goods being different in description to the terms of the agreement, or wholly worthless in quality. The promise as to quality is then a *warranty* in the strict sense of the term, 'a stipulation by way of agreement, for the breach of which compensation must be sought in damages,' in other words, a promise Ante, p. 64; and see Benjamin, bk. II. ch. 1, 2. L. R. 7 Ex 7. See post, p. 294. Behn v. Burness, 3 B. & S. p. 755.

to indemnify against failure to perform a term in the contract.

Conditional Promises.

Conditional Promises are of three kinds.

We now come to deal with conditional promises, and before we touch upon the sort of condition which is especially connected with the subject of discharge, it may be well to speak shortly of conditions in general.

If *A* make a promise to *X* which is not an absolute promise, but subject to a condition, that condition must, as regards its relation to the promise in time, be either *subsequent*, *concurrent*, or *precedent*.

Condition subsequent.

In the case of a *condition subsequent*, the rights of *X* under *A*'s promise are determinable upon a specified event. The condition does not affect the commencement of *X*'s rights, but its occurrence brings them to a conclusion. We have already dealt with conditions of this nature in speaking of the discharge of contract by agreement.

See ante, p. 258.

Condition concurrent.

In the case of a *condition concurrent*, the rights of *X* under *A*'s promise are dependent upon his doing, or being prepared to do, something simultaneously with the performance of his promise by *A*. Such a condition exists in the case of a sale of goods where no time is specified for the payment of the price; payment and delivery are concurrent conditions, and the right of the seller to receive the price and that of the buyer to receive the goods are dependent upon the readiness of each, the one to deliver and the other to pay.

Per Bayley, J., in Bloxam v. Sanders, 4 B. & C. 941.

Condition precedent.

In the case of a *condition precedent*, the rights of *X* under *A*'s promise do not arise until something has been done, or has happened, or some period of time has elapsed. But in dealing with conditions of this nature we must note that they are of two kinds, and that with one of these we are not here immediately concerned.

) Conditions which do not discharge.

Floating or suspensory conditions.

We must distinguish conditions which suspend the operation of a promise until they are fulfilled, from conditions the non-fulfilment of which is a cause of discharge. It is perhaps permissible to call the former *floating* conditions, as opposed to conditions the performance of which is fixed by time or circumstances. It may be well shortly to illustrate the character of such conditions.

The happening of an event.

A promise may be conditional on the happening of an uncertain event, as in the case of the underwriter whose liability accrues upon the loss of the vessel insured. Or it may depend upon the act of a third party, as in the case of a promise in a building contract to pay for the work upon receiving a certificate of approval from the architect. Such promises might be called *contingent* rather than *conditional*, for they depend for their operation on events which are beyond the control of the promisee and which may never happen.

Morgan v Birnie, 9 Bing. 672.

The of time.

Again, a promise may be conditional in the sense that its operation is postponed until the lapse of a certain time—as in the case of a debt for which a fixed period of credit is to be given—or until the happening of an event that is certain to happen, as in the case of an insurance upon life.

The act of the pro-

Or again, a promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified within which the act is to be done, the non-fulfilment of the condition merely suspends and does not discharge the rights of the promisee. Common illustrations of such conditions are furnished by cases of promises conditional upon demand or notice. *A* may promise *X* that he will do something upon demand: he cannot then be sued until demand has been made. Or *A* may promise *X* that he will do something upon the happening of an event, and he may stipulate that notice shall be given to him of the event having happened. Or it may be that the happening of the event is peculiarly within the knowledge of *X*, and then an implied condition would be

v. Watkinson, L. R. 6 Ex. 25.

imported into the contract that notice must be given to *A* before he can be sued upon his promise.

In all these cases it would appear that an action brought upon the promise, before the fulfilment of the condition, would be brought prematurely; and though neither the non-fulfilment of the condition, nor the action brought before it was fulfilled, would discharge the contract, the condition suspends, according to its terms, the right to the performance of the promise.

Palmer v. Temple, 9 A. & E. 521.

(2) Conditions precedent which may effect discharge.

But the conditions with which we are concerned effect a discharge of contract by their breach, if not performed at a fixed time or within a reasonable time from the making of the contract; and the breach of such a condition is the breach of a term expressly made, or necessarily implied in the contract, whereby one party loses either the whole or an essential part of that in consideration of which he made his promise.

And so we may say that where *A*'s promise to *X* is a conditional and not an absolute promise, he may be discharged—

(1) By the failure of *X* to perform a 'concurrent condition,' i. e. to do something or to be ready to do something which should be simultaneous with the performance of his promise by *A*.

(2) By the fact that there has been a total or substantial failure on the part of *X* to do that which he was bound to do under the contract—a state of things which we may describe as virtual failure of consideration.

(3) By the untruth of some one statement or the breach of some one term which the parties considered to be vital to the contract.

Breach of Concurrent Condition.

Concurrent conditions are mutual conditions precedent.

Concurrent conditions seem, in point of fact, to be conditions precedent; for the simultaneous performance of his promise by each party must needs be impossible except in contemplation of law. But what we mean by the phrase is,

that there must be a concurrent readiness and willingness to perform the two promises, and that if one is not able or willing to do his part, the other is discharged. Benjamin on Sales, p. 480.

This form of condition is more particularly applicable to contracts of sale, where payment and delivery are assumed, in the absence of express stipulation, to be intended to be contemporaneous.

In *Morton v. Lamb* the plaintiff agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant promised to deliver the corn within one month. The plaintiff alleged that he had always been ready and willing to receive the corn, but that it had not been delivered within the month. The Court held that readiness to receive was not a sufficient performance of his obligation by the plaintiff; that payment of the price was intended to be concurrent with delivery of the corn. As the plaintiff did not allege that during the time in which delivery might have been made he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by non-readiness to pay. 7 T. R. 125.

And so the law is laid down by Bayley, J., in *Bloxam v. Sanders*:—'Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and *the seller is liable to deliver them whenever they are demanded upon payment of the price;* but the buyer has no right to have possession of the goods *till he pays the price.*' 4 B. & C. 941.

Breach by Virtual Failure of Consideration.

It is laid down by high authority that 'where mutual promises or covenants go to the *whole consideration* on both sides, they are mutual conditions and performance must be averred.' Williams' Saunders, i. 556. Boone v. Eyre, 1 H. Bl. 273 n.

By this we must understand that where *A*'s promise is the entire consideration for *X*'s promise, then, in the absence of any clear indication that *X* is to perform his promise first, or that *X*, as the consideration for his promise, relied solely upon his right of action against *A*, *A* will not be able to sue *X* unless he can aver that he has performed or is ready to perform his promise; and if performance is no longer possible for him within the terms of the contract, *X* will be discharged.

It seems tolerably obvious that a total failure by *A* in performing that which was the entire consideration for *X*'s promise, and which should have been antecedent to *X*'s performance of his promise, will exonerate *X*; but it will be well to note some of the less obvious applications of the rule, and to mark its effect in cases where the performance of a promise has been illusory and consideration for the promise of the other party has consequently failed.

In cases of *executory* contract of sale.

In every executory contract of sale the buyer, if he has contracted for an article of a particular quality, is entitled to reject the article tendered if it do not correspond in quality with the terms of the contract. This however is a matter of express condition falling under the next and not the present head of conditional promises. But in the absence of express stipulations of this nature there are certain terms implied in every contract of sale which protect the buyer, if he has not been able to inspect the goods, from the imposition upon him of an article different to that which he contracted to buy, or practically worthless and unmarketable.

'In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specified description, but must also be saleable or merchantable under that description.'

Jones v. Just, L. R. 3 Q. B. 197.

Where goods do not answer

Thus the buyer is not bound to accept goods which *do not correspond to the description of the article sold*, even though correspond to the sample by which they were bought.

In *Nichol v. Godts*, the plaintiff agreed to sell to the defendant a certain quantity of *foreign refined rape oil, warranted only equal to samples;* and the action was brought for the refusal by the defendant to accept oil which corresponded to the samples, but which turned out not to be *foreign refined rape oil.* It was held that he was entitled to be discharged from the contract, inasmuch as the nature of the article delivered was different from that which he had to buy. 10 Ex. 191.

And see Azemar v Casella, L. R. 2 C. P. 431 & 677.

On the same principle, in *Laing v. Fidgeon* a contract to supply saddles was held to be discharged, and the purchaser exonerated from receiving the goods, on the ground that they were not of a merchantable quality. 6 Taunt. 108.

or are not marketable.

In the case of an executed contract of sale, in which the property in the article sold has passed unconditionally to the buyer, there does not seem to be express authority to the effect that the terms, imported into all executory contracts of sale in which the buyer cannot inspect the goods, give a right to return the article bought.

In executed contract of sale.

See Benjamin on Sales, p. 741

But it would seem that although the property has passed to the buyer, still if the article prove to be worthless and unmarketable, or different in character from that which he agreed to buy, he can exercise rights closely analogous with the right of return, and such as we have described as flowing from the discharge of contract by breach.

(1) He can defend an action successfully for the whole amount of the price.

(2) He can, if he has paid the price, recover it back, as money received to his use, on the principle explained above, that where a man has done all or any part of his share of a contract which is afterwards broken by the default of the other party, he may recover as upon a distinct contract arising upon the acceptance by the other of money, goods, or services offered by him.

Ante, p. 270

In *Poulton v. Lattimore*, the plaintiff sued the defendant 9 B. & C. 259.

for the price of seed; the seed had been sold as new growing seed, but when sown it proved wholly unproductive. The defendant refused to pay anything for the seed, and his defence was successful to the whole amount of the price.

3 Bing. N. C. 724.

In *Young v. Cole*, the defendant employed the plaintiff as a stockbroker, and delivered to him some Guatemala bonds to sell. The plaintiff sold them and paid the price to the defendant. The bonds turned out to be worthless because unstamped, and were returned to the plaintiff, who took them back, repaid to the purchaser their price, and sued the defendant for the amount which he had paid, as money received by the defendant for his use.

The Court held that he was entitled to recover inasmuch as the purchaser of the bonds was entitled to return them and demand their price back from the broker, and the plaintiff had thus been compelled to make the payment on behalf of the defendant. 'It is not a question of warranty,' said Tindal, C. J., 'but whether the defendant has not delivered something which, *though resembling the article contracted to be sold, is of no value*.'

It follows from what has been said that the buyer under the circumstances described may always maintain an action for damages sustained by the supply to him of an unmarketable article, or of something different in character to that which he agreed to buy. There needs no expressed term in the contract to enable him to do this.

2 B. & S. 447. Mody v. Gregson, L. R. 4 Ex. 49.

It is somewhat unfortunate that the phrase 'implied warranty' should have been used to describe terms of this nature. A non-compliance with such terms is, in fact, a breach of the entire contract, a substantial failure of consideration. If *A* agrees to buy beef of *X*, it seems hardly reasonable to say that *X* impliedly warrants that he will not supply mutton, or that he will not supply an article unfit for human food.

Per Lord Abinger, C.

The use of the term 'warranty' in this sense has been

emphatically condemned by eminent judges, but it still exists, and tends to obscure the subject of the performance and breach of contract.

B., Chanter v. Hopkins, 4 M. & 399. Per Martin, B., Azema v. Casella, L. R. 2 C. P. 677.

This matter of total failure of consideration has been introduced, with not very happy results, into the subject of Mistake. As a rule a man makes a contract with an honest intention to keep his promise, and, if he fail to do so, fails from circumstances of which he was not aware, or upon which he did not calculate at the time he made it. And the promisee in like manner expected with more or less reason that he would get what he bargained for. If both are wrong and the promise is broken by the supply of an article different in kind from what was contemplated, the rights of the promisee are not dependent on the mutual error of the parties, but on the somewhat elementary truth that a contract expressed in unequivocal terms gives a right of action to the party injured by its breach.

Pollock, 451, 452, and cases there cited.

The rule further applies to the case of promises which we have described as capable of more or less complete performance, and which may be broken in part without such breach affecting the existence of the contract.

In cases of divisible performance fails.

Where the performance of a promise is divisible so that a partial breach will not discharge the other contracting party, a total failure of performance will nevertheless operate as a discharge. And even where the failure is not total, there may well be a point at which its amount alters the character of the transaction, and makes the tender of any further performance nugatory for the purposes which the contract was originally designed to effect.

Poussard v. Spiers. 1 Q. B. D. 410.

Thus in *Ritchie v. Atkinson*, cited above, it was admitted that though the failure to deliver a *complete* cargo did not exonerate the charterer, yet that if *no* cargo had been delivered he would have been discharged.

10 East, 295.

Per Grose, J., at p. 309.

And so with a promise which the parties regard as a subsidiary term in the contract in so far as its exact perform-

ance is not a condition upon which the rights of the promisor depend: if it be broken in such a way as to frustrate the objects of the contract, it operates as a condition and the breach of it as a discharge.

Union v. In- Co., P.

So in the case of a charter party, 'not arriving with due diligence or at a day named is the subject of a cross action only. *But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract but discharges the charterer.*'

Conditions Precedent.

In the cases with which we have been dealing, one of the parties to a contract has been excused from performance of his promise by reason of the entire failure of the consideration which was to have been given for it. We now come to Conditions Precedent in the narrower and more frequent use of the word, as meaning a single term in the contract, but a term possessing a particular character.

Condition Precedent defined.

We will define a Condition Precedent, in this sense, as a Statement or Promise, the untruth or non-performance of which discharges the contract.

The difficulty which has always arisen, and must needs continue to arise with regard to Conditions Precedent, consists in discovering whether or no the parties to a contract regarded a particular term as essential. If they did, the term is a Condition: its failure discharges the contract. If they did not, the term is a Warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term.

Warranty and Condition are alike parts, and only parts, of a contract consisting in various terms. We have tried to define Condition, we will venture further to try and define Warranty.

Warranty defined.

Warranty is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract.

It is right to say that the word warranty is used in the most confusing manner, and in a great variety of senses[1], but it is submitted that the definition which has just been given assigns to the term its primary meaning. 'A warranty is an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, collateral to the express object of it.' The breach of a term which amounts to a warranty will give a right of action, though it will not take away existing liabilities; it is a mere promise to indemnify.

Per Lord Abinger, C. B., in Chanter v. Hopkins, 4 M. & W. 404.

[1] It would be a work of some research to enumerate the various senses in which the word *warranty* is used. The following are some of the commoner uses of the term:—

(1) Warranty is used as equivalent to a condition precedent in the sense of a descriptive statement on the truth of which the rights of one of the parties depend. *Behn v. Burness.* 3 B. & S. 751

(2) It is used as equivalent to a condition precedent in the sense of a promise with the effect above described. *Behn v. Burness.*

(3) It is used as meaning a condition the breach of which has been acquiesced in, and which therefore forms a cause of action but does not create a discharge. *Behn v. Burness.*

(4) It is used as an independent subsidiary promise, collateral to the main object of the contract. *Chanter v. Hopkins.* This, it is submitted, is its legitimate meaning. 4 M. & W. 404.

(5) In relation to the contract of sale, warranty is used for an express promise that an article shall answer a particular standard of quality; and this promise is a condition until the sale is executed, a warranty after it is executed. Street v. Blay, 2 B. & Ad. 456.

(6) *Implied warranty* is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties. We have mentioned the implied warranty in an executory contract of sale that goods shall answer to their specific description and be of a merchantable quality; in other words, that there shall be a substantial performance of the contract. Ante, p. 294.

Implied warranty of title appears to be a somewhat vexed question: but the better opinion seems to be that on the sale of an article a man is supposed to undertake that he has a right to sell it; in other words, 'that he sells a chattel and not a lawsuit.' Eicholz v. Bannister, 17 C. B., N. S. 708.

But the strangest applications of the implied warranty are the *warranty of authority* which an agent is supposed to give to a person contracting with him as agent, of which more hereafter; and the *warranty of possibility* which a man is said to give, if he omits to introduce into his promise conditions which guard him from being bound by it in the event of its becoming impossible of performance. Collen v. Wright, 7 E. & B. 301, 8 E. & B. 647. Clifford v. Watts, L. R. 5 C. P. 577.

We have called a warranty 'a more or less unqualified promise;' and we will illustrate the meaning of this phrase from the contract between a Railway Company and its passengers. It is sometimes said that a Railway Company as a common carrier warrants the safety of a passenger's luggage, but does not warrant his punctual arrival at his destination in accordance with its time tables. In truth it warrants the one just as much as it warrants the other. In each case it makes a promise subsidiary to the entire contract, but in the case of the luggage its promise is qualified only by the excepted risks incident to the contract of a common carrier; in the case of the time table its promise amounts to no more than an undertaking to use reasonable diligence to ensure punctuality. A promise is not more or less of a warranty because a greater or less degree of diligence is exacted or undertaken in the performance of it.

Richards v. London, Brighton, & S. C. Railway Co., 7 C. B. 839.

Le Blanche v. L. & N. W. Railway Co., 1 C. P. D. 311.

That the promises are warranties and not conditions is apparent from the fact that neither loss of luggage nor unpunctuality would entitle the passenger to rescind the contract and recover back his fare.

Difficulties of distinguishing condition and warranty.

The question whether a particular term in a contract is a Condition Precedent or a Warranty is one which, as it turns upon the construction of each individual contract, need not detain us longer here.

'The rule has been established,' said Tindal, C. J., in *Stavers v. Curling*, 'by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention when once discovered all technical forms of expression must give way.'

3 Bing. N. C. 355.

And Blackburn, J., puts the matter in the same light in the recent case of *Bettini v. Gye*:—

1 Q. B. D. 187.

'Parties may think some matter, apparently of very little

importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *primâ facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.'

This being the rule as to the ascertainment of a condition precedent, it will be enough to note that a condition precedent may assume the form either of a statement or of a promise. In speaking of Misrepresentation, we pointed out the mode in which statements forming the basis of a contract or regarded as essential to it were incorporated into the body of the contract, and were placed upon a level with promises the breach of which would confer a right of action, and in certain cases effect a discharge.

Ante, p. 146.

Acquiescence in a breach of turns it into a warranty.

But it must be borne in mind that a condition precedent may change its character in the course of the performance of a contract; and that a breach which would have effected a discharge if treated as such at once by the promisee, ceases to be such if he goes on with the contract and takes a benefit under it.

This aspect of a condition precedent is pointed out by Williams, J., in *Behn v. Burness*, where he speaks of the right of the promisee, in the case of a broken condition, to repudiate the contract, 'provided it has not already been partially executed in his favour;' and goes on to say that if after breach the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty in the sense that it can only be used as a means of recovering damages.

3 B. & S. 756.

An illustration of such a change in the effect of a condition is afforded by the case of *Pust v. Dowie*. The defendant chartered the plaintiff's vessel for a voyage to Sydney, he

32 L. J. Q. 170.

promised to pay £1550 in full for this use of the vessel on condition of her taking a cargo of not less than 1000 tons weight and measurement. The charterer had the use of the vessel as agreed upon; but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for non-payment of the freight the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition. 'It is not easy to see,' said Blackburn, J., 'what is meant by these latter words unless they import a condition in some sense; and *if when the matter was still executory*, the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, *I will not say that he might not have been justified in repudiating the contract altogether;* and in that case the condition would have been a condition precedent in the full sense.'

He then quotes with approval the *dicta* of Williams, J., in *Behn v. Burness*, and goes on to say, 'No doubt that principle is adopted from the judgment of Lord Wensleydale, in *Graves v. Legg*, and this distinction will explain many of the cases in which, although there appears to have been a condition precedent not performed, a party having received part of the consideration has been driven to his cross-action. Now is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single ton (which would be enough to support the plea) is to prevent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of *Behn v. Burness*.'

9 Exch. 709. See p 287.

but not if the breach be of a

But the part performance thus accepted after breach must be 'a substantial part of the consideration' or the condition not lose its force.

6 Exch. 424.

In *Ellen v. Topp* the father of an apprentice was sued upon an apprenticeship deed to which he was a party, by the master,

for a discontinuance of service by his son. The boy had served for three years out of a term of five. The father pleaded that the master, having agreed to teach the apprentice three trades, had abandoned one of them. It was argued that as the plaintiff had given so much of the consideration as a three years' instruction, the condition that he should practise the three trades which he had originally promised to teach, had ceased to be a condition precedent and that the apprentice was not discharged by the breach. The Court admitted that 'the construction of an instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less.' But it was held that the failure, although some performance had since been accepted, was a failure to fulfil a substantial part of the consideration, that the covenant to teach was a continuing condition precedent to the covenant to serve, and that, in consequence, the rule under discussion did not apply. Ellen v. Topp, 6 Exch. 424.

§ 3. Remedies for breach of Contract.

Remedies for breach.

Having endeavoured to ascertain the rules which govern the *discharge* of contract by breach, it remains to consider the remedies which are open to the person injured by the breach.

If the contract be *discharged* by the breach, the person injured acquires or may acquire, as we have seen, three distinct rights: (1) a right to be exonerated from further performance; (2) a right, if he has done anything under the contract, to sue upon a *quantum meruit*, a cause of action distinct from that arising out of the original contract, and based upon a new contract originating in the conduct of the parties; (3) a right of action upon the contract, or term of the contract broken.

But we are now no longer specially concerned with that breach of contract which amounts to a discharge: we may

therefore consider generally what are the remedies open to a person who is injured by the breach of a contract made with him. They are of two kinds: he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain *specific performance* of the contract which the other party has refused or neglected to perform.

Damages.

Specific performance.

But there is this difference between the two remedies: every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* can be obtained.

We do not propose to treat of these remedies otherwise than in the most general way, for the matter is one which barely comes within the scope of this work: but it may be well to state briefly some elementary rules which govern the two remedies in question.

Damages.

When a contract is broken and action is brought upon it,—the damages being unliquidated, that is to say unascertained in the terms of the contract,—how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

B., Robinson v. Harman, 1 Ex. 855.

(1) 'The rule of the Common Law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

Damages should represent

Thus where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for nominal damages only, and 'nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity.' And so in action for the non-payment of a debt, where there is no promise to pay interest upon the debt, nothing more than the sum due can be recovered; for the possible loss arising to the creditor from being kept out of his money is not allowed to enter into the consideration of the jury in assessing damages, unless

J., in Beaumont v. Greathead, 2 C. B. 494.

it was expressly stated at the time of the loan to be within the contemplation of the parties. But by 3 & 4 Will. IV. c. 42. § 28 a jury may allow interest at the current rate by way of damages, in all cases where a debt or sum certain was payable by virtue of a written instrument, or if not so payable was demanded in writing with notice that interest would be claimed from the date of the demand.

so far as it was in contemplation of the parties.

(2) The rule laid down by Parke, B., in *Robinson v. Harman* must be taken subject to considerable limitations in practice. The breach of a contract may result in losses which neither party contemplated, or could contemplate at the time that the contract was entered into, and the Courts have striven to lay down rules by which the limit of damages may be ascertained.

Baxendale, 9 Exch. 354.

The damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract; such as might have been in their contemplation when the contract was made.

Exceptional loss should be matter of terms.

Any special loss which might accrue to the plaintiff, but which would not naturally and obviously flow from the breach, must, if it is to be recovered, be matter of express terms in the making of the contract.

Per Blackburn, J., in Horne v. Midland 131

In *Horne v. Midland Railway Company*, the plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, were consequently rejected by the intending purchasers, and the plaintiff sought to recover, besides the ordinary loss for delay, the difference between the price at which the shoes were actually sold and that at which they would have been sold if they had been punctually carried. It was held that these damages were not recoverable, in the absence of any evidence that the Company undertook to be liable for the exceptional loss which the plaintiffs suffered from an unpunctual delivery.

Damages for breach of contract not vindictive.

(3) Damages in an action for breach of contract are by way of compensation and not of punishment. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained, subject to the above rules. To this general rule, however, the breach of promise of marriage is an exception, for in such cases the feelings of the person injured are taken into account, apart from such specific pecuniary loss as can be shown to have arisen.

Hamlin v. Great Northern Railway Co., 1 H. & N. 408.

Assessment by parties.

(4) The parties to a contract not unfrequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. Under these circumstances arises the distinction between penalty and liquidated damages, which we have already dealt with in considering the construction of contracts.

See p. 248.

In Robinson v. Harman, 1 Ex. 855.

(5) It follows from the general rule laid down by Baron Parke, that a difficulty in assessing damages can in no way disentitle a plaintiff from having an attempt made to assess them.

Difficulty of assessment must be met by jury.

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He entrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, its difficulty was no reason for not giving any damages at all.

Simpson v. L. & N. W. Railway Co., 1 Q. B. D. 274.

And further, the plaintiff is entitled to recover for prospective loss arising from a refusal by the defendant to perform a contract by which the plaintiff would have profited. Thus where a contract was made for the supply of coal by the

defendants to the plaintiff by monthly instalments, and breach occurred and action was brought before the last instalment fell due, it was held that the damages must be calculated to be the difference between the contract price and the market price at the date when each instalment should have been delivered, and that the loss arising from the non-delivery of the last instalment must be calculated upon that basis, although the time for its delivery had not arrived.

Roper v. L. R. 8 C. P. 167.

Specific Performance.

The jurisdiction, once exclusively possessed by the Court of Chancery, to compel performance of a promise, supplemented the remedy offered by the Common Law Courts, which was often inadequate or inapplicable to the loss sustained.

Jurisdiction of Chancery, as to specifi performance.

A promise to do a thing can be enforced by a decree for specific performance; a promise to forbear by an injunction.

The exercise of this jurisdiction by the Court of Chancery was limited by several rules, some of which have been already noticed. Defects in the formation of a contract afforded an answer to a claim for specific performance, and in some cases Equity was more guarded than the Common Law in granting its remedy to suitors. It was refused to a gratuitous promise though made under seal; nor can an infant obtain specific performance of a contract which cannot be enforced against him.

How limited.

pp. 49, 110, 161.

Kekewich v. Manning, 1 D. M. & G. 176.

Ff B.

Speaking generally on a subject which it is impossible to deal with here in detail, one may say that the substantial limitations on the employment of the remedy were these.

The Courts will not decree specific performance—

1. Where the Common Law remedy of damages is adequate to the loss sustained.

2. Where the matter of the contract is such that the Courts cannot supervise its execution.

(1) The first of these rules is illustrated by the different

Specific perform-

ance only where damage an inadequate remedy.

attitude which the Court has assumed in this matter towards contracts for the sale of land and contracts for the sale of goods.

The objects with which a man purchases a particular piece of land are different to those with which he purchases goods. He may be determined, in making the contract, by the merits of the site or its neighbourhood, and these cannot be represented by a money compensation; whereas goods of the kind and quality that he wants are generally to be purchased. Hence specific performance of a contract for the sale of goods is only decreed in the case of specific chattels the value of which, either from their beauty, the interest attaching to them, or some other cause, cannot be represented by damages.

Leake on Contract, 1127, and cases there collected.

And where the Court can insure performance.

(2) And the distinction drawn between land and goods illustrates the second rule also.

An agreement for the purchase of land can be performed by the doing of a specific act, the execution of a deed or conveyance. In a contract for the sale and delivery of goods performance may extend over some time and involve the fulfilment of various terms, and 'The Court acts only where it can perform the very thing in the terms specifically agreed upon.'

See per Lord Selborne, Wolverhampton Railway Co. v. L. & N. W. Railway Co., L. R. 16 Eq. at p. 439. Gervas v. Edwards, 2 Dr. & War. 80.

But the second rule is more distinctly illustrated by the refusal of the Courts to grant specific performance of contracts involving personal services; though it will enforce by injunction a promise not to act in a particular way.

Thus in *Lumley v. Wagner*, the defendant agreed with the plaintiff to sing at his theatre upon certain terms, and during a certain period to sing nowhere else. Subsequently she entered into an engagement with another person to sing at another theatre, and refused to perform her contract with the plaintiff.

1 D. M. & G. 604.

The Court declined to enforce so much of the contract as related to the promise to sing at the plaintiff's theatre, but

it restrained the defendant by injunction from singing elsewhere.

The remedy has been extended to breach of contract for the sale of specific goods by the Mercantile Law Amendment Act. 19 & 20 Vict. c. 97. § 2.

And specific performance may now be granted by any one of the Divisions of the High Court of Justice; for the Judicature Act has removed the old distinctions of jurisdiction between the Common Law and Chancery Courts. But to the Chancery Division is still reserved a special jurisdiction in suits for 'specific performance of contracts between vendors and purchasers of real estate, including contracts for leases.' Effect of Judicature Acts. c. 66. § 25. sub-§ 7. § 34. sub-§ 3.

§ 4. Discharge of Right of Action arising from Breach of Contract.

The right of action arising from a breach of contract can only be discharged in one of three ways:— Discharge of right of action,

(*a*) By the consent of the parties.

(*b*) By the judgment of a Court of competent jurisdiction.

(*c*) By lapse of time.

(*a*) *Discharge by consent of the parties.*

This may take place either by Release or by Accord and Satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without Consideration must, in order to be binding, be made under seal. A Release is a waiver, by the person entitled, of a right of action accruing to him from a breach of a promise made to him. by Release,

In order that such a waiver should bind the person making it, it is necessary that it should be made under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.

To this rule bills of exchange and promissory notes form

Ante, p. 253.

an exception. We have already seen that these instruments admit of a parol waiver before they fall due. It appears to be correct to say that the right of action arising upon a bill or note can be discharged by express, though gratuitous, renunciation.

Bills, 12th ed., 198.

by Accord and Satisfaction.

Accord and Satisfaction is an agreement, which need not be by deed, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. But in order to have this effect it is not merely necessary that there should be consideration for the promise of the party entitled to sue, but that the consideration should be executed in his favour. Otherwise the agreement is an *accord* without a *satisfaction*. The promisor must have attained what he bargained for in lieu of his right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability.

Bayley v. Homan, 3 Bing. N. C. at p. 920.

McManus v. Bark, L. R. 5 Exch. 65.

The *satisfaction* may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment; or of new rights against the debtor and third parties, as in the case of a composition with creditors; or of something different in kind to that which the debtor was bound by the original contract to perform; but it must have been taken by the creditor *as satisfaction* for his claim in order to operate as a valid discharge.

Goddard v. O'Brien, 9 Q. B. D. 40,

and see Sm. L. C. i. 351.

(*b*) *Discharge by the judgment of a Court of competent jurisdiction.*

The judgment of a Court of competent jurisdiction in the plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby *merged* in the more solemn form of obligation which we have described as a Contract of Record.

See ch. v. § 1.

The result of legal proceedings taken upon a broken contract may thus be summarised:—

Effect of

The bringing of an action has not of itself any effect in discharging the right to bring the action. Another action

may be brought for the same cause in another Court; and though proceedings in such an action would be stayed, if they were merely vexatious, upon application to the summary jurisdiction of the Courts, yet if action for the same cause be brought in an English and a foreign Court, the fact that the defendant is being sued in the latter would not in any way help or affect his position in the former. When the action is pursued to judgment, a judgment adverse to the plaintiff discharges the obligation by *estoppel*. The plaintiff cannot bring another action for the same cause so long as the judgment stands. The judgment may be reversed by the Court, in which case it may be entered in his favour, or else the parties may be remitted to their original positions by a rule being obtained for a new trial of the case.

Acts, order 51. § 4.

of judgment,

by way of estoppel,

But it is important to bear in mind that an adverse judgment, in order to discharge the obligation by estopping the plaintiff from reasserting his claim, must have proceeded upon the merits of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time, as in the case of action brought before a condition of the contract had been fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.

Palmer v. Temple, 9 A. & E. 521.

If the plaintiff get judgment in his favour, the right of action is discharged and a new obligation arises, a form of the so-called Contract of Record. It remains to say that the obligation arising from judgment may be discharged by payment of the judgment debt, under 4 & 5 Anne, c. 16. § 12, or by satisfaction obtained by the creditor from the property of his debtor by the process of *execution*.

by way of merger; p. 43.

of execution.

(c) *Lapse of Time.*

Except by express statutory provision, lapse of time does not affect the rights of parties to contracts. The rights arising from contract are of a permanent and indestructible

Per Lord Selborne,

character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

v. L. & N.W. Railway Co. L. R. 7 H. L. 567.

But though the rights arising from contract are of this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished.

Simple contract.

It was enacted by 21 Jac. I. c. 16. § 3, that

'All actions of account, and upon the case . . . and all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent . . . shall be commenced and sued within . . . six years next after the cause of such action or suit and not after.'

It will be noted that 'action upon the case' includes actions of Assumpsit, as was explained in an earlier chapter.

p. 38.

Specialties.

The Statute 3 & 4 Wm. IV. c. 42. § 3 limits the bringing of actions upon any contract under seal to a period of twenty years from the cause of action arising.

Disabilities suspending operation of Statutes.

These Statutes begin, in the ordinary course of things, to take effect so soon as the cause of action arises, but there are certain circumstances which suspend their operation. The Statute of James provided that infancy, coverture, insanity, imprisonment, or absence beyond seas should, where the plaintiff was affected by any of these disabilities at the time the cause of action arose, suspend the operation of the Statute until the removal of the disability. The Statute of William the Fourth made the same rule apply, except in case of imprisonment, to actions on specialties.

21 Jac. I. c. 16. § 7.

3 & 4 Will. IV. c. 42. § 4.

19 & 20 Vict. c. 97. § 10.

The Mercantile Law Amendment Act provides that neither imprisonment of the plaintiff nor his absence beyond seas shall operate as a suspensory disability in actions on simple contract or specialty.

3 & 4 Will. IV. c. 42. § 4. 4 Anne, c. 16. § 19.

Where the defendant is beyond seas at the time the right of action accrues, the operation of the Statute is suspended until the defendant returns.

But where there are two or more defendants, one of whom

is beyond seas, the plaintiff may proceed at once against those who are accessible without affecting his rights against the one who is beyond seas.

19 & 20 Vict. c. 97. § 11.

These are the only matters which hinder the Statutes of Limitation from affecting the plaintiff's remedy. Neither ignorance that a right of action existed, nor, so far as Common Law goes, the concealment of the cause of action by fraud, will prevent the plaintiff from losing his remedy by lapse of time: nor, again, will the operation of the Statute be affected by a disability arising after the period of limitation has begun to run.

Imperial Gas Co. v. London Gas Co., 10 Exch. 39.

But in cases where there has been a fraudulent concealment of the existence of a cause of action, Equity dates the commencement of the statutory period from the discovery of the fraud.

Blair v. Bromley, 5 Hare, 559.

Revival of right of action.

It is possible that Statutes of Limitation may be so framed as not merely to bar the remedy, but to extinguish the right: such is the case with regard to realty under 3 and 4 Will. IV. c. 27, but as regards contract the remedy barred by the Statutes of Limitation may be revived in certain ways.

In case of specialty.

Where a specialty contract results in a money debt, the right of action may be revived for the statutory period of limitation, (1) by an acknowledgment of the debt in writing, signed by the party liable, or his agent; or (2) by part payment, or part satisfaction on account of any principal or interest due on such a specialty debt. Such a payment if made by the agent of the party liable will have the effect of reviving the claim.

3 & 4 Will. IV. c. 42. § 5.

Of simple contract.

Where a simple contract has resulted in a money debt the right of action may also be revived by subsequent acknowledgment or promise, and this rule is affected by two Statutes, Lord Tenterden's Act, which requires that the acknowledgment or promise, to be effectual, must be in writing; and the Mercantile Law Amendment Act (19 & 20

By promise.

9 Geo. IV. c. 14.

Vict. c. 97), which provides that such a writing may be signed by the agent of the party chargeable, duly authorised thereto, and is then as effective as though signed by the party himself.

19 & 20 Vict. c. 97. § 13.

The sort of acknowledgment or promise which has been held to be requisite in order that a simple contract debt may be revived for another period of six years, is thus described by Mellish, L. J.:—'There must be one of three things to take the case out of the Statute (of Limitation). Either there must be an acknowledgment of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed.'

In re River Steamer Co., 6 Ch. 828.

This being the principle, its application in every case must turn on questions of construction of the words of the alleged promisor. And as was remarked in the most recent case upon the subject, 'When the question is, what effect is to be given to particular words, little assistance can be derived from the effect given to other words in applying a principle which is admitted.'

Per Cleasby, B, in Skeet v. Lindsay, 2 Ex. D. 317.

The debt, however, admits of revival in another mode than by express acknowledgment or promise. A part payment, or payment on account of the principal, or a payment of interest upon the debt will take the contract out of the Statute of Limitation. And it is expressly provided in Lord Tenterden's Act that nothing therein contained 'shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person.' But the payment must be made with reference to the original debt, and in such a manner as to amount to an acknowledgment of it.

By payment.

Waters v. 2 C. M. R. 723.

CHAPTER IV.

Impossibility of Performance.

IMPOSSIBILITY of performance arising subsequently to the formation of the contract will, in certain cases, operate as a discharge. But before proceeding to consider and classify these cases, it may be well to say something as to Impossibility in general in its relation to contracts.

Unreality of consideration. p. 80.

Obvious physical impossibility, or legal impossibility which is apparent upon the face of the promise, avoids the contract, because, as we have seen, the promise is an *unreal consideration* for any promise given in respect of it.

Mistake. Strickland v. Turner, 7 Exch. 217. p. 127.

Impossibility which arises from the non-existence of the subject-matter of the contract avoids it, as we have seen, on the ground of *mistake*. There are however two cases of this sort which may safely be said to be irreconcileable, and it may be well to notice them here lest the student should be perplexed in the attempt to reconcile them.

15 M. & W. 253.

In *Hills v. Sughrue*, the defendant agreed with the plaintiff by charter-party to take his (the defendant's) ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight. There was so little guano at Ichaboe that the performance of the defendant's promise to load a complete cargo was impossible. The plaintiff sued him for damages for failure to bring home a cargo, and was held to be entitled to recover: impossibility of performance was held to be no answer to an absolute promise such as the defendant had made.

L. R. 5 C. P. 577.

On the other hand, in *Clifford v. Watts* the plaintiff and defendant were landlord and tenant, and the plaintiff sued

upon a covenant in the lease in which the defendant undertook to dig from the premises not less than 1000 tons of potter's clay annually, paying a royalty of 2*s.* 6*d.* per ton. The defendant pleaded that there never had been so much as 1000 tons of clay under the land. The Court held that the plea furnished a good answer to the plaintiff's claim. 'Here,' said Brett, J., 'both parties might well have supposed that there was clay under the land. *They agree on the assumption that it is there; and the covenant is applicable only if there be clay.*'

The cases are practically indistinguishable. It is noticeable that the Judges in the Court of Common Pleas, in distinguishing *Hill v. Sughrue* from *Clifford v. Watts*, curiously misapprehended the point of the earlier case[1]; and this makes it useless to attempt to draw fine distinctions between the two cases.

15 M. & W. 253. L. R. 5 C. P. 577.

Subsequent impossibility no excuse.

We now come to deal with Impossibility arising subsequent to the Formation of the Contract, and we may lay it down as a general rule that whether or no such impossibility originates in the default of the promisor, he will not thereby be excused from performance.

We have already dealt with what are termed 'conditions subsequent,' or 'excepted risks,' and what was then said may serve to explain the rule now laid down. If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk: in the event of performance becoming impossible, the promisee must

[1] It is clear from the language of Willes, J., at p. 586, and of Brett, J., at p. 589, that they thought the action in *Hills v. Sughrue* was brought by the shipowner against the charterer for not furnishing a cargo, whereas it was brought by the charterer against the owner for not loading a cargo which the owner, contrary to the ordinary practice in charter-parties, undertook to do (see dicta of Parke, B., 15 M. & W. 258-9). There is a great difference between a man promising to go and bring home a thing which proves to be non-existent, and a man promising that, if another will let out his ship on certain terms, he will enable him to earn freight by loading a cargo which, when the ship is sent, and the consideration so far given, proves to be non-existent. It must seem that the Court of Common Pleas unintentionally decided contrary to *Hills v. Sughrue*.

L. R. 5 C. P.

bear the loss. If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.

An old case, *Paradine v. Jane*, illustrates the law upon this subject briefly and perspicuously. Aleyn, 26.

The plaintiff sued for rent due upon a lease. The defendant pleaded 'that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession . . . . . whereby he could not take the profits.' The plea then was in substance that the rent was not due, because the lessee had been deprived by events beyond his control of the profits from which the rent should have come.

But the Court held that this was no excuse; 'and this difference was taken, that *where the law creates a duty or charge* and the party is disabled to perform it without any default in him, and hath no remedy over, *there the law will excuse him*. As in the case of Waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . But when a party *by his own contract creates a duty or charge upon himself*, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, *because he might have provided against it by his contract*. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.'

This being the general rule of law, we must now note a group of exceptions to it. And these must be distinguished from cases in which the Act of God is said to excuse from non-performance of a contract; for this use of the term 'Act of God' has been condemned by high authority. Le pig L. R. 4 Q. B. at p. 185.

There are, as we have seen, certain contracts into which the Act of God is introduced as an express, or, by custom, an

implied condition subsequent absolving the promisor. But there are forms of impossibility which are said to excuse from performance because '*they are not within the contract*;' that
4 Q. B. is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts them specifically, nor promises unconditionally in respect of them.

We will deal with them *seriatim*.

Except where there be change of the law.

(1) *Legal impossibility arising from a change in the law of our own country exonerates the promisor.*

L. R. 4 Q. B. 180.

In *Baily v. De Crespigny*, the plaintiff was lessee to the defendant for a term of 89 years of a plot of land: the defendant retained the adjoining land, and covenanted that *neither he nor his assigns* would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. A Railway Company, acting under parliamentary powers, took the paddock compulsorily, and built a station upon it. The plaintiff sued the defendant upon the covenant: it was held that he was excused from the observance of his covenant by an impossibility arising from the action of the Legislature. 'The Legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, *has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into.* To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.'

Destruction of subject-matter.

(2) *Where the continued existence of a specific thing is essential to the performance of the contract, its destruction, from no default of either party, operates as a discharge.*

3 B. & S. 826.

The leading case upon this subject is *Taylor v. Caldwell.* There the defendant agreed to let the plaintiff have the use of a Music Hall for the purpose of giving concerts upon

certain days: before the days of performance arrived the Music Hall was destroyed by fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract.

The Court held that, in the absence of any express stipulation on the matter, the parties must be taken 'to have contemplated the continuing existence' of the Music Hall 'as the foundation of what was to be done;' and that therefore, 'in the absence of any express or implied stipulation that the thing shall exist, *the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.*' at p. 833.

It will be observed that in this case the Court introduces an 'implied condition' into the contract, that the subject-matter of it shall continue to exist; whereas in the later case quoted above, express note is taken of the fact that the impossibility is 'not within the contract,' and has not been made the subject of any condition; and this, it is submitted, is a more satisfactory interpretation of the rule than to introduce a term into the contract which was never present to the mind of either party to it.

(3) *A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.* Incapacity for personal service.

In *Robinson v. Davison*, an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness. L. R. 269.

The law governing the case was thus laid down by Bramwell, B.:—'This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain,

incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional and not absolute.'

CHAPTER V.

Discharge of Contract by Operation of Law.

THERE are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, and these we will briefly consider.

Merger.

Merger. The acceptance of a higher security in the place of a lower, that is to say, a security which in the eye of the law is inferior in operative power, *ipso facto*, and apart from the intention of the parties, merges or extinguishes the lower.

We have already seen an instance of this in the case of judgment recovered which extinguishes by *merger* the right of action arising from breach of contract. See p. 308.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.

The rules governing this process may be thus summarised:—

(*a*) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement. case, 6 Co. Rep. 45 b.

(*β*) The subject-matter of the two securities must be identical. Holmes v. Bell, 3 M. & G.

(*γ*) The parties must be the same.

Alteration of a Written Instrument.

Rules as to alteration,

If a deed or contract in writing be altered by addition or erasure, it is discharged, subject to the following rules:—

Pattinson v. Luckly, L. R. 10 Ex. 330.

(*a*) The alteration must be made by a party to the contract, or by a stranger while in his possession and for his benefit.

Wilkinson v. Johnson, 3 B. & C. 428.

Alteration by accident or mistake occurring under such circumstance as to negative the idea of intention will not invalidate the document.

(*β*) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(*γ*) The alteration must be made in a material part. What amounts to a material alteration must needs depend upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note the promise to pay made by the Bank is not touched by an alteration in the number of the note; but the fact that a Bank note is a part of the currency, and that the number placed on it is put to important uses by the Bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.

Suffell v. Bank of England, 9 Q. B. D. 555.

An alteration, therefore, to effect a discharge of the contract need not be an alteration of the *contract*, but must be 'an alteration of the instrument in a material way.' The Bills of Exchange Act 1882 provides that a bill shall not be avoided as against a holder in due course, though it has been materially altered, 'if the alteration is not apparent:' and the provisions of the Act respecting bills apply to promissory notes 'with the necessary modifications.' These last words have been held to exclude Bank of England notes, and therefore do not affect the decision in *Suffell's* case.

46 & 47 Vict. c. 61. § 64.

§ 89.

Leeds Bank v. Walker, 11 Q. B. D. 84.

or loss.

The loss of a written instrument only affects the rights of the parties in so far as it occasions a difficulty of proof; but

an exception to this rule exists in the case of bills of exchange and promissory notes. If the holder of the instrument lose it, he loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.

Hansard v. Robinson, 7 B. & C. 90. Conflans Quarry Co. v. Parker, L. R. 3 C. P. 1.

Bankruptcy.

Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the Court an order of discharge. It is sufficient to call attention to this mode of discharge, without entering into a discussion as to the nature and effects of Bankruptcy, or the provisions of the Bankruptcy Act of 1883.

46 & 47 Vict. c. 52.

PART VI.

AGENCY.

When dealing with the Operation of Contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man might represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called Agency.

The subject of Agency is interesting as a matter of legal history, as well as of practical importance, but we can only deal with it in outline here, in its relation to Contract.

Agency in Roman Law.

Roman Law never attained to the simplicity of our doctrine of representation for the purpose of acquiring rights and liabilities. We must look to the relations of *paterfamilias* with those *in potestate* for the beginnings of Agency. The benefit of a contract made by such persons inured to *paterfamilias*, but he could only be fixed with its liabilities in certain cases. The man who contracted with son or slave on the faith of the peculium, or separate estate, of the latter had a remedy against *paterfamilias* to the extent of that estate; and the liability was somewhat increased if the debts were trading debts incurred with the knowledge of the party charged.

Actiones *de peculio*, *tributoria*,

Again, if the father expressly authorised the contract of one *in potestate*, or if, not having given an antecedent authority, he took advantage of it, he incurred its liabilities at the same time that he acquired its rights. And here we get the only correspondence with our modern conception of agency; for

quod jussu,

de in rem verso.

here the rights and liabilities of a contract accrue to him who authorised it before, or ratified it after, it was made, while the agent drops out of the transaction.

Mandatum.

As between persons *sui juris*, agency did not take the form of representation, but of a contract for gratuitous employment, followed by a cession, real or feigned, of the rights of action acquired in the course of the transaction by the person employed.

Agency a form of employment;

English law, though till lately it leaned strongly against the assignment of actions, has fully recognised agency in the sense of the representation of one man by another. And it would seem that this liability of one for the act or default of another springs universally from the contract of employment[1]. The liability of the master for the negligence of his servant is the undesigned result of such a contract; the liability of the principal for the act of his agent is its designed or contemplated result. But the master is not liable for the act of his servant done outside the scope of his employment, nor the principal for the act of his agent done outside the limits of his authority.

To discuss the law of master and servant from this point of view would here be out of place, otherwise it would be interesting to inquire how far the doctrine of representation in such cases is of modern origin. It may be that the extreme form which the employer's liability has assumed in English law is an application to modern society of rules which are properly applicable when the master is served by slaves, and is liable for injuries done by them as being a part of his property.

But so far as we are concerned with Agency for the purpose of creating contractual relations it retains no trace in English law of its origin in status. Even where a man employs as his agent one who is incapable of entering into

[1] Writers on Agency seem loth to recognise that agency is a form of employment. Yet in dealing with the principal's liability for the agent's torts, they always introduce large selections from the law of Master and Servant.

a contract with himself, as where he gives authority to his child, being an infant, the authority must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to undertake, the authority given, though the person employed may, from defective status, be unable to sue or be sued on the contract of employment.

except agency of *necessity*.

From this general rule we must, however, except that form of agency known as 'agency of necessity,' a quasi-contractual relation formed by the operation of rules of law upon the circumstances of the parties, and not by the agreement of the parties themselves.

Outline of subject.

The rules which govern the relation of Principal and Agent fall into three chapters.

1. The mode in which the relation is formed.

2. The effects of the relation when formed: and here we have to consider—

(*a*) What is the effect of the contract of employment as between Principal and Agent.

(*β*) What are the relations of the parties where the agent contracts for a principal whom he names. Is the agent more than a mere instrument of communication; and does he incur any liabilities, and of what sort, if he exceeds his powers or asserts an authority which he does not possess?

(*γ*) Or he may have contracted as agent, but without disclosing his principal's name: or in his own name, without disclosing his principal's existence. What then are the relations to each other of the two real parties to the contract, and of the agent to the party who is not his employer?

3. Lastly, we have to consider the mode in which the relation is brought to an end.

CHAPTER I.

The Mode in which the Relation of Principal and Agent is created.

Capacity of parties.

We may deal shortly with the capacity of parties to this relation by saying that any one may be an agent, whether or no he is, in other respects, of contractual capacity. But that no one can appoint an agent who is not otherwise capable of entering into contracts.

How the relation may

As regards the mode in which the assent of the parties may be signified we may accept the processes described in the chapter on Offer and Acceptance as applicable to the constitution of this relation.

(a) By offer of a promise for an act.

It may arise from consideration executed upon request: as where services are asked for in such a manner as to import a promise of indemnity for any loss, risk, or expense incurred in rendering them.

Such are all cases of gratuitous agency in which the parties do not create, and very possibly do not contemplate as between themselves, any legal relation at the time the request is made. The obligation springs up when the service is rendered; the agent then becomes liable for misperformance of his undertaking, and the principal upon his implied promise of indemnity.

Employment a wider term than agency.

But in dealing with this aspect of the subject we should be very careful to avoid a not uncommon use of the word *agency* to signify *employment* merely. We use it here to mean *employment for the purpose of bringing the employer into legal relations with a third party.*

Gratuitous agency.

It is said that a man who undertakes to do a service for another gratuitously is liable only for misfeasance and not for nonfeasance. The law on this point is somewhat obscure. Perhaps it may best be explained by saying that where a man undertakes to act as agent or do any other service for another gratuitously, the contractual liability does not arise till he has entered upon the work and so affected the position of his employer; and that up to that moment there is nothing but a request to him to do the work importing a promise to indemnify him for losses which may be incurred if he do it.

1 Esp. 74.

So, in *Wilkinson v. Coverdale*, it was held a good cause of action that the defendant gratuitously undertook to effect a fire insurance for the plaintiff and by omitting some necessary formalities made it impossible for the plaintiff to recover upon the policy. It was assumed that no action would have lain if he had simply neglected to insure at all.

(β) By offer of an act for a promise; as by ratification.

Or secondly, the relation may be created by the acceptance of an executed consideration. Such is the case where *A* ratifies a contract which *X*, without any antecedent authority, has made on his behalf. *A* accepts the bargain and thereby takes over its liabilities from *X*.

(γ) By offer of a promise for a promise.

Or thirdly, the relation may be created by mutual promises, to employ and remunerate on one side, and to do the work required on the other.

Formal grant of authority

These being the modes in which the relation of principal and agent is created, it follows that we should consider the form, if any, in which the authority should be expressed, and the circumstances under which it will be assumed to exist.

only needed to make contract under seal.

In order that an agent may make a binding contract under seal it is necessary that he should receive authority under seal. Such a formal authority is called a *power of attorney*.

Except in such a case it is not necessary that authority should be given in any special form. Writing or words may indicate the intention of the parties.

But this intention may also be inferred from the conduct of the parties and this inference is more readily drawn where they stand in certain relations to one another.

Conduct:

If a master allows his servant to purchase goods for him of *X* habitually, upon credit, *X* becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.

in case of master and servant: 1 Shower, 95.

So too with husband and wife. Cohabitation does not necessarily imply agency. But if the wife is allowed to deal with a tradesman for the ordinary supplies of the household the husband will be considered to have held her out as his agent and to be liable for her purchases.

of husband and wife: Debenham v. Mellon. Per Thesiger, L. J., 5 Q. B. D. 403.

But there is nothing in the relations of master and servant or husband and wife to give any inherent authority to the servant or the wife. The authority can only spring from the words or conduct of the master or husband.

We can see this more clearly, if we contrast these relations with that of partnership. Marriage does not of itself create the relation of agent and principal: partnership does. The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding liability for the act of his fellows.

different rule for 8 M. & W. 710.

The relations above described, marriage and employment, enable an authority to be readily inferred from conduct. But apart from these, conduct alone may create so strong a presumption of authority that the person so acting is estopped from denying that it has been conferred.

In *Pickering v. Busk* the plaintiff allowed a broker to purchase for him a quantity of hemp which by the plaintiff's desire was entered in the place of deposit in the broker's name. The broker sold the hemp, and it was held that the conduct of the plaintiff gave him authority to do so. 'Strangers,' said Lord Ellenborough, 'can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a

15 East, 48.

principal and his broker: and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.'

We may apply to all the cases above described (excepting, of course, partnership) the term agency by *estoppel*. They differ only in the greater or less readiness with which the presumption will be created by the conduct of the parties. By *estoppel* we must be understood to mean a prohibition to deny facts a belief in which has been created by the conduct of the party estopped.

Necessity

Circumstances operating upon the conduct of the parties may create in certain cases Agency *from necessity*.

Eastland v. Burchell, 3 Q. B. D. at p. 436.

A husband is bound to maintain his wife: if therefore he wrongfully leave her without means of subsistence she becomes 'an agent of necessity to supply her wants upon his credit.'

may create agency *quasi ex contractu.*

A carrier of goods, or a master of a ship, may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. It has even been held that where goods are exported, unordered, or not in correspondence with samples, the consignee has, in the interest of the consignor, an authority to effect a sale of them. But here the relation of principal and agent does not arise from agreement, it is imposed by law on the circumstances of the parties. The agent occupies the position of the *negotiorum gestor* of Roman Law.

Kemp v. Pryor, 7 Ves. 246.

Ratification:

It remains to consider Ratification as a mode of constituting agency, and the rules under which a man may adopt and take the benefit and liabilities of a contract made by another person, on his behalf, but without his authority.

The rules may shortly be stated thus.

rules which govern it.

The agent must contract as agent, for a principal who is in contemplation, and who must also be in existence at the time, for such things as the principal can and lawfully may do.

(*a*) The agent must contract as agent.

He must not incur a liability on his own account and then assign it to some one else under colour of ratification. If he has a principal and contracts in his own name he cannot divest himself of the liability to have the contract enforced against him by the party with whom he dealt, who is entitled under such circumstances to the alternative liability of the agent and principal. If he has no principal and contracts in his own name he can only divest himself of his rights and liabilities in favour of another by *assignment* to that other subject; to the rules laid down in Part ii. ch. ii. § 1.

See post, p. 345.

(*b*) The agent must act for a principal who is in contemplation.

He must not make a contract, as agent, with a vague expectation that parties of whom he is not cognisant at the time will relieve him of its liabilities. The act must be 'done *for another* by a person not assuming to act for himself but for such other person.' This however would not prevent ratification in the case of a broker making contracts, as agent, in the expectation that customers with whom he was in the habit of dealing would take them off his hands. Thus, in contracts of marine insurance, persons 'who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. *But then they must be persons who were contemplated at the time the* policy was made.'

Wilson v. Tumman, 6 M. & G.

Watson v. Swann, 11 C. B., N.S. 764.

And the principal may exist only in contemplation of law, as in the case of estates of deceased or bankrupt persons; an agent may contract on behalf of the estate, and the administrators or trustees may take advantage of the contract though they were not appointed or even ascertained at the time of its making.

See dicta of Willes, J., cited below.

(*c*) The principal must be in existence.

This rule is important in its bearing on the liabilities of companies for contracts made by the promoters on their behalf before they are formed. In *Kelner v. Baxter* the

L. R. 2 C. P. 175.

promoters of a company as yet unformed entered into a contract on its behalf and the company when duly incorporated satisfied the contract. It became bankrupt and the defendant who had contracted as its agent was sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the Court held that this could not be. 'Could the "company,"' said Willes, J., 'become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation.'

(*d*) The agent must contract for such things as the principal can, and lawfully may do.

There can be no ratification of a void act. And so if an agent enter into a contract on behalf of a principal who is incapable of making it, or if he enter into an illegal contract, no ratification is possible. The transaction is void, in the one case from the incapacity of the principal, in the other from the illegality of the act.

Brook v. Hook, L. R. 6 Exch. 89.

On this last ground it has been said that a forged signature cannot be ratified, but it would seem that ratification is not here in question. For one who forges the signature of another does not either possess or contemplate agency. The forger does not act for another, he personates the man whose signature he forges.

Subject to these rules 'an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be in tort or in contract.'

Wilson v. Tumman, 6 M. & G. 236.

And the principal who accepts the contract made on his

behalf by one whom he thereby undertakes to regard as his agent, may as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may avow his responsibility for the act of his agent, or he may take the benefit of it, or otherwise by acquiescence in what is done create a presumption of authority given. Where conduct is relied upon as constituting ratification the relations of the parties and their ordinary course of dealing may create a greater or less presumption that the principal is liable.

CHAPTER II.

Effect of the relation of Principal and Agent.

HAVING considered the various modes in which the relation of Principal and Agent may be created, we now come to deal with the effects of that relation. And this part of the subject may be conveniently arranged under three headings.

1. The rights and liabilities of Principal and Agent *inter se.*

2. The rights and liabilities of the parties where an agent contracts as agent for a named principal.

3. The rights and liabilities of the parties where an agent contracts for a principal whose name, or whose existence, he does not disclose.

I. THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT *inter se.*

Relations of Principal and agent.

The relations of Principal and Agent *inter se* are for the most part the ordinary relations of employer and employed: but there are some which spring from the especial business of an agent to bring two parties into contractual relations—to establish privity of contract between his employer and third parties.

Duty of Principal to indemnify or reward,

The Principal is bound to indemnify the agent for acts lawfully done in the execution of his authority, and is further bound to pay him such commission, or reward for the employment, as may be agreed upon between them.

of agent to use diligence:

The agent is bound, like every person who enters into a contract of employment, to account for the property of his employer which comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his

duties; or to display any special skill or capacity which he may profess for the work in hand.

Jenkins v. Betham, 15 C. B. 168.

He is further bound not to make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment other than the commission agreed upon between them.

to make commission;

Such a failure by the agent to fulfil his obligations to his principal may take place in two ways.

He may accept reward from the other party to the transaction in which he is engaged, and thus may acquire an interest adverse to that of his employer. In other words, he may be bribed to make a bad bargain for his principal.

Or he may depart from his character as agent and assume that of principal, becoming the buyer of that which he is employed to sell, or the seller of that which he is employed to buy.

The one transaction is obviously fraudulent, the other need not necessarily be so; in both cases the rules of law are strong for the protection of the principal.

(1) by taking reward from others;

Where an agent is promised a reward or makes a profit which might induce him to act disloyally to his employer he can neither recover nor retain the money promised to him. An engineer in the employ of a Railway Company was promised by another Company a commission the consideration for which was, partly the superintendence of their work, partly the use of his influence with the Railway Company to obtain an acceptance by them of a tender made by his new employers. He did not appear in fact to have advised his first employers to their prejudice, but it was held that he could not recover in an action brought for this commission. 'It needs no authority to show that, even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.'

[illegible] v. Graving Dock Co., 3 Q. B. D. 548.

And further, the agent, if he obtain any profit by a transaction of this nature, is bound to account for it to his employer, 'or if there is no account remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.'

L. R. 4 Q. B. 480.

In *Morison v. Thompson* the defendant was employed as broker by the plaintiff to purchase a ship from *X*. *X* had promised his broker that he would allow him to keep any excess of the purchase money over £8500. The defendant bought the ship for his employer for £9250, and received by arrangement with the broker of *X* the sum of £225, a portion of the excess price. The plaintiff discovered this and sued his agent for £225 as money received to his use, and it was held that he could recover the money.

(2) by becoming principal as against his employer.

An agent may not depart from his character as agent and become principal party to the transaction even though this change of attitude do not result in injury to his employer.

ss. 210, 211.

The Courts have been strict in holding that if a man is employed to buy or sell on behalf of another he may not sell to his employer or buy of him. And this is part of the fiduciary relation created by the contract of employment.

Nor, again, if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party.

In illustrating these propositions we may usefully distinguish simple employment from agency or representation in the strict sense of the word.

Compare (1) sale,

A may agree with *X* to produce goods of *X* at a price fixed upon. This is a simple contract of sale and each party makes the best bargain for himself that he can.

(2) commission agency,

Or *A* may agree with *X* that *X* shall endeavour to procure certain goods and when procured sell them to *A*, receiving not only the price at which the goods were purchased but a commission or reward for his exertions in procuring them.

Here we have a contract of sale with a contract of em-

ployment added to it, such as is usually entered into by a commission agent or merchant, who supplies goods to a foreign correspondent. In such a case the seller sells the goods not at the highest but at the lowest price at which they are obtainable: what he gains by the transaction is not a profit on the price of the goods but a payment by way of commission, which binds him to supply them according to the terms of the order or as cheaply as he can.

L. R. 5 H. L. 407.

If a seller of goods warranted them to be of a certain quality he would be liable to the buyer, if the warranty were unfulfilled, for the difference in value between the goods promised and those actually supplied. If a commission agent undertakes to procure goods of a certain quality and fails to do so the measure of damages is the loss which his employer has actually sustained, not the profit which he might have made. A seller of goods with a warranty promises that they shall possess a certain quality. A commission agent only undertakes to use his best efforts to obtain goods of such a quality for his employer.

Cassaboglou v. Gibbs, 9 Q. B. D. 222.

And here the person employed has no authority to pledge his employer's credit to other parties, but undertakes simply to obtain and supply the goods ordered on the best terms. Yet it would seem that he might not, without his employer's assent, supply the goods himself, even though they were the best obtainable and supplied at the lowest market price. But this is employment, not agency in the sense of representation.

Rothschild v. Brookman, 2 Dow. & Cl. 188.

Or thirdly, *A* may agree with *X* that in consideration of a commission paid to *X* he shall make a bargain for *A* with some third party. *X* is then an agent in the true sense of the word, a medium of communication to establish privity of contract between two other parties.

(3) and brokerage.

Under these circumstances it is imperative upon *X* that he should not divest himself of his character of agent and become a principal party to the transaction. This may be said to arise from the fiduciary relation of agent and principal: the agent is bound to do the best he can for his principal; if he put himself in a position in which he

Agent to make a must remain agent.

has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Thus if a solicitor employed to effect a sale of property purchase it, nominally for another, but really for himself, the purchase cannot be enforced.

v. Watt, 3 App. Ca. 254.

But we may put the rule on another ground. If *A* employs *X* to make a bargain for him with some third party, the contract of employment is not fulfilled if *X* make the bargain for himself. The employer may sustain no loss, but he has not got what he bargained for.

L. R. 7 H. L. 802.

Thus in *Mollett v. Robinson* the defendant gave an order to the plaintiff, a broker in the tallow trade, for the purchase of a quantity of tallow. In accordance with the custom of the market the broker did not establish privity of contract between the defendant and a seller, but simply appropriated to him an amount of tallow, corresponding to the order, which he had purchased from a selling broker.

It was held that the defendant could not be required to accept goods on these terms, and that he was not bound by a custom of the market of which he was not aware and which altered the 'intrinsic character' of the contract. The broker was employed to make a contract on behalf of his principal, he had in fact made a sale to him, and the House of Lords held that such a transaction could not be supported.

Mollett v. Robinson, L. R. 7 H. L. 802.

May not delegate authority.

An agent may not as a rule depute another person to do that which he has undertaken to do.

The reason of this rule, and its limitations, are thus stated by Thesiger, L. J., in *De Bussche v. Alt.* 'As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon another an obligation to the principal which he has

8 Ch. D. 310.

himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract.'

The Lord Justice points out that there are occasions when such an authority must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency, 'and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself.'

But where there is no such implied authority and the agent employs a sub-agent for his own convenience, no privity of contract arises between the principal and the sub-agent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and sub-agent. Nor can he follow his property into the hands of the sub-agent as being his employer.

New Zealand Co v. Watson, 7 Q. B. D. (C. A.) 374

II. Rights and Liabilities of the Parties where an Agent contracts for a named Principal.

Where an agent, duly authorised, contracts, as agent, for a named principal, or—to put the same statement in another form—where the other party to the contract looks through the agent to a principal whose name is disclosed, the agent drops out of the transaction, if he keeps within his authority, so soon as the contract is made.

Agent for named principal

drops out when contract made,

Where the transaction takes this form only two matters arise for discussion: the nature and extent of the agent's authority; and the rights of the parties where an agent enters into contracts without or beyond the authority which is necessary to make them binding.

Much trouble has been taken to distinguish general from special agents as having two sorts of authority different in

kind from one another. But one may safely say that such a difference is one of degree only.

whether authority is general or special.

If *A* contracts with *M* on behalf of *X* who is named as the principal, so that *M* looks to *X* and gives credit to him; then, whatever may be the extent of *A*'s authority, so soon as the contract is made, he drops out; *M* and *X* are left face to face, and the only questions that can arise in regard to *A* are, firstly, what was the extent of authority given, and secondly, what is the remedy of *M* if *A* had no authority or exceeded his powers?

For instance, *X* sends *A* to offer £100 for *M*'s horse Robin Hood, or to buy the horse for as low a price under £100 as he can, or for as low a price as he can, or to buy the best horse in *M*'s stable at the lowest price, or *X* sends *A* to London to get the best horse he can at the lowest price, or *X* agrees with *A* that *A* shall keep him supplied with horses of a certain sort and provide for their keep: all these cases differ from one another in nothing but the extent of the authority given, there is no difference in kind between any one of the cases and any other: in none of them does *A* incur any personal liability to *M* or any one with whom he contracts on behalf of *X* so long as he acts as agent, names his principal, and keeps within the limits of his authority.

But it should be observed, and indeed it follows from what has already been said, that *X* cannot by private communications with *A* limit the authority which he has allowed *A* to assume. 'There are two cases in which a principal becomes liable for the acts of his agent—one where the agent acts within the limits of his authority, the other where he transgresses the actual limits but acts within the apparent limits, where those apparent limits have been sanctioned by the principal.'

Ante, p. 327.

v. Marshall, 16 C. B., N. S. 393.

It may be convenient here to note the amount of authority with which certain kinds of agents are invested in the ordinary course of their employment.

(*a*) An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; and he is so for the purpose of the signatures of both parties within the meaning of the 4th and 17th sections of the Statute of Frauds. He has not merely an authority to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce terms into the contract which he makes with the buyer, so as to render himself personally liable. Auctioneer. Woolfe v. Horne, 2 Q. B. D.

A factor by the rules of Common Law and of mercantile usage is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer. Factor.

He further has a lien upon the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the authority of a factor at Common Law, an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent. Pickering v. Busk, 15 East, 48.

By the Factor's Acts the presumed authority of the factor is extended to the pledging of goods, and persons who advance money on the security of goods or documents of title are thereby given assurance that the possession of the goods, or of the documents of title to them, carries with it an authority to pledge them. 5 & 6 Vict. c. 39. 40 & 41 Vict. c. 39.

(*c*) A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale he has not possession of the goods, and so he has not the Broker.

authority thence arising which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

The forms of a broker's notes of sale may be useful as illustrating what has hereafter to be said with reference to the liabilities of parties where an agent contracts for a principal whose name or whose existence he does not disclose.

When a broker makes a contract he puts the terms into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the sold note, that delivered to the buyer is called the bought note. The sold note begins 'Sold for *A* to *X*' and is signed '*M* broker,' the bought note begins 'Bought for *X* of *A*' and is signed '*M* broker.' But the forms may vary and with them the broker's liability. We will follow these in the sold note.

Forms of

(i) 'Sold for *A* to *X*' (signed) '*M* broker.' Here the broker cannot be made liable or acquire rights upon the contract: he acts as agent for a named principal.

L. R. 5 Ex. 169.

(ii) 'Sold for you to our principals' (signed) '*M* broker.' Here the broker acts as agent, but for a principal whom he does not name. He can only be made liable by the usage of the trade, if such can be proved to exist.

Southwell v. Bowditch, 1 C. P. D. (C. A.) 374.

Fleet v. Murton, L. R. 7 Q. B. 126.

(iii) 'Sold by you to me' (signed) *M*. Here we suppose that the broker has a principal, though his existence is not disclosed, nor does the broker sign as agent. He is personally liable, though the seller may prefer to take and may take the liability of the principal when disclosed; and the principal may intervene and take the benefit of the contract.

Higgins v. Senior, 8 M. & W. 834.

Commission agent.

(*d*) A commission agent is, as was described above, a person employed, not to establish privity of contract between his employer and other parties, but to buy or sell goods for him on the best possible terms, receiving a commission as the reward of his exertions.

Ante, p. 335.

Ireland v. Livingston, L. R. 5 H. L. 407.

***Del credere* agent.**

(*e*) A *del credere* agent is an agent for the purpose of sale, and in addition to this gives an undertaking to his employer

that the parties with whom he is brought into contractual relations will perform the engagements into which they enter.

He does not guarantee the solvency of these parties or promise to answer for their default: his undertaking does not fall under 29 Car. II. c. 3. § 4, but is rather a promise of indemnity to his employer against his own inadvertence or ill-fortune in making contracts for him with persons who cannot or will not perform them.

It remains to consider whether under any circumstances an agent acting as such for a named principal can acquire rights or liabilities on a contract so made.

Agent cannot sue, B. v. Burrell, 5 M. & S. 383.

An agent contracting as such, for a named principal, cannot sue upon a contract so made.

The party with whom he contracted has presumably looked to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely as a means of communication.

Lewis v. Nicholson, 18 Q. B. 503 unless he be party to contract under seal.

Nor except in a few cases can he be sued [1].

An agent who makes himself a party to a contract under seal is bound thereby, though he is described as agent. This arises from the formal character of the contract; the rule is best expressed in the words of Parke, B., in *Beckham v. Drake*, 9 M. & W. 95. 'those only can sue or be sued upon an indenture who are named or described in it as parties.'

or act for a foreign principal:

An agent who contracts on behalf of a foreign principal is held, by the usage of merchants, to have no authority to pledge his employer's credit, and becomes personally liable on the contract.

or for a non-existent principal.

If an agent contracts on behalf of a principal who does not exist or cannot contract, he is liable on a contract so made. The case of *Kelner v. Baxter* was cited above to show that a

L. R. 2 C. P. 175.

[1] Parol contracts have been framed so as to leave it uncertain whether the agent meant to make himself personally liable. But these do not affect the rule.

Lennard v. Robinson, 5 E. & B. 125.

company cannot ratify contracts made on its behalf before it was incorporated: the same case establishes the rule that the agent so contracting incurs the liabilities which the company cannot by ratification assume. 'Both on principle and authority,' said Willes, J., 'it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable.'

Remedies against agent who authority.

Since the agent is only in these exceptional cases liable upon a contract which he makes as agent, it becomes important to inquire what is the remedy for one who enters into a contract with a professed agent devoid of authority.

The remedy is in contract or in tort according as the professed agent acted *bona fide* or *mala fide* in his assumption of authority.

On warranty of authority.

If he believed that he had an authority which he did not in fact possess he may be sued upon a warranty of authority.

This is an implied or feigned promise to the other party that in consideration of his making the contract the professed agent undertakes that he has authority to bind his principal. Where directors of a building society borrowed money on its behalf, which the society had no power to borrow, the lender, being unable to recover the loan from the society, sued the directors. They were held liable *ex contractu* as having impliedly undertaken that they had the authority which they did not really possess. 'By the law of England, persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages *for the breach of an implied warranty of authority*. This was decided in *Collen v. Wright* and other cases.'

Richardson v. Williamson, L. R. 6 Q. B. 279.

8 E & B. 647.

The unreality of this warranty of authority makes it open to criticism, since the promise therein involved was probably

of Cockburn, C. J., in

never present to the minds of either of the parties affected by it. But it may not have been easy to find another remedy short of holding the agent personally liable upon the contract. Wright.

If the professed agent knew that he had not the authority which he assumed to possess, he may be sued by the injured party in the action of deceit. In action of deceit.

The case of *Polhill v. Walter* is an illustration of this. The defendant accepted a bill as agent for another who had not given him authority to do so. He knew that he had not the authority but expected that his act would be ratified. It was not ratified, the bill was dishonoured, and the defendant was held liable to an indorsee of the bill as having made a representation of authority false to his knowledge, and falling under the definition of Fraud given in a previous chapter. B. & Ad. 114.

III. Rights and Liabilities of the Parties where the Principal is undisclosed.

Where the name of the Principal is not disclosed.

A man 'has a right to the character, credit and substance of the person with whom he contracts;' if therefore he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent. Still more if the agent do not disclose his principal's existence. In the last case invariably, in the former case within certain limits, the party who contracts with an agent on these terms gets an alternative liability and may elect to sue agent or principal upon the contract. Per L. C. J., in Humble v Hunter, 12 Q. B. 317. Where Principal is unnamed

Where an agent contracts as agent but does not disclose the name of his principal, the rights and liabilities of agent and principal as regards the other party to the contract must depend on the construction of its terms. The law on this part of the subject is made difficult by the existence of a general rule imposing liability on the agent, if the other party choose to enforce it, while the exceptions are wide and the applications of the rule in reported cases are few. agent not liable if he contract as Thomson v. Davenport, 9 B. & C. 78.

Perhaps it is safe to state, in the light of the most recent authorities, that an agent who describes himself as such in the contract, and signs himself as such, if the contract be in writing, protects himself against liability.

'There is no doubt at all in principle,' said Blackburn, J., in *Fleet v. Murton*, 'that a broker as such, merely dealing as broker and not as purchaser, makes a contract, *from the very nature of things*, between the buyer and seller and is not himself either buyer or seller, and that consequently where the contract says "sold to *AB*" or "sold to my principals" and the broker signs himself simply as broker he does not make himself by that either the buyer or the seller of the goods.'

L. R. 7 Q. B. 126,

and see Southwell v. Bowditch, 1 C. P. D. (C. A.) 374.

But it may appear, on the face of the contract, or from the conduct of the parties, that credit is given to the agent, and that he is intended to be made liable upon the contract. It may be assumed, in the absence of words strongly and distinctly expressive of agency, that one who deals with an agent for an unnamed principal intends to take the alternative liability of the principal and the agent.

unless credit be given to him

Thomson v. Davenport, 9 B. & C. 78.

But even where the agent is distinctly described to be such, the usage of particular trades, as in *Fleet v. Murton*, or the general rule that an agent acting for a foreign principal has no authority to pledge his credit, may make the agent liable.

or usage make him liable.

L. R. 7 Q. B. 126.

Armstrong v. Stokes, L. R. 7 Q. B. 605.

Where a man has under these circumstances contracted as agent, he may as against the party with whom the contract is made declare himself to be the real principal. The other party to the contract does no doubt lose the alternative liability of the agent or the unnamed principal. Yet, if he was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract; and at any rate the character or solvency of the unnamed principal could not have induced the contract.

16 Q. B. 655.

Thus in *Schmalz v. Avery*, the plaintiff sued on a contract of charter party into which he had entered 'on behalf of another party' with the defendant. No principal was named and it

was held that the plaintiff might repudiate the character of agent and adopt that of principal.

Where the existence of the Principal is undisclosed.

Alternative liability where principal is undisclosed.

If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom he dealt. The reason of this rule is plain. If *A* enters into a contract with *X* he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *X* is in fact the representative of *M* he is entitled to choose whether he will accept the actual state of things, and sue *M* as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat *X* as the principal party to it.

A difficulty of evidence was suggested in some of the earlier cases in which it was desired to prove that the parties who appeared on the face of a written contract were not the only parties; that one was only an agent though contracting in his own name.

But the law may be thus stated where a contract is ostensibly made between *A* and *X*. *A* may prove that *X* is agent for *M* with a view of fixing *M* with the liabilities of the contract. But *X* may not prove that *M* is his principal with a view to escaping the liabilities of a contract into which he induced *A* to enter under the supposition that he (*X*) was the real contracting party. *A* is entitled under these circumstances to be maintained in the same position which he would have occupied if *X* had been the real contracting party; and though the real principal is entitled to sue upon such a contract, *A* may set up as against him any defence which he might have used against the agent.

Senior, 8 M. & W. 834.

Trueman v. Loder, 11 Ad. & E. 587.

Defence against agent principal.

Thus where a principal sells goods through a factor who has authority to effect sales in his own name: if he intervene and sue a purchaser for the price he may be met by any

Borries v. Imperial Ottoman

Bank, L. R. 9 C. P. 38.

set-off which the purchaser may have against the factor in the course of his transactions with him.

Alternative liability, how concluded.

But the right of the other contracting party to sue agent or principal—to avail himself of an alternative liability—may, in various ways, be so determined that he is limited to one of the two and has no longer the choice of either liability.

(*a*) The agent may contract in such terms that the idea of agency is incompatible with the construction of the contract.

Thus where an agent in making a charter-party described himself therein as owner of the ship it was held that he could not be regarded as agent, that his principal could not intervene, nor could, by parity of reasoning, be sued.

Humble v. Hunter, 12 Q. B. 310.

(*b*) If the other party to the contract after having discovered the existence of the undisclosed principal do anything unequivocally indicating that he adopts either principal or agent as the party liable to him, his election is determined and he cannot afterwards sue the other.

Per Lord Cairns, Hamilton v. Kendall, Ca.

So too if, before he ascertain the fact of agency he sue the agent and obtain judgment, he cannot afterwards recover against the principal. But the mere bringing of an action while in ignorance of the agency would not thus determine his rights. 'For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other.'

3 H. & C. 984.

(*c*) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser. If *A* buys goods from *X* on behalf of *M* whose existence he does not disclose, and *M* before he is known to be principal pays the price to *A*, *M* cannot be sued by *X*.

Armstrong v. Stokes, L. R. 7 Q. B. 599.

But the case is different where the existence of a principal is known though his name is not disclosed. There the other contracting party presumably looks beyond the agent to the credit of the principal. 'The essence of such a transaction,' said Bowen, J., in *Irvine v. Watson,* 'is that the seller as an ultimate resource looks to the credit of someone to pay him if

5 Q. B. D. 107. (C. A.) 414.

the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit. It remains in the background: but if before the time comes for payment, or before on non-payment by the agent recourse can fairly be had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit.'

Liability of Principal for Fraud of Agent.

Is that of an employer for that of his servant.

It has been settled after some division of opinion in the Courts that the principal is liable to an action for Deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment. The liability of the principal is in no wise different from that of an employer who is responsible for wrongful acts done by those in his service, within the scope of their employment. A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent who being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.

Barwick v English Joint Stock Bank, L. R. 2 Ex. 259.

But if the person employed act beyond the scope of his employment he no longer represents his employer to bind him by tort or contract. In *Udell v. Atherton* the defendant's agent was employed to sell a log of mahogany; he was not authorised to warrant its soundness, but he did so knowing it to be unsound. Bramwell and Martin, B. B., held that the employer was not liable for deceit: nor could the contract be avoided, because the parties could no longer be replaced in their previous positions, for the log had been sawn up and partly used.

7 H. & N. 172.

The rights of the parties may be stated to be as follows.

If the agent commits a fraud in the course of his employment, he is liable, and so is his principal.

If he commits a fraud outside the scope of his authority, he would be liable, but not his principal.

In either case the other party would be entitled to avoid the contract upon the conditions described at the conclusion of the chapter on Fraud.

But the law is by no means clear where a principal allows his agent to make a statement which he knows, but which the agent does not know, to be false.

It might be difficult to sue either principal or agent for deceit; for the one did not make the statement, and the other honestly believed it to be true. But there is reason to suppose that a contract would be vitiated by a fraud of this nature in the absence of any technical point in its favour.

on
70.
Ex-
.
of Glasgow
v. Drew,
2 Macq.
H. L. C. 103.

CHAPTER III.

Determination of Agent's authority.

An agent's authority may be determined in any one of three ways: by agreement; by change of status; or by death.

(i) *Agreement.*

Since the relation of principal and agent is that of employer and employed, a relation founded on mutual consent, it follows that the relation may be brought to a close by the same process which originated it, the agreement of the parties. Agreement.

Where this agreement is expressed by both parties, or where, at the time the authority was given, its duration was fixed, the matter is obvious and needs no discussion.

Where authority is determined by revocation it must be borne in mind that the right of either party to bring the relation to an end by notice given to the other is a term in the original contract of employment. Revocation a condition subsequent.

But the right of revocation together with the right of limitation of the agent's authority is affected by a rule laid down earlier. A principal may not privately limit or revoke an authority which he has allowed his agent publicly to assume. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority. Limits of right to

The case of *Debenham v. Mellon* is a good illustration of the nature and limits of this right of revocation. 5 Q. B. D 394. 6 App. Ca. 24

A husband who supplied his wife with such things as might be considered necessaries for her forbade her to pledge his credit; any authority she might ever have enjoyed for Illustration from case of

that purpose was thereby determined. She dealt with a tradesman who had not before supplied her with goods on her husband's credit and had no notice of his refusal to authorise her dealings. He supplied these goods on the husband's credit and sued him for their price. It was held that the husband was not liable, and the following rules were laid down in the judgments given.

Marriage no authority

(*a*) Marriage does not of itself create by implication an authority from the husband to the wife to pledge the husband's credit; except in such cases of necessity as we have described above.

See p. 328.

The wife therefore can only be constituted her husband's agent by express authority or by a course of conduct amounting to an *estoppel*.

But may raise a presumption from conduct.

(*b*) Where the husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has thus induced to look to him for payment, revoke her authority without notice. The law is thus stated by Thesiger, L. J.: 'If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognised continues. The husband's quiescence in such a case amounts to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume.'

5 Q. B. D. 403.

Otherwise wife's authority

(*c*) But in the absence of such authority arising from conduct the husband is entitled as against persons dealing

notice.

his wife to revoke any express or implied authority which he may have given her, and to do so without notice to persons so dealing. 'The tradesman must be taken to know the law; he knows that the wife has no authority in fact or in law to pledge the husband's credit even for necessaries, unless he expressly or impliedly gives it her, and that what the husband gives he may take away.'

Per Thesiger, L. J., 5 Q. B. D. 403.

The case of husband and wife is perhaps the best, as it is the strongest, illustration of the limits within which the principal may revoke an authority consistently with the rights of third parties.

Authority coupled with interest is irrevocable.

But there is a further limitation, in favour of the agent, of the principal's right of revocation. It is laid down as a general rule that 'an authority coupled with an interest is irrevocable.'

The cases which illustrate this rule seem to make it clear that we must not understand by such an interest as is here meant the advantage which the agent may derive from a continuance of the authority, or the inconvenience, or even the loss which he may suffer by its revocation.

What is an interest?

An authority given to an agent to pay to a third party a debt which he owes to his principal, or to sell lands and pay himself a debt due to him out of the proceeds, are instances in which an interest has been held to be coupled with the authority so as to make it irrevocable. The 'result appears to be,' said Wilde, C. J., in *Smart v. Sandars*, 'that where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest.'

5 C. B. 917.

A more extended interpretation has been given to the term in a recent case, which for purposes of illustration we will compare with *Smart v. Sandars*.

In *Smart v. Sandars* a factor who had made advances on account of his principal sold goods of the latter, contrary to his orders, in order to repay himself. He alleged an authority to sell; an interest in the proceeds, arising from the advances; and so, an irrevocable authority.

5 C. B. 895

It was held that such a contention could not be supported.

In *Read v. Anderson* an agent who had made bets on account of his principal paid the bets of the latter, contrary to his orders, to avoid being noted as a defaulter at

10 Q. B. D. 100.

Tattersall's. He alleged an authority to make and pay bets, an interest arising from his liability incurred at Tattersall's; and so, an irrevocable authority.

It was held by Hawkins, J., that the liability incurred was an 'interest' which made the authority irrevocable.

It is difficult to reconcile the two decisions, and unless
10 Q. B. D. 100. *Read v. Anderson* can be admitted to have altered the law on this subject, one may venture to say that, in so far as the decision rests on the irrevocability of the agent's authority it could not be sustained. It is true enough to say that a principal must indemnify his agent for any loss sustained or liability incurred in the course of the agency: it can hardly be true to say that such loss or liability incurred deprives the principal of his power of revocation.

(ii) *Change of Status.*

Bankruptcy. Bankruptcy of the principal determines, and before 1883 marriage of the principal determined an authority given while the principal was solvent, or sole.

Charnley v. Minett v. Forester, 4 Taunt. 54.

Insanity. It is still open to question whether insanity annuls an authority properly created while the principal was yet sane. The latest case on this point is *Drew v. Nunn*. The defendant there, being at the time sane, gave an authority to his wife to deal with the plaintiff; he then became insane; the wife continued to deal with the plaintiff and gave no notice of the insanity of her husband; the defendant recovered and resisted payment for goods supplied to his wife while he was insane.

4 Q. B. D. 689.

The Court did not expressly decide how insanity affected the continuance of an authority, but held that "the defendant by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act upon the defendant's representations.' But Brett, L. J., expressed his opinion 'that insanity does put an end to the agent's authority;' and Bramwell, L. J.,

considered it a question of degree, whether the insanity affected the authority or not; 'in order to annul the authority of an agent insanity must amount to dementia.' Cotton, L. J., expressed no opinion on this point.

The law therefore is so far unsettled, but it would seem that knowledge of the defendant's insanity might have disentitled the plaintiff to rely on the authority of the wife; for the decision in his favour rested mainly on the ground that the authority had been made known to him, but not the insanity which might have annulled it. In fact the defendant seems to have been held liable rather on the ground of his own representations than on the agency of his wife. It is possible that, since 1883, the wife who knowing that her husband was insane continued to exercise an authority once given by him, might be sued on a warranty of authority.

Collen v. Wright, 8 E. & B. 601.

Death of Principal.

Death.

The death of the principal determines at once the authority of the agent, leaving the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as in *Kelner v. Baxter,* as having contracted on behalf of a non-existent principal; for the agent had once received an authority to contract. Nor is he liable on a warranty of authority as in *Collen v. Wright;* for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands at present. It would appear probable however, from some expressions of Brett, L. J., in *Drew v. Nunn,* that the Court of Appeal might be disposed to attach liability to the estate of the deceased principal, should the question again arise.

Smout v. Ilbery, 10 M. & W. 1.

L. R. 2 C. P. 184.

Blades v. Free, 9 B. & C. 167.

4 Q. B. D. 689.

CONTRACT AND QUASI CONTRACT.

It is necessary to touch briefly upon certain kinds of legal obligation which, for want of a better name, we call Quasi Contract, and which have been invested with the form of a fictitious or implied agreement. In dealing with Form and Consideration we mentioned that an informal acquisition of benefit by one party at the expense of another, creating a liability to make a return, seemed to be at the root of the contract *Re* in Roman law, and the contract arising upon executed consideration in English law.

It is not improbable that the relation which we call quasi contract, or 'contract implied in law,' and the genuine contract arising upon consideration executed, sprang alike from this notion of the readjustment of proprietary rights. It may well be that the idea of Agreement expressed in offer and acceptance was not applied at first to that which we now call contract arising upon consideration executed, and that such genuine contracts were only by degrees disentangled from quasi contract. A passage in Gaius points to the blending of the two conceptions. After illustrating the nature of the contract *Re*, by the instance of *Mutuum* or loan for consumption, he goes on to say, 'is qui non debitum accepit ab eo qui per errorem solvit, *re obligatur*[1].' It is true that he immediately points out the difference in character between the two obligations; but it is significant that they were regarded as so nearly allied. And the application in English law of the action of Debt indicates a similar connexion, in early law, of the two sources of liability.

...n Contract, P. 75.

Gaius, 3. § 91.

[1] By the time of Justinian this legal relation had been definitely assigned to the province of Quasi Contract. *Institutes*, iii. 27. 6.

But it is the change of remedy in English law from Debt to Assumpsit, more than this possible community of origin with certain forms of true contract, which has invested the 'contract implied in law' with so much of the outward aspect of Agreement. Debt.

Debt was the remedy for cases of breach of a promise made upon consideration executed, where such a breach resulted in a liquidated or ascertained money claim: and later, this action came to be applied to any breach of contract resulting in a similar claim. And Debt was also the remedy in cases where statute, common law, or custom laid a duty upon one to pay an ascertained sum to another.

Se rities col- lected in Pollock on Contract, pp. 151, 2. Comyns, Digest, tit. Debt.

The action of Assumpsit was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee, and it was in the first instance inapplicable to legal liabilities arising otherwise than upon a contract springing from mutual promises.

But there were certain inconveniences attaching to the action of Debt. It admitted of the employment by the defendant of a mode of defence termed 'Wager of law.' This determined the result of the action, not upon the merits, but by a process of compurgation, in which the defendant came into Court and declared upon oath that he did not owe the debt, and eleven respectable neighbours also declared upon oath that they believed him to speak the truth. Again, the technical rules of pleading made it impossible to include in the same suit an action of debt and an action of assumpsit, an action for liquidated and one for unliquidated damages, inasmuch as the one was based upon contract real or feigned, the other upon a form of wrong, the *non-feasance* of an undertaking.

Comm. iii. 341. Wager of law.

And so the history of pleading in relation to contract is in great part the history of the encroachment of the action of *Assumpsit* upon the field of the action of *Debt*.

It was for some time doubtful whether assumpsit would lie where the action was brought upon a breach of contract

tus counts.

The next step was this: where the breach of a contract resulted in a liquidated claim, the pleadings in the action of assumpsit were reduced to a short statement of a debt originating in a request by the defendant, and a promise by him to pay. This was still almost a novelty in the reign of Anne. Henceforth the action of assumpsit possessed great practical convenience. It enabled claims arising from contract to be variously stated in the same suit, in the form of a special *agreement* which had been broken, and in the form of a debt *resulting* from an agreement and consequently *importing* a promise to pay it.

See expressions of Holt, C. J., quoted in Hayes v. Warren, 2 Str. 933.

Such a mode of pleading was called an *indebitatus* count, or count in *indebitatus assumpsit*; the remedy upon a special contract which resulted in a liquidated claim was now capable of being reduced to the shape of an action for debt with the addition of a promise to pay it. In this form it came to be applied to those kinds of legal liability which had given rise to the action of Debt, though devoid of the element of agreement, and thence to all cases where *A* was liable to make good to *X* a sum gained at *X*'s expense.

Moses v. Macferlan, 2 Burr. 1008.

The legal liability thus clothed in the form of contract, cannot be omitted from the treatment of our subject if only for the sake of distinguishing feigned from true Offer and Acceptance. For the convenience of the remedy certain legal liabilities have been made to figure as though they sprang from contract, and have appropriated the form of Agreement. It is enough to say, as regards the later history of the subject, that the Common Law Procedure Act of 1852 practically abolished the distinction between Assumpsit and Debt, by making it no longer needful that a plaintiff should specify the form in which his action is brought, by allowing the joinder of various forms of action in the same

15 & 16 Vict. c. 76

§ 3.

§ 41.

suit, and by providing for the omission of the feigned promise from the statement of the cause of action. The form of pleading, in such cases as resolved themselves into a simple money claim, was reduced to a short statement of a debt due for money paid or received; and now the Judicature Act has abolished formal pleadings, and has substituted for the *indebitatus* counts a simple indorsement upon the writ of summons.

Nevertheless, although the form no longer exists, the legal relations of the parties remain unchanged, and the obligation to which the action of *Assumpsit* conveyed a false air of agreement continues to furnish a cause of action, though that cause of action is now to be stated as it really exists.

It is rather in deference to its historical connection with contract, than to actual propriety of arrangement, that we briefly notice the kinds of legal relation which once, in the pleader's hands, wore the semblance of proposal and acceptance.

The liability of which we speak may arise either from the judgment of a court of competent jurisdiction, or from the acts of the parties.

As to the former, it is enough to say that the judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the court, but can be sued upon as creating a debt between the parties, whether or no the Court be a Court of Record.

Williams v. Jones, 13 M. & W. 628

The acts of the parties may bring about this obligation either (1) from the admission by one of a claim due to the other upon an account stated, or (2) from the payment by one of a sum which the other ought to have paid, or (3) from the acquisition by one of money which should belong to the other.

Acts of parties.

(1) An account stated is an admission by one party who is in account with another that there is a balance due from him. The admission that a balance is due imports a promise

Account stated. Irving v. Veitch, 13 M. & W. 106.

Hopkins v. Logan 5 M. & W. 241

to pay upon request, which may be sued upon as though it created a liability *ex contractu*.

Per Willes, J., in Johnson v. Royal Mail Steam Co., L. R. 3 C. P. 43.

(2) It is a rule of English law that no man 'can make himself the creditor of another by paying that other's debt against his will or without his consent.'

Money paid by *A* for the use of *X*.

But if *A* requests or allows *X* to assume such a position that *X* may be compelled by the law to discharge *A*'s legal liabilities, the law imports a request and promise made by *A* to *X*, a request to make the payment, and a promise to repay.

The payment by one of several co-debtors of the entirety of the debt will entitle him to recover from each of the others his proportionate share. In such a case a request to pay and a promise to repay were feigned in order to bring plaintiff within the remedy of *assumpsit*, and he could recover his payment from his co-debtors as money paid to their use.

Kemp v. Findon, 12 M. & W. 423.

And in like manner a lodger, who has paid the rent of his landlord under a threatened distress of his goods, may recover the amount which he has thus been compelled to pay.

Exall v. Partridge, 8 T. R. 308.

But legal liability incurred by *X* on behalf of *A* without any concurrence or privity on the part of *A*, will not entitle *X* to recover for money which under such circumstances he may pay to *A*'s use. The liability must have been in some manner cast upon *X* by *A*. Otherwise the mere fact that *X has paid* under compulsion of law what *A might have been* compelled to pay, will give to *X* no right of action against *A*. *X* may have been acting for his own benefit and not in consequence of any request or act of *A*.

For instance, *X* was entitled under a bill of sale to seize *A*'s goods; he did so, but left them on *A*'s premises till rent fell due to *A*'s landlord. The landlord distrained the goods. *X* paid the rent and then sued *A* for the amount paid as having been paid to his use. It was held that the facts gave *X* no right of action. 'Having seized the goods under the

bill of sale, they were his absolute property. He had a right to take them away; indeed it was his duty to take them away. He probably left them on the premises for his own purposes, ... at all events *they were not left there at the request or for the benefit of the defendant.*'

E. M... ...
L. R. 1 C. P. 529.

The right to an indemnity which is possessed by one whose circumstances make an *agent of necessity* for another may be classed among these forms of quasi-contractual obligation. *A* places *X* in a certain relation to himself without giving him authority to do acts which their relations may necessitate. *X* is compelled to act as though he possessed such authority, and the law will then presume that its exercise was requested by *A* and agreed to by *X*.

See p. 398.

(3) There are a number of cases in which *A* may be called upon to repay to *X* money which has come into his possession under circumstances which disentitle him to retain it.

Money received by *X* for the use of *A*.

This class of cases, though at one time in the hands of Lord Mansfield it threatened to expand into the vagueness of 'moral obligation,' is practically reducible to two groups of circumstances now pretty clearly defined.

Moses v. Macferlan, 2 Burr. 1010.

The first of these are cases of money obtained by wrong, of which payments under contracts induced by fraud, or duress, have afforded us some illustrations; the second are cases of money paid under such mistake of fact as creates a belief that a legal liability rests on the payer to make the payment [1].

Marriott v. Hampton, 2 Sm. L. C. ... and notes thereto.

It would not fall within the limits of our subject to deal with cases of this nature.

[1] To these is sometimes added the liability arising to repay money paid upon a consideration which has wholly failed, but this it would seem is based upon genuine contract, the breach of which with its consequences was thus shortly stated in an *indebitatus* count.

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